



To: Tanie Sherman
Arizona Hospital and Healthcare Association

From: Kristen Rosati and Naomi Jorgensen, Coppersmith Schermer & Brockelman PLC

Re: **Sharing Protected Health Information during Disaster-Relief Efforts**

Date: January 21, 2011

The Family Reunification Workgroup is a subcommittee of the Arizona Coalition for Healthcare Emergency Response (AzCHER), a coalition of representatives from public and private health care organizations and emergency response organizations that works on emergency-response planning. The Workgroup has asked for guidance about when health care providers may disclose protected health information (PHI) to state agencies and other organizations for family-reunification purposes during a disaster.¹

We understand that the Workgroup has proposed to create a Call Center that will be run by the Arizona Division of Emergency Management (ADEM). The Call Center will essentially act as a centralized registry for individuals involved in a disaster. This service will help people locate their loved ones more easily, because they will be able to call one phone number – instead of multiple hospitals – to locate a missing person, and it will help minimize the burden on hospitals by reducing the number of phone calls made directly to hospitals. For each patient, the hospital will disclose to the Call Center the patient's full name and birth date (for identification purposes) and the name of the hospital where the patient is located. The Call Center will record this information in an electronic software program.

The HIPAA Privacy Rule permits health care providers to release name, date of birth and location to the Call Center as proposed by the Workgroup, although we recommend that the Call Center not make date of birth publicly available (but only use it to confirm a patient's identity). As we explain in more detail below, even under ordinary circumstances, a health care provider may disclose PHI in order to notify a patient's family of the patient's location and general condition. If the patient is available and able to consent, the provider may release the patient's PHI if the provider gives the patient a chance to object. If the patient is not available or not able to consent, the provider may release the patient's PHI if it determines that the disclosure is in the best interests of the patient.

¹ This memorandum is provided as general information for the Family Reunification Workgroup, and should not be construed as legal advice or a legal opinion regarding any particular facts or circumstances. For advice and information concerning fact-specific situations and any specific legal questions you may have, please consult the attorney with whom you regularly work.

However, these rules are somewhat relaxed during disasters. During disasters, a provider may disclose PHI to certain public and private agencies that are authorized to assist in disaster-relief efforts without complying with those requirements if it would interfere with responding to the emergency. No formal declaration of a disaster or emergency is required.

Finally, during declared disasters, the Secretary of the Department of Health and Human Services (HHS) can choose to issue a waiver of the penalties for noncompliance with various requirements of the HIPAA Privacy Rule. This will occur only in rare circumstances.

I. Permissible Disclosures of PHI under HIPAA

The HIPAA Privacy Rule contains a general rule permitting disclosures of PHI to notify a patient's family about a patient, as well as a special rule for notification during disaster-relief efforts.

A. General Rules on Disclosures for Notification

As a general matter, the Privacy Rule allows a health care provider to disclose PHI to notify or assist in notifying the patient's family members, personal representative, or another person who is responsible for the patient of the patient's location, general condition, or death.² However, if a patient is present and able to make decisions, the provider may only release the patient's PHI if the provider first seeks the patient's agreement, provides an opportunity to object, or concludes that, based on the circumstances the individual does not object to release of the patient's PHI.³ The patient's written authorization is not required; a verbal agreement is sufficient. For example, if the patient is a hospital inpatient and is conscious, the hospital would be required to ask the patient if it is okay to release the patient's name, birth date and location to the Call Center to allow the patient's family to locate the patient; if the patient verbally agrees, the hospital may do so. (We recommend that the hospital document the patient's verbal approval in the patient's medical record.)

On the other hand, if the patient is not present, or if the provider can't seek the patient's agreement because the patient is incapacitated or it is an emergency, the provider may disclose PHI if it determines that the disclosure is in the best interests of the patient. In this circumstance, the provider may release only the PHI directly relevant to the recipient's

² See 45 C.F.R. § 164.510(b)(1)(ii) ("A covered entity may use or disclose protected health information to notify, or assist in the notification of (including identifying or locating), a family member, a personal representative of the individual, or another person responsible for the care of the individual of the individual's location, general condition, or death. Any such use or disclosure of protected health information for such notification purposes must be in accordance with paragraphs (b)(2), (3), or (4) of this section, as applicable.").

³ See 45 C.F.R. § 164.510(b)(2) ("*Uses and disclosures with the individual present.* If the individual is present for, or otherwise available prior to, a use or disclosure permitted by paragraph (b)(1) of this section and has the capacity to make health care decisions, the covered entity may use or disclose the protected health information if it: (1) Obtains the individual's agreement; (ii) Provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or (iii) Reasonably infers from the circumstances, based the [sic] exercise of professional judgment, that the individual does not object to the disclosure.").

involvement with the individual's health care.⁴ So, for example, if a patient is unconscious, the hospital may release the patient's name, birth date and location to the Call Center to help locate the patient's family members.

In its Frequently Asked Questions, the Office for Civil Rights (OCR) has explained that, "when necessary, the hospital may notify the police, the press, or the public at large to the extent necessary to help locate, identify, or otherwise notify family members and others as to the location and general condition of their loved ones."⁵ The OCR has also explained that this rule permits the following, as examples:

- a doctor can share information about a patient's condition with the Red Cross so that the Red Cross can provide emergency-communications services for members of the U.S. military, such as notifying service members of family illness or death;
- a hospital can ask police to help locate and communicate with the family of an individual killed or injured in an accident; and
- a hospital can contact a patient's employer for information to assist in locating the patient's spouse so that he or she may be notified of the patient's hospitalization.⁶

⁴ See 45 C.F.R. § 164.510(b)(3) ("*Limited uses and disclosures when the individual is not present. If the individual is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's health care. . . .*").

⁵ See FAQ at

http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/960.html (FAQ):

"Question: Can health care information be shared in a severe disaster? Answer: Providers and health plans covered by the HIPAA Privacy Rule can share patient information in all of the following ways: . . . NOTIFICATION: Health care providers can share patient information as necessary to identify, locate, and notify family members, guardians, or anyone else responsible for the individual's care of the individual's location, general condition, or death. The health care provider should get verbal permission from individuals, when possible; but if the individual is incapacitated or not available, providers may share information for these purposes if, in their professional judgement [sic], doing so is in the patient's best interest.

- Thus, when necessary, the hospital may notify the police, the press, or the public at large to the extent necessary to help locate, identify, or otherwise notify family members and others as to the location and general condition of their loved ones.
- In addition, when a health care provider is sharing information with disaster relief organizations that, like the American Red Cross, are authorized by law or by their charters to assist in disaster relief efforts, it is unnecessary to obtain a patient's permission to share the information if doing so would interfere with the organization's ability to respond to the emergency."

The OCR distributed this guidance shortly after Hurricane Katrina in a bulletin (*available at* <http://www.hhs.gov/ocr/privacy/hipaa/understanding/special/emergency/katrinanhipaa.pdf>).

⁶ See FAQ at

http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_to_friends_and_family/491.html:

"Question: May a doctor or hospital disclose protected health information to a person or entity that can assist in notifying a patient's family member of the patient's location and health condition?

However, the OCR explained that it did not intend for this rule to provide loopholes to get around other HIPAA requirements:

This section is not intended to provide a loophole for avoiding the rule's other requirements, and it is not intended to allow disclosures to a broad range of individuals, such as journalists who may be curious about a celebrity's health status. Rather, it should be construed narrowly, to allow disclosures to those with the closest relationships with the patient, such as family members, in circumstances when a patient is unable to agree to disclosure of his or her protected health information.⁷

Providers should be mindful not to apply the rule in a manner that contradicts its purpose.

We note one additional concern: The HIPAA Privacy Rule permits health care providers to release only PHI that is relevant to the purpose. The Workgroup proposes to collect name, date of birth and location, with date of birth being used as a method of identifying individuals who may have the same name. The release of this PHI to the Call Center is permissible under HIPAA, but we recommend that the Call Center not make date of birth widely available outside the Call Center, because date of birth may be used to commit identity theft (especially when combined with other publicly available information). To protect the patients on the Call

Answer: Yes. The HIPAA Privacy Rule permits a covered doctor or hospital to disclose protected health information to a person or entity that will assist in notifying a patient's family member of the patient's location, general condition, or death. See 45 CFR 164.510(b)(1)(ii). The patient's written authorization is not required to make disclosures to notify, identify, or locate the patient's family members, his or her personal representatives, or other persons responsible for the patient's care. Rather, where the patient is present, or is otherwise available prior to the disclosure, and has capacity to make health care decisions, the covered entity may disclose protected health information for notification purposes if the patient agrees or, when given the opportunity, does not object. The covered entity may also make the disclosure if it can reasonably infer from the circumstances, based on professional judgment, that the patient does not object. See 45 CFR 164.510(b)(2).

Even when the patient is not present or it is impracticable because of emergency or incapacity to ask the patient about notifying someone, a covered entity can still disclose a patient's location, general condition, or death for notification purposes when, in exercising professional judgment, it determines that doing so would be in the best interest of the patient. See 45 CFR 164.510(b)(3).

Under these circumstances, for example:

- A doctor may share information about a patient's condition with the American Red Cross for the Red Cross to provide emergency communications services for members of the U.S. military, such as notifying service members of family illness or death, including verifying such illnesses for emergency leave requests.
- A hospital may ask police to help locate and communicate with the family of an individual killed or injured in an accident.
- A hospital may contact a patient's employer for information to assist in locating the patient's spouse so that he/she may be notified about the hospitalization of the patient."

⁷ 65 Fed. Reg. 82,523 (Dec. 28, 2000).

Center's list, we thus recommend that Call Center staffers ask individuals calling for the date of birth or age to confirm that the name on the list is (or is likely to be) the patient.

B. Disclosure of PHI to Entities that Assist in Disaster-Relief Efforts

HIPAA also has a rule that permits disclosures of PHI to entities authorized to assist in disaster-relief efforts. During times of disaster, a provider may disclose PHI to "a public or private entity that is authorized by law or by its charter to assist in disaster relief efforts" for the purpose of coordinating notification efforts.⁸ The big difference from the previous rule is that, in a disaster, a provider does not have to give a patient the opportunity to agree or object if that would interfere with responding to the emergency.

The OCR explained that a provider who discloses a patient's PHI to an organization like the American Red Cross does not need to obtain the patient's permission if doing so would interfere with the organization's ability to respond to the emergency.⁹ The OCR also explained in the Preamble to the Privacy Rule that its reason for enacting the rule was to permit disaster relief organizations to operate effectively:

[W]e allow covered entities to use or disclose protected health information without individual agreement to federal, state, or local government agencies engaged in disaster relief activities, as well as to private disaster relief or disaster assistance organizations (such as the Red Cross) authorized by law or by their charters to assist in disaster relief efforts, to allow these organizations to carry out their responsibilities in a specific disaster situation. Covered entities may make these disclosures to disaster relief organizations, for example, so that these organizations can help family members, friends, or others involved in the individual's care to locate individuals affected by a disaster and to inform them of the individual's general health condition. This provision also allows disclosure of information to disaster relief or disaster assistance organizations so that these organizations can help individuals obtain needed medical care for injuries or other health conditions caused by a disaster.

We encourage disaster relief organizations to protect the privacy of individual health information to the extent practicable in a

⁸ See 45 C.F.R. § 164.510(b)(4) ("*Use and disclosures for disaster relief purposes.* A covered entity may use or disclose protected health information to a public or private entity authorized by law or by its charter to assist in disaster relief efforts, for the purpose of coordinating with such entities the uses or disclosures permitted by paragraph (b)(1)(ii) of this section. The requirements in paragraphs (b)(2) and (3) of this section apply to such uses and disclosures to the extent that the covered entity, in the exercise of professional judgment, determines that the requirements do not interfere with the ability to respond to the emergency circumstances.").

⁹ See FAQ at

http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/960.html, quoted in note 4.

disaster situation. However, we recognize that the nature of disaster situations often makes it impossible or impracticable for disaster relief organizations and covered entities to seek individual agreement or authorization before disclosing protected health information necessary for providing disaster relief. Thus, we note that we do not intend to impede disaster relief organizations in their critical mission to save lives and reunite loved ones and friends in disaster situations.¹⁰

In Arizona, examples of public entities that could receive PHI under this rule are the ADEM and the Arizona Department of Health Services, which are authorized by Arizona statute to assist in disaster-relief efforts.¹¹ Local police and fire departments assisting in responding to disasters would also be qualifying entities. The governor also has the authority to direct all state agencies to perform response activities during a declared state of emergency; if any agencies were so directed during a state of emergency, those entities would qualify as well.¹² There may be additional state, county and local government agencies that are authorized by Arizona law to assist in disasters; we recommend that the Workgroup collate this information for Arizona hospitals.

An example of a qualifying private entity is the American Red Cross, which is authorized by its charter to assist in disaster-relief efforts.¹³ The American Red Cross operates the Safe and Well disaster registry, to which providers would be permitted to disclose PHI to assist in locating family members.¹⁴ There may be other organizations whose charters also authorize disaster assistance;¹⁵ again, we recommend that the Workgroup compile a complete

¹⁰ 65 Fed. Reg. at 82,524 (Dec. 28, 2000).

¹¹ See A.R.S. § 26-305(B) (“The division [of emergency management] shall prepare for and coordinate those emergency management activities that may be required to reduce the impact of disaster on persons or property.”); A.R.S. § 26-301(6) (“‘Emergency management’ means the preparedness, response, recovery and mitigation activities necessary to respond to and recover from disasters, emergencies or contingencies.”); A.R.S. § 36-132(A)(19): “The department [of health services] shall, in addition to other powers and duties vested in it by law . . . [p]articipate in the state civil defense program and develop the necessary organization and facilities to meet wartime or other disasters.”

¹² See A.R.S. § 26-303(E).

¹³ Congressional Charter of the American National Red Cross (2007), *available at* <http://www.redcross.org/www-files/Documents/Governance/charter.pdf> (one of the purposes of the organization is “to carry out a system of national and international relief in time of peace, and apply that system in mitigating the suffering caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry out measures for preventing those calamities”).

¹⁴ See website of Safe and Well disaster registry, at <https://safeandwell.communityos.org/cms/index.php>.

¹⁵ Our research showed other organizations that are involved in disaster-relief efforts. For example, the Association of Arizona Food Banks says on its website that it has coordinated the response of Arizona food banks to 13 natural disasters, and is an active member of Arizona Voluntary Organizations Active in Disaster (AzVOAD); we were unable to locate the AAFB articles of incorporation, as they are on microfilm with the Arizona Corporation Commission. Another example is AzVOAD; we found bylaws on its website, but no actual articles of incorporation, and it does not appear to be registered with the ACC. Similarly, the Next of Kin Registry (NOKR) is listed on the Arizona Division of Emergency

list of organizations whose charters authorize them to assist in disaster-relief efforts and make that available to hospitals.

The HIPAA Privacy Rule does not define the terms “disaster” and “emergency.” Because the Privacy Rule contains no requirements for what constitutes a “disaster” or an “emergency,” we interpret the rule to mean that no formal declaration of a disaster or emergency is necessary under the rule. This interpretation is supported by the Preamble to the Privacy Rule, which, as explained above, makes clear that the rule was not intended to impede disaster relief organizations from saving lives and reuniting loved ones and friends in disaster situations.¹⁶ Another section of the Preamble to the Privacy Rule also indicates that the rule is not just applied to disasters or formal emergencies: “We agree with the comments noting that the Red Cross and other organizations may play an important role in locating and communicating with the family about individuals injured or killed in an accident or disaster situation. . . . We recognize the role of the Red Cross and similar organizations in disaster relief efforts, and we encourage cooperation with these entities in notification efforts and other means of assistance.”¹⁷ Finally, HIPAA *does* require a formal declaration of a disaster before the Secretary of HHS can *waive* penalties for noncompliance with HIPAA during certain emergencies (which is discussed in the next section); this indicates that the HIPAA rules expressly list the disaster declaration requirement when applicable. Accordingly, we believe there is little risk associated with the reasonable application of these rules, even if a disaster or emergency has not been formally declared by the local or federal government.

II. Issuance of Emergency Waiver from Penalties for HIPAA Noncompliance

During certain emergencies, the Secretary of HHS can choose to temporarily waive or modify the ordinary penalties that arise from noncompliance with certain provisions of the HIPAA Privacy Rule.¹⁸ Before a waiver can be issued, there first must be an emergency or

Management’s website, and it is described on its own website as a free registry for people’s emergency contact information for use in daily emergencies and in disasters, but we could not find its charter.

¹⁶ 65 Fed. Reg. at 82,524 (Dec. 28, 2000).

¹⁷ 65 Fed. Reg. at 82,665 (Dec. 28, 2000) (emphasis added).

¹⁸ See 42 U.S.C. §1320b-5. The Secretary of HHS is granted this authority under the Project Bioshield Act of 2004 and the Social Security Act, not under HIPAA. See FAQ at

http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/1068.html:

“Question: Is the HIPAA Privacy Rule suspended during a national or public health emergency?
Answer: No; however, the Secretary of HHS may waive certain provisions of the Rule under the Project Bioshield Act of 2004 (PL 108-276) and section 1135(b)(7) of the Social Security Act.

What provisions may be waived: If the President declares an emergency or disaster *and* the Secretary declares a public health emergency, the Secretary may waive sanctions and penalties against a covered hospital that does not comply with certain provisions of the HIPAA Privacy Rule:

1. the requirements to obtain a patient's agreement to speak with family members or friends involved in the patient’s care (45 CFR 164.510(b))
2. the requirement to honor a request to opt out of the facility directory (45 CFR 164.510(a))
3. the requirement to distribute a notice of privacy practices (45 CFR 164.520)
4. the patient's right to request privacy restrictions (45 CFR 164.522(a))
5. the patient's right to request confidential communications (45 CFR 164.522(b))

disaster declared by the President *and* a public health emergency declared by the Secretary of HHS.¹⁹ If the Secretary issues a waiver, it is limited in several ways:

- The waiver applies only to providers in an “emergency area” and during an “emergency period.” An “emergency area” is a geographical area to which the Presidential and Secretarial declarations apply. An “emergency period” is a time period to which the Presidential and Secretarial declarations apply.²⁰
- The waiver applies only if a provider’s actions do not discriminate among individuals on the basis of their source of payment or of their ability to pay.²¹
- The waiver applies only to providers that have implemented a disaster protocol.²²

Regardless of the activation of an emergency waiver, the HIPAA Privacy Rule permits disclosures for treatment purposes and certain disclosures to disaster relief organizations. For instance, the Privacy Rule allows covered entities to share patient information with the American Red Cross so it can notify family members of the patient’s location. See 45 CFR 164.510(b)(4).²³

It is worth noting that there is no waiver available for the HIPAA *Security* Rule. See FAQ at <http://www.hhs.gov/ocr/privacy/hipaa/faq/securityrule/2005.html>:

“Question: Is the Security Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) suspended during a national or public health emergency?

Answer: No, the Security Rule is not suspended during a national or public health emergency. The Secretary of HHS may waive sanctions and penalties arising from certain provisions of the Privacy Rule under the Project BioShield Act of 2004 (PL 108-276) and section 1135(b)(7) of the Social Security Act if the President declares an emergency or disaster and the Secretary declares a public health emergency. However, these provisions have no application to the Security Rule. The Security Rule includes requirements for covered entities to ensure the confidentiality, integrity and availability of all electronic protected health information they create, receive, maintain or transmit. The rule further requires that covered entities protect against any reasonably anticipated threats or hazards to the security or integrity of such information. Other provisions of the Security Rule require covered entities to implement security measures that specifically contemplate emergency conditions. For example, covered entities must have contingency plans that establish policies and procedures for responding to an emergency or other occurrence (fire, system failure and natural disaster) that damages systems that contain e-PHI (45 CFR §164.308(a)(7)(i)). As with all HIPAA-related complaints, the Office for Civil Rights will evaluate complaints that arise during the course of a national or public health emergency on a case-by-case basis and exercise its discretion in taking enforcement action. . . .”

¹⁹ See 42 U.S.C. §1320b-5(b), (g)(1).

²⁰ See 42 U.S.C. §1320b-5(b), (g)(1); FAQ at http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/1068.html, quoted in note 18.

²¹ See 42 U.S.C. §1320b-5(b).

²² See 42 U.S.C. §1320b-5(b); FAQ at http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/1068.html, quoted in note 18.

- The waiver applies for, at most, up to 72 hours from the time the provider implemented the disaster protocol.²³
- The waiver no longer applies once either the Presidential or Secretarial declaration terminates, even if the Presidential or Secretarial declaration terminates before the 72-hour period has elapsed.²⁴

III. Conclusions

The HIPAA Privacy Rule permits health care providers to release name, date of birth and location to the Call Center as proposed by the Workgroup, although we recommend that the Call Center not make date of birth publicly available (but only use it to confirm a patient's identity). Even under ordinary circumstances, a health care provider may disclose PHI in order to notify a patient's family of the patient's location and general condition. If the patient is available and able to consent, the provider may release the patient's PHI only if the patient is provided an opportunity to object and does not. If the patient is not available or not able to consent, the provider may release the patient's PHI if it determines that the disclosure is in the best interests of the patient.

However, these rules are somewhat relaxed during disasters. During times of disaster, a provider may disclose PHI to public and private agencies authorized to assist in disaster-relief efforts without complying with those patient notice requirements if it would interfere with responding to the emergency. No formal declaration of a disaster or emergency is required.

Finally, during declared disasters, HHS can choose to issue a waiver of the penalties for noncompliance with the HIPAA requirements related to family notification. This will occur only in rare circumstances.

²³ See 42 U.S.C. §1320b-5(b); FAQ at http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/1068.html, quoted in note 18.

²⁴ See 42 U.S.C. §1320b-5(b), (e); FAQ at http://www.hhs.gov/ocr/privacy/hipaa/faq/disclosures_in_emergency_situations/1068.html, quoted in note 18.