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## The Long Arm of the Law: HIPAA's Protections in the Face of Criminal Investigations

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The Health Insurance Portability and Accountability Act (HIPAA) safeguards protected health information (PHI) from disclosure by covered entities without a patient's consent. The protections of HIPAA, however, are not absolute, and there are exceptions to the restriction on disclosure of PHI. An important question arises as to whether covered entities may disclose PHI to law enforcement to aid in

an ongoing criminal investigation. Health care providers may have critical knowledge relevant to criminal investigations in the course of providing care to victims or suspects of criminal misconduct and may subsequently face the difficult question of whether to disclose PHI when requested by law enforcement. Fortunately, the HIPAA regulations do provide for the circumstances under which covered entities may disclose PHI to law enforcement, which should be understood by all providers, patients, law enforcement, and legal counsel to ensure compliance.

## HIPAA & Criminal Investigations

While HIPAA generally prohibits a covered entity's disclosure of PHI without the consent of the patient, there are situations in which covered entities are permitted to disclose a patient's PHI to identify threats to the health and safety of the public. These exceptions are provided for in 45 C.F.R. § 164.512 of the HIPAA Privacy Rule, which details the circumstances under which PHI disclosure by covered entities is required by law and complies with all relevant legal requirements.

There are six circumstances under which disclosure of an individual's PHI for law enforcement purposes is authorized: (1) when otherwise required by federal, state, or local law; (2) limited information may be provided for identification and location purposes; (3) disclosure of the identity of a crime victim; (4) disclosure of a decedent's identity; (5) disclosure of PHI when there is a crime committed on the disclosing party's premises; and (6) reporting a crime in emergencies. Unless a given circumstance falls under one of the circumstances provided for in 45 C.F.R. § 164.512(f) (or other legal authority), PHI may not be disclosed to law enforcement without a patient's consent.

## Circumstances Permitting Disclosure in the Course of Criminal Investigations

### 1. *When Required by Law or Legal Process*

The first circumstance allows disclosure when required by a court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or a grand jury subpoena. Disclosure of PHI may be required by laws mandating reporting of certain types of injuries, such as stab wounds or gunshot injuries. Additionally, disclosure is permitted for administrative requests, such as an administrative subpoena or summons, or a civil or authorized investigative demand. Such disclosure is permissible only if the following three elements are met:

1. The information requested is relevant and material to a legitimate law enforcement inquiry;
2. The request is specific and limited in scope; and
3. De-identified information could not reasonably be used to satisfy the purposes of law enforcement.

### 2. *When Necessary to Identify or Locate a Suspect*

The second circumstance allows a covered entity to respond to a request from law enforcement for information necessary to identify or locate a suspect, fugitive, material witness, or a missing person. Disclosure under this scenario is permitted so long as the disclosed information is limited to the individual's:

1. Name and address;
2. Date and place of birth;

3. Social security number;
4. ABO blood type and rh factor;
5. Type of injury;
6. Date and time of treatment;
7. Date and time of death, if applicable; and
8. A description of the individual's physical characteristics, such as height, weight, gender, race, hair and eye color, presence or absence of facial hair, scars, and tattoos.

Under this second circumstance, it is important to note that a covered entity may not disclose PHI related to an individual's DNA or DNA analysis, dental records, blood typing, samples or analysis of body fluids or tissues.

### *3. When Necessary to Identify a Victim of a Crime*

The third circumstance permits disclosure in response to law enforcement's request for information about an individual who is a victim or believed to be a victim of a crime. This circumstance permits the disclosure of information beyond what is described in the first two circumstances, as long as the individual whose PHI is being disclosed either agrees to the disclosure or is unable to do so due to incapacity or an emergency. If such disclosure is permitted, all of the following additional requirements must be met:

1. 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;
2. 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; and
3. The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

### *4. When Necessary to Identify a Decedent Whose Death May Have Been Caused by Criminal Activity*

The fourth circumstance permits disclosure of PHI about a deceased individual to a law enforcement official if it is suspected that the death may have been caused by criminal activity and the purpose of the disclosure is to alert law enforcement.

### *5. When a Crime Is Suspected to Have Been Committed on the Premises*

The fifth circumstance permits disclosure of PHI if the covered entity believes in good faith that the information constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

## 6. *When Providing Emergency Care Arising from or Related to a Crime*

The sixth circumstance permits the disclosure of PHI if a covered health care provider, such as a hospital, is providing emergency health care in response to a medical emergency that did not occur within the health care provider's premises. The disclosure is permissible under this circumstance if disclosure appears necessary to alert law enforcement of:

1. The commission and nature of a crime;
2. The location of such crime or of the victim(s) of such crimes; and
3. The identity, description, and location of the perpetrator of such crime.

Under this circumstance, if the covered health care provider believes the medical emergency is the result of abuse, neglect, or domestic abuse, this section does not apply. Instead, disclosure is governed by the third circumstance of 45 C.F.R. § 164.512(c), which addresses victims of crime.

## 7. *When a Patient Is a Suspected Victim of Abuse, Neglect, or Domestic Violence*

Finally, when determining whether a health care provider may disclose PHI to a law enforcement official, it is important to consider if the individual is a victim of abuse, neglect, or domestic violence, as special rules and limitations apply to such disclosures under HIPAA. Under 45 C.F.R. § 164.512(c), if the case involves child abuse or neglect, the covered entity may make a report to any government authority authorized by law to receive the report without the individual's consent. By contrast, in situations involving adults, information related to abuse, neglect, or domestic violence may be disclosed if either the individual agrees to the disclosure, the report is required by law, or it is expressly authorized by law, and based on professional judgment, the report is necessary to prevent serious harm to the individual or others.

Further, information may be disclosed if authorized by law and in certain emergency situations where the individual is unable to agree due to incapacity, as long as the following conditions are met: the PHI will not be used against the individual, and the immediate enforcement activity that is dependent on the disclosure of the information would be materially and adversely affected if law enforcement is required to wait until the individual agrees to the disclosure.

## **Conclusion**

It is imperative that health care providers ensure all legal requirements are met in any given situation before disclosing any PHI to law enforcement personnel. Providers should exercise caution and disclose only the necessary information to comply with HIPAA and safeguard patient privacy. Health care providers should also routinely review their obligations under HIPAA when interacting with law enforcement to ensure providers are able to comply with their legal requirements even when faced with emergency requests.

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