

The Patient Right to their Medical Record: Format, Fees and other Requirements

In April 2003, physician practices and other covered entities were required to be in compliance with the HIPAA Privacy Final Rule, which covers a patient's right to gain access to their own protected health information (PHI). In 2013, the government released additional regulations which expanded and clarified these patient access rights and in early 2016, issued further clarifying guidance. This MGMA member-benefit resource is designed to assist practice leaders in better understanding all of these requirements regarding a patient's right to access their PHI. In general, HIPAA affords patients with a wide-ranging set of rights regarding access to their PHI. The patient is permitted to:

- Inspect their PHI;
- Obtain copies of some or all of their PHI;
- Direct the practice to transmit a copy of the PHI to a designated person/entity;
and
- Amend their health information.

General right of access

- The Privacy Rule generally requires practices to provide patients, upon request, with access to their PHI in one or more "designated record sets" maintained by or for the practice.
- Patients have a right to access this PHI for as long as the information is maintained by the practice itself, or by a business associate on behalf of the practice, regardless of the date the information was created, how it is stored (onsite/offsite, paper/electronic, etc.), or where it originated (e.g. with the practice, another provider, the patient, etc.).

TIP: your Notice of Privacy Policies and Procedures (NPP) should contain a section outlining a patient's right to access their PHI. Access the MGMA Privacy Resource Center for model NPPs

Exceptions to a Patient's Right to Access

Practices may deny patient access without providing the patient an opportunity to review the designated record set in the following circumstances:

- The information is contained in psychotherapy notes.
- The information has been compiled in reasonable anticipation of use in a civil, criminal, or administration action or proceeding.
- The information is subject to the Clinical Laboratory Improvements Amendments of 1988, the federal law that spells out the requirements for the certification of clinical laboratories.
- The practice is a correctional institution or a healthcare provider acting under the direction of the correctional institution, and an inmate's request to obtain a copy of protected health information would jeopardize the safety of the patient or anyone else.
- The patient agreed to temporary denial of access when consenting to participate in research that includes treatment and the research is not yet complete.
- The PHI was obtained from someone other than a healthcare provider under a promise of confidentiality and access would likely reveal the source of the information.

- A licensed healthcare provider has determined that the access is likely to endanger the life or physical safety of the patient or another person.
- The PHI makes reference to another person who is not a healthcare provider, and a licensed healthcare professional has determined that the access requested is likely to cause substantial harm to that other person.
- The request for access is made by the patient's personal representative, and a licensed healthcare professional has determined that access is likely to cause substantial harm to the patient or another person. In such situations, the patient must be given the right to have the denial reviewed by a licensed healthcare professional for a second opinion.
- The PHI requested to be amended was not created by the practice (unless the originator is no longer available to act on the request).
- The PHI is deemed by the practice to be accurate and complete.
- The PHI does not include the information in the defined designated record set.

Form and Format of PHI Disclosure

- Patients have the right to access their PHI stored on paper or in an electronic record. A patient may request information in a specific format, and the practice must comply with the request if the data is "readily producible." If the data is not readily producible in the patient's specified format, the practice and patient can agree on another format. If they cannot reach agreement, the practice must produce a human readable hard copy.
- As an example, a patient might ask to provide their record on a personal storage device, such as a USB drive, but the practice may not agree because it believes this USB poses a security risk. In this scenario, the practice could use its own USB or offer the PHI on paper if the patient and practice cannot reach an agreement.
- While patients do not have an unlimited choice in the form of electronic copy requested, a patient may request the PHI be provided in Microsoft Word or Excel, as a PDF, or as structured, machine readable data (e.g., a document following the Consolidated Clinical Document Architecture (CCDA) standard using LOINC (to represent lab tests) and RxNorm (to represent medications)). Practices, however, are not required to purchase new software or other equipment in order to accommodate every possible patient format request. If the patient requests an electronic copy of PHI that the practice maintains only on paper, the practice must provide the patient with the electronic copy if the copy is readily producible electronically (e.g., if the practice can readily scan the paper record into an electronic format). If the copy is not readily producible in electronic form, or the patient declines to accept the electronic format(s) readily producible by the practice, then a readable hard copy may be provided.
- For example, a practice that maintains the requested PHI only on paper may be able to readily produce a scanned PDF version of the PHI but not the requested Word version. In this case, the practice may provide the patient with the PDF version if the patient agrees to accept the PDF version. If the patient declines to accept the PDF version, or if the practice is not able to readily produce a PDF or other electronic version of the PHI, the practice may provide the patient with a hard copy, such as a photocopy, of the PHI.
- When a patient requests access to PHI in a particular form or format, the question for the practice is whether or not the entity is able to readily produce the copy in that format – which is a matter of capability, not "willingness." Thus, if a practice has the capability to readily produce the requested format, it is not permissible for the practice to deny the patient access to that format because the entity would prefer that the patient receive a different format, or utilize other customary record access processes of the entity.
- This patient right to copies of PHI also applies to x-rays or other diagnostic images. As with other PHI in a designated record set, the patient has a right to access the information in the form and format they prefer, as long as the practice can readily produce it in that form and format.

NOTE: Patients have the right to see and receive a copy of their PHI, but not a right to the original records.

NOTE: The large file size of some x-rays or other images may impact the selection of available formats.

NOTE: A practice may not require a patient to purchase portable media and patients have the right to have their PHI e-mailed or mailed to them upon request.

TIP: Practices are discouraged from permitting a patient to give you their media device such as a USB drive to capture their PHI. External USB drives could pose a security risk to your network. You should consider having your own USB drives (perhaps branded with your practice logo!) and offer this low-cost alternative to your patients.

Tip: Your NPP should contain a section discussing the type of media/formats on which you can provide patients with their PHI.

TIP: Before making a copy of the entire PHI, discuss with the patient whether they are only interested in certain portions of the record, such as a specific test result or period of time. This can reduce cost for both the patient and practice

Sending PHI via e-mail

- Patients generally have a right to receive copies of their PHI by e-mail if they request that method. It is expected that all practices have the capability to transmit PHI by e-mail and transmitting PHI in such a manner does not present unacceptable security risks to the systems of practices, even though there may be security risks to the PHI once it has left the systems.
- In the limited case where a practice is unable to e-mail the PHI as requested, such as in the case where diagnostic images are requested and e-mail cannot accommodate the file size of the images, the practice should offer the patient alternative means of receiving the PHI, such as on portable media that can be mailed to the patient.
- Further, patients have a right to receive a copy of their PHI by unencrypted e-mail if the patient requests access in this manner. In such cases, the practice must provide a brief warning to the patient that there is some level of risk that the patient's PHI could be read or otherwise accessed by a third party while in transit, and confirm that the patient still wants to receive her PHI by unencrypted e-mail. If the patient says yes, the practice must comply with the request.
- While practices are responsible for adopting reasonable safeguards in implementing the patient's request (e.g., correctly entering the e-mail address), they are not responsible for a disclosure of PHI while in transmission to the patient based on the patient's access request to receive the PHI in an unsecure manner (assuming the patient was warned of and accepted the risks associated with the unsecure transmission). Further, practices are not responsible for safeguarding the information once delivered to the patient.

Patient-requested amendments to their record

- The practice must act on the patient's request to amend the record within 60 days of receipt. The practice may have a one-time extension of up to 30 days for an amendment request if it provides a written statement of the reason for the delay to the patient and the date by which the amendment will be processed.
- Practices may require patients to make requests for amendment in writing and to provide a reason to support the amendment, provided it informs individuals in advance of such requirements. A practice must also document the titles of the persons or offices responsible for receiving and processing individual's requests for amendments of PHI. If a patient's request for amendment is granted, the practice must:
 - Insert the amendment or provide a link to the amendment at the site of the information being requested;
 - Inform the patient the amendment is

accepted; n Obtain the patient's agreement to have the practice notify the relevant persons with whom the amendment needs to be shared; and

- Within a reasonable timeframe, make realistic efforts to provide the amendment to all parties, including business associates that the practice knows to also have the PHI subject to the amendment and that these other entities may be relying on the information, to the detriment of the patient.

NOTE: While a patient can receive copies of her PHI by unsecure methods if that is their preference, as described in more detail above, a practice is not permitted to require a patient to accept unsecure methods of transmission in order to receive copies of her health information.

If the practice denies the requested amendment, it must provide the patient with a timely, written denial written in plain language that contains:

- The basis for the denial; n The patient's right to submit a written statement disagreeing with the denial and directions for how the patient may file such a statement (though the practice may reasonably limit the length of said statement);
- The patient's right to request that the practice provide the patient's request for amendment of denial with any future disclosures of his or her PHI; and
- A description of how the patient may issue a formal complaint to the practice or to the Department of Health and Human Services.

NOTE: The practice may prepare a written rebuttal to the patient's statement of disagreement. Whenever such a rebuttal is prepared, the practice must provide a copy to the patient who submitted the statement of disagreement.

TIP: Develop an internal process to handle patient requests to amend their record. This process should include review of the requested language by a member of the clinical staff.

Charging patients fees for copies of PHI

Practices are permitted to impose a "reasonable, cost-based fee" for the PHI, including:

1. Labor for the actual copying of the PHI, whether in paper or electronic form (i.e., labor to scan records, prepare an e-mail, transferring PHI from one format to another, and other activities).
2. Labor to prepare an explanation or summary of the PHI, if the patient in advance both chooses to receive an explanation or summary and agrees to the fee that may be charged.
3. Supplies for creating the paper copy (e.g., paper, toner) or electronic media (e.g., CD or USB drive) if the patient requests that the electronic copy be provided on portable media
4. Postage, when the patient requests that the copy, or the summary or explanation, be mailed.

The practice must inform the patient in advance of the approximate fee that may be charged for the copy.

NOTE: Labor for copying cannot include costs associated with reviewing the request for access or searching for and retrieving the PHI.

There are three ways a practice can calculate this reasonable, cost-based fee for the PHI maintained electronically:

- Actual costs;
- Average costs; or
- Flat fee

NOTE: Flat fees cannot exceed \$6.50, inclusive of all labor, supplies, and any applicable postage.

A practice may not:

- Withhold a patient's PHI (even if the patient has an outstanding account balance);
- Withhold the PHI and apply the fee charged to the outstanding account balance;
- Charge patients a fee to view or inspect their PHI; or
- Charge a patient who takes notes or pictures to capture PHI.

TIP: While the Privacy Rule does permit practices to charge patients a cost-based fee for a copy of their medical record, practices should consider implementing a policy of providing a no-cost option for the first request

Sending PHI to third parties

- A practice must transmit the PHI directly to another person or entity designated by the patient.
- The request from the patient must be in writing, signed by the patient, and clearly identify the designated person/entity and where to send the PHI. Practices must take action within 30 days.
- Practices may rely on the information provided in writing by the patient about the identity of the designated person and where to send the PHI for purposes of verification of the designated third party as an authorized recipient. However, practices must implement "reasonable safeguards" to carry out the request, such as taking reasonable steps to verify the identity of the patient making the access request and to enter the correct information into the practice's system.
- Practices must safeguard the PHI in transit and may be liable for impermissible disclosures that occur in transit. The only exception, as noted above, arises when a patient has requested that the PHI be sent to the third party in an unsecure manner. If the patient was warned of and accepted the security risks, the practice is not responsible or liable for disclosures that occur in transit.

UPDATE AS OF JAN. 2020: Following a court ruling, the Office for Civil Rights has revised its policy regarding the fees practices can charge for patient records that are sent to third-parties. There is no longer a prohibition on practices setting their own fees for transmitting patient data to a third party. However, the fee limitations outlined in this document still apply when patients request their data for their own use.

TIP: Ensure that practice staff sufficiently warn the patient about security risks, and consider having them sign an acknowledgement of this risk, should they request their PHI be sent to a 3rd party by unencrypted e-mail.

Intersection of HIPAA with State Law

- Practices must comply with any additional requirements under state laws or regulations if they are more stringent than those outlined under the federal standards.

- For example, practices must comply with state law should it require that the patient is to be provided one free copy of their PHI. HIPAA does not override those State laws that provide individuals with greater rights of access to their PHI.

NOTE: Search and retrieval costs or other costs not permitted by the Privacy Rule may not be charged to patients, even if authorized by state law. Example: If state law limits costs to 25 cents a page and the actual cost is only four cents per page, then the practice may charge only four cents. If the cost is 30 cents per page and state law allows for 25 cents, then the practice may charge no more than 25 cents.