

September 10, 2015

Health IT Policy Committee Privacy and Security Workgroup
Office of the National Coordinator
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Jocelyn Samuels, Director
HHS Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, Southwest
Washington, District of Columbia 20201

RE: Charges/Fees for Providing Electronic Copies of Health Information

Dear Director Samuels and the HIT Policy Committee:

On behalf of the American Health Information Management Association (AHIMA), this letter is in response to the Office of the National Coordinator's (ONC) and the Office for Civil Rights' (OCR) request for responses regarding the charges and fees for electronic copies of health information.

AHIMA is a nonprofit association of over 101,000 health information management (HIM) professionals. These professionals work in a variety of sites that collect, store, analyze, use, and disclose protected health information. HIM professionals have been the stewards of health information confidentiality for decades and with the advent of the HIPAA privacy and security requirements many serve as privacy or security offices for HIPAA covered entities. AHIMA has supported these efforts over many years and provides members, educators, the healthcare industry, and consumers with a variety of related best practices, and other healthcare confidentiality, privacy, and security information and products. AHIMA also addresses privacy on its myPHR.com website. AHIMA and its member professionals also participate in a variety of privacy-related projects, education, and advocacy on a federal and state basis.

With this background and interest, we are pleased to see the collaborative efforts of the ONC and the OCR to provide guidance on this matter. AHIMA has solicited comments from privacy and security professionals – members of AHIMA's Privacy and Security Practice Council, and others in the field since HIM professionals often also serve as release of information (ROI) officers.

As requested, our comments below follow the order in which the questions appear in the request for response.

Request for Responses

- 1. Is an electronic file size an appropriate proxy for "pages" in setting fees for electronic access, or is it simply a substitute for a per-page proxy? If file size is appropriate, how should cost be calculated, particularly considering the questions below? If not, what is a better proxy for calculating labor costs for electronic access?**

AHIMA feels that file size is not a good proxy for “pages” as far as setting charges/fees. Different systems will create different file sizes based on system capability (i.e., PDF file sizes vary). Page size will also vary by EHR system and thus the ability to run a report (create the record requested) could take varying amounts of labor and time.

AHIMA believes it would be better to base the charge/fee on the costs associated with the labor that is expended or on how the information is being shared such as a CD, thumb drive or hard copy and including such costs as the overhead of maintaining an EHR and/or vendor administrative fees. For example, a large record may take the use of two folders to send the complete record so more time may be needed in generating, indexing, etc. The time associated with downloading a file that includes images or scanned documents can be considerably lengthier in process than a straight digital file. Another labor cost that should be included in the charge/fee would be the time it takes to review the contents of the file to audit for the accuracy in what is being released to ensure that super confidential or other improper information is not being disclosed. This can take a considerable amount of time to complete depending on the amount of information requested. The type of facility (i.e. large hospital vs. long term care) and geographical location (i.e. large city vs. rural) will also impact the cost of labor.

When writing the guidance AHIMA suggests the following options to determine charges and fees:

- Set a maximum amount, taking into consideration that each state has its own fee structure
- Provide the first copy to the patient at no charge
- Charge for subsequent copies
- Set a flat fee that includes labor, supplies and additional consideration for certification or other special handling procedures

- 2. One of the objectives of Stage 2 of the Meaningful Use EHR Incentive Program is to provide individuals the ability to view, download and transmit their health information.¹ Therefore, should the producible form and format of the electronic copy the individual requests affect how the individual is charged? (For example, an individual downloads an electronic copy onto a portable thumb drive or CD vs. using the download or transmit capabilities of certified EHR technology or email.) This issue may also arise when an individual uses personal health records or mobile health devices.**

AHIMA feels that if a charge is assessed in allowing an individual to view, download or transmit health information, it should cover the cost of the device. Various formats could take different amounts of labor and time. For example, it could take longer to email rather than produce paper copies. There are many variables that could come into play for there to be a single, concise answer. There could be a tiered fee structure where electronic copies for patients are free, but other formats outside of Meaningful Use would generate a charge. Systems including EHRs that produce copies, other than the portal would then need the ability to collect payment online, if requested, or some mechanism for payment would need to be available.

¹ 45 C.F.R. § 170.314.

A question to consider, “Would covered entities be expected to download their EHR to someone’s personal health record?” That could pose a potential IT security risk to the host EHR or other source system and require additional technology. A portal would be more secure.

- 3. If, due to interoperability issues between an EHR where the requested information is maintained, and the software used to create the copy for the individual (for example, proprietary software of a business associate which provides the electronic copy to the individual), the business associate must download the file from the EHR, and subsequently upload it to the business associate’s software before generating an electronic copy for an individual, should labor costs associated with this process be charged to the individual? Why or why not? If so, how should they be calculated? Additionally, if the information is located in several different EHRs, downloaded, and uploaded to a separate software or system, should labor costs associated with this process be charged, as well – and if so, how should they be calculated?**

AHIMA believes that labor costs associated with the processes provided in this question should be charged; EHRs and HIT systems are not at the appropriate level of interoperability to enable automated processing such that there would be no cost incurred in the process. . Processes must be in place to ensure the requests are valid and that the records sent adhere to the request as stated in state and federal laws as well as organizational policies. Business associates should be able to collect costs incurred for labor in performing the tasks mentioned above (downloading the file from the EHR and uploading it to the business associates’ software for transmission to the recipient) such as the process of a validation and appropriate release must be reviewed. Additionally, in order for providers and business associates to maintain a work force which must be adequately compensated, all labor costs permissible under existing rules and regulations must be accounted for. It must also be kept in mind that any charges must not exceed individual state maximums (where applicable).

Regarding, how the calculation should be computed, AHIMA suggests the use of labor costs that can be demonstrated to create a fee schedule based on the following variables:

- The nature of request
- Creating/writing the report – assembling the electronic copies
- Reviewing for quality and accuracy in preparation for release of the health information
- Method of transmission and process for transmission

A final consideration for calculating the additional costs of this scenario would be to allow for a flat compilation fee for the multiple downloads, uploads, etc. from each EHR (and/or ancillary systems) where information is located.

- 4. Similarly, if information from an EHR has to be printed on paper (therefore paginated) and then scanned and uploaded to a different software program used to create and/or send the copy for/to the individual, should the individual be charged, and if so, how should the cost be calculated?**

Since the Omnibus Rule Commentary (page 5633 of Fed.Reg. Vol. 78, No. 17) on the electronic access requirement states that “We clarify that covered entities *are not required to scan paper*

documents to provide electronic copies of records maintained in hard copy,” we assume that printing a hard copy from an EHR, and then uploading (scanning) it to software solely to make it electronic, would similarly not be required. If an EHR is incapable of producing an electronic copy for an individual it should be permitted to deny such a request. If it is OCR’s position that such operations are required, then the costs associated with that process should be allowed, and could be calculated as a flat fee for compilation, as referenced in #3 above or could be treated in accordance with current practices which is to charge by page and/or based on costs of labor.

5. Would you answer anything differently if the copy of the data from the designated record set were being transmitted to a non-HIPAA covered business associate, such as a PHR vendor compared to another HIPAA covered entity or that organization’s business associate?

AHIMA took this into account when discussing where the patient is receiving the information (e.g., through a portal) versus an attorney request for information on a patient for a specific scenario. If a HIPAA compliant authorization exists then no, the answer would not be different. If the patient is requesting information via a non-secure portal, the patient would need to be informed that it is not a secure transmission. Also, the cost associated with this would not be the facility’s responsibility for sharing the information via a portal if the patient is paying for that service.

Most requesters of medical records are not business associates. If such a requester has a patient authorization, then states’ statutory or regulated rates generally are charged (except for those requesters who are government agencies or in special circumstances such as criminal subpoenas, records delivered to physicians for continuing care, etc.). Separately, contract pricing applies to records supplied to payers for certain special projects. Often the designated record set is not requested because insurance records are not maintained along with medical records; they are kept separately in the business office or departments known as “Patient Financial Services,” other similar department name or a separate electronic system altogether.

AHIMA appreciates the collaboration between the ONC, its HIT Policy Committee’s Privacy and Security Workgroup and the OCR to work toward providing guidance related to charges/fees permitted for the request of electronic copies of health information. AHIMA recognizes the degree of work and effort that will be required to review all responses submitted. We appreciate the opportunity to comment on the posed questions and commit to responding to any additional inquiries the ONC and OCR might make as well as continuing to work with the ONC and OCR in any way possible to secure and protect PHI wherever it may lay or through whatever means it may be transmitted.

If there are additional questions or concerns regarding this response, or other questions with regard to HIPAA, HITECH, or confidentiality, privacy or security, please feel free to contact me at (312) 233-1092 or lynne.thomasgordon@ahima.org

We thank you for your time and consideration of these comments.

Sincerely,

Cassi Birnbaum

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