

September 25, 2015

VIA E-MAIL (Helen.Caton-Peters@hhs.gov)

Privacy and Security Workgroup
Health Information Technology Policy Committee
c/o Helen Caton-Peters
Senior Health Information Privacy Program Analyst
Office of the National Coordinator
330 C Street, SW
Washington, DC 20201

Re: Assessing Fees When an Individual Requests Electronic Access to PHI

Dear Workgroup Members:

I am Counsel and Director of Government Relations at HealthPort|IOD, the country's leading provider of health information management products and services, serving more than 18,000 healthcare facilities across the United States. I wish to thank the Privacy and Security Workgroup for considering the important issue of the appropriate fees that may be charged to individuals for electronic copies of their protected health information. On behalf of HealthPort|IOD, we respectfully submit the following comment for your consideration to address some of the issues raised on the September 21, 2015, Workgroup call.

HIPAA Regulatory History and Guidance on Permissible Charges for Individual Requests for Access

The HIPAA Privacy Rule¹ regulates the fees that covered entities (and their business associates) may charge to individuals for copies of their medical records. The regulatory provision at 45 C.F.R. § 164.524(c)(4) has changed over time, and relevant guidance is found in a number of locations. For the convenience of the Workgroup, we have collected the relevant regulatory history in a single document, which is attached.

The Scope of Search and Retrieval for Electronic Records

On the September 21st call, the Workgroup identified the challenge of distinguishing between time spent on search and retrieval (not reimbursable under HIPAA) and time spent compiling and extracting information (reimbursable under HIPAA) in an electronic environment. When copying paper records, search and retrieval refers to the time spent obtaining the

¹ Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Part 160 and Part 164, Subparts A and E.

individual's records, whether the information is maintained onsite or offsite. Once the individual's hard copy medical records are retrieved, they cannot simply be inserted into a copying machine. Rather, a health information management ("HIM") professional must carefully remove the appropriate pages that are responsive to the individual's request (e.g., that fall within the requested time period), ensure that every page relates to the individual and has not been misfiled, and review each page for sensitive information (e.g., alcohol and substance abuse treatment information) that may create additional authorization requirements.² Once the hard copy information is extracted and compiled, it can be fed into a copying machine to produce a copy for the individual. This process is all part of copying the record and the associated time is reimbursable under HIPAA.

The process for making electronic copies is not significantly different. Most times, the search and retrieval will merely involve inputting the appropriate individual identifiers and selecting the individual. This time is not reimbursable under HIPAA. As with hard copy files, electronic files may be archived, in which case there would be additional time to obtain the record. This time also is not reimbursable under HIPAA.

Once the individual's electronic record has been retrieved, an HIM professional must review each episode of care to determine whether it is responsive, and must ensure that each portion of the record relates to the individual (as information can be misfiled within the electronic health records system). The HIM professional then must review the output, reviewing each page of the record for sensitive information that may create additional authorization requirements. The electronic record can then be uploaded (when access is provided through an electronic portal) or downloaded to CD, USB drive, or other electronic media. As with hard copy records, the process that occurs after the individual's electronic health record has been retrieved is part of "copying" the record and the associated time is reimbursable under HIPAA.

In sum, whether records are stored in hard copy or electronically, there is a distinct search and retrieval phase which is not included in the calculation of copying costs under HIPAA. But, once the individual's record has been retrieved, the time that follows is properly treated as part of the copying process and is appropriately included in the calculation of reasonable costs under HIPAA.

The Costs of Electronic Records Remain Significant

As the Workgroup generates recommendations to HHS regarding appropriate copying fees to provide individuals with copies of their records under HIPAA, we wish to clarify that the time and expense of providing such copies remain significant. It is true that health information technology has significantly changed individuals' access to their protected health information. Through the Medicare and Medicaid EHR Incentive Programs' view/download/transmit requirements, and through technology such as the Blue Button initiative, individuals have far greater free access to portions of their records.

² For example, if an individual requests that a covered entity provide a copy of the individual's medical record to a third party, 42 C.F.R. Part 2 will include certain authorization and notice requirements if the medical record includes alcohol or substance abuse treatment information that is subject to Part 2.

When individuals seek access to their full medical records, however, it does not merely involve the push of a button. The process for extracting and compiling medical and billing records for electronic records remains similar to that of paper records. In fact, our time studies have found that it takes longer to provide electronic copies of electronic health records than it does to make hard copies of hard copy records. To address the misconceptions involving the copying of electronic records, the Association for Health Information Outsourcing Services has developed a helpful video, available at <https://www.youtube.com/watch?v=8jrm9LYqpAY>, that walks through the process.

Accordingly, we respectfully request that the Workgroup recognize the significant costs that are involved in providing an individual with an electronic copy of the individual's protected health information. Covered entities and their business associates are not seeking to profit from providing individuals with copies of their protected health information. Rather, we seek to ensure that covered entities and their business associates can continue to recover their reasonable costs when providing such copies.

If the Workgroup has any questions regarding the costs of providing electronic copies, we would be happy to answer them.

Sincerely,



Kyle Probst