



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

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May 4, 2004

Alan Lambert, M.D.
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DOH GC Opinion No. 04-03
Medical Record Release

Dear Dr. Lambert:

This is in response to your April 15th letter regarding the authority of an Article 28 facility to release medical records of a decedent to a legally authorized estate executor. The medical record in issue relates to an abortion procedure. The estate executor was the deceased patient's spouse. You also noted that the patient had clearly expressed her intent that the information about the procedure not be disclosed to her husband. This intent was documented in the record. You requested an opinion regarding the application of Public Health Law ("PHL") §§ 17 and 18 and regarding the effect of the federal Health Insurance Portability and Accountability Act ("HIPAA") on state law. Your specific questions and the Department's responses follow.

Issue I

Can an Article 28 facility that performed an abortion on a decedent/patient release a copy of the medical record for the decedent/patient to the legally authorized executor of the estate upon being provided with a HIPAA compliant authorization signed by the executor of the estate?

Issue II

Can an Article 28 facility that performed an abortion on a decedent/patient release a copy of the medical record for the decedent/patient to the legally authorized executor of the estate upon being provided with a HIPAA compliant authorization signed by the executor of the estate in a circumstance where the patient's previously expressed intent as documented in the medical record was that information with respect to the abortion (medical record) not be provided to the husband? (Please be reminded that the husband is now the legally appointed executor of the estate.)

Response

PHL § 17 addresses the release of medical records with a written request to “any other designated physician or hospital.” This is not the situation you present in either question since the intended recipient of the record would be the estate executor. Therefore, PHL § 17 is not, on its face, relevant to either question and does not provide any authority for releasing medical records of a deceased to an estate executor.

PHL § 18 permits “qualified persons” to access certain records which are defined in the law as “patient information.” “Qualified person” in PHL § 18(1)(g) includes the subject, a guardian, etc. and “an attorney representing or acting on behalf of the subject or the subject’s estate.” Consequently, if an attorney acting on behalf of the estate is conferred a derivative right to access “patient information,” then we believe that the estate executor, having a certificate of appointment from a court, and who has retained the attorney may assert at least the same right to access such information.

However, PHL § 18(3)(d) permits a provider to deny access to records to a qualified person if it “can reasonably be expected to cause substantial and identifiable harm to the subject or others which would outweigh the qualified person’s right of access....” In making the decision to disclose information, a number of factors may be considered by the provider, including but not limited to “the extent to which the knowledge of the information may be harmful to the health or safety of the subject or others” and “the extent to which the information contains sensitive materials disclosed to the practitioner...by the subject which would be injurious to the subject’s relationship with other persons, except when the subject is requesting information concerning himself or herself....”

Because she is dead, it is hard to conclude that disclosure of this subject’s medical record could reasonably be expected to cause harm to the subject. Depending on the circumstances, one might reasonably conclude that such disclosure could reasonably be expected to cause substantial and identifiable harm to others or that knowledge of the record may be harmful to the health or safety of others, perhaps family members. However, this Department does not have sufficient knowledge of the circumstances to express any opinion on these issues.

One might reasonably conclude that the record of this subject’s abortion is sensitive material disclosed in confidence. It is less clear whether the disclosure of that record to the executor of the subject’s estate, who was the subject’s husband, would be “injurious to the subject’s relationships with other persons.” If, as a matter of law after a subject’s death, she can no longer have relationships with other persons which might be injured, then, of course, disclosure could not be so injurious. But if a decedent can, as a matter of law, have such relationships, then, depending on the circumstances, one might reasonably conclude that such disclosure would be so injurious. This Department expresses no opinion on this question of law which must ultimately be answered by the courts. Furthermore, we lack knowledge of the circumstances sufficient to opine whether, if a decedent can as a matter of law have relationships with others which might be injured, this decedent has such a relationship which would be injured by disclosure of the record of her abortion.

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You also requested comment on whether or not HIPAA regulations impact on applicable law. Federal privacy regulations at 45 C.F.R. § 164.524 require HIPAA covered entities to grant access to protected health information, with a few limited exceptions, to the subject of the information or to a legal representative.

Use of a HIPAA compliant authorization permits a covered entity to disclose information to a named person for a listed purpose and for a designated time period, but does not mandate that such disclosures must occur, unless otherwise required by governing law. I am enclosing for your information a preemption chart developed by this office. This chart is also available on our website, www.health.state.ny.us. The last two rows under the heading “Exceptions to the general rule (when access can be denied),” in the “PHL § 18 ” chart, address the issue which you raise. New York State PHL § 18 prevails over HIPAA and permits the provider to withhold information when disclosure would cause substantial harm to another person.

In closing, although PHL §§ 17 and 18 do not mandate disclosure in the situations you describe, other statutes, regulations or processes may require it, for example, via judicial process in a proceeding.

Very truly yours,

Donald P. Berens, Jr.
General Counsel

Enclosure