



## *Privacy in Practice: Long-Term Care Adapts to HIPAA*

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The Health Insurance Portability and Accountability Act (HIPAA) of 1996 was the first federal statute that offered protection of the privacy of personal health information (PHI). This law places restrictions on the scope of information that a healthcare entity, including long-term care (LTC) facility, may release about its residents. The goal of this rule was to safeguard the privacy of residents while still allowing the flow of information needed to provide adequate care.<sup>1</sup> This rule applies to a broad range of healthcare entities, including nursing homes and all long-term care (LTC) facilities including assisted living (AL) residences.

There are several purposes to HIPAA's Privacy Rule. Generally, it serves as a national standard to protect the rights of consumers of healthcare services by curtailing inappropriate use of their PHI. The Privacy Rule regulates what PHI may be released under certain circumstances to other healthcare facilities or family members. The rule is designed to be flexible and to cover a variety of disclosures.

The Privacy Rule ensures that facilities exercise a higher level of caution when dealing with PHI. This includes any information regarding a resident's past, present, or future physical or mental conditions or any information that would serve to identify a resident.<sup>2</sup>

This rule also allows residents to have some control over the dissemination of their medical information. Residents can restrict who may receive their and may authorize the release of health information only in certain circumstances. Healthcare providers are only allowed to use resident information to provide proper treatment, to determine payment, and for other purposes related to the resident's care.

The Privacy Rule includes a "minimum necessary standard," which addresses how a facility should handle the use and disclosure of PHI. It states that a covered entity must make an effort to disclose, use, and request the minimum amount of information needed to accomplish the intended purpose. Each entity must develop procedures to limit disclosures to the minimum necessary standard.

### **How the HIPAA Privacy Rule Is Enforced**

The Privacy Rule came into effect in 2003 and the Office for Civil Rights (OCR) immediately began its enforcement. The OCR enforces the rule by educating and conducting outreach programs to foster compliance with its requirements.<sup>3</sup> It also investigates certain complaints that are filed and may conduct compliance reviews to determine if covered entities are in compliance.

It is important to recognize that not all complaints are investigated by the OCR. To be investigated, a complaint must fulfill certain requirements. For instance, the alleged action must have occurred after April 14, 2003, when the Privacy Rule was implemented. The complaint must also be made against an entity that is required to comply with the Privacy Rule (ie, a skilled nursing facility). The alleged activity must also be something that would violate the rule if proven true, and the complaint must have been filed within 180 days of the occurrence. A complaint can also only be investigated if OCR has a written consent from the complainant because OCR must reveal that person's name to the facility to perform the investigation.<sup>4</sup>

When OCR receives a complaint, it notifies the complainant as well as the named covered entity of the pending investigation. The person who filed the complaint and the covered entity must then present information about the incident or problem.

If the evidence that OCR gathers indicates that the covered entity was not in compliance with the Privacy Rule, OCR may use several methods to resolve the investigation. It can attempt to obtain voluntary compliance, corrective action, or a resolution agreement. Pursuant to the Final HIPAA Administrative Simplification Enforcement Rule, which went into effect on March 16, 2006, if an entity does not attempt to cure any violations found by OCR, civil money penalties may be imposed.<sup>5</sup> If such penalties are imposed, the covered entity may request a hearing in which an administrative judge from the Department of Health & Human Services decides if the penalties are supported by the evidence in the case. Any monies received are deposited in the US Treasury.

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## Changes Made to Ensure Compliance

To comply with HIPAA standards, many facilities assessed their standards regarding storage, access to, and release of information and made changes they felt were necessary. These facilities also had to make changes they deemed necessary regarding which staff members were allowed to access the information. For some facilities, these changes may have required a complete overhaul of old standards and drafting completely new policies and procedures.

These changes were not necessarily easy and often created added expense and confusion. The HIPAA Privacy Rule has been in effect for several years, but many LTC facilities and nursing homes are still struggling with basic concepts surrounding the regulations and compliance. Certain facilities are uncertain about how to interpret certain aspects of the rule, such as the definition of “minimum necessary standard.” Part of the reason for the confusion is because the administrative requirements are scalable, which means that a facility must only take the steps that are reasonably designed to achieve compliance with the regulations.<sup>6</sup>

There has been some confusion over the means by which the Privacy Rule should be implemented. For example, one concern would be that a facility might overinterpret the regulations and withhold information in a situation in which the free exchange of information would actually benefit the resident. This may occur if a facility interprets the rule to mean that the resident’s confidentiality must be protected at all costs, despite the potentially detrimental effects on that resident’s health.

In these cases, it is likely that a facility’s staff would err on the side of caution and be hesitant to release information.<sup>7</sup> In some situations, the refusal to disclose information to unauthorized persons achieves the purpose of the Privacy Rule and protects privacy. However, in LTC settings, the reluctance to share information may result in compromising the care of the resident. To meet the minimum necessary standard, facilities should be sure to disclose information that is necessary to properly care for the resident, but not to withhold information at all costs. For instance, there have been situations in which an appointed power of attorney has been denied access to the PHI of a loved one, restricting them from making important medical decisions on the resident’s behalf.

Many covered entities have implemented business practices in the name of privacy that have no basis in the law. This confusion and misinterpretation of the HIPAA requirements seems to be related to the flexibility built into the rules and providers’ difficulty in integrating overlapping state and federal requirements.<sup>8</sup>

What must be considered by these facilities is that the Privacy Rule creates a very broad ground, which allows for the release of information to people who are trying to help individuals with healthcare needs. The HIPAA statute was not created to prevent adequate care. Instead, it was created to ensure that facilities make good-faith efforts to act in the best interests of their residents, and only release the information necessary to facilitate their care.

## How to Avoid the Confusion

Covered entities can avoid confusion surrounding the Privacy Rule. It is important to remember that there are no set requirements. Facilities must only take reasonable steps to ensure that the PHI of a resident is being used appropriately. Each facility will have different protocols and policies that work best for them to meet the standards set by the Privacy Rule.

One way to be certain that resident information is being used properly is to obtain written authorization from the resident. Or, if a resident is physically present and gives consent, any information may be given. Issues arise most often in LTC facilities when family members

request information and the resident is either not present or incapacitated.

If the person requesting information is in charge of making that resident’s healthcare decisions, the facility must determine if the disclosure is in the best interest of the resident. As long as the facility deems that the release of information is in the best interest of the resident, then the information can be disclosed, generally circumventing the need for written consent. If a resident is incapacitated and unable to communicate, then their personal representative or power of attorney has the same power that the resident would have. This representative can make decisions on the resident’s behalf and consent to the release of information. If there is a situation in which a dispute arises among family members, then the facility must be

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miss airline connections, when everyone is busy just after the program is over, when I become restless at night, when I can't remember when someone is picking me up, or sometimes even if or why someone is picking me up—it assures everyone at home and me that I am safe, if sometimes unsound, if a family member or friend accompanies me.

To no one's surprise I diverge and digress from my point. After spending a week and a half at home—I haven't reorganized, recentered, repacked, refocused, and taken care of the details for the next 2 weeks. In fact, I am more behind now than when I came home a week and a half ago. I've made additional problems for myself as I attempted to deal with my original "to do" list. Help, I realize I'm falling behind—across the board! Not just with 1 symptom here or there. I'm not keeping up, much less getting ahead of myself with the details of

my life. I have a spouse who is an angel, a fulltime care assistant, dozens and dozens of people around me here in Houston, and literally hundreds of people around me in the US, and even a couple of dozen in foreign countries—all dedicated to enabling me, all helping to keep me safe and organized. And now I have observed I am my own worst enemy and an additional force for them to deal with as they attempt to support me.

Why don't/can't I stop this madness—this counterproductive behavior? Ah, now I am back to thinking like a psychologist. But, alas I am not. I no longer think enough like one for the label to mean anything useful to me. I still think about my own thinking, but honestly I almost never can recall what I was thinking about more than a couple of hours after I thought of it. Great ideas and insights come and go like snowflakes in Houston, Texas. First, they are pretty rare. Second, they exist

only in the moment. Third, they leave no trace of their existence.

Oh, I still have access to crystallized memories. I still recall what I did yesterday, at least some of it. I know what you just said, and I might recall it in conversation yesterday. But figuring out today what to do about tomorrow—that has become a real challenge for me. Sticking to a plan is almost impossible, if the plan is longer than a couple of minutes.

Writing about me is still a clarifying and reassuring experience for me. I don't understand myself "on the fly" as I did, or at least thought I did, in the past. And, those times when I am confident I know what's going on are not only fewer and shorter, I am less sure of them when they do show up between my ears.

A local merchant recently told my spouse he thought I was such a kind person, and sometimes I acted a little oddly. Me odd?!

That's why I'm crying!

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## Legal Corner

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careful to disclose information only to those who have legal access to it.

## Summary

The purpose of the HIPAA Privacy Rule was not to restrict information at the expense of providing appropriate care for residents. Instead, it was created to prevent unlimited sharing of information to anyone who requests it. To ensure that this rule is implemented properly, covered entities should weigh all the factors in a given circumstance and determine whether the release of the information is necessary to promote the best care and treatment for the resident. By keeping this in mind, the facility's staff can ensure compliance with the rules and the best care possible for its residents.

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