Cost of Patient Access to Medical Information: Recent HHS Guidance

Recent confusion surrounding a patient’s ability to obtain their personal medical files, and the possibility that fees are limiting such access, has led to the issuance of revised federal guidance that may change organizational practices regarding the release of an individual’s medical information. In various updates throughout 2016, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) has released guidance regarding how healthcare providers may lawfully present access to an individual’s protected health information (PHI), i.e., individually identifiable health information transmitted or maintained in a patient’s medical record, under the Health Insurance Portability and Accountability Act (HIPAA), including the appropriate method for determining patient fees to acquire such information. After confusion from industry commentators arose due to beliefs that a fee maximum was implemented, the OCR opined that “…individuals can be charged only a reasonable, cost-based fee for the labor and supplies associated with making the copy, whether on paper or in electronic form.” [Emphasis included] The OCR guidance notes that organizations are permitted to charge individuals based on one of three methods: actual costs, average costs, or a flat fee. This Health Capital Topics article will briefly discuss an individual’s right of access to PHI under HIPAA, and detail the three methods that may be utilized in determining the charges that organizations may levy on patients to access their PHI.

Generally, HIPAA provides individuals with a right to “…inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set…” [Emphasis added] A designated record set is defined as “…[a] group of records maintained by or for a covered entity that is: (i) The medical records and billing records about individuals maintained by or for a covered health care provider; (ii) The enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or (iii) Used, in whole or in part, by or for the covered entity to make decisions about individuals.”

Requests for access to PHI maintained in a designated record set may be made by the individual, or the individual’s personal representative, defined as a person who has legal authority to act on behalf of the individual. Requests must be honored within thirty days unless an extension applies, and PHI provided must be in the form (i.e., electronic or paper) and format (i.e., a summary or complete file) requested by the individual, if it is readily producible in that form and format.

Covered entities, defined as a “…(1) health plan…[;] (2) healthcare clearinghouse…[;] and,] (3) healthcare provider who transmits any health information in electronic form…[,]” may charge individuals for providing access to, or copies of, PHI. Confusion arose regarding the amount of those fees for providing access to PHI after a fact sheet was released by OCR in early 2016, which many health industry stakeholders interpreted as stating that healthcare organizations could not charge patients over $6.50 in total for their PHI. In an updated Frequently Asked Questions webpage, the OCR clarified that $6.50 is not the maximum allowable fee. Instead, the OCR noted that covered entities may impose a reasonable, cost-based fee, based on one of three methods:

1. **actual costs**, based on labor, supplies, and postage, for creating and delivering the PHI copy, and preparing an explanation or summary of the health information if requested by the individual;
2. **average costs**, based on a schedule of labor costs in fulfilling the request; or,
3. **a flat fee** not to exceed $6.50 per request (inclusive of all labor, supplies, and postage) for electronic copies of PHI maintained electronically.

While the OCR attempted to limit the scope of labor costs by requiring the use of “…the reasonable hourly rate of the person copying and sending the PHI”, a limit on those labor costs remains undefined, as the OCR maintains that a “reasonable” hourly rate may also depend on “…the level of skill needed to create and transmit the copy [of PHI]… (e.g., administrative level labor to make and mail a paper copy versus more technical skill needed to convert and transmit the PHI)” According to the OCR, the flat fee is “an option available to entities that do not want to go through the process of calculating actual or average allowable costs for requests for electronic copies of PHI maintained electronically.”

However, the seeming simplicity of the $6.50 flat fee
may be misleading, as covered entities must satisfy other requirements pertinent to charging fees for access to PHI, including:

1. Covered entities must provide individuals in advance with an approximate fee amount to be charged for the actual cost method (which method is discussed above);
2. Per-page fees are not allowed for health information maintained electronically; and,
3. State laws granting individuals one free copy of PHI override the HIPAA fee determination methods for the first copy. Of note, the OCR opined in its guidance that HIPAA rules regarding charging for access to PHI override state laws allowing covering entities to charge fees above HIPAA regulations.

The OCR will likely continue to scrutinize compliance with rules related to an individual’s access to PHI. Proper access to an individual’s PHI is one of the top concerns in the OCR’s enforcement of rights conferred by HIPAA. Over the last thirteen years, from April 14, 2003, to May 31, 2016, the OCR received over 134,246 complaints, and initiated over 879 reviews regarding HIPAA compliance. Of the HIPAA compliance issues investigated by the OCR thus far in 2016, an individual’s lack of proper access to their PHI served as the third most prevalent reason to file a complaint with the agency, trailing only “…impermissible uses and disclosures of protected health information…” and “…lack of safeguards of [PHI]…”. Consequently, ensuring compliance with any updated HIPAA guidance regarding an individual’s access to PHI, may be prudent for covered entities under HIPAA, especially in consideration of the current uncertainty regarding the maximum allowable hourly rates due to the lack of an explicit limit.

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1 “Definitions” 45 C.F.R. § 160.103 (January 25, 2013), definition of “protected health information.”
4 “Clarification of Permissible Fees for HIPAA Right of Access – Flat Rate Option of Up to $6.50 is Not a Cap on All Fees for Copies of PHI” Department of Health and Human Services, May 23, 2016, http://www.hhs.gov/hipaa-for-professionals/privacy/guidance/access/clarification-flat-rate-copy-fee/index.html (Accessed 6/15/16);
6 “Access of individuals to protected health information” 45 C.F.R. § 164.524(a).
7 “Definitions” 45 C.F.R. § 164.501 (January 25, 2013), definition of “designated record set.”
8 “Uses and disclosures of protected health information: General rules” 45 C.F.R. § 164.502(g).
9 45 C.F.R. § 164.524(b)(2).
10 45 C.F.R. § 164.524(c)(2).
11 45 C.F.R. § 164.524(c)(2).
12 45 C.F.R. § 164.524(c)(4).
14 HHS; 45 C.F.R. § 164.524(c)(4).
15 HHS.
16 Ibid.
17 Ibid.
18 Ibid.
21 Ibid.
Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&amp;A, serves as Chief Executive Officer of HEALTH CAPITAL CONSULTANTS (HCC), a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Master in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institution of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Accredited Valuation Analyst (AVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&amp;A – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a national speaker and author of dozens of books, the latest of which include: “Adviser’s Guide to Healthcare – 2nd Edition” [2015 – AICPA]; “Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services” [2014 – John Wiley & Sons]; “Accountable Care Organizations: Value Metrics and Capital Formation” [2013 - Taylor & Francis, a division of CRC Press]; and, “The U.S. Healthcare Certificate of Need Sourcebook” [2005 - Beard Books].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious “Shannon Pratt Award in Business Valuation” conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS).

Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of HEALTH CAPITAL CONSULTANTS (HCC), where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures.

Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of the “Adviser’s Guide to Healthcare – 2nd Edition” [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: The Accountant’s Business Manual (AICPA); Valuing Professional Practices and Licenses (Aspen Publishers); Valuation Strategies: Business Appraisal Practice; and, NACVA QuickRead. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA), the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is currently Chair of the ASA Healthcare Special Interest Group (HSIG).

John R. Chwarzinski, MSF, MAE, is Senior Vice President of HEALTH CAPITAL CONSULTANTS (HCC). Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, as well as, economics and financial analysis. Mr. Chwarzinski is the author of peer-reviewed and industry articles published in Business Valuation Review and NACVA QuickRead, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo.

Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.

Jessica L. Bailey-Wheaton, Esq., is Vice President and General Counsel of HEALTH CAPITAL CONSULTANTS (HCC), where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey-Wheaton is the author of peer-reviewed and industry articles in Business Valuation Review and NACVA QuickRead, and she has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo.

Mr. Bailey-Wheaton is a Research Associate at HEALTH CAPITAL CONSULTANTS (HCC), where he provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and tracks impact of federal and state regulations on healthcare exempt organization transactions. Mr. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where he served as Fall Managing Editor for the Journal of Health Law & Policy.

Kenneth J. Farris, Esq., is a Research Associate at HEALTH CAPITAL CONSULTANTS (HCC), where he provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and tracks impact of federal and state regulations on healthcare exempt organization transactions. Mr. Farris is a member of the Missouri Bar and holds a J.D. from Saint Louis University School of Law, where he served as the 2014-2015 Footnotes Managing Editor for the Journal of Health Law & Policy.