

Legal Q/A

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Q: *Does HIPAA protect the confidentiality of medical records?*

A: Yes. Although for most legal purposes, privacy rights terminate upon death of an individual, the Health Insurance Portability and Accountability Act (HIPAA) protects the confidentiality of a decedent's medical records. Of course, HIPAA does not prohibit all disclosures of protected health information; it merely regulates the circumstances under which medical records may be accessed or shared.

After a person dies, the personal representative of the estate (e.g., executor or administrator) has the legal right of access to the decedent's medical records with the same powers that the decedent had while living so long as the personal representative has the authority to act on behalf of the estate. Physicians, hospitals and insurers (covered entities) must respect the right of the estate representatives to deal with the medical records of the decedent. On the other hand, the holder of a power of attorney from the decedent has no such right since death automatically results in the revocation of power of attorney.

HIPAA allows for the use and disclosure of protected health information contained in a patient's medical records without the necessity of consent from the patient where the disclosure is for treatment, payment or healthcare operations. In the case of a decedent, there are a few special rules.

For example, any covered entity under HIPAA may disclose protected health information to a coroner or medical examiner for the purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. A covered entity that also performs the duties of a coroner or medical examiner may use protected health information for those purposes.

Also, a covered entity may disclose protected health information to funeral directors, consistent with applicable law, as necessary to carry out their duties with respect to the decedent. If necessary for funeral directors to carry out their duties, the covered entity may disclose the protected health information prior to, and in reasonable anticipation of the individual's death.

HIPAA allows disclosure of protected health information about an

individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct.

The HIPAA Privacy Rule recognizes that a deceased individual's protected health information may be relevant to a family member's health care. It provides two ways for a surviving family member to obtain the protected health information of a deceased relative. First, disclosures of protected health information for treatment purposes – even the treatment of another individual – do not require an authorization; thus, a covered entity may disclose a decedent's protected health information, without authorization, to the health care provider who is treating the surviving relative. Second, a covered entity must treat a deceased individual's legally authorized executor or administrator, or a person who is otherwise legally authorized to act on the behalf of the deceased individual or his estate, as a personal representative with respect to protected health information relevant to such representation. Therefore, if it is within the scope of such personal representative's authority under other law, HIPAA permits the personal representative to obtain the information or provide the appropriate authorization for its

disclosure. The medical records of a decedent may also be disclosed to a researcher if the researcher represents that the use or disclosure being sought is solely for research on the protected health information of decedents, that the protected health information being sought is necessary for the research, *and*, at the request of the covered entity, documentation of the death of the individuals about whom information is being sought.

The HIPAA Privacy Rule contains no statute of limitations on the disclosure of a decedent's protected health information. Physicians should therefore comply with the confidentiality provisions of HIPAA until the decedent's medical records are transferred or otherwise destroyed in accordance with applicable laws.

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