

# University of California Policy



## HIPAA Patients' Rights

**Responsible Officer:** Senior Vice President/Chief Compliance and Audit Officer

**Responsible Office:** Ethics, Compliance and Audit Services

**Effective Date:** September 13, 2010

**Next Review Date:** September 1, 2013

**Who is Covered:** All UC HIPAA workforce members

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### Policy Summary

HIPAA affords patients and their representatives certain rights, such as the right to receive a Notice of UC's Privacy Practices, and the right to access, inspect, and copy their medical records. This policy describes the rights afforded patients and their representatives under HIPAA.

### Policy Definitions

Refer to the document entitled "UC HIPAA Glossary".

## **Policy Text**

### **A. Required Notice of Privacy Practices**

All components of the SHCC will use common content for the Notice, which will be provided by UCOP. Each component of the SHCC may format the Notice for their own purposes, utilize their own logos, etc., however the content will remain unchanged.

Each organizational component of the SHCC must implement the standard UC Notice and its own Acknowledgement Process. The Notice is required to be delivered to the patient only once when the individual is a patient within the SHCC, as long as the Notice remains unchanged. The Notice must be provided no later than the date of first service delivery. If it cannot be established that the individual has received the Notice, or the Notice has changed materially since the individual's most recent visit, then the Notice must (again) be provided.

The SHCC must make a good faith effort to obtain a written Acknowledgment of receipt of the Notice, except in an emergency situation where no written acknowledgment is required.

For over-the-phone first treatment encounters, the SHCC must mail the Notice no later than the first service delivery date and include a mail-back Acknowledgment Form.

When the first service delivery to an individual is via the Internet, through e-mail or other electronic delivery format, the SHCC must furnish the electronic Notice automatically and contemporaneously, and must make a good faith effort to obtain a return receipt or other transmission from the individual as acknowledgement of receiving the Notice.

The SHCC may e-mail the Notice to an individual if the individual agrees to receive an electronic Notice. Electronic Notices and Acknowledgments are appropriate for home health care visits so long as they are provided no later than the first day of service.

The SHCC may provide a mailed Notice that contains a tear-off sheet or other document requesting that the Acknowledgement be mailed back to the SHCC. A file copy of the form sent to the patient is adequate documentation of the provider's good faith effort to obtain the Acknowledgment. Mailed Notices and Acknowledgments are appropriate in those cases where the health care provider makes home visits. Failure of the individual to return the Acknowledgment is not a violation of the Privacy Rule.

The Notice may not be combined with an Authorization Form or any other legal permissions or consents; however, the Acknowledgment may be combined with another form (excluding a HIPAA Authorization Form).

When the initial contact from an individual is made to schedule an appointment, the Notice requirement can be satisfied when the individual arrives at the provider's facility for the appointment, receives the Notice then, and signs the Acknowledgement. The SHCC does not have to witness the individual's signing of the Acknowledgment or verify the individual's signature.

If an Acknowledgment cannot be obtained, the SHCC must document its efforts to obtain the Acknowledgment and the reason why it was not obtained

Each component of the SHCC must post the entire and complete Notice in a clear and prominent location at physical service delivery sites, and make copies available for individuals to take with them.

Each component of the SHCC must retain documentation for six years from the last date of service of the written Acknowledgment or of the SHCC's good faith efforts to obtain Acknowledgment.

If changes are made to the Notice, the SHCC is not required to inform all patients, but must modify and post the Notice accordingly, and make the changed notice copies available to all visiting patients thereafter

The SHCC may also provide the individual a condensed Notice summarizing the individual's HIPAA rights, but that summary does not suffice for the required the full Notice.

#### **B. An Individual's Right to Request Restriction on the Uses and Disclosures of Protected Health Information (PHI)**

The SHCC must provide the individual an opportunity to request restrictions of uses and disclosures of PHI for treatment, payment and operations, and to family and friends and others involved in their care but the SHCC need not agree to these requests. However, if the SHCC agrees to any request for restrictions, it must respect and abide by those restrictions, except when the individual needs emergency treatment. If restricted PHI is disclosed to a provider for emergency treatment, the SHCC must request that the recipient provider not further use or disclose the information.

Unlike the requests for restrictions on disclosure noted above (which the SHCC is not required to follow), if the following criteria are met, the SHCC must honor the request when: (1) the request pertains to a disclosure to a health plan for the purposes of payment or health care operations; and (2) the disclosure pertains to a health care item or service for which the SHCC has been paid out of pocket in full.<sup>1</sup>

All requests for restrictions and responses to such requests must be documented. The organizational scope to which the restriction applies should be clearly indicated.

The SHCC may terminate its agreement to the restriction if the individual agrees to or requests a termination in writing or an oral agreement is documented and signed by the individual or their authorized representative. The SHCC may also inform the individual that it terminates its agreement for a restriction. The termination of the restriction is not retroactive (i.e., terminating an agreement to a restriction applies only *after* the SHCC has informed the individual of the termination).

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<sup>1</sup> Prior to accepting a patient's full payment (and restricting disclosure), the SHCC should ensure that full out-of-pocket payment is permissible under the terms of the patient's health plan participation agreement.

The patient has the right to request restrictions on use or disclosure of PHI to family members, friends, or relatives involved in the individual's care.

### **C. An Individual's Right to Request Confidential Communications**

The SHCC must permit individuals to request communications of PHI from the SHCC and must accommodate reasonable requests to receive communications of PHI by alternative means of communication or to alternative locations. The SHCC may not require the individual to explain the reason for the request.

The SHCC will accommodate reasonable requests if:

- Requests are made in writing to the responsible SHCC individual with specific instructions as to location, address or fax number and include individual's signature and dated;
- The request is for electronic communications via email<sup>2</sup> or fax, and the individual has provided a signed request for electronic communications; and
- The individual provides payment in advance for all costs of mailing to one or more alternative locations (e.g., FedEx, express mail, etc.) when the requests are for mailed communications, other than standard first class mail

The SHCC shall document its response to any written request and maintain such documentation for six years following the last communication to which a request pertains.

### **D. An Individual's Right to Access and Copy the Designated Record Set**

Unless permitted under applicable policies, the SHCC must provide patients with an opportunity to access, inspect, and obtain a copy of the patient's Designated Record Set (DRS).

The Notice of Privacy Practices must provide information that describes how the individual can request access.

Timing: Requests to access, inspect or copy the DRS must be in writing to an individual or office specified for these purposes. The specified individual and office will be responsible as follows:

- To grant access or provide a written denial of access within 5 days to their medical record and within 30 days to the billing records and other elements of the DRS;
- To provide a copy of the patient's medical record within 15 days of the request;
- To grant access or provide written denial of access to the non-medical records portion of the DRS within 60 days if those portions of the designated record set are located or maintained off-site and not readily accessible;
- To advise the individual in writing if the SHCC does not maintain the DRS;

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<sup>2</sup> Per the Office for Civil Rights' FAQ on this issue, the SHCC should limit the amount (minimum necessary) and type of information (e.g., no STD information) disclosed through unencrypted e-mail.

- To provide the individual in writing the reason for a one-time delay of no more than 30 days and a specific date when the SHCC will take action on the request; or
- To provide a written denial of the request as allowed by applicable law or SHCC policies.

Format: If it is reasonable to do so, the SHCC must provide the information in the format requested by the individual, in a readable hard copy or in some other form that can be agreed upon by the SHCC and the individual. The SHCC may not deny access or refuse to provide copies of the information based on a disagreement as to format. If the SHCC maintains the information in an Electronic Medical Record, the SHCC must provide the individual with an electronic copy of that information, if the individual chooses, and any fees are limited to the labor costs.

When an individual requests access to or copies of medical records or PHI in the DRS, the covered entity or individual that receives the request is responsible only for providing the copy of the DRS that is maintained or stored within that entity (e.g., a single medical center or physician office). The patient or individual requesting access is responsible for identifying his/her health care providers and providing separate requests to each of the covered entities for access to or copies of his/her records. However, each covered entity (e.g., one medical center) is responsible for providing the individual with access to the full DRS that is maintained by the covered entity, even if it is located within different departments in the covered entity.

In order to expedite the response to the written request for access, the SHCC should:

- Provide the individual with a Request for Access Form that allows the individual to specify the scope, format, and the option of purchasing a summary of the PHI requested;
- Provide the individual with a list of the fees<sup>3</sup> for summarizing the information, if the individual requests a summary of the DRS;
- Provide the individual with convenient times and location for inspecting or obtaining a copy of the information; and
- Request the location for mailing or otherwise transmitting the information.

When an individual contacts the specified office or individual to request access, the SHCC may provide the Request for Access Form in order for the individual to comply with the SHCC's requirement that all requests be in writing.

The SHCC will charge a reasonable, cost-based fee<sup>4</sup> for copying (including supplies and labor), postage, and the cost of creating a summary, if requested. The fee for copies of

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<sup>3</sup> The individual must agree to the fees so the form language should be clear that by ordering the summary the individual is agreeing to the specified fees.

<sup>4</sup> California Evidence Code Section 1158, which applies to the inspection and copying of medical records pursuant to a patient's authorization (obtained from the patient's attorney), includes a list of "reasonable costs": ten cents (\$0.10) per page for standard reproduction of documents of a size 8½ by 14 inches or less; twenty cents (\$0.20) per page for copying of documents from microfilm.

medical records may not exceed 25 cents per page or 50 cents per page for records that are copied from microfilm, along with reasonable clerical costs. If the request comes from parties other than the individual or the personal representative, the fee limitations do not apply to those individuals or entities (e.g., attorneys). If the records are provided in electronic form, fees are limited to the labor costs.

#### Access to Mental Health Records/Access to Psychotherapy Notes

If a patient requests access to “psychotherapy notes”<sup>5</sup>, then the SHCC may decline to permit inspection or provide copies of the records to the patient if the provider determines there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by the patient. The only requirements are as follows:

- The SHCC must make a written record and include it in the patient's file, noting the date of the request and explaining the SHCC/physician's reason for refusing to permit inspection or provide copies of the records, including a description of the specific adverse or detrimental consequences to the patient that the physician anticipates would occur if inspection or copying were permitted.
- The SHCC must permit inspection or copying of the mental health records by a licensed physician, psychologist, marriage and family therapist, or clinical social worker designated by the patient. These health care providers must not then permit inspection or copying by the patient.
- The SHCC must inform the patient of the physician's refusal to permit the patient to inspect or obtain copies of the requested records, and inform the patient of the right to require the physician to permit inspection by, or provide copies to, the health care professionals listed in the paragraph above. The physician must indicate in the mental health records of the patient whether the request was made to provide a copy of the records to another health care professional.

If a patient requests access to “mental health records”<sup>6</sup> that do not qualify as psychotherapy notes (e.g., diagnosis and functional status summaries), the individual has the right of access to inspect and obtain a copy of the records in a DRS, as long as the information is maintained in the DRS, unless one of the exceptions listed below applies (i.e., the SHCC is not required to provide access to the following information:

- Information compiled in anticipation of a civil, criminal or administrative action or proceeding;

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<sup>5</sup> Psychotherapy notes are notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

<sup>6</sup> **Mental health records** are patient records or discrete portions thereof, specifically relating to the evaluation or treatment of a mental disorder. Mental health records include, but are not limited to, all alcohol and drug abuse records.

- Information not available because of restrictions under the Clinical Laboratory Improvements Amendments of 1988 (CLIA);
- Oral communications;
- The request is to a correctional institution or to the SHCC under the direction of a correctional institution, if release of the information would jeopardize the health, safety, security, custody or rehabilitation of the individual, other inmate or an officer or employee of the correctional institution;
- The PHI has been created or obtained by the SHCC in the course of research that includes treatment and in the research consent process, the individual has agreed he or she will not be allowed access to that PHI so long as the research is in progress;
- Information that is restricted by the Privacy Act; or
- Information that was obtained from a third party other than a health care provider under a promise of confidentiality and the access requested would be reasonably likely to identify the source.

When questions arise regarding the decision to deny access to the DRS, the SHCC workforce member must consult with the appropriate Privacy Official or with the Office of the General Counsel.

If the individual is allowed a review of the denial, the SHCC may deny access to the DRS in the following circumstances, so long as California law does not preempt the Privacy Rule in such circumstance<sup>7</sup>:

- If a licensed health care professional has determined that access could endanger the life or physical safety of the individual or another person;
- If the requested information references another person (except a health care provider) and a licensed health care professional has determined that access is reasonably likely to cause substantial harm to the other person; or
- If the request is made by the individual's personal representative, and a licensed health care professional has determined that access is reasonably likely to cause substantial harm to the individual or another person.

The SHCC may only deny access to that portion of the DRS described in those three circumstances listed above. To the extent possible, the individual must have access to all other information. The SHCC workforce member should consult with the Office of the General Counsel or appropriate Privacy Official if questions arise.

If the SHCC denies access, the SHCC must provide a written denial to the individual that:

- Is written in plain language;
- Contains the basis for denial;

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<sup>7</sup> In some cases, California law requires greater access for behavioral or mental health patients. Individuals responsible for providing access should consult with Counsel.

- Provides for review rights [only if the denial is reviewable];
- Describes how the individual may object to the SHCC; and
- Includes the name or title, telephone number of the covered component's Privacy Official designated to receive complaints.

When access is denied and the individual requests a review of a reviewable denial, the SHCC will designate a licensed health care professional, who did not participate in the denial of access decision, to act as a reviewing official. Within a reasonable time period, the reviewing official must provide the individual with a written decision.

### **E. An Individual's Right to Request Amendments of the DRS**

An individual has a right to request that the SHCC amend the medical record or other information in the DRS. The individual must provide a written request to the SHCC for the amendment and provide the reason to support the requested amendment. The SHCC must inform individuals in advance of these requirements (i.e., that the request for an amendment be in writing and that the individual provide a reason to support a requested amendment). The SHCC must maintain the written request for 6 years.

The SHCC must act on the individual's request for an amendment no later than 60 days after receipt of such a request by either accepting and making the amendment, or denying the request in writing. If the SHCC is unable to act on the amendment within 60 days, it may have a one-time delay of no more than 30 days by providing the individual with a written statement of the reasons for the delay and the date by which action on the request will be completed within the initial 60 days of receipt of the request for an amendment.

If the SHCC accepts the amendment in whole or in part, the SHCC must:

- Identify the affected records and link the amendment to the affected records in the designated record set;
- Inform the individual in a timely manner that the amendment has been made;
- Obtain the individual's identification of and agreement to have the SHCC notify those persons with whom the amendment needs to be shared; and
- Make a reasonable effort to notify those persons who the SHCC knows has the designated record set that has been amended. These persons include those identified by the individual and others, including business associates, who should amend the DRS because reliance on the un-amended DRS could cause harm to the individual.

The SHCC may deny an individual's request for amendment, if it determines that the record:

- Is accurate and complete without amendment;
- Is not part of the designated record set;
- Would not be available for inspection by the individual; or
- Was not created by the SHCC, unless the individual provides a reasonable basis to believe that the originator of the information is no longer available to act on the requested amendment.



If the SHCC denies the request for amendment, the SHCC must provide in writing:

- A denial written in plain language within the time limits described above;
- A basis for the denial;
- The process by which the individual may submit a written statement disagreeing with the denial, including the basis for disagreement and the SHCC's accepted length of the statement of disagreement;
- A statement that if the individual does not submit a written statement of disagreement, the individual may request that the SHCC provide the individual's request for amendment and the written denial with any future disclosure of the PHI subject to the requested amendment; and
- The process by which the individual may make a complaint to the SHCC or the Secretary, including the title, name, contact number of the appropriate Privacy Official.

The SHCC may also prepare a rebuttal statement, but must provide the individual with a written copy of the rebuttal statement.

Even if the SHCC denies the request for an amendment, the SHCC must link or append all relevant, written documents pertaining to the request to the information that is subject to the request, including the written request, denial, statement of disagreement and rebuttal.

If the SHCC denies the request for an amendment and the individual has either submitted a statement of disagreement or a request as defined above, the SHCC must include all material described above or the SHCC's summary of that information, in any future disclosures of the PHI or information that was the subject of the individual's request.

When a subsequent disclosure of the information that was the subject of an amendment request is made by a standard transaction (see definitions) that prevents amending the information in the format of the transaction, the amendment or other information may be separately transmitted.

If the SHCC is informed by another covered entity of an amendment to an individual's PHI, the SHCC must amend the PHI in its DRS.

#### **F. An Individual's Right to Request an Accounting of Disclosures**

The Privacy Rule requires the SHCC to provide a patient with an accounting of the disclosures of the patient's PHI made by the SHCC in the six years prior to the date on which the accounting is requested except for for the following uses and disclosures to or for:

- The individual;
- Treatment, payment and health care operations (note that if the covered component maintains all or part of the PHI in an Electronic Health Record (EHR) then the covered component eventually will be required to provide an accounting of disclosures for

treatment payment or health care operations from the EHR for up to 3 years prior to the date of the request);<sup>8</sup>

- Business Associates who have entered into either a Business Associate Agreement or Amendment as required, so long as the disclosure is for treatment, payment, or healthcare operations;
- Incidental to treatment, payment and operations;
- Authorized by the individual with a signed HIPAA authorization;
- Part of a Limited Data Set disclosed under a Data Use Agreement, or of a De-identified Data Set;
- The Facility Directory;
- Persons involved in the individual's care, including others when the individual is present and to persons who should be notified of the individual's location, general condition or death;
- Disaster relief purposes;
- National security or intelligence purposes to authorized federal officials for the conduct of lawful intelligence, counter-intelligence and other national security activities authorized by the National Security Act;
- Correctional institutions or law enforcement officials for custodial situations so long as the use or disclosure is for: the provision of health care, health and safety of the individual or other inmates or persons responsible for transporting inmates; law enforcement on the premises and for maintaining the good order of the correctional institution;
- Health oversight or law enforcement agency who request temporary suspension of accounting because it may impede their activities (see documentation requirement); and
- Those disclosures that occurred prior to April 14, 2003 or disclosures that were made more than 6 years prior to the date of the request for an accounting.

The individual must provide the SHCC with a written request for an accounting, and the SHCC must maintain the written request for six years.

The SHCC must respond to the written request for accounting within 60 days of receipt of the request. If the SHCC is unable to provide the accounting within 60 days, the SHCC is allowed a one-time delay of 30 days by providing the individual with a written statement of the reasons for the delay and the date when the SHCC will provide the accounting.

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<sup>8</sup> The DHHS Office for Civil Rights has not, as of the writing of this policy, released details on the timing and content of such accountings. It appears that for EHRs implemented prior to January 1, 2009, the treatment, payment and health care operations accounting requirement will not become effective until at least January 1, 2014; for those who adopted EHRs on or after January 1, 2009, the requirement may become effective as early as January 1, 2011.

The SHCC must provide the individual with a written accounting that meets the following requirements:

- The date of the disclosure;
- The name of the entity or person who received the PHI and, if known, the address of such entity or person;
- A brief description of the PHI disclosed;
- A brief statement of the purpose of the disclosure that reasonably informs the individual of the basis for the disclosure or a copy of a written request for disclosure from an official source; and
- If there have been multiple disclosures of the individual's PHI to the same person or entity for a single purpose, the accounting may include the information required for the first disclosure, date of the last disclosure and the number of disclosures made during the accounting period.

If the disclosure of the individual's PHI is pursuant to an IRB or Privacy Board Waiver of Authorization and includes disclosures for a research purpose that involves 50 or more individuals, the Privacy Rule (45 CFR 164.528(b)(4)) provides for an alternate method of accounting for disclosures; however, the SHCC does not recommend or encourage the use of this method. If this method is used, the local Privacy Official must approve.

An individual may request one free accounting of their disclosures in a rolling 12-month window. The SHCC may charge a reasonable cost-based fee for additional requests from the same individual within the 12-month window if the SHCC advises the individual in advance of the fee and provides the individual with an opportunity to withdraw or modify the request in order to reduce or avoid a fee.

The SHCC must document and retain for 6 years:

- The information required to be in the accounting;
- The written accounting that is provided to an individual; and
- The titles of the persons or officer responsible for processing accounting requests.

### **Approval Authority**

Implementation of the Policy: Senior Vice President/Chief Compliance and Audit Officer

Revisions to the Policy: Senior Vice President/Chief Compliance and Audit Officer

Approval of Actions: not applicable

### **Compliance and Reporting**

N/A

### **Implementation Procedures**

UC Organizational Units subject to HIPAA are responsible for implementation.

### **Related Documents**

45 CFR 164.522, 164.524, 164.510, 164.528

### **Frequently Asked Questions**

FAQs may be found on the UC HIPAA website.

### **Revision History**

HIPAA Privacy Rule: University of California Systemwide Standards and Implementation Policies (System Standards), April 2003.