HIPAA: Guidelines for Law Enforcement

Implications and Applications for Investigative Procedures
### Purpose

The development and implementation of the Health Insurance Portability and Accountability Act (HIPAA) has been occurring over the last several years, but only recently went into effect as of April 14, 2003. The long-term ramifications of this federal legislation are unclear; however, immediate effects are already being felt by local and state law enforcement agencies.

Health care entities are being educated on the regulations, with emphasis on the civil and criminal penalties attached to wrongful disclosures. While both federal and state regulations are clear with regards to investigative efforts, reluctance to disclose ANY Protected Health Information (PHI) is the result. Our purpose in developing guidelines for law enforcement is to 1) present the HIPAA regulations that directly and indirectly apply to law enforcement efforts in a death investigation, 2) discuss the implications for death investigations and obtaining information, and 3) provide recommendations for applying both state and HIPAA mandates appropriately to death investigations.

### Introduction

The Health Insurance Portability and Accountability Act (1996, PL 104-191) was created to ensure health coverage when employees change jobs (portability), protect the integrity, confidentiality, and availability of health data (accountability), and set national standards for how health information is transmitted and protected. While the road was paved with good intentions, gravel and potholes mar the actual interpretation of this federal act.

The end result is federal legislation that must co-exist with existing state laws. Thus, there are preemptions of state law by the federal regulations, exemptions by state law to the preemptions of the federal regulations, and state law provisions which have to be examined individually against federal regulations to determine which applies. So how do we know which is correct? That is not yet clear. Interpretations vary across covered entities, attorneys, and agencies needing specific protected information. Unfortunately, the courts will most likely be the determining force as the source for orders and warrants to obtain information, as well as to interpret the intent and application of the laws. Ideally, the initial fervor and reluctance to share ANY information will die down, allowing entities to better understand and apply the mandates. In the meantime, we will look at the specifics of HIPAA and how it can be applied in death investigations.

### Definitions

**PHI (Protected Health Information)** – All Individually Identifiable Health Information and other information on treatment and care that is transmitted or maintained in any form or medium

**Use** – The sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information

**Disclosure** – Release or divulgence of information by an entity to persons or organizations outside of that entity

**Authorization** – The mechanism for obtaining consent from a patient for the use and disclosure of health information for a purpose that is not treatment, payment, or health care
operations or not for other permitted disclosures such as those required by law and for public health purposes

Minimum Necessary – When using PHI, a covered entity must make all reasonable efforts to limit itself to “the minimum necessary to accomplish the intended purpose of the use, disclosure, or request”

Health Plan – An individual or group plan that provides, or pays the cost of, medical care

Health Care Provider – Any person or organization that furnishes, bills, or is paid for health care services or supplies (such as DSS, EMS, Mental Health, Health Departments, etc)

Health Care Clearinghouse – A public or private entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements

Covered Entities – Those entities that must comply with HIPAA regulations: Health Plans, Health Care Providers, and Health Care Clearinghouses
Statutes

** NOTE: Only the applicable portions of the statutes are presented.

160.203 General rule and exceptions

A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

(c) The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

164.502 Uses and disclosures of protected health information: general rules

(a) Standard – A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.

1) Permitted uses and disclosures – A covered entity is permitted to use or disclose protected health information as follows:

   i. As permitted by and in compliance with this section, 164.512 or 164.514 (e), (f), or (g).

2) Required disclosures – A covered entity is required to disclose protected health information:

   i. To an individual, when requested under, and as required by 164.524 or 164.528; and

   ii. When required by the Secretary under subpart C of part 160 of this subchapter to investigate or determine the covered entity’s compliance with this subpart.

(b) Standard: minimum necessary

1) Minimum necessary applies

2) Minimum necessary does not apply – This requirement does not apply to:

   (v.) Uses or disclosures that are required by law, as described by 164.512 (a)

164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in 164.508, or the opportunity for the individual to agree or object as described in 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use of disclosure permitted by this section, the covered entity’s information and the individual’s agreement may be given orally.
(a) Standard: uses and disclosures required by law

1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

(b) Standard: uses and disclosures for public health activities

1) Permitted disclosures: A covered entity may disclose protected health information for the public health activities and purposes described in this paragraph to:
   i. A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, 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;
   ii. A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect

2) Permitted uses: If the covered entity also is a public health authority, the covered entity is permitted to use protected health information in all cases in which it is permitted to disclose such information for public health activities under paragraph (b)(1) of this section.

(c) Standard: disclosures about victims of abuse, neglect or domestic violence

1) Permitted disclosures: Except for reports of child abuse or neglect permitted by (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:
   i. To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;
   ii. If the individual agrees to the disclosure; or
   iii. To the extent the disclosure is expressly authorized by statute or regulation and:
      A. The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or
      B. If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against
the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

2) Informing the individual: A covered entity that makes a disclosure permitted by paragraph (c)(1) of this section must promptly inform the individual that such a report has been or will be made, except if:

i. The covered entity, in the exercise of professional judgment, believes informing the individual would place the individual at risk of serious harm; or

ii. The covered entity would be informing a personal representative, and the covered entity reasonably believes the personal representative is responsible for the abuse, neglect, or other injury, and that informing such person would not be in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

(d) Standard: uses and disclosures for health oversight activities

(e) Standard: disclosures for judicial and administrative proceedings

1) Permitted disclosures: A covered entity may disclose protected health information in the course of any judicial or administrative proceeding

2) Other uses and disclosures under this section: The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

(f) Standard: disclosures for law enforcement purposes

1) Permitted disclosures: pursuant to process and as otherwise required by law. A covered entity may disclose protected health information:

i. As required by law including laws that require the reporting of certain types of wounds or other physical injuries, except for laws subject to paragraph (b)(1)(ii) or (c)(1)(i) of this section; or

ii. In compliance with and as limited by the relevant requirements of:

A. A court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer;

B. A grand jury subpoena; or

C. An administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that:

1. The information sought is relevant and material to a legitimate law enforcement inquiry;
2. The request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

3. De-identified information could not reasonably be used.

2) Permitted disclosures: limited information for identification and location purposes. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official’s request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, provided that:

   i. The covered entity may disclose only the following information:
      A. Name and address;
      B. Date and place of birth;
      C. Social security number;
      D. ABO blood type and rh factor;
      E. Type of injury;
      F. Date and time of treatment;
      G. Date and time of death, if applicable; and
      H. A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair, scars, and tattoos.

   ii. Except as permitted by paragraph (f)(2)(i) of this section, the covered entity may not disclose for the purposes of identification or location under paragraph (f)(2) of this section any protected health information related to the individual’s DNA or DNA analysis, dental records, or typing, samples or analysis of body fluids or tissues.

3) Permitted disclosure: victims of a crime. Except for disclosures required by law as permitted by paragraph (f)(1) of this section, a covered entity may disclose protected health information in response to a law enforcement official’s request for such information about an individual who is or is suspected to be a victim of a crime, other than disclosures that are subject to paragraph (b) or (c) of this section, if:

   i. The individual agrees to the disclosure; or

   ii. The covered entity is unable to obtain the individual’s agreement because of incapacity or other emergency circumstance, provided that:
      A. The law enforcement official represents that such information is needed to determine whether a violation of law by a person other than the victim has occurred, and such information is not intended to be used against the victim;
B. The law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure; and

C. The disclosure is in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.

4) Permitted disclosure: decedents. A covered entity may disclose 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.

5) Permitted disclosure: crime on premises. A covered entity may disclose to a law enforcement official protected health information that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity.

6) Permitted disclosure: reporting crime in emergencies.

i. A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to:

A. The commission and nature of a crime;

B. The location of such crime or of the victim(s) of such crime; and

C. The identity, description, and location of the perpetrator of such crime.

ii. If a covered health care provider believes that the medical emergency described in paragraph (f)(6)(i) of this section is the result of abuse, neglect, or domestic violence of the individual in need of emergency health care, paragraph (f)(6)(i) of this section does not apply and any disclosure to a law enforcement official for law enforcement purposes is subject to paragraph (c) of this section.

(g) Standard: uses and disclosures about decedents

1) Coroners and medical examiners: A covered entity 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 the purposes described in this paragraph.

2) Funeral directors

(h) Standard: uses and disclosures for cadaveric organ, eye or tissue donation purposes

(i) Standard: uses and disclosures for research purposes
(j) Standard: uses and disclosures to avert a serious threat to health or safety

1) Permitted disclosures: A covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure:

   i. (A) Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
   B. Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat; or

   ii. Is necessary for law enforcement authorities to identify or apprehend an individual:

      A. Because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim; or

      B. Where it appears from all the circumstances that the individual has escaped from a correctional institution or from lawful custody (164.501)

2) Use or disclosure not permitted: A use or disclosure pursuant to paragraph (j)(1)(ii)(A) of this section may not be made if the information described in paragraph (j)(1)(ii)(A) of this section is learned by the covered entity:

   i. In the course of treatment to affect the propensity to commit the criminal conduct that is the basis for the disclosure under paragraph (j)(1)(ii)(A) of this section, or counseling or therapy; or

   ii. Through a request by the individual to initiate or to be referred for the treatment, counseling, or therapy described in paragraph (j)(2)(i) of this section.

3) Limit on information that may be disclosed: A disclosure made pursuant to paragraph (j)(1)(ii)(A) of this section shall contain only the statement described in paragraph (j)(1)(ii)(A) of this section and the protected health information described in paragraph (f)(2)(i) of this section.

4) Presumption of good faith belief: A covered entity that uses or discloses protected health information pursuant to paragraph (j)(1) of this section is presumed to have acted in good faith with regard to a belief described in paragraph (j)(1)(i) or (ii) of this section, if the belief is based upon the covered entity’s actual knowledge or in reliance on a credible representation by a person with apparent knowledge or authority.

(k) Standard: uses and disclosures for specialized government functions

(l) Standard: disclosures for workers’ compensation
Implications

160.203 General rule and exceptions

The general rule and exceptions section makes it clear that HIPAA is the overriding mandate to follow. Provision (c) describes the State Law exemptions to the general rule. As this applies directly to the reporting of fatalities, this should not affect law enforcement. While there are existing problems with regards to notification in the event of a death, these are largely local communication gaps and are not related to HIPAA. As a public health authority, the medical examiner system is exempt under the HIPAA regulations. Thus, local medical examiners should be able to continue to conduct inquiries and investigations as they typically would, which should include contacting law enforcement.

Unfortunately, it appears that many are not reading beyond this statute. There is an overwhelming reaction of ‘when in doubt, do not give it out’. It is critical for law enforcement to know what the regulations are and when to question a refusal to disclose information as part of an active death investigation.

164.502 Uses and disclosures of protected health information: general rules

This section defines permitted versus required disclosures. The implication behind these standards being that while an entity may disclose PHI under this subchapter, they may not necessarily have to disclose anything. This is particularly relevant given that 164.512, which includes the standards for law enforcement purposes and decedents, is specifically listed under permitted disclosures.

The minimum necessary standard simply means that the covered entity must make every reasonable effort to provide the requesting agency with the bare minimum. The standard does not apply to disclosures required by law. However, the standard specifically cites 164.512 (a). So how the minimum necessary applies to sections b-l of that section is open to interpretation.

164.512 Uses and disclosures for which an authorization or opportunity to agree or object is not required

(a) Standard: uses and disclosures required by law – The item that stands out with this standard is, that the disclosure must be limited to the relevant requirements of the law. So it appears that entities may disclose information to the letter of the law, meaning the requests need to be for exactly what is needed. If it is not written in there, you can bet it will not be provided.

(b) Standard: uses and disclosures for public health activities – This section allows for the exchange of information between health care providers and medical examiners. There is little room for misinterpretation here, though a few calls have been made regarding nursing staff refusals to disclose. Medical examiners can issue administrative subpoenas if necessary.

(c) Standard: disclosures about victims of abuse, neglect, or domestic violence – The State Law requiring reporting of suspicions of abuse or neglect trumps HIPAA. The provisions clearly stipulate disclosures when the threat of harm to the victim exists, or if an investigation will be compromised without the information. In addition, entities do not have to disclose to a representative for the victim (e.g., the abusive parent) if they are the suspected perpetrator. While things tend to move rapidly at the time, mutual agreement on this section should expedite the sharing of information.
(d) Standard: uses and disclosures for health oversight activities

(e) Standard: disclosures for judicial and administrative proceedings – If a death investigation has proceeded to this stage, there should be no arguments for obtaining records.

(f) Standard: disclosures for law enforcement purposes – Section (1) under this subchapter covers the statute for physicians to report certain types of wounds and injuries (G.S. 90-21.20), as well as requests required by law. Section (2) delves into information sought for identification and location purposes. As problems obtaining this type of information are already occurring, it is important that law enforcement know this section thoroughly. It is specific with regards to what the information is for and what can be disclosed. While identifying characteristics are invaluable in identifying some bodies, decomposed cases or skeletal remains may require DNA or dental records. The statute clearly states information related to DNA, dental records, or fluids and tissues cannot be disclosed. Section (3) deals with a victim or suspected victim of a crime. As we deal exclusively with the dead, an agreement by the victim to disclose is obviously not an option. Therefore, law enforcement will have to show that the information is needed to rule out criminal activity in the death, or that the investigation will be compromised without the information. This leads directly to Section (4) regarding decedents. You will notice the statute specifically states that law enforcement can be alerted about a death ‘if the covered entity has a suspicion that such death may have resulted from criminal conduct’. Two potential problems exist here. First, that is the opinion of the covered entity, which is not likely to have all the information necessary to make that judgment, nor is that necessarily their role. Second, it implies that seemingly accidental, suicidal, or natural deaths are not a law enforcement concern. Therefore, as law enforcement is charged with investigating all deaths as potentially suspicious until proven otherwise, Section (3) should hopefully assist in obtaining the necessary information. Section (6) relates to situations involving EMS. We are already being informed that law enforcement is being refused information at scenes by EMS personnel, requiring court orders to get ambulance call sheets and reports. The statute houses disclosures under ‘crime’, similar to Section (4). With respect to a fatality on scene, or a person transported that later dies, it is unclear whether EMS personnel have to provide any information to law enforcement without clear evidence of criminal conduct, with the exception of abuse, neglect or domestic violence.

(g) Standard: uses and disclosures about decedents – This section reiterates G.S. 130A-385 Duties of the medical examiner
Recommendations

We really have no way of knowing how this intermingling of federal and state legislation will play out until it is taken to the courts for interpretation. In the meantime, we must deal with it on a case-by-case basis the best we can. Following are several recommendations that law enforcement agencies can use and/or adapt for assimilating HIPAA into everyday law enforcement activities and active death investigations.

1) Meeting of the minds – Department attorneys should meet with legal and staff representatives from the covered entities, particularly hospitals and county EMS, to discuss the statutes and policies for exchanging information to the benefit of all. The end result should be a written document all parties agree on.

2) Specificity – Any court orders, warrants, subpoenas, or other judicial or official requests for information should be as specific as possible. ‘Fishing expeditions’ without solid justification are not likely to be accepted by covered entities. Your reasons for needing the information will need to be just as clear as how it will be used.

3) Documentation – If departments have an existing request form, modify it to include the specific HIPAA regulations related to the information needed. For example, the OCME request for medical records includes the following statement; “We request the following records as part of our investigation under the authority granted by NC G.S. 130A-385.” If modifying an already existing document is not possible, consider having a letter drafted or template created that states your agencies purpose, the nature of the investigation, the HIPAA regulation that allows the entity to disclose the requested information, and agency contact information. The Centers for Disease Control has sample letters available on their website (See Resources).

4) Availability – Law enforcement personnel should keep a copy of the applicable HIPAA regulations where they can be easily accessed in the event questions arise during an investigation. A conversation and professional explanation between two parties could potentially avoid an unnecessary court order for information.
Resources

www.hipaa.org

www.medicalprivacy.unc.edu

Excellent legal interpretations of the regulations and potential impact.

www.dirm.state.nc.us/hipaa

www.cdc.gov/mmwr

Do a search for HIPAA on the site and it will list several appendices available. This will include the sample letters mentioned above. They were available as of May 2, 2003.