

Patient privacy and health information confidentiality

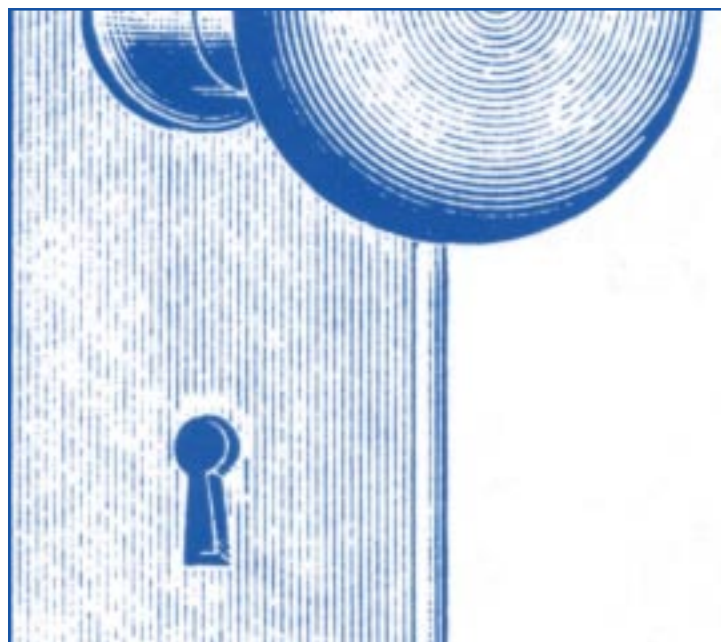
by *Jon H. Sutton, State Affairs Associate,
Health Policy and Advocacy Department*

“The surgeon should maintain the confidentiality of information from and about the patient, except as such information must be communicated for the patient’s proper care or as is required by law.”

—American College of Surgeons
Statements on Principles,
Statement IV.D.

In recent years, a great deal of attention has been focused on the issue of patient privacy and medical records/health information confidentiality. Rapid advancements in information technology, the development of health care delivery systems with non-traditional relationships to other business entities, and the ease with which personally identifiable health information may be electronically disclosed around the globe have caused genuine concern among patient advocacy organizations, state and federal governments, and the medical profession.

Physicians have always maintained strong ethical standards and principles pertaining to privacy and confidentiality of pa-



tients' health information. These standards are considered a sacred part of the physician-patient relationship. However, while most physicians fervently adhere to this principle, business entities, third-party payors, and other elements of the health care delivery system are not as committed to preserving patient privacy and trust. Indeed, the potential uses for personal medical information have evolved over the years to encompass a broad range of goals, many of which are laudable, but some of which are troublesome. For example, patient data may be used for direct marketing of pharmaceuticals, assessing the quality of care provided by individual physicians or under various health plans, and ensuring the financial integrity of publicly financed health care systems. Patients also fear that their personal medical information may influence their employers' decisions about promotions or downsizing or be made public in press reports or civil court actions.

In response to these growing concerns, the federal government in 1996 passed the Health Insurance Portability and Accountability Act (HIPAA), and rules to implement the standards for electronic transactions were issued April 14, 2001. In addition, state legislatures have explored the issue and passed privacy of health information statutes.

This article examines the status of patient privacy and confidentiality protections in the states by describing in some detail three state laws and by briefly reviewing the HIPAA standards for electronic transactions.

State privacy statutes

Grasping the varied and complex details of each state's patient privacy and confidentiality statutes can be very difficult. For example, some states have few protections and may only restrict access to and disclosure of mental health or substance abuse records and the results of genetic testing. Many states do allow patients to access their own medical records, and, in some cases, that includes records for services provided by nonphysicians (such as optometrists and pharmacists).

In addition, the statutes are found in various places within their respective civil codes. For example, medical privacy pertaining to patient information in the possession of health maintenance organizations (HMOs) might be included in the

insurance licensing statute, and laws affecting physicians might be part of the medical licensing statute. Protection of health information might also be found in consumer protection laws, yet may only cover certain health care professionals or entities.

A central source of information on health privacy laws in the states has been collected by the Health Privacy Project, based at Georgetown University in its Institute for Health Care Research and Policy. This organization undertook an 18-month project completed in 1999 that queried all 50 states and the District of Columbia regarding their health privacy laws. The Health Privacy Project then summarized by state the data according to patient access, restrictions on disclosure, condition-specific requirements (cancer, trauma, HIV, and so on), remedies and penalties for violation of the law, government-maintained records, and research.¹ The resulting 289-page report, "The State of Health Privacy: An Uneven Terrain," is available on the project's Web site (<http://www.healthprivacy.org/resources>).

States with broad statutes

A few states—**Hawaii, Rhode Island, and Wisconsin**—have reasonably comprehensive health privacy statutes that are worth examining in greater detail.

Hawaii

The Hawaii legislature passed House Bill 351 during its 1999 session, creating the Privacy of Health Care Information Act—commonly referred to as Act 87. In the preamble of the bill, the legislature concludes that "individuals have a constitutional right to privacy with respect to their personal health information and records, and with respect to information about their medical care and health status."² These sentiments are reflected in the law's extensive provisions.

Under the provisions of Act 87, Hawaiian citizens or their "designees" have the right to inspect and copy their protected health information held by an "entity," which is defined as a health care provider, health care data organization, health plan, health oversight agency, public health authority, employer, insurer, health researcher, law enforcement official, or educational institution.

Patient requests for this information must be submitted in writing and may be denied only under limited circumstances. Physicians and other entities must post in a prominent place a notice of their current confidentiality practices, including the following information:

- A description of the individual's rights with respect to protected health information, including the right to inspect and copy his or her record, the right to request that information be appended to the medical record, and the right to receive this notice by each health plan upon enrollment, annually thereafter, and when confidentiality practices are substantially amended.

- Information about the potential uses and disclosures of protected health information authorized under state law—claims payment; quality assurance and outcomes assessments; competence or qualifications reviews; accreditation, licensing, or credentialing activities; analysis of claims or health care records data; clinical performance evaluations; utilization management; or audits.

- Explanation of the individual's right to limit disclosure of protected health information by deciding not to use any health insurance or other third-party payment and description of the procedures for giving and revoking consent to disclosures of protected health information.

- Description of procedures established by the entity for the exercise of the individual's rights required by statute.

- Documentation of the right to obtain a copy of the notice of confidentiality practices required by the statute.²

Protected health information may be disclosed for the purpose of treatment, payment, or qualified health care operations—otherwise, proper consent must be obtained. Exceptions are made for certain circumstances, such as coroner or medical examiner activities, emergency situations, public health reports and registries, and so forth. Separate authorization is not required for health research or discovery as part of a court order.

Finally, penalties are assessed to those entities that violate Act 87. For a knowing violation, a civil penalty of \$25,000 for each and every violation, not to exceed \$100,000, may be assessed. An individual may also bring a civil action against an entity that violates these privacy rights.

The Hawaii legislature suspended Act 87 in the

summer of 2000 with the intent to resolve problems raised by medical providers, hospitals, and workers' compensation insurers. In addition, there are efforts in the legislature to repeal the statute following the promulgation of national standards under HIPAA.³

Rhode Island

The Confidentiality of Health Care Communications and Information Act is contained in Title 5, Chapter 5-37, of the Rhode Island Businesses and Professions Code. A patient has the right to access his or her medical records, and a patient's confidential health care information may not be released or transferred without the written consent of the patient or the patient's authorized representative. Exceptions to the written consent requirements include:

- Physicians or other medical personnel who believe in good faith that the information is necessary for diagnosis or treatment of the individual in a medical or dental emergency.

- Review boards conducting peer review or medical/dental licensure and discipline activities.

- Qualified personnel conducting scientific research or other activities, provided no individual patient is identified in any report.

- Qualified personnel and health care providers within the medical system who share information between or among themselves in order to coordinate the patient's health care services or for education and training within the facility.

- Third-party health insurers for claims payment purposes.

- Civil or legal purposes as required by law or court order.

- Public health officials in the conduct of their functions.

- The cancer registry.

The Rhode Island statute specifically notes that, unless otherwise allowed by law, an individual's confidential health care information cannot be given, sold, transferred, or in any way relayed to another person not specified in the consent form without first obtaining the patient's additional written consent for the new use of this information. Violation of this or any part of the Confidentiality of Health Care Communications and Information Act could result in civil or criminal penalties.⁴

Wisconsin

The confidentiality of health care records for patients in Wisconsin is strongly protected. Twenty-three specified health care providers (that is, physicians, nurses, clinics, and inpatient facilities) are prohibited from disclosing patient health care records without written consent. The consent must include: (1) the patient's name, (2) the type of information to be disclosed, (3) the types of health care providers making the disclosure, and (4) the purpose of the disclosure. However, disclosure of patient health care records is permitted without written informed consent under certain circumstances, including:

- Health care facility committees, accreditation, or health care services review organizations that conduct management audits, financial audits, program monitoring and evaluation, health care services reviews, or accreditation.
- Health care providers caring for the patient, medical staff members, and employees involved in consultations, emergency situations, preparation and maintenance of records, claims, or pursuit of a lawful court order.
- Federal or state governmental agencies performing legally authorized functions.
- Researchers affiliated with the health care provider.

Individuals who knowingly and willfully violate this law are liable for actual damages to the person, exemplary damages of not more than \$25,000, and costs that include reasonable actual attorney fees. Any person, including the state or political subdivision of the state, who negligently violates the law shall be similarly liable, although exemplary damages are limited to \$1,000.⁵

HIPAA regulation

On December 28, 2000, the U.S. Department of Health and Human Services (HHS) issued national standards to ensure the confidentiality of patient medical records. First proposed in November 1999 as mandated by HIPAA, the regulations essentially serve as a "national baseline" for protection of patient medical records; states with stronger patient confidentiality laws will be allowed to maintain their own standards. While the new federal regulations became effective

Resources

American College of Surgeons

<http://www.facs.org/dept/HPA/index.html>

Select "ACS Views on Legislative, Regulatory, and Other Issues" and "Publications on Socioeconomic Issues" to find information on policies and views pertaining to patient privacy and health information confidentiality.

American Medical Association

<http://ama-assn.org/ama/pub/category/4015.html>

This page is devoted to the AMA's Washington, DC, activities and contains fact sheets and comments on the HIPAA rules. Scroll down to "The White House and Federal Agencies" and select "AMA Communications on Proposed Regulations."

Health Privacy Project

<http://www.healthprivacy.org>

Download the report "The State of Health Privacy: An Uneven Terrain," as well as other information pertaining to health privacy.

Joint Healthcare Information Technology Alliance (JHITA)

<http://www.jhita.org/admsimp.htm>

An issue summary on the HIPAA privacy standards and links to numerous resources are provided.

U.S. Department of Health and Human Services

Administrative Simplification

<http://aspe.hhs.gov/admsimp/>

Scroll down to "National Standards" to obtain a copy of the HIPAA privacy rules, as well as implementation guides and other information.

April 14, 2001, compliance will not be mandated until April 14, 2003.

The initial proposed regulations posed a variety of concerns for the surgical community, such as limiting physicians to sharing only the "minimum necessary" portion of a patient's medical records with other physicians caring for the patient. The College argued that limited informa-

tion exchange could have a negative impact on patient care and that physicians should be allowed to share all appropriate information about an individual with other physicians who are treating the patient.

The final regulation was changed to reflect this recommendation, and was issued only days before President Clinton left office. Under pressure from a variety of sources, the new Bush Administration offered the public an additional opportunity to comment on the rules. Taking advantage of that opportunity, the College offered comments on the following areas:

- *Administrative requirements.* The final rule imposes unreasonable burdens and expectations on the health care system. Surgeons and other physicians already must, under ethical and legal obligations, maintain the confidentiality of patient medical records. Adding more burdens will take time away from patient care and increase the time spent complying with administrative requirements.

- *Effect on disease registries.* Under the privacy rules, hospitals that report to the National Cancer Data Base (NCDB)—the data collection analysis arm of the American College of Surgeons Commission on Cancer—would be required to de-identify the cancer data before they are transmitted to the NCDB. Information to be stripped out would include city, county, zip code, and birth date, which are all key elements in identifying cases for subsequent study. If the NCDB were to be defined as critical to the public health, physicians and hospitals would be permitted to disclose personal health information without individual/patient authorization.


- *Private sector accreditation programs.* The College operates two approval programs: one that sets standards for cancer programs and another that assesses trauma centers (as well as burn centers in conjunction with the American Burn Center Association). Under the HIPAA privacy rules, these approval programs could be considered “business associates” and could be required to develop a formal business associate contract between them and any facility program they assess. The administrative burdens of changing this from a voluntary program to one that requires a formal contract will likely lead to increased costs that many programs may not

be able to sustain. If these accrediting organizations were defined as health oversight agencies, the need for a formal business associate contract would be eliminated.⁶

HHS Secretary Tommy Thompson has indicated the department is reviewing the comments, and he expects some changes to the privacy regulations in the near future. Currently, the regulation would apply to certain “covered entities,” which would include health plans, institutional providers, physicians and other health care professionals, and health information clearinghouses. These covered entities would have strict requirements on when they could disclose individually identifiable health information. In many cases, these protections would also apply to all business associates of the covered entities. In addition, patients would have the right to inspect and copy their medical records. Physicians must provide written notices to their patients on the potential uses and disclosures of their protected health information.

The exact nature of future changes and also how exactly the regulations will affect each state’s current medical records privacy laws remains unclear.

Conclusion

Most surgeons’ practices are familiar with the health information privacy requirements in their respective states and comply with them. While the final HIPAA privacy regulations have been issued, their ultimate impact on surgical practice and their relationship to current state laws is not yet known. The College will continue to monitor this situation on behalf of its Fellows and their patients. Individuals seeking further information, compliance advice, and so forth, should watch for future communications from the College. In addition, specific questions or concerns regarding state privacy laws can be raised with Jon Sutton in the College’s Chicago Office at 312/202-5150, and questions regarding the federal regulations can be raised with the College’s Washington Office at 202/337-2701. 

References

1. Pitts J, Goldman J, Hudson Z, et al: *The State of Health Privacy: An Uneven Terrain. A Comprehensive* *continued on page 51*

2002 surgical investigators conference will focus on NIH programs and policies

The Surgical Research Committee announces the sixth biennial Young Surgical Investigators Conference, to be held March 8-10, 2002, at the Lansdowne Resort & Conference Center, Leesburg, VA. The program includes: intensive exposure to National Institutes of Health (NIH) programs and

policies, information from NIH institutes, workshops in grantsmanship, and mock study sections with grant reviews. Many NIH staff participate in this conference, as do more than 50 senior surgeon-investigators. This conference is ideally suited for new faculty members who are inexperienced in grant-writing

and in applying for extramural research funds. Additional information and online registration are available on the College's Web site at <http://www.facs.org/dept/serd/srec/young surg.html>. The registration deadline for the Young Surgical Investigators Conference is January 2, 2002.

Surgeons As Educators course to be held in early 2002

The Graduate Medical Education Committee announces the ninth annual Surgeons As Educators course, February 23 through March 1, 2002, at the University of Florida Hotel and Conference Center, Gainesville.

The six-day course is limited to 30 participants and emphasizes the needs of adult learners

and the techniques necessary to develop an optimal learning environment for medical students, surgical residents, colleagues, and others in the health profession. The course will address teaching skills, curriculum development, educational administration and management, and performance

and program evaluation.

Information and online registration is available on the College's Web site at <http://www.facs.org/dept/serd/gmec/saeintro.html>. The registration deadline for this course is November 2, 2001.

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- sive Survey of State Health Privacy Statutes*. Washington, DC: Health Privacy Project, Georgetown University, August 1999. Web site <http://www.healthprivacy.org>.
2. Act 87, "Privacy of Health Care Information Act," State of Hawaii, 1999 legislative session (HB 351). Web site <http://www.capitol.hawaii.gov/>. Select "Archives," then "1999," then "List of All Acts under 1999 Legislative Session Bills Introduced, Passed, and Vetoed," then scroll down to Act 87.
 3. Altonn, H: Medical privacy law repeal criticized. *Honolulu Star-Bulletin* Online Edition, Sunday, April 29, 2001. Web site <http://starbulletin.com/2001/04/29/news/story7.html>.
 4. Rhode Island Confidentiality of Health Care Communications and Information Act, Section 5-37. Web site http://www.rilin.state.ri.us/gen_assembly/genmenu.html. Select "State of Rhode Island General Laws," then "5."
 5. Wisconsin Annotated Statutes, Chapter 146. Web site <http://www.legis.state.wi.us/rsb/stats.html>. Enter in search box "ch.146" and press "Go."
 6. American College of Surgeons: Comments on standards for privacy of individually identifiable health information. Unpublished letter to HHS, March 30, 2001.