

The Nathaniel Witherell

POLICY ON INDIVIDUALS' RIGHT TO ACCESS PROTECTED HEALTH  
INFORMATION

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HIPAA/HITECH REFERENCE(S): 45 C.F.R. § 164.501  
45 C.F.R. § 164.524  
HITECH § 13405(e)

OTHER RELEVANT LAW(S) AND/OR  
REGULATION(S): Conn. Gen. Stat. § 19a-490b  
42 C.F.R. § 483.10(b)(2) and  
Tag F153  
42 C.F.R § 483.10(e)(2) & (3)  
and  
Tag F167

RELATED POLICIES AND FORMS: Request for Access to  
Protected Health  
Information Form  
Notice of Privacy Practices

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**POLICY:**

Covered Entity shall permit residents to exercise their right to access their protected health information ("PHI") maintained by Covered Entity in the resident's "Designated Record Set," including the right to inspect and obtain copies of the PHI, in accordance with state and federal law. Covered Entity also shall permit residents to exercise their right to receive an electronic copy of their PHI maintained in an Electronic Health Record and to direct Covered Entity to transmit an electronic copy directly to a third party designated by the resident.

**DEFINITIONS:**

A "Designated Record Set" means the resident's medical and billing records and any other records containing PHI that are used, in whole or in part, to make decisions about the resident.

An "Electronic Health Record" means an electronic record of health-related information about a resident that is created, gathered, managed and consulted by authorized health care clinicians and staff.

**PROCEDURES:**

**1. Requests for Access:**

- 1.1. Residents have the right to request, orally or in writing, to inspect and obtain copies of their PHI in a Designated Record Set. To the extent Covered Entity maintains an Electronic Health Record with respect to PHI, residents also have the right to receive an electronic copy of the PHI and to direct Covered Entity to transmit an electronic copy directly to a third party designated by the resident. Covered Entity's *Notice of Privacy Practices* will inform residents of these rights.
- 1.2. Mercedes Rice, Medical Records, will receive and process all resident requests for access to and copies of PHI.
- 1.3. Residents will be asked to complete the *Request for Access to Protected Health Information Form*. If a resident makes the request orally, Mercedes Rice, Medical Records, will complete the Form.
- 1.4. A resident's personal representative may also request access to and/or copies of the resident's PHI. (See *Personal Representatives Policy* for guidance on who may serve as a resident's personal representative.) Covered Entity will verify the identity and authority of a personal representative in accordance with its *Policy on Verification of Identity*. Attorneys who provide legal representation to a resident may not access the resident's PHI unless the attorney also serves as a personal representative, or the resident provides an Authorization for Covered Entity to provide the attorney access to the resident's records.
- 1.5. Mercedes Rice, Medical Records, will notify the Administrator or his designee upon receipt of any request for access to or copies of PHI. If the request involves billing records, Raymond Augustine, Director of Finance, or his designee will also be notified.

**2. Responding to Requests for Access:**

- 2.1. Covered Entity must allow the resident to inspect his or her PHI within twenty-four (24) hours (excluding

weekends and holidays) of receiving a written or oral request for access. A designated staff member must be present when the resident (or the resident's personal representative) reviews the records.

- 2.2. If the resident requests copies of his or her PHI, Mercedes Rice, Medical Records, will provide the requested copies within two (2) days of the resident's request, excluding weekends and holidays.
- 2.3. Covered Entity will provide the information in the form requested (i.e., electronic or hard-copy), if the information is readily reproducible in that form. However, to the extent Covered Entity maintains an Electronic Health Record with respect to the PHI, if requested by the resident, Covered Entity must provide an electronic copy to the resident or to a third party designated by the resident, as applicable.

If the information is not readily reproducible in the requested form, Covered Entity will provide the information in hard-copy form, or such other form as the resident and Covered Entity agree.

- 2.4. If the request pertains to paper records, copying fees will be assessed at a rate of sixty five cents (\$.65) per page. If the request pertains to electronic copies, Covered Entity may charge a reasonable fee not to exceed its labor costs in responding to the request for the electronic copy. Copies must be provided free of charge if the resident presents documentation that the records are needed for a Social Security claim or appeal, or provides an affidavit attesting to his or her inability to pay the applicable fee. If no such documentation or affidavit is received, an invoice for the applicable fee will be sent to the resident when the records are provided.
- 2.5. If the resident agrees, Covered Entity may provide the resident with a summary or explanation of the PHI maintained by Covered Entity instead of providing direct access. If Covered Entity will charge a fee for such a summary, the resident must agree in advance to the fee.
- 2.6. Any clinical concerns about providing a resident access to or copies of his or her PHI should be

communicated immediately to the Administrator or his/her designee who will review the matter with the resident's attending physician and/or the medical director.

### 3. Documentation

- 3.1. If the resident reviewed the record, the date, time of review and name of the individual reviewing the record will be documented on the *Request for Access to Protected Health Information Form*. If the resident received copies, the documentation should identify the format and content of the copy(ies), the name of the individual who created the copy(ies) and the date provided. The documentation will be maintained in the resident's medical record.
- 3.2. Covered Entity will document and retain documentation of the following in accordance with its *Policy on Documentation and Record Retention*:
  - The Designated Record Set subject to access by individuals, and
  - The titles of person(s) or office(s) responsible for receiving and processing requests for access to and copies of PHI.

## ISSUES TO CONSIDER

- **Individual Right of Electronic Access.** Under the Privacy Rule, individuals have a right to access and obtain a copy of their PHI in the form or format requested (i.e., electronic or hard-copy), if the information is readily reproducible in that form. HITECH more specifically provides that individuals have a right to receive an electronic copy of PHI with respect to which a covered entity uses or maintains an "electronic health record" (as defined in HITECH), and to direct the covered entity to transmit an electronic copy directly to a third party designated by the individual. "Electronic health record" is broadly defined as "an electronic record of health-related information on an individual that is created, gathered, managed and consulted by authorized health care clinicians and staff."

The Department of Health and Human Services ("HHS") has not yet issued guidance or regulations clarifying the scope and application of the term "electronic health record" for purposes of an individual's right of electronic access under HITECH. Therefore, it is not clear at this time whether, for purposes of an individual's right to an electronic copy of PHI under HITECH, an "electronic health record" encompasses any record that contains PHI and is maintained electronically, or instead includes only a true electronic health record (i.e., an interoperable electronic system that can provide individuals with an electronic, digitized copy of their complete medical record). It also is not clear how covered entities are expected to comply with the new requirement. For example, it is not clear whether "electronic copy" includes a portable document format ("PDF") file attached to an email sent by the covered entity to the requesting individual. Guidance is needed to resolve these outstanding questions.

Until guidance is issued, a covered entity that maintains PHI in electronic systems should provide an electronic copy of such information upon request using whatever technological means are currently available to the Covered Entity, such as by emailing a PDF to the individual (or to a third party designated by the individual, depending on the request), or providing the individual with a CD or other portable device containing a copy of the PHI.