COMMITTEE REPORT

Newsgathering Committee Memo:

HIPAA - A Quick Guide

by Thomas R. Julin
Hunton & Williams
August 7, 2003

80 Eighth Avenue, Suite 200 New York, New York 10011 (212) 337-0200
www.medialaw.org

A Journalist's Quick Guide to Federal Restrictions on Dissemination of Personally Identifiable Medical Information

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. 104-191, Title II, § 262(a), 110 Stat. 2029, imposes serious criminal restrictions on dissemination of certain health information. This sheet provides a summary of key parts of the law. To answer specific questions, seek the advice of competent counsel in your state.

The Statute

42 U.S.C. § 1320d-6(a):

A person who knowingly and in violation of this part—

(1) uses or causes to be used a unique health identifier;
(2) obtains individually identifiable health information relating to an individual; or
(3) discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b) of this section.

42 U.S.C. § 1320d-6(b):

A person described in section (a) of this section shall—

(1) be fined not more than $50,000, imprisoned not more than 1 year, or both;
(2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and
(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

Regulations

The Department of Health and Human Services has adopted regulations implementing the statute at 45 CFR Parts 160-164. The regulations have a compliance deadline of April 14, 2003.

Preemption of State Laws

Under 42 U.S.C. § 1320d-7(a)(2), HIPAA preempts contrary state law unless (1) the Secretary of HHS finds preemption unnecessary, or (2) state law more stringently protects privacy of individually identifiable health information.

Applicability

The purpose of HIPAA is to prevent **"covered entities"** who receive individually identifiable health information from disclosing that information to third parties. **Business associates** of covered entities are also required to keep individually identifiable health information confidential.

HIPAA should not be interpreted as preventing government employees who receive health information incidental to providing other services from disclosing that information. It also should not be regarded as applicable to most nongovernmental personnel. For example, HIPAA should not apply to:

a. Police.
b. Fire personnel.
c. Other emergency personnel.
d. Other government service providers not engaged in healthcare.
e. Journalists.
f. Relatives.
g. Clubs and associations.
h. Religious organizations.

A journalist who lawfully obtains or discloses individually identifiable health information does not violate HIPAA. However, a journalist who knowingly induces a covered entity to violate HIPAA by obtaining or disclosing information may be viewed as soliciting a violation of HIPAA and that could be a crime itself.

HIPAA should not be interpreted as applying to hospital **birth records** generally. It would apply to records relating to healthcare received in connection with a birth.

HIPAA protects individually identifiable health information even after the individual has died. HIPAA does not, however, prohibit disclosure of **autopsy records** because they are not "health information."

No exemption to HIPAA exists for "health information" of **public officials** and **public figures**.

Constitutional Issues

HIPAA probably would be an invalid prior restraint if interpreted as prohibiting journalists or other private persons from obtaining or disclosing health information.

HIPAA might be an invalid prior restraint if interpreted as prohibiting state and local governments from releasing health information to the public and press that they believe should be released as, for example, in a **public health emergency**.

Important Definitions

"Business associate" typically means accountants, accreditors, administrators, analysts, banks, billers, consultants, lawyers, managers and processors.

"Covered entity" means: (1) a health plan, (2) a health care clearinghouse, and (3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

"Health information" means any information, whether oral or recorded in any form or medium, that:

(1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

"**Individually identifiable health information**" is information that is a subset of health information, including demographic information collected from an individual, and:

(1) Is created or received by a health care provider, health plan, employer, or health care clearing-house; and

(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

(i) That identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Common Records *NOT* Required to be Kept Confidential by HIPAA

The following records typically are not required by HIPAA to be kept confidential

1. Police incident reports.
2. Fire incident reports.
3. Records of agencies that do not provide healthcare or insure healthcare.
4. Court records.
5. Birth records.
6. Autopsy records.
7. Records that do not reveal the identity of an individual. (Names, addresses, geographic codes smaller than a state, all dates (except year) elements related to a person, telephone numbers, fax numbers, license numbers, social security numbers, etc. are all regarded as revealing the identity of an individual).
8. Records authorized to be disclosed by the subject of the records.
9. Healthcare facility records of:
   a. An individual's name,
   b. An individual's location in the facility,
   c. An individual's condition described in general terms,
   d. An individual's religious affiliation

   unless the individual who is identified in the records has objected to disclosure or has not had an opportunity to object to disclosure.
10. Records maintained by family members, clubs, and associations.
11. Records required to be disclosed by a court order and certain subpoenaed records.

Common Records Required to be Kept Confidential by HIPAA

The following records of covered entities and their business associates typically are required by HIPAA to be kept confidential:

1. Health care claims or equivalent encounter information.
2. Health care payment and remittance advice.
3. Coordination of benefits.
4. Health care claim status.
5. Enrollment and disenrollment in a health plan.
6. Eligibility for a health plan.
7. Health plan premium payments.
8. Referral certification and authorization.
9. First report of injury to a healthcare provider.
10. Health claims attachments.