



TMA Privacy and Civil Liberties Office Information Paper



INCIDENTAL USES AND DISCLOSURES OF PHI

HIPAA Privacy ♦ October 2010

I. Supporting Policies for this Information Paper

- A. The Department of Defense Health Information Privacy Regulation (DoD 6025.18-R, C8.4) and the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (45 CFR 164.502(a)(1)(iii)) establish the requirement for incidental uses and disclosures.
 - 1. DoD 6025.18-R, C14.3 requires covered entities to have in place appropriate safeguards to protect the privacy of protected health information (PHI).
 - 2. DoD 6025.18-R, C8.2, outlines the “Minimum Necessary Rule.”
- B. The Department of Defense Health Information Security Regulation (DoD 8580.2-R) provides guidance regarding administrative, physical, and technical safeguards of PHI.

II. Definitions Associated with Incidental Uses and Disclosures of PHI

- A. Covered Entity: A health plan or a healthcare provider within the Military Health System (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 divulging in any other manner of PHI outside the entity holding the information.
- C. Incidental use and disclosure: Occurs when the use or disclosure of an individual’s PHI cannot reasonably be prevented by chance or without intention or calculation during an otherwise permitted or required use or disclosure.
- D. 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.
- E. Protected Health Information (PHI): Information that is created or received by a covered entity and relates to the past, present, or future physical or mental health of an individual; providing payment for healthcare to an individual; and can be used to identify the individual. It excluded health information in employment records held by a covered entity in its role as employer.

- F. 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 Permitted Incidental Uses and Disclosures of PHI

- A. The Privacy Rule is not intended to impede routine healthcare communications and practices that are essential in providing healthcare to individuals. Such practices can continue, even when an incidental use or disclosure may occur, provided that the entity has taken reasonable precautions to safeguard and limit the PHI disclosed.
- B. DoD 6025.18-R, C8.4, permits incidental uses and disclosures only to the extent that the covered entity:
1. Is in compliance with the minimum necessary rule (DoD 6025.18-R, C8.2), where applicable; and,
 2. Has in place administrative, technical, and physical safeguards (DoD 6025.18-R C14.3 and DoD 8580.02-R) to protect the privacy of PHI.
- C. Examples of Incidental Uses and Disclosures:
1. Confidential conversations among healthcare providers or with patients.
 - a. For example, a provider may instruct an administrative staff member to bill a patient for a particular procedure, and may be overheard by one or more persons. Assuming that the provider made reasonable efforts to avoid being overheard, and reasonably limited the information shared, such an incidental disclosure would be considered permissible.
 2. Use of sign-in sheets or calling out patient names in waiting rooms.
 3. Use of whiteboards or x-ray boards.
 4. Use of PHI near patient bedside. D. For further information:
<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/incidentalusesanddisclosures.html>

IV. Avoiding Incidental Uses and Disclosures

- A. The incidental uses and disclosure rule does not excuse non-compliance due to mistakes, neglect, failure to have in place appropriate safeguards, or failure to make reasonable efforts to limit the use or disclosure of PHI to the minimum necessary to accomplish the intended purpose of the use or disclosure.
- B. While incidental uses and disclosures are permitted, reasonable steps, such as those noted below, should be taken to protect PHI in both paper (faxes, paper medical records) and electronic forms (electronic records) to avoid these events to the extent possible.
1. Paper PHI should be protected by being stored in secure areas in reasonably protected containers.
 2. Fax machines and other printers should not be readily accessible by the general public.
 3. Documents that are to be discarded should be placed in designated containers for shredding or placed in a burn bag for proper disposal.

4. Electronic PHI should be protected by using Common Access Cards and/or passwords and computer screens should be face away from public traffic areas to minimize exposure of PHI to unauthorized individuals.
5. Emails containing PHI should be encrypted and digitally signed.
6. All devices, including laptops and electronic media, which contain PHI should be physically secure when not in use.