

Applying information sharing laws across the sequential intercepts in Pennsylvania

The information below is a Center of Excellence summary of key points regarding sharing protected health information at each step along the sequential intercept model. It is drawn from a preconference workshop presented by John Petrila (2013) at the 2013 Pennsylvania Annual Forensic Rights and Treatment Conference. Slides from the presentation are available [here](#). The information is provided as a guide but we suggest that you consult with legal authorities for specific applications.

We begin this document with some definitions of standards set by three legal policies: Health Insurance Portability and Accountability Act (HIPAA), federal law regarding the confidentiality of drug and alcohol patient records (42 CFR Part 2), and Pennsylvania state law. We then move to issues and examples related to the intercept stages.

One important note before we start: this primer applies to situations when protected health information may legally be shared between entities without the consent of the consumer. However, it is always preferable to get a consumer's consent before sharing information whenever possible.

Definitions

HIPAA

- HIPAA sets a *minimum* standard for privacy of protected health information (if federal or state law is more restrictive, then it is the higher standard that applies)
- Covers “protected health care information”
- Rules apply only to:
 - Health insurance plans
 - Health care clearinghouses
 - Health care providers who transmit health information electronically
- HIPAA does not apply to those who are not “covered entities,” such as law enforcement (e.g., police officers, probation officers), dispatchers, or judges (or other court personnel)
- HIPAA is often misunderstood and misapplied

Federal Law (42 Code of Federal Regulations, or CFR)

- 42 CFR Part 2 sets a *relatively high* standard for privacy of alcohol/substance use information
- Applies to “Programs” (although “program” is not well defined)
 - An individual or entity that “holds itself out as providing, and provides, alcohol or drug abuse diagnosis, treatment or treatment referral”
 - Unit within a general medical facility that holds itself out as providing diagnosis, treatment or treatment referral
- The incidental provision of alcohol or substance abuse treatment is not a “program”

Pennsylvania State Law

- State confidentiality laws are almost always stricter than HIPAA but rarely stricter than 42 CFR Part 2
- In Pennsylvania, however, state confidentiality laws are stricter than both
- Pennsylvania statutes are more restrictive than 42 CFR in regard to substance use records
 - All patient records ...relating to drug or alcohol abuse or drug or alcohol dependence prepared or obtained by a private practitioner, hospital, clinic, drug rehabilitation or drug treatment center shall remain confidential and may be disclosed only with the patient's consent (Pa. Cons. Stat. Ann. tit. 71 § 1690.108(b)).

Intercept 1 (Law Enforcement/Emergency Services)

Mental health providers can disclose information about an individual's mental health history without the person's consent under certain conditions.

- HIPAA permits disclosure of mental health information
 - if the disclosure is necessary to prevent or lessen a serious threat to the health or safety of the individual or the public
 - to a person able to reduce the risk that a threat will be carried out (this includes disclosure to a potential a victim)
 - if it is necessary for law enforcement to apprehend a person suspected of a crime
 - when required by law (e.g., reporting child abuse, reporting in response to a court order)
- 42 CFR prohibits any disclosure of information related to a person's drug and alcohol treatment
- Pennsylvania law permits disclosure of mental health information
 - Non-consented disclosure permitted in response to emergency medical situation when release of such information is necessary to prevent serious risk of bodily harm or death...must be pertinent to relief of the emergency (55 Pa Code § 5100.32a(9)).
 - There is a legal duty for mental health professionals to warn identifiable potential victim of patient violence (*Emerich v. Philadelphia Ctr. For Human Dev.*, 720 A.2d 1032 (Pa. 1998))
 - Patient makes immediate and specific threat of bodily harm
 - Specifically identified or readily identifiable victim
 - Can discharge through warning to potential victim

Examples:

- Dispatchers can reveal any mental or physical health information they have to police officers. Neither dispatchers nor officers are covered entities under HIPAA.
- Mental health providers can disclose information about an individual's mental health in "emergency" situations.
- Drug and alcohol treatment programs are not permitted to disclose information about a patient's treatment without his or her consent.

Intercept 2 and 3 (Initial Booking/Detention/Court Hearings and Jail/Courts)

- Correctional facilities are generally not covered entities under HIPAA unless they declare themselves to be covered entities (and many do), but health care personnel working in correctional facilities are “health providers” are HIPAA
- HIPAA allows release of health information without consent for almost any reason in correctional settings.
- HIPAA permits health information to be disclosed without consent for purposes of providing health care to an inmate or protecting the health and safety of other inmates.
- Most health and substance abuse information can be released without consent under a court order. A court order would trump the statute, but is likely difficult to obtain.
- PA State Law: Non-consented disclosure of mental health information permitted to “professional treatment staff of State Correctional Institutions and county prisons” when individuals are transferred from jail to prison and prison to jail (55 Pa Code § 5100.32(a)(1))
- Pennsylvania state law permits health information to be disclosed without consent for purposes of providing health care to an inmate; protecting the health and safety of other inmates; protecting the health and safety of the officers, employees, or others at the correctional institution; or protecting the health and safety of inmates, officers, or persons responsible for the transporting of inmates
- Per Pennsylvania state law, consent for release of substance use information requires a separate and specific signature. It is not subsumed in a consent for release of mental health records

Examples:

- Jails can send list of bookings to treatment providers in the community; the rationale is that this information is already publically available.
- Jails can flag the mental health status of an inmate
- Health care providers can provide an individual's health information to a jail.
- Data security is important in jail settings and electronic information should be carefully password protected.
- Information about inmates' HIV status must be kept separate from other files and accessed only on a need-to-know basis.
- Drug court and mental health court participants must waive their rights to confidentiality to participate in court where treatment issues and protected health information are discussed openly.
- "Therapy notes" or material recording the content of communications between consumers and service providers is protected under PA state law. Protections are equivalent to those provided to attorney and their clients.

Intercept 4 and 5 (Re-entry and Community Corrections/Community Support)

- HIPAA provides for access to one's one health file, although such access can be interpreted through correctional policy as providing such information to a program or a treatment agent rather than directly to the individual. This is Pennsylvania DOC policy, for example.

- Although there is an open door for health information sharing on an individual's way into the justice system, HIPAA and state regulations apply again on re-entry.

Example:

- Probation and parole officers do not have a right to a person's health information without consent or a court order.

Templates for data sharing agreements are available

There are many online resources for creating data sharing agreements. One example:

<http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/nist80066.pdf>

References

Petrila, J. (2013, December). *Clinical practice and Information sharing: HIPAA, state confidentiality laws and other legal issues*. Workshop presented at the Forensic Rights and Treatment Conference, Harrisburg, PA.