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Individual and Third-Party Access to Medical Records



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Recently, HHS released guidance and FAQs regarding an individual's access to protected health information (PHI): <http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/>. The guidance and FAQs provide specific information regarding access, including form and format, timeliness, copy fees and the individual's right to direct the PHI to another person or entity.

HIPAA is a Federal law that **supersedes** state statute. That means when providers supply records directly to the individual (the patient or his or her personal representative for health care, e.g. a parent, guardian, or estate administrator) the HIPAA restrictions apply.

Regarding access to PHI, HIPAA controls with respect to individuals, and Illinois state law controls with respect to third parties.

Under Illinois law, access, including form and format, timeliness, and the amount a covered entity (including but not limited to hospitals and physicians) may charge individuals (the patient and/or his or her personal representative for health care, e.g. a parent, guardian, or estate administrator) for copies of medical records are set forth in statutes. These state laws control unless HIPAA requires other actions or decisions. The two issues addressed by this guideline are how to supply records to individuals, and to third parties.

This guideline is not a substitute for legal advice but is intended to help covered entities in Illinois understand how the HHS guidance under HIPAA can be reconciled with Illinois law.

I. PROVIDING ACCESS TO PATIENTS AND THEIR PERSONAL REPRESENTATIVES FOR HEALTHCARE PURPOSES

PROVIDING ACCESS

The covered entity must take reasonable steps to verify the identity of an individual making a request for access and cannot impose an unreasonable measure on the individual for access to their records. For example, a facility may not require that an individual pick up their records at the facility, as this may cause a hardship or be a barrier to the individual receiving their requested information.

The covered entity may require that the individual's request for access to PHI be in writing; however, they may not require a HIPAA-compliant authorization. The covered entity may also require individuals to use the entity's own form, provided that the use of such a form does not create a barrier or unreasonable delay.

The covered entity may offer individuals the option of using electronic means, such as email or a secure web portal, to request access.

ACCESS VIA EMAIL

When an individual requests access in an unsecure manner, such as e-mail that is not encrypted, the covered entity must warn the individual that the transmission is unsecure and the individual must accept the risks associated with the transmission in writing.

Please refer to the HHS “Guidance to Render Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals” (available at <http://www.hhs.gov/hipaa/for-professionals/breach-notification/guidance/index.html>).

FORM AND FORMAT

The covered entity is required to provide the individual with access to the PHI in the form and format requested. If the individual requests electronic access to PHI that the covered entity maintains electronically, the covered entity must provide the individual with access to the information in the requested electronic form and format.

- Paper copies may be provided when requested.
- Electronic copies must be readily producible electronically, and the copy provided to the individual must be readable.
- When an individual requests an electronic copy of a paper record, the covered entity must provide the individual with an electronic copy if it is readily producible electronically (e.g. the covered entity can scan the paper record into an electronic format).
- When requested, the covered entity must provide access by having the copy of PHI mailed or e-mailed, or accessible via a secure web portal. E-mail is considered readily producible as long as the individual is aware of and willing to assume the risks if the PHI is sent unsecured.

FEES

HIPAA applies to copies made for and sent to the individual*. If the records are being provided to the individual, the maximum charge allowed under HIPAA is equal to the actual costs of copying the medical record: supplies and labor plus postage. No handling fee is allowed.

When copying and sending records to an individual*, a covered entity must comply with both HIPAA and Illinois law.

The covered entity must make the approximate fees to be charged known to the individual* in advance. For regular requests for records, covered entities should post approximate fee charges on their websites and in their offices.

The covered entity can charge for actual postage incurred when mailing the copy to the individual*. If the covered entity has to prepare a summary or an explanation of the PHI requested, they can charge an additional amount for preparation of the summary if agreed to by the individual*.

*In this context, “individual” refers to the patient or his or her personal representative for health care, e.g. a parent, guardian, or estate administrator.

The covered entity may calculate the fee in one of three ways:

1. **Actual costs.** A covered entity may calculate actual labor costs as long as the labor only includes copying and the labor rates used are reasonable for such activity. The covered entity may add to the actual labor costs the cost of any applicable supplies (paper, CD, USB drive – HOWEVER, under Illinois law, covered entities cannot charge individuals for electronic storage media) and postage. Labor for copying includes only the labor for creating and delivering the electronic or paper copy in the form and format requested, such as: photocopying paper PHI; scanning paper PHI into an electronic format; converting electronic information in one format to the format requested; transferring (downloading, uploading, attaching, burning) electronic PHI from a covered entity's systems to a web-based portal; or creating and executing a mailing or email of the PHI. Labor may include preparation of an explanation or summary of the PHI, if the individual in advance both chooses to receive an explanation or summary and agrees to the fee that may be charged. Postage may be included when the individual requests that PHI be mailed.
2. A covered entity can develop a schedule of costs for labor based on average labor costs to fulfill standard types of access requests. Covered entities can charge a per-page fee only in cases where the PHI requested is maintained in paper form and the individual requests a paper copy of the PHI or asks that the paper PHI be scanned into an electronic format. Per-page fees are not permitted for paper or electronic copies of PHI **maintained electronically**.
3. **Flat fee for electronic copies of PHI maintained electronically.** A covered entity may charge individuals a flat fee for all standard requests for electronic copies of PHI maintained electronically. For covered entities that do not want to calculate actual or allowable costs to determine the cost for a request, the covered entity may charge a flat fee not to exceed \$6.50 per request, inclusive of all labor, supplies and any postage.

[PLEASE NOTE: IL law limits electronic copy fees to ½ of the per-page fee for paper copies. HIPAA prohibits per-page fees for electronic copies. Therefore, any request for less than 13 electronic pages should be provided free of charge. However, the maximum amount that requests for 13 or more e-pages can be charged is \$6.50. This statement is based on the Illinois copy fee rates for 2017 and the rates are generally updated every January.]

A covered entity **MAY NOT** charge the individual a fee for the following:

- Searching for and retrieving the PHI (locating and gathering the documents, whether paper or electronic);
- PHI delivered via the covered entity's patient portal;
- Costs passed on from a third-party outsourcing vendor, such as the costs associated with an electronic health record program or off-site storage of medical records;
- Electronic storage media;
- To inspect their PHI (on-site review); and/or
- To access the patient portal.

INDIVIDUAL'S RIGHT TO DIRECT THE PHI TO ANOTHER PERSON OR ENTITY

The individual has the right to direct the covered entity to send his or her PHI to another person or entity designated by the individual. The request must be in writing, be signed by the individual, and clearly identify the designated person/entity and where to send the PHI. An electronic signature must be accepted as a signed request. HIPAA requirements such as fee limits, timeliness, and form and format apply regardless of to whom the individual has directed the copies be sent.

INDIVIDUAL'S RIGHT TO KNOW CHARGES

When an individual requests access to her PHI and the covered entity intends to charge the individual the limited fee permitted by the HIPAA Privacy Rule for providing the individual with a copy of her PHI, the covered entity must inform the individual in advance of the approximate fee that may be charged for the copy. An individual has a right to receive a copy of her PHI in the form and format and manner requested, if readily producible in that way, or as otherwise agreed to by the individual. Since the fee a covered entity is permitted to charge will vary based on the form and format and manner of access requested or agreed to by the individual, covered entities must, at the time such details are being negotiated or arranged, inform the individual of any associated fees that may impact the form and format and manner in which the individual requests or agrees to receive a copy of her PHI.

TIMELINESS

The covered entity must provide the individual with access to PHI no later than 30 calendar days from receipt of the request. HHS notes that 30 days is the "outer limit" and encourages entities to respond as soon as possible.

If the covered entity cannot respond within 30 calendar days, the entity is allowed a one-time 30 day extension. The covered entity **must** inform the individual in writing of the reasons for the delay and the date by which the information will be provided. An example of needing an extension may be if the records are stored off site and retrieval takes more than 30 days.

II. PROVIDING ACCESS TO THIRD PARTIES

FEES

HIPAA applies to copies made for and sent to the individual (and his or her personal representative for health care purposes). It does not apply to requests made by other individuals and entities. Such other individuals and entities include attorneys, insurance companies, other health care providers, and anyone other than the individual or his or her personal representative presenting a signed patient authorization for release of records.

When providing records to attorneys, health plans or other entities (excluding the patient and their personal representative for health care purposes) the third-party requestor can be charged. Under Illinois law (735 ILCS 5/8-2006), the amount a covered entity may charge for copying medical records is limited. Copies must be provided electronically, if available. The maximum amounts a covered entity can charge for copying medical records are as follows:

- \$27.33 handling fee (for persons other than patients and their personal representatives) PLUS \$1.02 each for pages 1-25;
- \$0.68 each for pages 26-50; and
- \$0.34 each for pages 51 to end; PLUS actual postage.

In addition:

- Charges for microfiche or microfilm may not exceed \$1.71 per page.
- Reasonable cost for duplication may be charged for copies of record information that cannot be duplicated on a copy machine (other than electronic records).
- Insurance company contracts or policies may prohibit or limit billing for records.
- Medicare and Medicaid do not pay for records.
- [Click here](#) to see the current rates as posted on the Comptroller's website.
- IL law limits electronic copy fees to ½ of the per-page fee for paper copies.
- No fee may be charged for the storage media, such as CD-ROM or USB drive.
- This statement is based on the Illinois copy fee rates for 2017 and the rates are generally updated every January.

III. Frequently Asked Questions

1. **May a covered entity withhold a copy of an individual's PHI from the individual because there is an outstanding bill?** No—a covered entity MAY NOT withhold or deny an individual access to his/her PHI because the individual has not paid a bill for health care services.
2. **Does the individual have a right to access PHI about themselves maintained by a covered entity that is very old or is archived?** Yes—an individual has a right to access PHI about themselves regardless of the date the information was created or whether the information is maintained onsite, stored remotely, or is archived. Example: If your facility keeps PHI from the opening of the facility, such as 1938, and a patient requests such PHI, you are obligated to include those records in the release.

[PLEASE NOTE: Under IL law and guidelines, PHI must be maintained for at least 10 years after the last patient encounter.]

3. **May a covered entity accept standing requests from individuals to access their PHI or to have their PHI sent to a third party of their choice?** Yes, and covered entities should have processes in place that enable individuals to receive access to their PHI, including directing a copy of the PHI to a third party of their choice on a standing, regular basis, without requiring individuals to repeat their requests for access every time a copy of the PHI is to be sent or otherwise made accessible.

THIS DOCUMENT SHOULD NOT BE VIEWED AS LEGAL ADVICE. ALL HEALTH CARE PROFESSIONALS OR PROVIDERS READING THIS DOCUMENT ARE ENCOURAGED TO SEEK THEIR OWN LEGAL COUNSEL BEFORE REVISING THEIR ORGANIZATION'S MEDICAL RECORD COPYING PROCEDURES AND FEES IN LIGHT OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES GUIDANCE OUTLINED ABOVE.

Further Information

ISMS members who have questions may contact medicallegal@isms.org.



HIPAA Medical Record Cost Calculation Sheet Guideline

Calculating actual cost			
		Charges for patient or personal representative access	Charges for third-party access
Cost of paper used (Price of ream divided by number of sheets in a ream) x number of pages in record	\$	\$	\$
Cost of postage	\$	\$	\$
Cost of labor: Time used to make copies • Machine set up: 1 min. • Number of pages copied per minute: usually 30 Cost of labor by minute for copying (*not search and retrieval) • First calculate staff cost per hour (hourly rate or salary divided by hours worked) • Then calculate staff cost per minute (staff cost per hour divided by 60)	Number of minutes to make copies = X Staff costs per minute = Y X times Y = Z (staff labor costs to make copies for the individual request) Z = \$	\$	\$
Total actual cost = cost of paper used + cost of postage + cost of labor	\$	\$	\$

Calculating average cost			
		Charges for patient or personal representative access	Charges for third-party access
1. Total actual costs of 20 previous medical record requests	\$	\$	\$
2. Total number of pages in 20 previous medical record requests	X pages	X pages	X pages
3. Divide total actual cost per request in Row 1 by total number of pages in Row 2. This is your average cost per page.	\$	\$	\$
<p>**This average per-page fee method can only be charged in cases where the PHI requested is maintained in paper form and the individual requests a paper copy of the PHI, or asks the paper PHI be scanned into an electronic format. Per-page fees are not permitted for paper or electronic copies of PHI maintained electronically.</p>			

Calculating flat fee for electronic copies of PHI maintained electronically			
		Charges for patient or personal representative access	Charges for third-party access
Record requests for paper copies of less than 13 pages: Free	Free	Free	Free
Record requests for paper copies of more than 13 pages: no more than \$6.50	No more than \$6.50	No more than \$6.50	No more than \$6.50

Calculating per-page copy fees			
		Charges for patient or personal representative access	Charges for third-party access
Handling fee* (*cannot charge this for records provided directly to the patient/personal representative. If the records are going to entities beyond the patient/personal representative, such as attorneys or health plans, the handling fee may be charged.)	\$27.33	Cannot charge	\$
Per-page charges		Cannot charge	
Pages 1-25	\$1.02 per page	Cannot charge	\$
Pages 26-50	\$0.68 per page	Cannot charge	\$
Pages 51 until end	\$0.34 per page	Cannot charge	\$
Postage cost	\$	Cannot charge	\$
Total cost	\$	Cannot charge	\$

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