

HIPAA's Impact on Prisoners' Rights to Healthcare

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Under the Eighth Amendment to the United States Constitution, it has been determined that prisoners (or inmates) have a constitutional right to adequate health care.¹ Texas has codified society's requirement to give care to its incarcerated persons, and requires state prisons to provide health care.² Under the final HIPAA Privacy rule, identifiable health information pertaining to "inmates" has been deemed "protected health information," called "PHI." Although excepted in the preliminary rule, the final Privacy Rule protects inmates' PHI.³ This protection is further broadened by the loose definition afforded to "inmates."

An "inmate" is defined as a "person incarcerated in or otherwise confined to a correctional institution." See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02). "Correctional Institution" is defined as "any penal or correctional facility, jail, reformatory, detention center, work farm, halfway house, or residential community program operated by, or under contract to, the United States, a state, a territory, a political subdivision, of a state or territory, or an Indian tribe, for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other persons held in lawful custody." See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02). Both of these definitions were created with wide latitude for interpretation because DHHS believes these definitions are "necessary to explain the privacy rights and protections of inmates in this regulation." See *id.* Therefore, HIPAA applies to a class of persons that includes incarcerated persons as well as other persons detained for criminal law violations.

Hospitals charged with inmate care must therefore follow the statutory scheme and protect inmate PHI, subject to listed exceptions below. Under the final Privacy Rule, an inmate hospital is not required to obtain an authorization or consent prior to using or disclosing inmate PHI for treatment, payment, or health care operations.⁴ Furthermore, a prison hospital, as a "covered entity" may "use or disclose protected health information without the written authorization of" inmates.⁵ However, permitted use and disclosure is subject to limitations specifically designed to protect inmate PHI. These include the right of access, and the right to amend one's medical record.

I. Permitted Disclosures

A hospital providing prison health care may disclose PHI to a "correctional institution" or a law enforcement official having lawful custody of an inmate if the correctional institution or law enforcement official represents that such protected health information is necessary for:

- A) the provision of health care to such individuals;
- B) the health and safety of such individual or other inmates;
- C) the health and safety of officers or employees or others at the correctional institution;

¹ See *Estelle v Gamble*, 429 US 97 (1976) reh. den. 429 US 1066 (1977), and on remand 554 F2d 653 (5th Cir. 1977), reh. den. 559 F2d 1217(5th Cir.1977) and cert den. 434 US 974 (1977).

² See TEX. LOC. GOV'T CODE §351.001(a) (stating that "the commissioners court of a county shall provide *safe and suitable* jails for the county")(emphasis added); see also *Vest v. Lubbock County Com'rs Court*, 444 F.Supp. 824 (N.D.Tex.1977) (failure to provide adequate medical care, resulted in deprivation of inmates' rights under First, Fourteenth and Eighth Amendments of Federal Constitution and under Texas statutory law).

³ See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02) (with DHHS stating "we have removed the exception for individually identifiable health information of inmates of correctional facilities and detainees in detention facilities," and that "individually identifiable *health information about inmates is protected health information in the final rule*")(emphasis added).

⁴ See 45 C.F.R. §164.506(a).

⁵ See 45 C.F.R. §164.512

- D) the health and safety of such individuals and officers or other persons responsible for the transport of inmates or their transfer from one institution, facility or setting to another;
- E) Law enforcement on the premises of the correctional institution;
- F) The administration and maintenance of the safety, security, and good order of the correctional institution.⁶

A prison hospital's disclosure is permitted to entities outside the hospital if the correctional institution or law enforcement official represents that the protected health information is necessary for any of the purposes listed above.⁷ Furthermore, a prison hospital may reasonably rely upon any such representations from public officials regarding the health of an inmate.⁸ However, when one is released from custody, that person is no longer categorized as an "inmate," and the permitted use and disclosure provisions no longer apply.⁹ While Texas law specifically denies inmates privacy protection for their health information,¹⁰ HIPAA will pre-empt state law and provide stronger protection for inmate PHI.

II. Permitted Uses

A covered entity that is a correctional institution may use PHI of inmates for any purpose for which such protected health information may be disclosed.¹¹ Just to clarify, the final rule differentiates between individuals incarcerated in correctional facilities that are part of the criminal justice system, or in the lawful custody of law enforcement officials, and those individuals detained for non-criminal reasons.¹² Because many prison hospitals are a "health care component" of a correctional institution, the final rule permits these "covered entities" to use PHI in all cases where they are permitted to disclose PHI as well.

Furthermore, a distinction is made between individuals who are confined to psychiatric institutions for correctional reasons and not allowed to leave, and those individuals in psychiatric care for treatment purposes only, who are not there because they committed a crime.¹³ The inmates in correctional psychiatric care have diminished rights regarding PHI. When they are released from the correctional facilities, the inmates regain all their rights regarding PHI.¹⁴ In other words, the inmate provisions do not apply to:

- A) Individuals in psychiatric institutions for treatment purposes only, who are not there due to a crime they committed or under a mandate from the criminal justice system;
- B) Individuals in pretrial release, probation, or on parole; such persons are not considered to be incarcerated in a correctional facility.¹⁵

All prison hospitals must continue to protect health information for psych patients not incarcerated.

III. Notice of Privacy Practices

HIPAA mandates that patients be apprised of their rights regarding their protected health information.¹⁶ However, inmates do not have a right to a Notice of Privacy Practices (Notice)

⁶ See 45 C.F.R. §164.512(k)(5)(i).

⁷ See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02)

⁸ See 45 C.F.R. §164.514(h)

⁹ See 45 C.F.R. §164.512(k)(5)(iii) (stating "no application [of this section] after release [from custody]").

¹⁰ See Tex. Occupation Code §159.004(9)

¹¹ See 45 C.F.R. §164.512(k)(5)(ii).

¹² See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02)

¹³ See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02)

¹⁴ See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02)

¹⁵ Page 82488 of Final Privacy Rule

¹⁶ See 45 C.F.R. §164.520

from a prison hospital relating to their care while incarcerated,¹⁷ or even after they are released from incarceration or detention.¹⁸ Thus, present inmates do not have a right to receive the Notice with respect to a medical record created during incarceration, and a prison hospital need not send a Notice to an inmate after that inmate is released.

IV. Right to Access

A prison hospital may deny an inmate's request to obtain a copy of his/her PHI if obtaining the copy of PHI would jeopardize the "health, safety, security, custody, or rehabilitation of the individual or other inmates or the safety of any officer, employee or to the person at the correctional institution or responsible for the transporting of the inmate."¹⁹ Thus, a prison hospital may deny an inmate's request to obtain a copy of PHI, but must document its proper reason. Texas has recognized this prisoners' right to access PHI for more than twenty years.²⁰

However, if an inmate requests inspection of PHI, the prison hospital must grant that request, unless another ground for denial exists. DHHS states that the purpose for this exception, "and the reason that the exception is limited to denying an inmate a copy [of PHI] and not to denying a right to inspect, is to give correctional institutions the ability to maintain order in these facilities and among inmates *without denying an inmate the right to review his or her protected health information.*"²¹ This mandate from the federal government protects inmates' PHI.

V. Right to Amend

Under HIPAA, inmates may amend their PHI, and may request to amend. A prison hospital may deny a request to amend, if the subject of the request for amendment is not part of a designated record set or otherwise would not be available for inspection under §164.524.²² While the Texas Occupation Code seems to deny inmates this right to amend their medical records, it is granted in HIPAA and thus the federal law would pre-empt the state code. Texas prison health care entities must therefore uphold this right for inmates. Although requests for medical records are sent to TDCJ by many Texas hospitals providing inmate care, these hospitals should safeguard their inmate medical records, and uphold inmates' rights to amend their own records.

VI. Accounting of Disclosures

All prison hospitals must safeguard inmates' PHI. These hospitals must treat inmate health information as PHI if it falls within the definition of health information or if the information is transmitted.²³

¹⁷ See 45 C.F.R. §164.520(a)(3)

¹⁸ See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02) (stating that "no person, including a *current or former inmate*, has the right to notice of such a covered entity [UTMB]'s privacy practices.

¹⁹ See *id.*

²⁰ Op. Atty. Gen. 1981, No. MW-381 (quoting that "with regard to all Texas Department of Corrections medical records which are generated or held by a physician, an inmate has a statutory right of access unless the physician determines that access "would be harmful to the physical, mental or emotional health" of the inmate').

²¹ See <http://www.hhs.gov/ocr/part2.html> (visited 9/30/02).

²² See *id.* (DHHS stating: "we intend to preserve an inmate's ability to request amendments to information, even if a copy of the information would not be available to the inmate, subject to the other exceptions provided in this section").

²³ See <http://www.hhs.gov/ocr/part4.txt> (visited 9/30/02).

Usually, prisoners are asked to sign a release before a Texas prison hospital disseminates their information, and TDCJ keeps those documents. It may be a good idea to review the language in those release documents to see whether they contain the new regulatory language for authorizations. As long as any Texas prison hospital discloses or uses health information about prisoners for treatment, payment, or health care operations, it need not account for disclosures. Any other disclosures not authorized by inmates should be documented and recorded.

CONCLUSION

The Texas Occupation Code section that denies inmates any rights to health information will be pre-empted by HIPAA. Thus, Texas prison hospitals must develop a uniform process to record disclosures of inmate health information not authorized for release by the inmate. Because many prison hospitals share separate repositories for inmate health information (in the prisons **and** at hospitals), both of those areas need to be protected, and a logging system needs to be established. A discussion regarding a modern solution should involve the acceptance of an EMR (electronic medical record).

Furthermore, while a prison health care delivery system is not required to send a Notice of Privacy Practices to inmates, any such entity must give a valid reason to an inmate to deny that inmate access to PHI (such as custody concern or safety concern). Prison hospitals must grant an inmate the opportunity to review his/her medical record, or provide a separate reason for denial. Lastly, prison hospitals must account for disclosures not related to treatment, payment, or health care operations, and not associated with a valid authorization/release. In light of the countless prisoner lawsuits the Attorney General's Office defends, these recommendations present proactive solutions for Texas prison health providers' compliance with HIPAA.

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