

HIPAA Guidance During COVID-19

HHS clarifies how patient information may be shared with public health authorities via electronic health information exchanges while the emergency is in effect

By Denise Bloch, JD

The COVID-19 public health emergency continues to provide many challenges for health care providers. One such challenge concerns how HIPAA impacts providers and their business associates disclosing protected health information via electronic health information exchanges for reporting to a public health authority. Examples might include COVID-19 test results, contact tracing and vaccines administered. On December 18, 2020, the Office for Civil Rights (OCR) published guidance¹ to help answer the questions that health care providers and their business associates face on this subject.

These answers will help navigate the maze of issues related to how providers use and disclose protected health information via these electronic information exchanges to respond to the many facets of the COVID-19 public health emergency. The current federal emergency declaration is now set to continue for another 90 days from the latest renewal on January 7, 2021.²

It will continue to be important that all health care staff understand HIPAA and how to protect PHI.

1. What is a health information exchange (HIE)?

Despite the growth of electronic health records, it is still commonplace for a patient's records to be spread across many different providers, from the local pharmacy to the primary care doctor to one or more specialists. Health information exchanges (HIEs) allow different providers to access and securely share a patient's medical information electronically, providing necessary



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care coordination and improving the speed, quality and safety of patient care. During the pandemic, HIEs have played an important role in aggregating public health data and providing key alerts to public health officials. HIEs may be nationwide as well as statewide HIEs, regional health information organizations (RHIOs) and some clinical data registries.

2. When does HIPAA permit a provider to disclose protected health information (PHI) electronically to an HIE for purposes of reporting to the public health authority, without an individual's authorization?

During the health care emergency, the importance of sharing data to improve public health has been an important issue. HIPAA permits covered entities and their business associates to share PHI with an HIE for reporting to a public health authority conducting public health activities for the following circumstances:

- The disclosure is required by law.³
 - ◆ For example, a state law requires reporting patient treatment and laboratory testing data to an HIE in order for the HIE to report the data to the appropriate local or state health department. Such disclosure would not violate HIPAA.
- When the HIE is a business associate of the provider that desires to provide information for public health purposes.
 - ◆ For example, the provider or its business associate may have the HIE, as its business associate, provide information on its behalf for a HIPAA-covered function, such as treatment or other permitted purpose that may include public health uses and disclosures.
 - ◆ Any disclosure of PHI would be subject to the terms of the business associate agreement between the HIE and the provider or its business associate, except when PHI is transmitted in response to a public health authority's request during the COVID-19 emergency; even without an agreement, the transmission is allowed.
- When the HIE is acting under a grant of authority or contract with a public health authority.⁴

3. Can a provider rely on a public health authority's request to disclose a summary record to an authority or HIE as being the minimum necessary PHI needed by the authority to accomplish the public purpose of the disclosure?

Yes. The provider's disclosure of a summary record should be limited to the minimum necessary to achieve the purpose of the disclosure. If the public health authority represents that the request is the minimum necessary to accomplish its stated public purpose,⁵ the provider may rely on the request as being reasonable.

4. May a provider disclose PHI to a public health authority through an HIE without receiving a direct request from the authority?

Yes. A direct request for PHI from the public health authority is not required to allow for disclosure by the provider through an HIE to the public health authority.

➤ A public health authority, i.e. the county health department, is authorized to obtain COVID-19 test results. The authority may utilize an HIE to obtain summary records of COVID-19 test results from local health care providers. If the provider knows the authority is using the HIE to collect information on its behalf, the provider may disclose the information to the HIE even if it does not receive the request directly from the authority.

5. May an HIE provide PHI it has received as a business associate of a provider to a public health authority for public purposes without first obtaining permission from the provider?

Yes. During the COVID-19 public health emergency, the OCR issued a notice of enforcement⁶ stating it will take no action against a business associate for making PHI disclosures in good faith for public health purposes even if the agreement between the provider and the business associate does not expressly permit disclosure of PHI from the business associate to a public health authority. However, in these cases, the business associate must inform the provider within 10 calendar days after the use or disclosure.

6. Is a provider required to provide notice to individuals about its disclosures of PHI to a public health authority for public health purposes? Is an HIE that is a business associate required to provide such notice?

Yes. The provider is required to provide notice to individuals, in the provider's Notice of Privacy Practices (NPP), that it discloses PHI for public health purposes.⁷ As a result, individuals receive advance notice through the NPP of potential uses or disclosures of their PHI that may occur without the individual's authorization.⁸ However, HIPAA does not require disclosure of PHI to a public health authority. As a result, a provider may honor an individual's request that the individual's PHI not be disclosed to a public health authority, unless otherwise required by law.

Business associates, including HIEs, are not required by HIPAA to provide a NPP to individuals. However, the provider is required to provide an accounting of disclosures of an individual's PHI upon request, including disclosures made for public health purposes.⁹ In certain circumstances, the business associate may be directly liable for failing to provide an accounting of its disclosures of PHI, which may include disclosures for public health purposes.¹⁰

Conclusion

Since PHI may be disclosed to HIEs for public health purposes without first obtaining authorization from the individuals, individuals must receive notification of these possible disclosures. As a result, it is important that potential disclosures for public health purposes are included in covered entities' NPP. Throughout the COVID-19 health care emergency and with the onset of the vaccinations, questions will continue to arise regarding HIPAA and how to protect patient PHI. The Privacy Rule allows access to information needed to protect the public while protecting the privacy of individual patients' PHI. It will continue to be important that all health care staff understand HIPAA and how to protect PHI. Reviewing your policies and procedures related to HIPAA, PHI and privacy will help to ensure that they address sharing of PHI with HIEs for public health purposes.

When questions arise about the propriety of disclosures of PHI, i.e. to an HIE for public health purposes or concerning other HIPAA questions, legal counsel may assist physicians to obtain answers to those questions. A review of HIPAA compliance policies may also be helpful to ensure that policies and procedures are compliant with the current COVID-19 public health emergency. Finally, annual HIPAA training helps keep staff and providers aware of their obligations under the Privacy Rule. ➤

References

1. <https://www.hhs.gov/sites/default/files/hie-faqs.pdf>
2. <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-07Jan2021.aspx>
3. See 45 CFR § 164.103.
4. See 45 CFR § 164.501 (definition of "public health authority;" see also 45 CFR § 164.512(b) (description of public health activities).
5. See 45 CFR 164.514(d)(3)(iii)(A). See also OCR, FAQs on Minimum Necessary, at <https://www.hhs.gov/hipaa/forprofessionals/faq/minimum-necessary/index.html>.
6. As stated in the published notification, "the [Business Associate NED] will remain in effect until the Secretary of HHS declares that the public health emergency no longer exists, or upon the expiration date of the declared public health emergency (as determined by 42 U.S.C. 247d), whichever occurs first." See 85 FR 19392 (April 7, 2020) available at <https://www.govinfo.gov/content/pkg/FR-2020-04-07/pdf/2020-07268.pdf>.
7. See 45 CFR 164.520(b)(1)(ii); 45 CFR 164.512(b)(1)(i).
8. See 45 CFR 164.520(c)(3)(i).
9. See 45 CFR 164.528. This general requirement to account for disclosures of PHI does not apply to disclosures of a limited data set for public health purposes pursuant to 45 CFR 164.514(e). See 45 CFR 164.528(a)(1)(viii).
10. See the HITECH Act section 13405(c)(3), 42 U.S.C. 17935(c)(3).