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HIPAA DISCLOSURES OF PATIENT INFORMATION FOR LAW ENFORCEMENT

Since the passage of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, covered entities have walked a fine line when approached by law enforcement agencies and officials to release patient information during criminal and other investigations. When, how much and what kind of patient information a hospital can release to law enforcement officials on request or upon presentment of a subpoena or warrant can raise complicated questions, and the answers will depend on the circumstances surrounding the purpose of the law enforcement request. Releases of too much or the wrong type of information can result in HIPAA or similar state law privacy violations while too little information can potentially derail collection of critical information for criminal and other investigations.

HIPAA specifically permits, *but does not require*, certain disclosures of patient protected health information (PHI) for “national priority” purposes. These include *certain* disclosures:

- ❖ to **public health law agencies**, or **governmental agencies** for child abuse and neglect;
- ❖ regarding **victims of abuse, neglect or domestic violence**;
- ❖ for **judicial or administrative proceedings**; and,
- ❖ for **law enforcement** purposes.¹

HIPAA also does not require the patient’s prior written authorization for disclosures to **medical examiners** and **coroner’s officers** for the purposes of determining cause of death, identifying a deceased person, and the performance of other functions authorized by law.² In addition, where a person or the public faces a **serious threat to health or safety**, HIPAA does not require the patient’s prior written authorization to disclose information to such third party whom the covered entity believes can lessen or prevent the threat, including disclosure to law enforcement officials where the information is needed to identify or apprehend an escapee or violent criminal.³

¹ HIPAA Act of 1996, P.L. 104-191; 45 C.F.R. § 164.512.

² § 164.512(g).

³ § 164.512(j).

Under HIPAA, covered entities are also permitted to maintain **patient directories** without patient authorization.⁴ Information regarding the patient's name, location, general condition and religious affiliation may be maintained in a facility directory **so long as the patient is given an opportunity to object or agree**, or, for incapacitated patients or emergency situations, the circumstances do not suggest that the patient would not want his or her information made available in the covered entities directory and it would be in the patient's best interests. Through the patient directory, law enforcement and other key individuals can find out a patient's location and general status. In addition, HIPAA does not prohibit disclosures where they would be **"required by law."**⁵ Therefore, where a state or federal law would **require** the reporting of certain information, such as for communicable diseases or gunshot wounds, a covered entities hospital would be permitted to release such information as required to comply with the legal **requirement**.

Note that while HIPAA would **permit** disclosure of information for the above purposes, it does **not** permit disclosure of **all** of a patient's information. Therefore, for purposes of law enforcement agencies and officers, even where a disclosure would be permissible under HIPAA, a covered entity must be careful to release only that information which is **permitted** to be disclosed under HIPAA and any corresponding or applicable **state** law. Likewise, where information would be permitted or required to be disclosed for purposes of complying with a state reporting or other law or regulation, **only that information permitted or required** to be disclosed for such purpose in accordance with the state law **and** HIPAA may be released without authorization from the patient or patient's family or other representatives.

In sum, when responding to law enforcement official requests for information, HIPAA would not prohibit a covered entity from disclosing PHI in accordance with the following⁶:

❖ **Required by Law:**

- As **required by law**, including laws that require the reporting of certain types of wounds or other physical injuries (except for victims of abuse, neglect or domestic violence⁷, or public health activities⁸ which are subject to specific requirements); or
- In compliance with and *as limited by the relevant requirements of*:
 - A **court order** or **court-ordered warrant**, or a **subpoena or summons issued by a judicial officer**;
 - A **grand jury subpoena**; or
 - An **administrative request**, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process **authorized under law**, provided that:

⁴ § 164.510(a).

⁵ § 164.512(a).

⁶ 45 C.F.R. § 164.512(f)(1)-(6).

⁷ § 164.512(c).

⁸ § 164.512(b).

- The information sought is relevant and material to a legitimate law enforcement inquiry;
 - The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and
 - De-identified information could not reasonably be used.
- ❖ **Limited information for identification and location of suspect, fugitive, material witness, or missing person:**
- The covered entity may disclose ***only*** the following information:
 - Name and address;
 - Date and place of birth;
 - Social security number;
 - ABO blood type and rh factor;
 - Type of injury;
 - Date and time of treatment;
 - Date and time of death, if applicable; and
 - A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.
 - Except as permitted by the above for identification or location, the covered entity may ***not*** disclose any PHI related to the individual's ***DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissue.***
- ❖ **Victims or suspected victims of a crime** (*excluding abuse, neglect or domestic violence or public health reporting, which is addressed under a separate HIPAA section*):
- Either the individual agrees to the disclosure of his/her PHI; or
 - The covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance, ***provided that***:
 - The law enforcement official *represents* that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim [*aka: "Can't use PHI against the victim-patient" requirement*];
 - The law enforcement official *represents* that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure [*aka: "Material & adverse harm to the case" requirement*];

and

 - The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment [*aka: "Best interest of patient" requirement*].

- ❖ **Decedents:** A covered entity may disclose PHI about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.
- ❖ **Crime on premises:** A covered entity may disclose to a law enforcement official PHI that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.
- ❖ **Reporting crime in emergencies:**
 - A covered entity providing **emergency health care** in response to a medical emergency (except victims of abuse, neglect or domestic violence, discussed above), other than such emergency on the premises of such hospital, may disclose PHI to a law enforcement official if such disclosure appears necessary to alert law enforcement to:
 - The commission and nature of a crime;
 - The location of such crime or of the victim(s) of such crime; and
 - The identity, description, and location of the perpetrator of such crime.

New Jersey Law Considerations

In addition to HIPAA, New Jersey state law **requires** reporting of certain information to state agencies and law enforcement, as well as places **restrictions** on certain information that covered entities, such as a hospital, would ordinarily be permitted to disclose under HIPAA. In general, the New Jersey hospital licensing regulations permit a New Jersey licensed acute care hospital to disclose patient information without the patient's "*approval*" only:

- ✓ as "*required and permitted by law*";
- ✓ to a facility the patient is transferred to,
- ✓ third-parties pursuant to a payment contract,
- ✓ for medical peer review, or
- ✓ to the New Jersey Department of Health.⁹

In addition, New Jersey law **requires** the reporting of:

- ❖ **Suspected or actual child abuse and neglect** (but only to the Division of Youth and Family Services only, which may then, in turn, choose to inform local authorities) (information must include name/address of parent or guardian having custody and control of the child, nature and possible extent of the injuries, abuse or maltreatment,

⁹ N.J.A.C. 8:43G-4.1(a)21.

and “any other information” believed to be helpful with respect to the child abuse and the identity of the perpetrator);¹⁰

- ❖ **Elder abuse** (to the Ombudsman only and only for institutionalized elder abuse);¹¹
- ❖ **Violent, suspicious, unknown causes, unattended and other deaths** (but only to the appropriate medical examiner and/or prosecutor) (information must include the time, place, manner and circumstances of the death);¹²
- ❖ To **law enforcement**, any **wounds, burns or injuries** arising from or caused by a **firearm**, destructive device, explosive or weapon;¹³
- ❖ To **law enforcement, flame burn injuries**¹⁴ accompanied by one or more specific factors:
 - Fire accelerants used in the incident causing the injury and presence would create a reasonable suspicion that the patient committed arson;
 - Treatment for the injury was sought after unreasonable delay of time;
 - Patient or accompanying person accounts have discrepancies or change concerning the cause of the injury which creates a reasonable suspicion that the patient committed arson;
 - Patient or accompanying person’s voluntary statement that patient was injured during commission of arson;
 - Patient or accompanying person’s voluntary statement that patient was injured during suicide attempt or commission of criminal homicide;
 - Patient or accompanying person’s voluntary statement that patient has exhibited fire setting behavior prior to injury or received counseling for such behavior; *and/or*
 - Any other factor determined by bureau of fire safety in Department of Community Affairs to typify a patient whose injuries were caused during the commission of arson.

New Jersey also **requires reporting** of certain **communicable** and **infectious diseases**, such as HIV/AIDS and tuberculosis, and patient adverse or safety events **to the State Department of Health** and other designated agencies. New Jersey does not specifically prohibit (*nor specifically permit*), in general, the release of information which may be permitted by

¹⁰ N.J.S.A. § 9:6-8.10 (2011). Any person having “reasonable cause” to suspect child abuse or acts of child abuse must immediately report it to the Division. The New Jersey Hospital Licensing Regulations likewise require hospitals to have policies and procedures in place for reporting all diagnosed and/or suspected cases of child abuse and/or neglect. N.J.A.C. § 8:43G-2.13.

¹¹ N.J.S.A. § 27G-7.1; Proposed A. 4118 and S. 2919, “Peggy’s Law,” would require immediate reporting to local law enforcement as well.

¹² N.J.S.A. § 52:17B-87. In addition, N.J.A.C. § requires emergency department policies and procedures in place for reporting suspicious and/or unattended deaths.

¹³ N.J.S.A. § 2C:58-8a (2011).

¹⁴ § 2C:58-8b (2011).

HIPAA, such as in hospital directories, to law enforcement for reporting crime in emergencies, and information and location for suspects, fugitives, material witnesses, or missing persons. Additionally, for specific types of information, such as genetic information or HIV/AIDS related information, New Jersey further limits the circumstances under which such information could be released for law enforcement purposes.¹⁵

Recap

New Jersey hospitals have the ability to cooperate with law enforcement officials in some form without violating state or federal privacy laws. HIPAA and New Jersey law for the most part allow for pertinent information to be disclosed to law enforcement officials while protecting patient privacy by preventing the release of all of a patient's PHI. In addition, hospitals can ensure that patient names are included in hospital directories, where the patient does not object to such listing, affording law enforcement officials with a mechanism to determine the general condition and location of a patient. Hospitals can also encourage family members to grant broad authority to law enforcement officials to access the medical records of the patient-victim or decedent (*provided that such family member otherwise has the legal authority to "step into the shoes of" and act on behalf of such patient/decedent*).

Hospitals should, however, have in place clear and specific policies and procedures to ensure personnel appropriately respond to requests from law enforcement officials or agencies for information about a current or former patient. Hospital's Privacy Officers should also take a strong role in evaluating any requests for information to be released for law enforcement officials in consultation with legal counsel as necessary to ensure patient privacy rights are safeguarded while at the same time cooperating to the fullest extent permitted or required by law.

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Attorneys at Oscislawski LLC is a health law firm with its main office located in Princeton, New Jersey but a nationwide reputation for experience with and understanding of federal and state privacy and security laws, as well as electronic health information exchange, health information technology, and managing health data breaches. Our attorneys also advise clients on wide-range of other legal issues. For more information about our firm visit www.oscislaw.com. For excellent compliance information, tools and solutions, please also visit our affiliated blog & resource website www.legalhie.com.

¹⁵ For example, N.J.S.A. § 26:5C-8 does not include disclosures for law enforcement purposes as disclosures permissible without an individual's written consent for HIV/AIDS related records and information. However, the New Jersey Genetic Privacy Act permits the release of genetic information without informed consent to law enforcement for identification purposes or other criminal or death investigation purposes. N.J.S.A. § 10:5-47.