



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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October 20, 2006

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DOH GC Opinion No. 06-03
Access to Patient Information

Dear Ms. Ciardullo:

I acknowledge receipt of your letter of September 13, 2006, requesting clarification regarding access to patient information by qualified persons pursuant to Public Health Law (PHL) § 18. The definition of "qualified person" in PHL § 18(1)(g) was amended by chapter 634 of the Laws of 2004, effective October 26, 2004. I address three questions below.

Question 1

May a lay person holding a durable power of attorney (POA) for a subject obtain copies of patient information concerning the subject where the POA explicitly authorizes the attorney-in-fact to access such information?

Answer to Question 1

Yes. Of course, any access to patient information is subject to the terms and limitations of PHL § 18, modified by HIPAA regulations as they may apply to the provider.

PHL § 18 provides that patient information held by health care providers concerning a subject must be made available to the subject or to another qualified person acting instead of the subject. The statute has long included among "qualified persons" subjects, certain guardians of subjects, the parents of infant subjects, and, from 1992 until 2004, "an attorney representing or acting on behalf of the subject or the subject's estate." In 2004, the definition was amended to include, among others, "an attorney representing a qualified person or the subject's estate who holds a power of attorney from the qualified person or the subject's estate explicitly authorizing the holder to execute a written request for patient information under this section."

The current statutory definition does not distinguish between an attorney-at-law and an attorney-in-fact, but it includes among qualified persons those attorneys of either sort who hold a POA with the explicit authorization. Accordingly, a lay person who holds a durable POA for a subject may obtain from a provider copies of patient information concerning the subject where the POA explicitly authorizes the attorney-in-fact to execute a written request for patient information under PHL § 18, all subject to the terms and limitations of PHL § 18. Among those limitations are those of PHL § 18(3) which permit the provider to withhold portions of records. However, federal regulations may require providers covered by the Health Insurance Portability and Accountability Act (HIPAA), upon the request of a qualified person, to disclose records which § 18 would permit them to withhold. See, 45 CFR §§ 160.201, et seq., § 164.502(g), § 164.508(c) and 164.524(a).

The statutory short form durable POA set forth in General Obligations Law (GOL) § 5-1501(1) offers an option to grant the agent power to act with respect to "records, reports and statements." That statutory form does not constitute in so many words an explicit authorization for "the holder to execute a written request for patient information under [PHL § 18]." However, pursuant to GOL § 5-1502K, the optional statutory form language granting general authority with respect to "records, reports and statements" must be construed to authorize the agent to do certain specific enumerated acts and, in addition, "to do any other act or acts, which the principal can do through an agent, in connection with the preparation, execution, filing, storage or other utilization of any records, reports or statements of or concerning the principal's affairs." Thus, GOL § 5-1505K(5) gives an agent who has been granted power to act with respect to "records, reports and statements" the authority to request the same records of patient information concerning the principal that the principal as subject could request pursuant to PHL § 18. In my opinion, such statutory form language constitutes a sufficiently explicit authorization for the holder to be deemed a qualified person under PHL § 18 and so to receive patient information pursuant to the terms of that section.

Question 2

If such a person holding such a POA may obtain such patient information, is the reasonable charge for paper copies which the provider may impose limited to no more than 75 cents per page pursuant to PHL § 18(2)(e)?

Answer to Question 2

Yes, subject to the terms and limitations of PHL § 18.

Pursuant to PHL § 18(2)(e), "The provider may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider, provided However,

the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person shall not be denied access to patient information solely because of inability to pay."

Since the 2004 amendment, a person holding a POA from a qualified person or the subject's estate explicitly authorizing the holder to execute a written request for patient information is a qualified person entitled to records on the terms of PHL § 18, including the limitations on charges for inspections and copies.

Question 3

Do the limitations on provider charges for copying costs found in PHL § 18 apply whenever a qualified person signs an authorization to a third party for medical records, but uses language which says in effect "deliver the records to me in care of _____?"

Answer to Question 3

Yes.

Subject to the limitations of PHL § 18(3), modified by HIPAA regulations as they may apply, upon the written request of any qualified person, a health care provider must furnish to such person, within a reasonable time, a copy of any patient information requested which the qualified person is authorized to inspect pursuant to PHL § 18(2). If a subject, another qualified person, or the subject's estate signs a POA explicitly authorizing the holder to request patient information under PHL § 18, the holder may compel the provider to provide the information. Alternatively, a subject or other qualified person making written request for information may, without the formality of a POA, designate another person in care of whom copies of the requested information are to be delivered.

Whether an adverse party in litigation can compel a qualified person to execute such a request or POA that complies with PHL § 18 is a question to be resolved under procedural rules of court applicable to the litigation. If the qualified person executes such a request or POA, it is pursuant to PHL § 18 and the limitations of that statute on provider charges apply. It is not clear that a simple authorization by a qualified person for a provider to give records to an adverse party requires the provider so to limit the charges for copies.

As set forth above, PHL § 18(2)(e) sets four limitations on the charge which a provider may impose for access to patient information: (1) the charge must be reasonable; (2) it may not exceed the actual costs incurred by the provider; (3) it may not exceed 75 cents per page for paper copies; and (4) a qualified person shall not be denied access to patient information solely because of inability to pay. These four limitations all clearly apply to patient information sought

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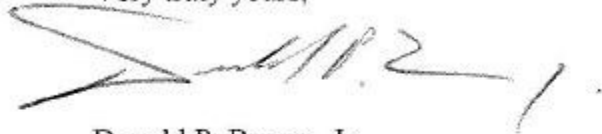
by a subject or another qualified person acting instead of the subject. It is not so clear whether the first three limitations also apply to information sought by other persons.

Unlike the fourth limitation (access despite inability to pay) which expressly applies only to qualified persons, application of the first three limitations (the charge must be reasonable and may not exceed either actual costs or 75 cents per page) is not expressly so narrowed. In fact, the statute provides that the first three limitations apply to "all" inspections and copies.

Courts have split on whether one of the first three limitations applies only to qualified persons. See, for example, Boltja v. Southside Hospital, 186 AD2d 774 (2nd Dept., 1992) and Davenport v. County of Nassau, 245 AD2d 331 (2nd Dept., 1997), holding that those who are not qualified persons are not entitled to the 75 cents per page cap. But see, McCrossan v. Buffalo Heart Group, 265 AD2d 875 (4th Dept., 1999), holding that, where a plaintiff-patient authorized defendant's attorney to obtain plaintiff's medical records from a hospital, the hospital was permitted to charge no more than 75 cents per page.

In my opinion, the language of PHL § 18(2)(e) better supports the conclusion that the first three limitations on permissible charges apply to all inspections and copies, so long as a qualified person has authorized the record custodian to make them available, no matter to whom the qualified person has authorized the disclosure and no matter for what purpose. Obviously, the courts may be the final arbiters of this question.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Donald P. Berens, Jr.", with a stylized flourish at the end.

Donald P. Berens, Jr.
General Counsel

DPB/dlm