



Connecting Healthcare with Legal ExcellenceSM

Health Law Diagnosis

PRIVACY & SECURITY IMPLICATIONS FOR DISCLOSURES OF HEALTH INFORMATINO DURING EMERGENCY SITUATIONS AND NATURAL DISASTERS

The recent events of Hurricane Sandy, Katrina and Rita evidence the need for covered entities and other organizations to **develop emergency preparedness plans** in order to respond to the needs of individuals and assist in disaster relief efforts in these and other emergency situations. After Hurricane Katrina, the Office for Civil Rights (OCR) released guidance emphasizes that the Privacy Rule would not prohibit information being shared for disaster relief purposes. Although the HIPAA Privacy Rule generally requires patient authorization for disclosures of protected health information (PHI), there are several exceptions to this authorization requirement. As such, providers can share information, both in general, and during disaster relief activities, in several ways.

HIPAA Permissible Disclosures

Treatment Purposes

HIPAA permits providers to share patient information as needed to provide the individual with treatment. This can include sharing information with other hospitals, clinics, and health care providers, referring patients to other providers where they have been relocated, and coordinating patient care with individuals such as emergency relief workers, or others that assist with finding appropriate health services for patients. HIPAA also permits providers to share patient information as needed to obtain payment for treatment, as well as for health care operations purposes. The HIPAA “minimum necessary” standard, however, will apply in certain circumstances, such as where the disclosure would be made to third parties to assist with coordinating patient care.¹

Public Health Activities

HIPAA permits providers to share patient information for public health activities, which may include disaster relief efforts. Disclosures of PHI may be made to “public health authorities,” which include agencies of federal or state government responsible for public health matters as part of their official mandates, or persons or entities acting under grant of authority or grant with such agency. Local health departments are also public health authorities. Disclosures may be made for the purpose of controlling or preventing disease,

¹ 45 C.F.R. 164.506(c).

injury or disability, public health surveillance, public health investigations and public health interventions. Disclosures, however, are subject to the HIPAA minimum necessary standard.²

Averting Threat to Health or Safety

Providers may disclose PHI in order to prevent or less a ***serious and imminent threat to the health or safety of a person or the public***. The provider must act in good faith and further limit the disclosure to only such person or persons “reasonably able to prevent or lessen the threat” or to law enforcement to identify or apprehend an individual. The minimum necessary standard will apply.³

National Security

Disclosures of PHI may be made for certain specialized government functions, in particular, intelligence, counter-intelligence and national security activities authorized by the NSA, as well as protection of the President and other authorized persons.⁴

Facility Directories, Notice to Caregivers and Others

Finally, providers may disclose PHI, subject to the minimum necessary, through facility directories and for notification purposes. PHI may be disclosed to individuals responsible for the care of the patient to the extent of such individual’s involvement in the patient’s care or payment of the patient’s care. This includes family, friends, guardians, and other individuals that may be identified. PHI may also be disclosed to notify or assist in notifying family, friends and other individuals of the patient’s general location, condition or death. Furthermore, disaster relief purposes are specifically carved out and made permissible in order for the provider to assist with and coordinate disaster relief efforts for notification purposes as described above. Disclosures may be made to a public or private entity authorized by law or its charter to assist with disaster relief. Finally, a provider may include a patient’s name, location and general condition on its facility directory so that people may inquire about the patient by name. For all of these disclosures, the individual must be provided with the opportunity to object, if practicable.⁵

Disclosures to Business Associates.

In general, business associates of a covered entity may use and disclose PHI in connection with the performance of services or functions for or on behalf of the covered entity subject to the terms and conditions of a HIPAA Business Associate Agreement. However, in disasters and other emergencies, certain disclosures of PHI may not within the permissible uses/disclosures set forth in the HIPAA BAA. As such, OCR released guidance that permits the HIPAA BAA to be amended to allow for such disclosures in response to the disaster or emergency situation.

New Jersey Permissible Disclosures

² 164.512(b).

³ 164.512(j).

⁴ 164.512(k).

⁵ 164.510.

Health care providers in New Jersey are governed by licensing and other regulations that affect how patient health and other information may be disclosed without authorization. Depending on the applicable law, disclosure may not be permitted in general for treatment and other HIPAA permissible purposes without the patient's approval, consent or written authorization, even in the context of a natural disaster or other emergency. Therefore, unless permitted or otherwise required by law, disclosure will require some form of patient approval.

For physicians and other providers governed by the Board of Medical Examiners, information may be exchanged with other licensed health care providers for treatment purposes. Likewise, physicians must disclose patient information where required by law, such as public health reporting.⁶ Hospitals, however, may not generally disclose patient information for treatment purposes to third parties outside the facility without the patient's "**approval.**" They may disclose information, however, where transferring a patient to another facility or where the facility to which a patient was transferred requires the information, where required by law, and as required by the NJ Department of Health.⁷

The **State's Emergency Operations Plan**, Emergency Support Function #8, Health and Emergency Medical Annex, in part states that the New Jersey Emergency Support Function (NJESF) #8 will not disclose patient medical information due to state confidentiality laws. However, it will provide appropriate information to the Red Cross for access by the public. In addition, it must be officially activated by the State Office of Emergency Management.

While it does not specifically permit information sharing for treatment and coordination of care purposes, NJESF 8 states, "**Health and medical information is exchanged through the local, county and State EOC's and liaison occurs at these facilities. The NJDHSS and the local health departments provide for health surveillance in the affected area.**" At the very least then, information may be exchanged among and flow through local, county and other designated health departments and emergency operations individuals. Furthermore, where otherwise required by the Department of Health, information may also be disclosed.

The **New Jersey Civil Defense and Disaster Control Act, P.L.1942, c.251** (C.App.A:9-33 et seq.), requires any information disclosed to the Governor (or his or her designees) as reasonably necessary to carry out the powers granted to him by the Act. Furthermore, the Governor may make any order, rule or regulation governing medical corps, rescue squads, and other forces performing functions or duties in connection with emergency management. However, it does not authorize specifically the disclosure of information for disaster relief efforts to and among public health and other entities, or third parties conducting disaster relief activities.

The **New Jersey Emergency Health Powers Act, N.J.S.A. 26:13-1 et seq.**, addresses public health emergencies and the scope of power granted to the Department of Health,

⁶ N.J.A.C. 13:35-6.5(d).

⁷ N.J.A.C. 8:43G-4.1(a)21. Note, the patient "approval" standard is not further defined. So, the patient's acknowledgement, "acceptance" and "approval" of a provider's HIPAA Notice of Privacy Practices, which sets forth the types of general uses and disclosures a hospital might make of a patient's information, would arguably satisfy this "approval" requirement.

requires providers to report to the Department of Health and any local health official any persons who are suspected of or have any illness or health condition reasonably believed to be potential causes of a public health emergency. Unless the individual otherwise consents in writing, **disclosure of any information held by the Commissioner of Health** is for very limited purposes, such as to local health departments for epidemiological investigation or **containment countermeasures**, to law enforcement agencies, and to determine death, among others. However, the Emergency Health Powers Act only addresses public health emergencies, and not natural disasters and other forms of emergencies which may require disclosure of patient information.

Thus, in sum, HIPAA offers broad supports the sharing of information in a disaster or in emergencies. New Jersey law does not contain a similar broad exception, and any disclosures of patient information to protect the “health, welfare or safety” of an individual would have be threaded through applicable state regulations (i.e., patient “approval” was obtained). In the aftermath of Hurricane Sandy, the issue might be ripe for legislature to evaluate and consider if a potential amendment is needed allow for appropriate sharing of information more broadly if it protects the health, welfare and safety of individuals.

* * * *

For more information, please contact:

Helen Oscislawski, Esq.

Principal at Oscislawski LLC
tel: 609-385-0833, ext. 1
helen@oscislaw.com

OR

Krystyna Monticello, Esq.

Partner at Oscislawski LLC
tel: 609-385-0833, ext. 2
kmonticello@oscislaw.com

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.