Public Health Emergencies and HIPAA: When Is the Disclosure of Individual Health Information Lawful?

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Now we know his name. In fact the entire world knows the name of the young man who traveled from the United States and through Europe while infected with the communicable disease, tuberculosis. The timing and methods used to disclose his name and other protected health related information may determine whether a violation of federal privacy laws occurred, and is the focus of this article.

Although some salient facts are contested, a chronology of events based upon reported events is important in analyzing whether a potential violation of HIPAA rules occurred. The individual, now known to be Andrew Speaker, learned in January of 2007 that tuberculosis was detected in his lung as a result of an X-ray during an unrelated physician visit. At that time, Mr. Speaker was asymptomatic and doctors collected secretions from his lung to confirm the diagnosis of tuberculosis. Mr. Speaker was treated for tuberculosis for a period of time before treatment was discontinued as the treatment did not appear to be effective. On April 23, 2007 Mr. Speaker was referred to the Fulton County Department of Health and Wellness in accordance with Georgia regulations. Two days later, Mr. Speaker was interviewed and examined by the Fulton County Department of Health as required by law and again began treatment for tuberculosis. Testing of samples taken during this evaluation indicated Mr. Speaker had contracted a multidrug-resistant strain of tuberculosis. He again met with officials of the Department of Health on May 10, 2007 to review his disease status. The details of discussions that took place during this meeting are highly disputed by Mr. Speaker and county officials. However, at the conclusion of this meeting, county officials were aware of Mr. Speaker’s scheduled plan to travel to Europe on May 14 and Mr. Speaker was aware that he had a confirmed diagnosis of drug-resistant tuberculosis. According to county officials and consistent with Georgia regulations, on May 11 a summary of the previous day’s meeting was drafted in the form of an order directing Mr. Speaker to comply with a

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2 Id.
3 Id.
5 GA. COMP. R. & REGS. 290-5-16-.02(1) (2007) In-patient or out-patient treatment of a case of active tuberculosis and treatment of a suspected case with two or more anti-tuberculosis drugs shall be reported to the Epidemiology and Prevention Branch of the Department through the local county health department or its designee (LCHD).
6 GA. COMP. R. & REGS. 290-5-16-.02(2) (2007).
7 Hendrick, supra note 4.
8 GA. COMP. R. & REGS. 290-5-16-.03(3) (2007).
written plan of evaluation. They state they attempted to hand deliver this document to Mr. Speaker at both his place of business and his residence on May 11 and again on May 12 but were unable to do so. It is not known where Mr. Speaker was on May 11. By 9:00 p.m. on Saturday, May 12 Mr. Speaker was on a flight to Paris, two days earlier than his scheduled departure. On May 17, state health officials in Georgia learned that Mr. Speaker’s tuberculosis was not just drug-resistant, but was a rare form of the disease known as extensively drug-resistant tuberculosis, or XDR TB. After traveling in Europe, Mr. Speaker returned to the United States on May 24, where he was placed under federal quarantine, first in New York at Bellevue Hospital in Manhattan, then in Grady Memorial Hospital in Atlanta, Georgia. Mr. Speaker was then transferred to National Jewish Medical and Research Center in Denver, Colorado to receive long-term treatment for XDR TB.

Speculation on the legal issues presented by this situation began shortly after the story was reported in the media. Some legal scholars believe Andrew Speaker can sue the federal government for being quarantined on the foundation that such federal regulations are unconstitutional. Others believe Speaker himself may be the subject of litigation should any of the passengers on the commercial flights contract tuberculosis. This situation has also prompted concern over policies regarding border security and is now the topic of Congressional hearings. However, no one has yet questioned whether the disclosure of the name and medical details of this individual violates the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA).

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10 Id.

11 Id.

12 Id.; See also N.S. Shah, et al., *Extensively Drug-Resistant Tuberculosis – United States, 1993-2006*, 56 MMWR 250-53 (March 23, 2007). The Emergency Global Task Force on XDR TB of the World Health Organization defines a case of XDR TB to be one that is resistant to at least isoniazid and rifampin among the first-line anti-TB drugs, resistance to any fluoroquinolone, and resistance to at least one second-line injectable drug (amikacin, capreomycin, or kanamycin). XDR TB is considered to be a global threat and renewed vigilance to prevent the spread of this disease is needed including drug-susceptibility testing, case reporting, specialized care, infection control, and expanded capacity for outbreak detection and control.

13 Centers for Disease Control and Prevention, *Global Migration and Quarantine*, Legal Authorities for Control of Communicable Diseases, available at http://www.cdc.gov/ncidod/dq/lawsand.htm (last visited June 5, 2007). The Public Health Service Act of 1944 established the federal government’s authority to quarantine. Today, the authority is delegated to the Centers for Disease Control and Prevention, Division of Global Migration and Quarantine. The list of quarantinable diseases is determined by Executive Order of the President and includes infectious tuberculosis as well as cholera, diphtheria, smallpox, plague, yellow fever, viral hemorrhagic fevers, and SARS.

14 Altman & Schwartz, supra note 1.

15 Mike Stobbe, *TB Quarantine Raises Legal Questions*, WASHINGTON POST, June 1, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR2007060100205.html. According to Lawrence Gostin of Georgetown University, Speaker may be able to challenge the constitutionality of the quarantine order and perhaps seek federal payment for damages.

16 Id.

HIPAA was enacted on August 21, 1996 with the intent to improve the portability and continuity of health insurance coverage, reduce health care waste and fraud, improve access to long-term care, and simplify the administration of health insurance. Sections 261 through 264 of HIPAA contain administrative simplifications that require the Secretary of HHS to publicize standards for electronic interchange of health care information. HIPAA also required the Secretary to issue privacy and security regulations if Congress did not enact privacy legislation within three years of the passage of HIPAA. When Congress failed to meet this deadline, HHS responded by adopting the Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”). The Privacy Rule aims to ensure that sensitive personal health information is shared for core healthcare-related activities while limiting inappropriate use and sharing of patient data.

For covered entities using or disclosing private health information, the Privacy Rule establishes a range of requirements and standards that attempt to balance individual privacy interests with the interests of the community to have access to such data. Generally, a covered entity may not use or disclose an individual’s private health information without written authorization by the patient. However, regulations do allow for instances in which verbal authorization will suffice and also allows for instances in which private health information may be used or disclosed without the individual’s authorization. For instance, in order to maintain a directory of patients within its facility, an entity such as a hospital may, upon verbal agreement of the patient, disclose the individual’s name, location in the facility and general condition to “persons who ask for the individual by name.” Covered entities may use or disclose personal health information without written or verbal authorization of the individual only in specified instances. For example, a covered entity may disclose this information to a public health official in efforts to prevent or control disease. Unauthorized disclosure may also be made to a person believed to be exposed to a communicable disease and may be at risk of spreading the disease.

19 45 C.F.R. § 160.101-160.552 and § 164.102-164.534 (2007). Specifically, 45 C.F.R. § 160.103 states individually identifiable health information is referred to as “protected health information (PHI) and includes demographic data that identifies the individual such as name, address, birth date, and Social Security Number. Other data that relates to the individual’s health condition, the provision of health care or the payment of health care is also protected health information.
25 45 C.F.R. § 164.512(b)(1)(i).
26 45 C.F.R. § 164.512(b)(1)(iv).
In the circumstances involving Andrew Speaker, there are five instances in which the private health information of Mr. Speaker was used or disclosed that deserves scrutiny for potential violation of the Privacy Rule. Assuming no authorization was given by Mr. Speaker, the facts must comply with one of the several exceptions to this requirement in order to have avoided a HIPAA violation. The first instance occurred when Mr. Speaker’s physician communicated health information to the Fulton County Department of Health. This disclosure would comply with HIPAA regulations under 45 CFR § 164.512(b)(i) which authorizes a covered entity to “disclose protected health information... to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease...”

In addition, the Privacy Rule permits covered entities to make disclosures that are required by other laws, including laws that require disclosure for public health purposes. This same regulatory exception would also apply to a second instance of disclosure in which Fulton County Department of Health authority released health information about Mr. Speaker to the Centers for Disease Control and Prevention (CDC) in their efforts to control any potential spread of XDR TB.

The Privacy Rule also allows a covered entity to use or disclose private health information without the patient’s authorization “at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority.” The scope of disclosure was broadened in the final HIPAA rules specifically to address an instance where a foreign government is collaborating with the CDC to limit the spread of infectious disease. Thus, it reasonable that communication of Mr. Speaker’s private health information by Georgia officials to Italian health officials would comply with HIPAA privacy regulations.

It is less clear whether two final disclosures of private health information would be permitted by the Privacy Rule without authorization of the individual. First concerns the disclosure of Mr. Speaker’s name and other medical information to media sources. Mr. Speaker’s identity was first reported by CTV News late on May 30, soon after he was transferred to Denver for treatment. The morning edition of the New York Times on May 31 published an article regarding this incident, but did not disclose Mr. Speaker’s

27 45 C.F.R. §§ 160.102, 160.103. Every health care provider, including physicians, who electronically transmits health information in connection with certain transactions, is a covered entity.
28 For example, section 290-5-16-02(1) of the Comprehensive Rules and Regulations of the State of Georgia requires physicians who are treating a patient for drug-resistant tuberculosis to report to the state Epidemiological and Prevention Branch through the local county health department.
29 Stephen B. Thacker, HIPAA Privacy Rule and Public Health: Guidance from CDC and the U.S. Department of Health and Human Services, 52 MMWR 1-12 (April 11, 2003) (providing examples of public health authority functions that make them covered entities). Assuming Fulton County Department of Health was a covered entity, the disclosure to CDC would comply with 45 C.F.R. § 164.512(b)(i).
30 45 C.F.R. § 164.512(b)(1)(i).
32 Altman & Schwartz, supra note 1. News report indicates the CDC contacted Mr. Speaker on May 22 while he was in Rome on his honeymoon. A “former disease agency officer” attempted to contact Mr. Speaker personally at his hotel but Mr. Speaker had already departed. It is not clear at this time whether the “agency officer” was a representative of the CDC or an Italian health official.
However, by 12:56 p.m. EST, the New York Times posted a story by the Associated Press on its website identifying Andrew Speaker as the tuberculosis patient. The HIPAA Privacy Rule addresses this situation through a standard for uses and disclosures to avert a serious threat to the health and safety of the community. A covered entity may, “consistent with applicable law and standards of ethical conduct” disclose private health information if they believe doing so would prevent a “serious and imminent threat” to the public. Thus, representatives of Grady Memorial Hospital, where Mr. Speaker was located at the time of the disclosure, or any other covered entity could potentially communicate private health information about Mr. Speaker only if they had a “good faith” belief that by doing so, they would prevent the spread of XDR TB to others. At this time, the source of the entity that disclosed information about Mr. Speaker is not known. Mr. Speaker’s name was released by an “official” who requested anonymity because “he was not authorized to talk about the case.” Reportedly another “official” related to the medical industry in Atlanta confirmed, also anonymously, the identity of the patient.

If the disclosure of private health information was made by a covered entity or representative thereof, then I suggest the HIPAA standard for uses and disclosures cannot be supported. Specific facts known at this time substantiate this conclusion for two primary reasons. First, Mr. Speaker was already in federal quarantine at the time of the disclosure and therefore was no longer an “imminent threat” to the public, a situation which would have triggered an exception to HIPAA regulations. Second, a central aspect of the Privacy Rule is the principle of “minimum necessary” use and disclosure. Under this principle, the covered entity must make reasonable efforts to use or disclose only the minimum amount of protected information necessary to achieve the intended purpose. Arguably, the purpose of disclosing private information in this instance is to notify other passengers on the flights with Mr. Speaker to alert them to take precautionary measures concerning potential exposure to XDR TB. However, media reports had already been released attempting to notify passengers on specific airlines and flights that “a man, infected with the extensively drug-resistant form of TB” had also been a passenger. One could argue that under the “minimum necessary” principle, this was sufficient and disclosure of further private information about Mr. Speaker was not necessary to achieve the purpose of protecting fellow passengers. Additionally, the Privacy Rule anticipates that this disclosure would be to public health officials who may

34 Altman & Schwartz, supra note 1.
36 45 C.F.R. § 164.512(j)(1).
39 Id.
41 45 C.F.R. § 164.502(b) and § 164.514(d) (2007).
then use this information to control an outbreak or prevent further infection, rather than disclosing public health information to the media.43

However, if the disclosure of private health information was made by the CDC or a representative thereof, this would not be a HIPAA privacy violation as the CDC is not bound by the Privacy Rule.44 Once a covered entity has disclosed private health information pursuant to the provisions of federal privacy regulations the information may subsequently be “maintained, used and disclosed” in accordance with the “laws, regulations, and policies applicable to the public health authority.”45 Therefore, once the private health information of Mr. Speaker was disclosed to the Georgia Department of Health or the Center for Disease Control and Prevention, it would no longer be protected by the Privacy Rule.46

It is notable that at least one entity with the authority to disclose information without the individual’s authorization, repeatedly chose not to do so.47 In a news article dated May 31 health officials in Georgia refrained from disclosing the identity of the airline passenger with tuberculosis while communicating other relevant information.48 Again, in a news article published on June 3, after Mr. Speaker’s identity had already been disclosed, a representative of the Fulton County Department of Health continued to discuss the case without referring to Mr. Speaker by name “in deference to patient confidentiality.”49

In the final instance what, if any, application does the HIPAA Privacy Rule have to the media? We know HIPAA prohibits a hospital from releasing anything more that directory information to the media without the patient’s authorization except under certain conditions.50 However, the Privacy Rule does not directly cover the media as they are not considered to be a “covered entity” nor are they likely to have a “business associate” relationship with a covered entity.51 Thus, once a reporter obtains patient information from any source, he or she is not restricted by HIPAA in how the information is subsequently used or disclosed. At this juncture, use or disclosure of an individual’s

44 Id.
45 JAMES G. HODGE, PUBLIC HEALTH LEGAL PREPAREDNESS BRIEFING MEMORANDUM 4 (2003), http://www.publichealthlaw.net/Resources/ResourcesPDFs/1HIPAA.pdf.
46 Other state and federal laws concerning public health emergencies may prevent further disclosure of this information but the Privacy Rule does not.
47 Again, under 45 C.F.R. § 164.512, a covered entity may disclosed private health information to a public health authority for the purpose of preventing or controlling disease. See also, Stephen B. Thacker, HIPAA Privacy Rule and Public Health: Guidance from CDC and the U.S. Department of Health and Human Services, 52 MMWR 1-12 (April 11, 2003). After private health information is disclosed to a public health authority pursuant to the Privacy Rule, the public health authority (if it is not a covered entity) may maintain, use, and disclose the data consistent with federal or state laws, regulations and policies applicable to the public health authority.
48 Altman & Schwartz, supra note 1, at A1.
49 Young & Murchison, supra note 9, at A1.
50 45 C.F.R. § 164.510(a)(1)(i).
private health information is governed by ethical principles of journalism and other applicable laws.

The question remains as to what recourse does Andrew Speaker have against any entity if his private health care information was unlawfully released? The answer is, very little. The HIPAA Privacy Regulation does not give private citizens the right to sue. Even if a person is the victim of an egregious violation of the HIPAA Privacy Rule, the law does not provide for an avenue of individual legal recourse. Enforcement of the Privacy Rule is through written complaint to the Secretary of Health and Human Services (HHS) through the Office for Civil Rights. The Secretary holds the power of discretion to investigate a written complaint with corrective action being the focus of enforcement rather than civil or criminal sanctions. The HHS is authorized to impose civil penalties, criminal sanctions and prison terms, which are enforced through the Department of Justice. To date, only a handful of cases have been prosecuted for wrongful disclosure of individually identifiable health information in violation of 42 U.S.C. § 1320d-6(a)(2).

The HIPAA Privacy rules seeks to maintain a delicate balance between respecting individual privacy while allowing health authorities access to information needed to fulfill their mission of protecting the health of the public. The prevalence of tuberculosis has been relatively low in the United States, in part due to the success of public health authorities in locating, isolating, and treating people with TB. The case of Andrew Speaker is further complicated by his travels abroad where tuberculosis is a public problem of greater magnitude. All of these details should be taken into consideration when determining whether private health information should be released without an individual’s authority in order to prevent or control the spread of disease to the public. Should the source of disclosure and their relationship to a covered entity ever be determine, instructions for filing a HIPAA complaint may be found at http://www.hhs.gov/ocr/privacyhowtofile.htm.

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