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CLIENT ALERT

HIPAA and the Disclosure of Protected Health Information to Law Enforcement Agencies

October 15, 2013

The Office of Civil Rights (“OCR”) at the U.S. Department of Health and Human Services recently released a Guide for Law Enforcement as it relates to the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). In general, HIPAA provides federal protection against the disclosure of individually identifiable health information, known as Protected Health Information (“PHI”), without the consent of the individual patient.

While it is certainly understandable that individuals have an expectation of privacy in preventing the unauthorized disclosure of their confidential medical records, there is an interesting overlap between protecting those interests and the need for law enforcement agencies to utilize information that may be necessary in investigating criminal activity and protecting victims of crime.

The following guidance is provided by OCR for law enforcement:

- PHI may be disclosed to law enforcement with the signed consent of the individual whose medical records are sought
- PHI may be disclosed without individual consent under the following circumstances:
 - If reasonably likely to prevent or lessen a serious or imminent threat to the health and safety of an individual or the public
 - To report evidence of a crime that occurred on the property of the covered entity
 - To alert law enforcement to a death that may have resulted from criminal conduct
 - To alert law enforcement to criminal activity at an off-site medical emergency
 - To report PHI to law enforcement as required by law (i.e. gunshot or stab wounds)
 - To comply with a court order, warrant, subpoena, or similar administrative request from law enforcement, provided that there is a written statement that the information is relevant and that de-identified information cannot be used
 - To respond to a request for basic demographic or PHI information for purposes of identifying a suspect, fugitive, material witness, or missing person
 - To respond to a request for PHI about an adult victim of crime with the victim’s consent
 - To report child abuse or neglect information (no parental consent is required)

- There are several Michigan statutes that speak specifically to law enforcement’s access to PHI:
 - An individual’s application to the concealed weapon licensing board shall authorize the board to access the individual’s medical records. MCL 28.425(b)(1)(c).
 - An interagency domestic violence fatality review team may review all circumstances surrounding a fatality including a review of events leading up to the incident, the response actions to the incident, community resources, laws and policies, and “any other information considered relevant by the team.” MCL 400.1511.
 - A child ombudsman is entitled to the same information about children as the Family Independence Agency would be entitled to, including access to medical records. MCL 722.926.
 - Under the Michigan Health Code, certain types of health records are entitled to an increased level of protection, such as HIV testing (MCL 333.5131), substance abuse treatment (MCL 330.1262), marriage and family therapy notes (MCL 333.16911), triggering a requirement for a specialized release authorization.

Notably, where law enforcement agencies are entitled to access PHI, those records retain their confidential and protected status under the law, particularly in Michigan. There are three specific exemptions under the Michigan Freedom of Information Act, MCL 15.243, that specifically exempt this type of information from disclosure while in the hands of law enforcement personnel, specifically:

- Subsection (1)(h): Information or records that are subject to the physician-patient privilege, the psychologist-patient privilege, or other recognized privilege under state law;
- Subsection (1)(b): investigative records compiled for law enforcement purposes where disclosure would negatively impact the investigation or constitute an unwarranted invasion of individual privacy; and
- Subsection (1)(c): information that is exempt from disclosure under statute. This last catch-all is extremely important as all of the Michigan statutes cited above expressly provide exemptions from disclosure of the PHI that is required to be shared with law enforcement.

Should you have any questions regarding the applicability of this new guidance from the OCR on your organization, please do not hesitate to contact any of the following attorneys in our firm at (313) 965-2121:

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