



# TMA Privacy and Civil Liberties Office Information Paper



## USES AND DISCLOSURES OF PHI ABOUT DECEDENTS

HIPAA Privacy ♦ February 2012

### **I. Supporting Policies for this Information Paper**

- A. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule establishes requirements regarding uses and disclosures of protected health information (PHI) when authorization is not required.
- B. The Department of Defense Health Information Privacy Regulation (DoD 6025.18-R) implements the HIPAA Privacy Rule for the Military Health System (MHS).
- C. DoD Directive (DoDD) 5154.24, “Armed Forces Institute of Pathology (AFIP),” provides the authority for the Armed Forces Medical Examiner System.
- D. DoD Privacy Program (DoD 5400.11-R) provides guidance on the Privacy Act of 1974 and its implementation within DoD. See 5 USC § 552a.
- E. DoD Freedom of Information Act Program (DoD 5400.7-R) provides guidance on the Freedom of Information Act and its implementation within DoD. See 5 USC § 552.

### **II. Definitions Associated with Uses and Disclosures of PHI about Decedents**

- A. Covered Entity: A health plan or a healthcare provider within the MHS that transmits any health information in electronic form to carry out financial or administrative activities related to healthcare.
- B. Disclosure: The release, transfer, provision of access to, or revealing in any other manner of PHI outside the entity holding the information.
- C. Military Health System (MHS): All DoD health plans and all DoD healthcare providers that are, in the case of institutional providers, organized under the management authority of, or in the case of covered individual providers, assigned to or employed by TMA, the Army, the Navy, or the Air Force.

- D. Protected Health Information( PHI): Information that is created or received by a covered entity and related to the past, present, or future physical or mental health of an individual; providing payments for healthcare to an individual; and can be used to identify the individual. It excludes health information in employment records held by a covered entity in its role as employer.
- E. Use: With respect to PHI, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.

### **III. Guidance Regarding Uses and Disclosures a Decedent's PHI**

- A. Generally, covered entities are required to protect the privacy of a decedent's PHI in the same manner and to the same extent that is required for the PHI of living individuals.
- B. Under certain circumstances, a covered entity may disclose PHI about decedents without authorization to:
  - 1. Coroners, Medical Examiners, Armed Forces Medical Examiners (in accordance with DoDD 5154.24), or a covered entity performing the functions of a coroner or medical examiner for the purposes of:
    - a. Identifying a deceased person,
    - b. Determining a cause of death; or c. Other duties authorized by law.
  - 2. Funeral Directors, as necessary to carry out their duties concerning the decedent.
    - a. For example, a covered entity may disclose the fact that a deceased individual donated an organ or tissue to a funeral director due to potential implications with embalming.
  - 3. Law Enforcement, to alert law enforcement of the individual's death, if the covered entity suspects that the death may have been the result of criminal conduct.
  - 4. Researchers, if the covered entity obtains the following from the researcher:
    - a. Representation that the PHI sought is solely for research on decedents;
    - b. Documentation, at the request of covered entity, of the death of such individuals; and
    - c. Representation that the PHI sought is necessary for the research.
- C. Personal Representatives. If an individual has legal authority to act on behalf of a decedent or the decedent's estate, a covered entity should treat that individual as a personal representative regarding the decedent's PHI relevant to such representation.
- D. Psychotherapy Notes. A covered entity may disclose psychotherapy notes pertaining to a decedent to coroners and medical examiners for the purposes noted in section B. 1.
- E. The Privacy Act of 1974 (Privacy Act). The Privacy Act does not speak to decedents as individuals or personal representatives with respect to decedents. Therefore, relatives and other relevant parties are generally not permitted to exercise Privacy Act rights after the death of an individual.
  - 1. See Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28951 (July 9, 1975).

2. If PHI is required to be disclosed under the Freedom of Information Act (FOIA), the Privacy Act does not prohibit the disclosure.
- F. Freedom of Information Act (FOIA). Disclosure of a decedent's PHI is generally permissible under the FOIA so long as the disclosure would not be an unwarranted invasion of personal privacy of the decedent or the decedent's relatives. See 5 U.S.C. § 552(b)(6), 5 U.S.C. § 552(b)(7)(C) and paragraph C3.2.1.6 of DoD 5400.7-R.