MISUSE OF PATIENT DIRECTED REQUESTS FOR COPIES OF MEDICAL RECORDS

FINANCIAL AND PRIVACY IMPACT TO HEALTHCARE PROVIDERS AND THEIR PATIENTS—STEPS YOUR ORGANIZATION CAN TAKE

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GLOSSARY OF TERMS

Designated Record Set (DRS)—*a group of records maintained by or for a covered entity that may include patient medical and billing records; the enrollment, payment, claims, adjudication, and cases or medical management record systems maintained by or for a health plan; or information used in whole or in part to make care-related decisions; it does not include films or images that are interpreted by report. Every provider should define the contents of their DRS, clearly indicate which items are electronically maintained vs. paper-based, and specify location.*

Patient Access Request—*a patient request to receive a copy of PHI in their designated record set for personal use.*

Patient-Directed Request—*a patient request to designate a third party to receive PHI in their designated record set. Request must be in writing, signed by the individual, clearly identify the designated person or entity, and indicate where to send the PHI.*

Patient Rate—*the reasonable, cost-based, nominal fee for patients to obtain their PHI for personal use, such as providing records to their primary care physician, a mobile healthcare app or to researchers.*

Record Retrieval Company (RRC)—*a company that requests medical records on behalf of third-party medical record requesters such as attorneys and insurance companies.*

Third-Party Generated Medical Record Request—*a request disguised as a patient-directed request, by which an attorney asks the patient to sign a generic form, instead of a valid HIPAA authorization, to transmit records to the attorney or an RRC, citing the patient's right to access.*

MISUSE OF PATIENT-DIRECTED REQUESTS FOR COPIES OF MEDICAL RECORDS

Financial and Privacy Impact to Healthcare Providers and Their Patients—Steps Your Organization Can Take

This white paper provides insights, education and strategies to help hospitals, health systems and other healthcare provider organizations address issues that arise when attorneys solicit copies of medical records – often through record retrieval companies (RRCs)— at the limited fees applicable to patient access requests. Attorneys do this by taking advantage of a patient's right to designate a third party to receive the records and styling the requests to make providers believe the requests are patient-directed requests subject to the limited fees.

However, most of these requests from attorneys and RRCs are third-party requests that are not subject to the limited fee, but rather to state-regulated rates. In this white paper, such requests whether originating from a law firm or RRC, when posed as patient-directed requests, are referred to as "attorney requests." This paper addresses the confusion regarding fees charged for attorney requests and suggests that providers take a firm stance against attorneys' attempts to have their requests treated as patient-directed requests.

For health information management (HIM) professionals, inhouse attorneys, and compliance officers, the tenets set forth in this paper serve as an essential guide to understand and mitigate problems associated with these attorney requests, including the rising financial burden imposed on providers when attorneys shift the costs of medical record production for litigation to providers.

BACKGROUND

The U.S. Department of Health and Human Services (HHS) established the HIPAA Privacy Rule "Standards for Privacy of Individually Identifiable Health Information" to safeguard patients' protected health information (PHI) from improper use and disclosure. Since 1996, the HIPAA Privacy Rule has set parameters for providers, payers and other covered entities (CEs) regarding the use and disclosure of PHI.

An important adjunct to the HIPAA Privacy Rule was created in 2009 with the passage of the Health Information Technology for Economic and Clinical Health Act (HITECH). HITECH incentivized providers to adopt electronic health records. HITECH also specifically enhanced individuals' ability to access PHI maintained in an electronic health record.

Patients have always had the ability to authorize others to receive their PHI by completing a HIPAA-compliant authorization form. HITECH sought to simplify access to electronic PHI by omitting the authorization requirement when CEs maintain PHI in an electronic health record. Congress specifically altered 45 CFR §164.524 with Section 13405 of HITECH, which set forth the following limits:

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- Section 13405(e)(1) created an individual's right to (1) receive PHI in an electronic format when it is held in an electronic health record, and (2) require CEs to provide copies of records to a third party at the patient's request. Under the existing HIPAA Privacy Rule—45 CFR §164.502(a)(1)(iv)—CEs are permitted, but not required, to disclose information pursuant to authorizations (though state law may mandate the disclosure). Under HITECH, disclosure of information by CEs to third parties became mandatory when the patient chose to direct the information to a third party, provided that the choice was "clear, conspicuous, and specific."
- Section 13405(e)(2) required the provision of electronic information to the individual at a reasonable cost-based fee. It could have, but did not, require that all disclosures made pursuant to 45 CFR §164.524 be at the same reasonable, cost-based fee.

However, the Office of Civil Rights (OCR) chose not to limit the right of individual access to PHI in an "electronic health record" as defined by HITECH, when creating the regulations to implement HITECH. Rather, the final rule applied to all PHI maintained in electronic form in one or more designated record sets (DRS). With respect to fees, the final 2013 Omnibus Rule regulations modified what costs could be included in a patient's request for records for personal use but did not specify that those fee limitations applied to patient-directed requests. Accordingly, CEs and their business associates (BAs) involved in Release of Information (ROI) continued to fulfill attorney requests and other third-party requests at state-regulated rates without objection from attorneys and other frequent third-party requesters.

In 2016, a shift occurred when the OCR released guidance and a set of frequently asked questions about individuals' right to access and patient-directed requests under HITECH. The guidance emphasized removal of financial and other roadblocks to individuals' access to their information by advocating the imposition of a nominal fee for patients to obtain their PHI for personal use, such as providing records to their primary care physician, a mobile healthcare app or to researchers. Though applying a nominal fee for patient-directed disclosures to these types of entities is reasonable, the OCR's inclusion of the phrase "and it doesn't matter who the third party is" opened the door for manipulation by attorneys and RRCs who demanded the $6.50 fee suggested in the guidance.

After the guidance was released, RRCs were formed or expanded to help attorneys get records at the nominal "patient rate" – the reasonable, cost-based rate outlined in 45 CFR § 164.524 (c)(4) – instead of state-regulated rates for third-party requesters. Though the OCR never affirmed that the patient rate should apply to for-profit activities unrelated to healthcare, attorneys and RRCs threatened to file complaints with the OCR if records were not provided at that rate. Some actually filed such complaints even before the records were due and left ominous voicemails with providers regarding OCR action.

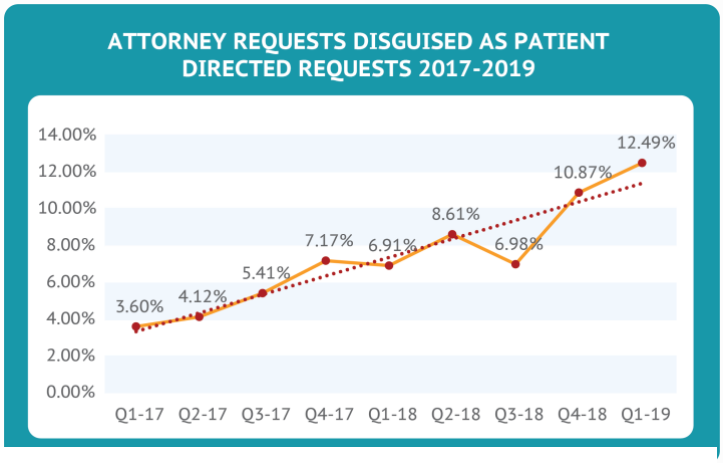
THE RISING TIDE OF THIRD-PARTY GENERATED MEDICAL RECORD REQUESTS DISGUISED AS PATIENT-DIRECTED REQUESTS

Third-party requesters of records, including attorneys and the RRCs that assist them, are aggressively taking advantage of perceived loopholes in the guidance by creating templates and form letters to pose as patient-directed requests in order to obtain records for the nominal patient rate.

Under the guise of patient-directed requests, attorney requests for medical records have soared with a specific pattern identified:

- Because the regulations require only that the individual's request be in writing, signed by the individual, clearly identify the designated person or entity, and indicate where to send the PHI, the attorney asks the patient to sign a generic form—instead of a valid HIPAA authorization—to transmit records to the attorney or an RRC, citing the patient's right to access.
- The request specifies records to be sent directly to the attorney's office or RRC as a patient-directed request at the patient rate under HITECH.
- The attorney or RRC obtains records with fewer restrictions and at the lower fee, rather than following a stricter process via an authorization and paying the appropriate state-regulated third-party fee. Attorneys are using these means to receive not only the patient's clinical medical record, but also all information within the provider's DRS that contains the patient's PHI. The DRS contains all information used to make decisions about a patient's stay or payment of the claim. This may include case management notes, insurance carrier comments and other sensitive information, all of which may be housed in disparate databases and/or physical locations.

The volume of these types of requests is growing exponentially, as reflected in the graph below. AHIOS member metrics show a steady increase in the number of attorney requests submitted under the guise of a patient-directed request demanding the patient rate.



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In the first quarter of 2017, 3.6% of all legal/attorney requests were presented as patient-directed requests. By first quarter 2019, that percentage spiked to 12.49%, a staggering 347% increase.

Additionally, an increase in the page count of PHI requested is consistently noted with attorney requests. AHIOS members are tracking a surge in attorney and RRC demand for "any or all" records from the DRS, styled as patient-directed requests. If an attorney requests this information with a patient's authorization, information is typically released from the patient's clinical health record only (and billing records if requested), and the patient makes the choice as to the extent of the record released.

The table below shows the difference in average attorney request page count versus patient-directed request page count for three provider organizations. The number of pages attached to attorney-generated patient-directed requests is excessive.

Customer	Pages per request		% PDR increase
	Legal	PDR	
A	853	1590	86.3
B	119	273	130.1
C	90	592	556.3

DETRIMENTAL IMPACT TO HEALTHCARE SYSTEMS AND PATIENTS

Neither Congress nor the OCR intended for the individual rights to access under 45 CFR §164.524(c) or the guidance to be interpreted and implemented to (a) shift the costs of obtaining medical records for the purpose of for-profit litigation or other non-healthcare related purposes to providers, (b) subject more PHI than necessary—including sensitive PHI that may or may not be related to the litigation—to disclosure, or (c) remove HIPAA protection resulting from disclosure via RRCs to attorneys. However, healthcare organizations are rightfully concerned about these risks associated with the rise in attorney-generated patient-directed requests.

Financial Impact

Determining fees that may be charged for producing copies of medical records for third parties is complicated. Each state has its own rules for the amounts that may be charged, and often these vary based on provider type (e.g., hospitals versus physicians) and the type of request.

The guidance further complicated this issue by limiting costs to a "reasonable, cost-based fee" and narrowly defining the types of costs that may be included in the calculation for patients' requests for their own records to be sent to them and certain patient-directed requests.

Many believe the costs for fulfilling patient-directed requests based on the guidance can't exceed $6.50. However, this was only a suggestion and was never meant to be a cap or industry fee, as has been specifically clarified by OCR.

Due to blogs posted online by attorneys who purport to instruct other attorneys how to get the patient rate, many attorneys refuse to (a) use the traditional means—a HIPAA-compliant authorization—to obtain the records they want, and (b) accept the associated costs to produce this information. Many providers are concerned about mounting OCR complaints connected to attorney requests—claims that have been filed "on behalf of" the patient, and not by the patient.

Patients clearly have the right to use patient-directed requests to have PHI sent to whomever they choose. However, Congress plainly indicated that the same fee structure does not apply to all patient-directed requests. Disclosures to patients' other healthcare providers (even competitors), mobile health apps used by the patient, and researchers should be fulfilled at the patient rate because they are for the patient's current or future healthcare benefit. In contrast, requests generated by or for attorneys or RRCs are not in furtherance of the patient's healthcare. Rather, they are used to obtain medical records for the third party's for-profit activities—specifically, litigation. Moreover, computer-generated forms from third parties are not patient-directed requests. The requests must come from the patients.

Privacy Impact

Patient privacy is a concern for all healthcare organizations and the patients they serve. When a patient's request for information appears to be a patient-directed request to provide information to an attorney or RRC, there are fewer protections and safeguards for patient privacy.

RRCs that retrieve PHI on behalf of attorneys are not subject to HIPAA and, consequently, not subject to restrictions on further use of PHI that comes into their possession. Further, unlike attorneys, RRCs have no fiduciary duty to the patient. We have learned that some RRCs are using the PHI they receive to create "big data" analytics for the purpose of selling it to other law firms or corporate clients to stack the deck in future litigation.

The minimal requirements of patient-directed requests do not afford the patient the same protections of an authorization, which specifies the categories of PHI to be disclosed and warns individuals that information disclosed pursuant to the authorization is subject to further redisclosure.

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FIVE PRIVACY RISKS

1. Patients sign over their information access rights without the original protections of HIPAA.
2. Length of time/expiration date of the consent and special restrictions to sensitive information are not required to be, and typically are not, included in patient-directed requests and are rarely included in attorney requests.
3. Attorneys may attempt to use patient-directed requests to receive all PHI regarding a patient, not just the specific encounters or visits that are relevant to the litigation. They also are using these means to obtain all PHI contained in all the entity's DRS, which includes more information than the clinical health record and the billing records.
4. Because providers are not required to disclose records pursuant to questionable HIPAA third-party authorizations, they may refuse to disclose if they believe patient privacy may be compromised. Providers lose this option and the authorization's added layers of privacy protection when information is disclosed pursuant to a patient-directed request.
5. A patient-directed request does not prevent the attorney from sharing records during future litigation.

THREE FINANCIAL AND LEGAL RISKS

1. Higher operational expenses: If attorneys and RRCs are given records at the patient rate, providers must absorb costs to produce copies.
2. Increase in management and legal expenses: Providers incur additional costs associated with responding to illegitimate attorney and RRC complaints and threats directed at the provider.
3. Greater risk of OCR letters: Regardless of merit, when the attorney or RRC files an OCR complaint, providers must review the circumstances and respond, resulting in the expenditure of time, resources and often outside legal and consultant fees.

Impact across Health System Departments

The increase in the number of attorneys trying to obtain records at the patient rate creates costly administrative burdens on the healthcare industry. HIM departments carry most of the burden to validate the legitimacy of the request for information. However, other areas of a healthcare organization also experience negative impacts and legitimate privacy, cost and legal risks. The complexity of rules governing providers and requesters leads to meritless arguments and burdensome OCR complaints by attorneys and RRCs. Lack of effective communication among multiple healthcare departments and their legal counsel can worsen these issues.

Department	Impact of Attorney Misuse of Patient-Directed Requests
Health Information Management (HIM)	• Increased volumes, workload, costs and staffing • Lost revenue as records are produced for nominal fees, not true cost • More complaint calls from attorneys and threats to escalate • Minimal authority to resolve attorney-created problems • Greater concerns about patient privacy risks with attorney requests • Shorter time frames to fulfill requests (30 days versus longer time frames with traditional HIPAA third-party authorizations)
Compliance	• Concern about OCR incrimination driving knee-jerk responses versus well-informed actions • Lack of time or resources to push back on meritless attorney complaints and threats
Risk Management	• OCR complaints and outside attorney pressure • Ensuring risk mitigation and appropriate actions taken for the correct outcomes of attorney requests and patient-directed requests for all parties involved • Lack of understanding about steps and costs to fulfill requests for medical records (See AHIOS 45-Step ROI Process)
Finance	• Lack of awareness regarding revenue loss associated with providing records for lower fees • Managing unbudgeted HIM department and/or vendor expenses • Inability to keep up with growing volumes of requests negatively impacted by HIM operational budget cuts
In-House Legal Counsel	• Incoming calls, letters and threats of OCR complaints and/or lawsuits from plaintiff attorneys regarding ROI company or internal HIM team pushback on fees • Higher legal costs if lawsuit or OCR letter received and outside attorneys needed to defend or respond • Lack of understanding about steps and costs to fulfill requests for medical records (See AHIOS 45-Step ROI Process)

AHIOS 45-Step ROI Process

The Association of Health Information Outsourcing Services (AHIOS) provides a full description of all the steps involved in receiving, validating and fulfilling a request for patient information or medical records—available on our website: https://www.ahios.org/pdf/AHIOS-45-Step-ROI-Process-Poster.pdf

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RECOGNIZING MISUSE OF PATIENT-DIRECTED REQUESTS FOR MEDICAL RECORD COPIES

Law firms gaining access to patient records at little to no cost as the first step in suing third parties in personal injury suits or in suing providers for malpractice is not an outcome that Congress or the OCR intended—but one that has become all too common and costly for healthcare organizations. Providers should be aware of the following red flags when receiving incoming requests:

- A template form with filled-in blanks and mismatched pronouns is used.
- The form is included in a larger packet with other documents—such as a HIPAA-compliant authorization.
- The patient's signature appears to be copy-pasted or photoshopped. Attorneys or RRCs may lift the patient signature from a driver's license or other document.
- The letter uses "legalese" and references statutes, laws and regulations. It may attach the guidance.
- The same letter is received repeatedly—one law firm and most RRCs use the same letter and same packet for all their requests.
- The letter is labeled a "HITECH authorization." This terminology is only used by attorneys and RRCs that work with them.
- There is a filled-in blank where the provider name is located. The attorney may have the patient sign a form with the provider name left blank and copy and reuse the form to obtain records from other providers.
- Certified copies of medical records are requested. It should be noted that certification is commonly requested for submission to court and is not subject to the patient rate—though it may be subject to state fee limits.

WHAT NOW? HOW TO COMBAT THE ISSUES

At the organizational level, best practices have emerged to confront these attorney-created issues—ranging from refuting the request to engaging the patient and meeting with the OCR. However, when providers push back, attorneys and RRCs may become even more aggressive by taking steps including the following:

- Refer to the guidance in their correspondence as a basis for action.
- Escalate complaints beyond HIM to in-house legal counsel and compliance directors.
- Threaten or file an OCR complaint.

Some healthcare organizations, fearful of OCR sanctions and the negative publicity that might accompany any OCR action, simply give up. Rather than fight attorneys, they process attorney patient-directed requests at the patient rate. Others pursue their position—even presenting their case to the OCR.

Healthcare leaders should not be deterred by threats and invalid complaints from attorneys who misuse patient-directed requests. While succumbing to attorney threats may seem beneficial in the short term, on a long-term basis the costs can pose a substantial risk to the stability of the organization's balance sheet. Incurring the costs and expending the resources now to stop the growing practice of attorneys demanding records at the patient rate is essential for the long-term survival of providers.

Steps for Success: Building Your Game Plan

To combat this problem, healthcare organizations need a comprehensive game plan that includes education and awareness across HIM, compliance, legal, risk management and finance. New strategies must also be employed at the national level to raise awareness and garner support.

Step One: Educate HIM, compliance and hospital legal counsel

Most complaints from attorneys go to the provider's in-house legal counsel since outside attorneys may have pre-existing relationships with them. However, attorneys may also try to contact HIM or compliance teams. Inform your hospital legal counsel, compliance leaders and HIM staff that:

- The attorney will call or send a letter stating that the HIM department or an outsourced ROI company refused to fill their patient-directed request at the patient rate.
- The attorney will state that the hospital is in violation of HIPAA or HITECH and threaten a lawsuit or complaint to OCR.
- Records should not be processed for attorneys at a financial loss to the organization. Educate internal teams on the full process of ROI, including costs and challenges associated with the process.

Step Two: Establish a rebuttal process

Build a rebuttal process for use by in-house legal counsel, compliance directors and HIM departments to:

- Make sure everyone is informed and in lockstep.
- Define all the work and expertise required to fulfill a request for information and approximate required costs.
- Establish a solid position to take if threatened with an OCR complaint.

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Step Three: Communicate with the OCR

The final and most important piece of a solid game plan involves communicating with the OCR. If an OCR complaint letter is received, follow these recommendations:

- Don't panic. Consider the OCR letter as an invitation for a conversation.
- Recognize the OCR's role to ensure patient access to information. They will automatically assume the provider or ROI company is inhibiting patient access to PHI. Your job is to demonstrate otherwise.
- Focus on your responsibility to guard patient privacy and facilitate access to patients and share your process to accomplish this goal.
- Gather your evidence—form letters and templates from attorneys and RRCs, patient conversations, etc. Share and explain your evidence and position to the OCR.
- Work directly with your ROI vendor to prepare your response.

CONCLUSION: FOR THE BETTER GOOD

The healthcare industry shares a common goal: to allow patients to receive a copy of their records for informational purposes, for ongoing medical care, or to represent a loved one during a care episode. We are aligned with HIPAA and HITECH's mission to expand information access while simultaneously protecting patient privacy.

The issue is not about prohibiting authorized access. The issue is about limiting the ability of attorneys and other third parties to manipulate the OCR guidance and patient-directed requests for their own commercial gain. Healthcare organizations that give in to attorney misuse of patient-directed requests may think that they are mitigating legal risk. Instead, they are welcoming negative financial impacts for themselves and potential adverse privacy effects for their patients. Producing thousands of pages of PHI for the nominal patient fee is not a business practice that can be sustained in the long term by any provider. This cost-shifting cannot be tolerated.

The efforts of attorneys and RRCs to obtain PHI via their mischaracterization of the guidance— which, to date, has not been challenged—is well documented and significantly more advanced than a lone provider's ability to combat it. While providers are steadfast in protecting patient privacy, they also need to protect their fiscal health. They can only do so by taking concrete steps now to stop disreputable attorney and RRC behavior before the issue becomes a more serious problem and a financial crisis for provider organizations.

Disclaimer: This white paper is for informational purposes only and does not constitute legal advice. You should contact your attorney to obtain advice with respect to your specific issue or problem.

About the Association of Health Information Outsourcing Services

Established in 1996, AHIOS promotes, strengthens and enhances the health information management outsourcing industry while ensuring excellence in managing risk and compliance issues associated with the disclosure of Protected Health Information. Its goals are to increase awareness of the value, importance and complexity of the industry's services; establish standards of excellence for the industry of health information management outsourcing; pursue fair and equitable treatment of the industry through legislative, regulatory and legal processes; and create educational and networking opportunities for members. For more information, visit AHIOS.org

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