Revenue Cycle Advisor

# Bracing for potential records request change in the Privacy Rule

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Covered entities (CEs) that have flirted with the 30-day mark for response time with patient requests for access to or copies of their protected health information (PHI) should take notice: they may need to get better. Two times better, that is.

The Department of Health and Human Services (HHS) in its Notice of Proposed Rulemaking (NPRM) released December 10, 2020 calls for shortening CEs' required response time to no later than 15 calendar days (from the current 30 days) with the opportunity for an extension of no more than 15 calendar days (from the current 30-day extension).

It could be quite the change for CEs if that proposal makes it through the rulemaking process. The comment period for the rule was scheduled to wrap up May 6, 2021.

Now is the time for CEs and privacy officers to conduct an internal assessment of how exactly their organizations respond to patient requests for medical records and determine gaps that lead to delays, experts told **Briefings on HIPAA**. They'll need a thorough understanding of their internal processes: who's involved, how they work with the medical records department, if there's a clear understanding of a Designated Record Set (DRS) vs. only the medical record. They must also find ways to make response-time more of a priority.

"There is a clamping down because the Privacy Rule, when it comes to patient access, has just been abused, to put it frankly, by too many provider organizations," says **Kate Borten, CISSP, CISM, HCISPP**, founder of The Marblehead Group in Marblehead, Massachusetts. "There are just too many stories, and many of them never even get to HHS. But I hear anecdotally of individuals, including my friends and neighbors, who say they've been trying for two months to get their medical records. That's just unconscionable."

Further, the NPRM clarifies, Borten adds, that when you receive the request from the patient, the clock starts ticking.

Feds already made this serious business

This isn't the first time HHS has shown its seriousness over the matter of patient access to medical records. The Interoperability and Patient Access final rule was published in March of 2020. In fact, reviewing that rule is a good place to start, according to **Rita Bowen, MA, RHIA, CHPS, CHPC, SSGB,** vice president of privacy, compliance, and HIM policy at MRO Corp., in Norristown, Pennsylvania.

The Interoperability and Patient Access final rule requires, in part, healthcare organizations to adapt standards-based patient access APIs set forth by CMS-regulated payers. Effective as of January 1, 2021, enforcement on this requirement will begin on July 1, 2021.

In another way the government is cracking down on providing patients better access to their medical records, the Office for Civil Rights (OCR), enforcer of the HIPAA Privacy Rule, has settled 18 investigations as of press time in the HIPAA Right of Access Initiative—OCR's initiative to support individuals' right to timely access of their health records at a reasonable cost under the HIPAA Privacy Rule.

Here's a snapshot of some of the latest settlements:

**March 26, 2021**: Village Plastic Surgery (VPS) agreed to take corrective actions and pay $30,000 to settle a potential violation of the HIPAA Privacy Rule's right of access standard. In September 2019, a complaint was filed with OCR alleging that VPS failed to take timely action in response to a patient's records access request made in August 2019. OCR initiated an investigation and determined that VPS's failure to provide timely access to the requested medical records was a potential violation of the HIPAA right of access standard.

**March 24, 2021**: Arbour Hospital agreed to take corrective actions and pay $65,000 to settle a potential violation of the HIPAA Privacy Rule's right of access standard. In July 2019, a complaint was filed with OCR alleging that Arbour failed to take timely action in response to a patient's records access request made in May 2019. Later, in July 2019, OCR received a second complaint alleging that Arbour still had not responded to the same patient's records access request. Arbour provided the patient with a copy of their requested records in November 2019, more than five months after the patient's request.

**February 12, 2021**: Sharp Rees-Stealy Medical Centers (SRMC) agreed to take corrective actions and pay $70,000 to settle a potential violation of the HIPAA Privacy Rule's right of access standard. In June 2019, a complaint was filed with OCR alleging that SRMC failed to take timely action in response to a patient's records access request directing that an electronic copy of PHI in an electronic health record be sent to a third party. In August 2019, OCR received a second complaint alleging that SRMC still had not responded to the patient's records access request. OCR initiated an investigation and determined that SRMC's failure to provide timely access to the requested medical records was a potential violation of the HIPAA right of access standard. As a result of OCR's investigation, SRMC provided access to the requested records.

Tightening up mental health requests

Lessons from these OCR settlements should be taken from the published materials in the OCR settlements such as corrective action plans and civil money penalties, according to Bowen.

"What I found interesting in looking through the cases: it was just a little less than half that dealt with behavioral health," Bowen says. "This makes me question if more education is required."

When HIPAA first started, she says, there were a lot of guardrails around behavioral health information. Special authorization was needed for these cases.

"Today," Bowen adds, "these restrictions are not needed if you're releasing information to the patient themselves, as the patient already knows of these events or they are directing the information to someone that can stand in their shoes in making health care decisions. There shouldn't be anything that precludes you from providing information directly to the patient unless it's a protected psychotherapy note."

Find more information in the HIPAA Privacy Rule around psychotherapy notes at C.F.R. § 164.501.

Determining a central point of access

Further, Bowen notes that in the 18 cases OCR has settled as of press time in its access initiative, most of the delays were months, and not just a few days.

"Delays were long and often the patient requested their information multiple times," Bowen says. "That tells us smaller facilities may have tried to do release of information themselves, but they didn't have adequately trained staff or staff with enough time to perform that piece of the process."

An internal audit or a gap assessment should be in order, Bowen says. One issue she saw recently: a patient asked for their images from the radiology department, and since that department only had privilege to provide a copy of the image, there was a delay in providing the patient the information that they requested.

"Facilities should look at how patients come into their facilities to ask for information across departments, or if there is one central place that the patient can ask for all information," Bowen says. "If the facility is still operating in a world where they're saying, 'I can get you this but you have to go to another department,' I would suggest that be evaluated to assure the patient is not presented with any barriers to obtain their health information."

Remember the patient has the right to obtain information that is defined in the facility's DRS. It may be an opportune time to review the DRS content and the ease in which it can be assimilated for the patient upon request.

"I suggest that facilities create a central intake process for all requests for information," Bowen adds, "and have that become a centralized function for the facility."

Borten also advocates for a central point of patient request coordination for these multisystem types of CEs, but oftentimes the responsibility defaults to a medical records or health information management (HIM) department. Patients may get directed elsewhere if the department handles only inpatient records, for example, but patients shouldn't have to understand those sorts of internal organization boundaries, Borten says.

Centralizing record access would go a long way in streamlining these hurdles often placed in patients' way—and avoid being beyond the 30-day—perhaps soon to be 15-day—mark for delivering on a patient's request, she adds.

Better to be proactive

No CE will make major changes based on proposals. Nor should they.

However, the 15-day requirement could easily stick. This is especially true since HHS in the proposed rule says, "The Department is strongly persuaded … by comments from entities operating in states with 10- to 15-day access provisions that, when mandated, covered entities are able to adapt to shorter access time limits. … Additionally, these shorter timelines would better support the Department's initiatives to improve healthcare price transparency to empower and assist consumers with making more informed healthcare decisions."

In other words, some states can do the shorter timeframes, so why can't we make that a HIPAA Privacy Rule provision?

Are your response times near the 30-day mark? If so, why? What are the opportunities to bring that down to 15 and below?

Privacy officers should begin to take a proactive approach in determining gaps in their patient-access protocols and try to make things as quick and efficient as possible.

"Analyze data from whatever time period you choose, and see how well you've done," Borten says. "But also if you're more than just a single-facility provider, make sure that you're looking at every point of entry or point where a patient could say, 'I'd like a piece of my record.'"

The onus is generally on the medical records department, or the HIM team traditionally. But that's often just a piece of the medical record and not the entire DRS to which patients have access rights.

According to the HIPAA Privacy Rule, a DRS is defined as:

(1) 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 healthcare 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.

"The burden is often on the patient to have to make a lot of phone calls and go to different places to get different parts of what is the DRS for that patient," Borten says. "The DRS is basically all the PHI an organization holds to which a patient is entitled, and I think that is still a concept and a term that baffles many people in the healthcare industry on the provider side, and I find that discouraging."

Because the organizations aren't necessarily clear about that, the patients also are unclear, Borten adds. Many patients believe that they're getting access to their full medical record when they access their details through a provider's patient web portal. And many believe they're getting access to or a copy of all the PHI to which they're entitled when they get their legal medical record, but that's only a subset of their DRS, according to Borten.

Bottomline: Make turnaround time a priority

Getting half the amount of time to do something in any business is daunting. That's why fulfilling patient requests for their medical records should be a top priority as HHS goes through the process of finalizing its proposed modifications to the HIPAA Privacy Rule—and considers dropping the turnaround time from 30 to 15 days.

"I'm not sure that this is as high a priority for provider organizations in general as it should be," Borten says. "Certainly some providers do a great job, no doubt, and they take it quite seriously. But I think many provider organizations see this as kind of a nuisance, and not a high priority. And I wouldn't be surprised if no more than a very small number of providers actually go back and track what their performance has been on meeting this."

The most important message for privacy officers, Borten says, is this an important time to take a look at your own organization's process for providing access. Review what is your DRS. Determine if your staff members charged with releasing information understand what they can and cannot release, how to do it, what they may charge, and how they make the most efficient turnaround.

"The whole point of this is improving patient access," Borten says. "Don't just walk to the medical records department and ask how are we doing. Make sure that you really dig into this. How do patients get access to everything in their DRS, because that's what they're entitled to. And that's clear and not ambiguous or debatable."