

H O S P I T A L

# Public Relations

Under the **Health Insurance  
Portability and Accountability  
Act of 1996 (HIPAA)**

February 2003



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The Health Insurance Portability and Accountability Act of 1996 (HIPAA) *mandated regulations that establish standards to protect the privacy of individually identifiable health information. Hospitals must comply with these privacy standards—and the restrictions they place on the way hospitals may use or disclose “protected health information” or PHI—by April 14, 2003.*

*HIPAA’s privacy standards (the Privacy Rule) will affect virtually every department within a hospital. While there is no single provision that addresses public relations, a number of provisions in the Privacy Rule will directly impact the activities of the hospital public relations department, which fields numerous inquiries—from the press and the general public—concerning whether certain individuals are patients at the hospital, their medical condition, and the treatment they are receiving.*

*Greater New York Hospital Association has prepared this booklet to summarize and clarify the specific provisions of the Privacy Rule that pertain to hospital public relations activities. We hope it is useful to hospital public relations staff as well as members of the media.*

## The Hospital Directory

For many years, hospital public relations departments have followed their own institution-specific guidelines concerning inquiries about particular patients by family, friends, and the media, among others. These policies have recognized—and prioritized—a patient’s right to privacy, and therefore most hospitals’ current operating practices should bring them very close to compliance with the Privacy Rule. The Privacy Rule, however, does set forth specific requirements concerning the Hospital Directory that will have an impact on the hospital public relations department.

Under the Privacy Rule, a hospital must provide each of its patients, at the time of first service after April 14, 2003, with a Notice of Privacy Practices and must make a good faith effort to obtain from the patient an acknowledgment of receipt of the Notice. In addition, the Notice must describe, among other things, the uses and disclosures that the hospital may make of patients’ PHI, including uses and disclosures in its Hospital Directory of patients. Specifically, the Notice of Privacy Practices must describe the following concerning the Hospital Directory:

### Directory Information

The Notice of Privacy Practices must inform the patient of the specific PHI that the hospital includes in its Hospital Directory. Under the Privacy Rule, the Hospital Directory may include:

- The patient’s name;
- The patient’s location in the hospital (e.g., room number);
- The patient’s condition (described in general terms that do not communicate specific medical information about the individual); and
- The patient’s religious affiliation.

### Disclosure of Directory Information

The Notice of Privacy Practices must inform the patient of the persons to whom the hospital may disclose the PHI that is included in the Hospital Directory:

- The hospital may confirm the patient’s presence in the hospital and may disclose the patient’s location in the hospital, and his or her general condition *to any person who asks about the individual by name*. (Greater New York Hospital Association strongly recommends that hospitals clarify in their Notice of Privacy Practices that “any person” includes family members and friends, as well as members of the press.)
- The hospital may disclose the patient’s name, location, general condition, and religious affiliation *to members of the clergy*.

#### Option to “Opt Out” of the Directory

The hospital must give the patient the opportunity to restrict or prohibit some or all of these permitted disclosures of the PHI that is to be included in the Hospital Directory, including restricting the use or disclosure of one or more categories of PHI (e.g., a patient could opt to have his or her name and location, but not his or her condition, included in the Directory). This “opt out” process can be implemented orally, or in writing through use of an “opt out form.” (Hospitals should consider centralizing the “opt out” process if possible and documenting any oral “opt outs” they accept. These steps will reduce the chance that an “opt out” request will be agreed to but not appropriately made part of the Hospital Directory and communicated and effectuated throughout the hospital. In any case, the “opt out” procedure should be clearly stated in the hospital’s internal policies and procedures regarding maintenance and operation of the Hospital Directory.)

If the hospital has provided its Notice of Privacy Practices containing the elements described above and has provided the patient an opportunity to “opt out” of the Hospital Directory, the hospital public relations department can, under the Privacy Rule, release Hospital Directory information to the press, so long as the patient has not, in fact, opted out of the Hospital Directory and the person making the inquiry asks about

## CONDITION OF PATIENT

Under the Privacy Rule, the Hospital Directory should include a one-word, general description of the patient's condition that does not communicate specific medical information about the individual. These one-word descriptions should be disclosed only if **1)** the patient has not opted out of the Hospital Directory, and **2)** the person inquiring about the patient asks about the patient by name. The following terms are recommended by the American Hospital Association's Society for Healthcare Strategy and Market Development:

**Undetermined**—Patient awaiting physician assessment.

**Good**—Vital signs are stable and within normal limits. Patient is conscious and comfortable. Indicators are excellent.

**Fair**—Vital signs are stable and within normal limits. Patient is conscious, but may be uncomfortable. Indicators are favorable.

**Serious**—Vital signs may be unstable and not within normal limits. Patient is acutely ill. Indicators are questionable.

**Critical**—Vital signs are unstable and not within normal limits. Patient may be unconscious. Indicators are unfavorable.

Note: It is arguable that death is a "condition" that may be disclosed under the auspices of the Hospital Directory (so long as the patient is still within the facility, did not opt out of being listed in the Directory, and is being asked about by name). However, hospitals are advised to first notify the next of kin or make a reasonable attempt to do so. Information regarding the cause of death should come from the patient's physician but only pursuant to an authorization signed by the legal representative of the deceased. If a deceased patient has been removed from the hospital, then the hospital must obtain a signed authorization from the patient's personal representative to release information about the patient's death. When a death is investigated by the county/city coroner, questions about the cause of death should be addressed to that public office. The coroner's office may also have information about which funeral home is handling arrangements for the deceased.

the patient by name. Hospital public relations departments should always use their best judgment and may decide—in some or all cases—to use a stricter standard and reconfirm the patient’s desire to have his or her Hospital Directory information disclosed to the press (by asking the patient or the patient’s personal representative in person) before making such disclosure. Note, however, that if your public relations department decides to take this extra step, it should adhere to an established policy and procedure that, among other things, requires recording the patient’s agreement or objection, both to document facts in case a dispute arises and to prevent future disclosures that may be contrary to the patient’s expressed wishes.

### **Patients Who Are Unable to Consent to Inclusion in the Hospital Directory**

If a patient is unconscious or otherwise incapacitated when he or she is brought to the hospital and cannot agree or object to his or her inclusion in the Hospital Directory, the hospital may use and disclose the Hospital Directory information to people who ask about the individual by name if such disclosure is consistent with any known preference of the patient (e.g., if the patient expressed a preference when he or she was a patient at the hospital in the past) and if the hospital believes that such disclosure is in the patient’s “best interest.” Similarly, if the patient is in an emergency treatment situation and providing an opportunity to agree or object to being in the Hospital Directory would jeopardize that patient’s health, the hospital may use and dis-

#### **LESS, NOT MORE**

“ It is likely that most hospitals will decide that a patient’s ‘best interest’ is served by disclosing less, not more, PHI. ”

close the Hospital Directory information to people who ask about the individual by name so long as such disclosure is consistent with any known preference of the patient and the hospital believes that such disclosure is in the patient's "best interest." In both cases, if there is no known preference, the hospital must decide whether disclosure of the Hospital Directory information is in the patient's best interest.

The Privacy Rule does not provide specific guidance on whether disclosure of an incapacitated patient's condition to the media is considered in the patient's best interest; however, it is likely that most hospitals will decide that a patient's "best interest" is served by disclosing less, not more, PHI. The preamble to the Privacy Rule states that when a patient is incapacitated or in an emergency treatment situation and a hospital must exercise its judgment as to the patient's "best interest," the hospital should consider: 1.) whether disclosing that an individual is in the facility could cause harm or danger to that individual (e.g., would subject the person to domestic violence); 2.) whether disclosing information about a patient's location in the hospital could inadvertently reveal information about the patient's reason for being there (e.g., if giving a patient's room number could reveal that the patient is in the psychiatric ward or an AIDS unit); and 3.) whether it is necessary or appropriate to disclose such information to the patient's family and friends (e.g., so that such persons could assist in the patient's care by providing information to aid in the administration of proper medications).

The hospital must notify the patient of his/her right to agree or object to inclusion in the Hospital Directory as soon as the patient is conscious and able to make that decision.

### **Minimum Necessary Rule**

The Privacy Rule also requires that whenever a hospital uses or discloses PHI (except in certain limited circumstances, the most notable being uses and disclosures of PHI for treatment purposes), it "must make reasonable

efforts to limit the [PHI used or disclosed] to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.” Thus, although most uses for public relations purposes are circumscribed by the specific requirements set forth in the Privacy Rule, hospital public relations departments must nevertheless keep in mind the “minimum necessary” rule in making any use or disclosure of PHI. Most important, the minimum necessary rule should be factored into all policies and procedures developed to address the Privacy Rule’s provisions that impact public relations.

### Other Applicable Federal and State Laws

Other federal and state statutes and regulations may prohibit, or otherwise restrict to a greater extent than the Privacy Rule, disclosures of certain highly sensitive PHI, such as PHI relating to mental health, alcohol or substance abuse treatment, and diseases such as HIV/AIDS. These laws include the New York State Mental Hygiene Law; the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, the Drug Abuse Office and Treatment Act of 1972, and the implementing regulations at 42 CFR Part 2; and the New York State HIV/AIDS Confidentiality Law (Article 27-F of the Public Health Law). Hospital public relations staff should abide by hospital policies and procedures regarding such highly sensitive PHI, and, as necessary, consult with hospital legal counsel before disclosing any such highly sensitive PHI.

#### THE “MINIMUM NECESSARY” RULE

*Except in certain limited circumstances, whenever a hospital uses or discloses, or requests, PHI, it “must make reasonable efforts to limit the [PHI] to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.”*

### Matters of Public Record

In certain situations, existing state or local law requires hospitals to disclose certain PHI to governmental authorities, such

as law enforcement agencies, medical examiners, or public health officials, and the PHI received by the governmental authority may be considered a matter of public record that may be accessed by and disclosed to the general public, including members of the press. However, the fact that the hospital is required by law to disclose PHI to a governmental authority does not alter the hospital's obligation under the Privacy Rule to protect the privacy of that PHI and to otherwise comply with the Privacy Rule. For example, just because the hospital has filed a death certificate listing a patient's cause of death, the hospital cannot then disclose that patient's cause of death (or other PHI that is not part of the facility directory) to members of the press or other parties outside the hospital. Media inquiries regarding matters of public record should be directed to the appropriate governmental authority (e.g., the police or fire department, the medical examiner's office, the state or local department of health) that receives such reports.

Similarly, the fact that a plaintiff in a medical malpractice action has put his/her condition at issue and made his/her PHI part of a public court record will not allow the hospital to use or disclose that individual's PHI in the media or other public forums without following the requirements of the Privacy Rule (and any other applicable laws). Accordingly, without a HIPAA-compliant authorization from the plaintiff, the hospital may not attempt to defend itself in the media by making any specific statement regarding the plaintiff, if derived from PHI held by the hospital. In these situations, public relations staff should consult closely with hospital legal counsel. Depending on the circumstances, hospital legal counsel may advise that denial of charges or assertions that care provided was appropriate may be made by the hospital, even if questionably compliant with the Privacy Rule.

### **Requests for Extensive Patient Information**

If a member of the press is seeking information about a patient's condition and/or treatment at the hospital that goes beyond the basic information that is provided in the

Hospital Directory (e.g., a detailed statement about the patient's condition, a photograph of the patient, or an interview with the patient), the hospital public relations department must obtain written authorization from the patient to use and disclose that PHI. This authorization must describe in detail what information will be used and to whom this information will be disclosed, and must establish a specific point in time (a date or an event related to the patient or the purpose of the use or disclosure) at which the authorization will terminate and the use and/or disclosure of PHI will no longer be permitted.

### **Asking Patients to Participate in Media Stories**

When public relations staff seek to generate publicity about a particular treatment or procedure at the hospital (or when staff receives calls from the media about a treatment or procedure), the staff is often interested in finding a hospital patient who is willing to be interviewed for the media story or segment. However, the Privacy Rule does not specifically permit the use or disclosure of PHI for this purpose. A practical approach that would permit these activities while comporting with the general spirit of HIPAA would be to allow the public relations department, when it receives such a request from the media, to alert the relevant physician(s) at the institution about the request and to ask the physician(s) to help identify patients who might be candidates for the media story. The physician should ask those patients—in a non-coercive fashion—whether they have an interest in participating in the media story. A technical interpretation of the Privacy Rule requires the physician to obtain an authorization allowing the physician to disclose the patient's identity to the public relations department, and allow that department to use the patient's PHI to contact the patient in connection with the story. In conversations with the Office for Civil Rights, the U.S. Department of Health and Human Services' enforcement and technical assistance unit for the Privacy Rule, it appears that verbal consent from the patient may suffice for the physician to refer the patient

## PATIENT PERMISSION FOR USE OF PHOTOGRAPHS, VIDEO AND AUDIO TAPES, MOVIES, AND/OR HISTORIES

The Privacy Rule requires a hospital to have a patient sign an authorization form in order for the hospital to use or disclose the patient's PHI for purposes other than treatment, payment, or health care operations, or as otherwise required or permitted by the Privacy Rule. An authorization, among other things, must:

- n describe in detail what PHI will be used or disclosed,
- n describe in detail the purpose(s) for which this PHI will be used or disclosed,
- n describe in detail to whom this PHI will be disclosed, and
- n establish a specific point of expiration (a date or an event).

Examples of uses or disclosures of PHI that require authorization include photographs, video and audio tapes, movies, and histories that may be used in connection with media interviews, marketing and advertising campaigns, or hospital projects or publications such as annual reports and newsletters. Authorization is not required for the use and disclosure of PHI in a Hospital Directory, provided that such uses and disclosures are in accordance with the Privacy Rule's specific requirements applicable to facility directories.

to the public relations department. Once either formal authorization or verbal consent has been obtained, the hospital public relations staff can meet with the patient, brief the patient about the interview and its format, and ask him/her to sign an authorization to permit the disclosure of certain of the patient's PHI to the member of the media who requested it.

### **Disclosures to Notify, Locate, or Identify People Responsible for an Individual's Care**

A hospital may use or disclose PHI about a patient in order to notify or assist in notifying (including identifying or locating) a family member, personal representative, or other person responsible for the patient's care about the patient's location, general condition, or death. For example, a hospital may provide a photo of an unidentified patient to the news media in order to help locate the patient's next of kin. Before making any such use or disclosure, the hospital must determine whether the patient is "present or otherwise available," and whether the patient has the capacity to make health care decisions. If the patient is both "present or otherwise available" and not incapacitated, the hospital may make such use or disclosure only if the patient agrees or is provided a reasonable opportunity to object and does not do so, or if the hospital reasonably infers from the circumstances that the patient does not object. If the patient is not "present or otherwise available" or otherwise cannot be provided an opportunity to agree or object because of incapacity or emergency circumstance, the hospital may use or disclose PHI only if it determines that doing so is in the best interests of the patient; additionally, any such disclosure must be limited to that PHI that is directly relevant to the recipient's involvement in the patient's health care.

### **Disaster Relief**

Similarly, in the event of a disaster—such as an airplane accident, a weather-related emergency, or a bombing—a hospital may use, or disclose to a public or private entity authorized by law or by its charter to assist in disaster relief

efforts, a patient's PHI in order to coordinate disclosures to notify or assist in the notification of (including identifying or locating) a family member, personal representative, or other person who is responsible for the patient's care about the patient's location, condition, or death. The requirements outlined above relating to whether a patient is "present" and not incapacitated also apply to disaster relief disclosures to the extent the hospital determines that such requirements do not interfere with its ability to respond to the emergency circumstances.

In the event of a disaster, registries may be set up to assist in location and notification of family members and other persons about patient location, condition, or death. These registries could be established by federal, state, or local authorities, or by private groups working under the auspices of a government/health oversight agency, and, as was the case with the September 11, 2001, terrorist attacks, may involve coordination with representative organizations such as the Greater New York Hospital Association. In circumstances like September 11th, a hospital should feel comfortable in determining that providing each individual with an opportunity to agree or object to inclusion in the registry would in fact interfere with the hospital's ability to provide such notifications in a timely and appropriate manner. (Greater New York Hospital Association recommends that hospitals document this judgment in their disaster preparedness/response plans and in their HIPAA policies and procedures.) In making disclosures to registries in connection with disaster relief efforts, hospitals also must keep in mind the Privacy Rule's "minimum necessary" rule. (Greater New York Hospital Association also recommends that hospitals make a determination about what PHI is the minimum necessary to accomplish the purpose of notifying-or assisting in notifying, including locating or identifying-a family member, personal representative, or other person involved with the care of an individual of the individual's location, general condition, or death, and document that judgment in their disaster preparedness/response plans and in their HIPAA policies and procedures.)

## Public Officials and Public Figures

Because the Privacy Rule makes no distinction between individuals with respect to permitted uses and disclosures of their PHI, hospitals should not treat a public official's or a public figure's PHI any differently from any other person's PHI.

## Written Policies and Procedures

The Privacy Rule specifically requires that each hospital adopt and implement written policies and procedures that are designed to ensure its compliance with the Privacy Rule. Hospital public relations departments will need to develop, adopt, and implement (including training all affected staff) written policies and procedures that address the uses and disclosures of PHI for the purposes and in the circumstances described above.

## Penalties for Wrongful Disclosure

**Hospitals:** Hospitals can face serious penalties for disclosing PHI about their patients without proper permission. The U.S. Department of Health and Human Services views wrongful disclosure of PHI as a violation of civil rights and has delegated the civil enforcement responsibilities for the Privacy Rule to its Office of Civil Rights (OCR). OCR will monitor compliance with, and enforce civil penalties for violations of the standards set forth in, the Privacy Rule, which penalties are \$100 per violation, up to \$25,000 per standard per year, and will refer criminal violations to the U.S. Department of Justice. The criminal penalties for wrongful disclosure of PHI fall into three categories:

	FINES	IMPRISONMENT
Knowingly	up to \$50,000	up to one year
False Pretenses	up to \$100,000	up to five years
Intent to Sell, Transfer, or Use for Commercial Advantage, Personal Gain, or Malicious Harm	up to \$250,000	up to ten years

## HOSPITAL POLICIES AND PROCEDURES

*Hospitals should develop...*

- *policies and procedures regarding what constitutes Hospital Directory information and how to handle related inquiries;*
- *policies and procedures regarding how to deal with disclosures of Hospital Directory information regarding incapacitated patients and in emergency treatment circumstances;*
- *reliable procedures to provide patients with an opportunity to “opt out”—to agree or object to uses and disclosures—of PHI for Hospital Directory purposes, including making sure that patients who have objected to being listed in the Hospital Directory are not listed, both now and in the future;*
- *policies and procedures regarding use and disclosure of PHI to notify or assist in notifying (including locating or identifying) persons responsible for a patient’s care; and*
- *policies and procedures concerning use and disclosure of PHI for disaster relief purposes.*

*Hospital public relations staff should understand these policies and procedures, and should change the public relations department’s Administrative Policies and Procedures to reflect any protocols that have been changed to comply with the Privacy Rule. Training of front-line staff in policies and procedures that are new or have been modified to comply with the Privacy Rule will be critical and is required by the Privacy Rule.*

**Members of the Press:** A reporter who obtains PHI in violation of the Privacy Rule under “false pretenses” (for example, where the reporter impersonates a physician) could be subject to a criminal penalty under HIPAA of up to five years in prison and/or a \$100,000 fine. In addition, members of the press (including reporters, editors, and publishers) could be subject to common law tort liability for breach of privacy by writing, producing, and publishing a story that uses PHI disclosed to them in violation of the Privacy Rule (which is expected to become the *de facto* common law privacy standard). ■

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