

# A HIPAA Morning

## Gaining Access to Protected Health Information

By John M. Parr, JD, CSA

The release of protected health information (PHI) is critical to building your care-receiving network in the event of physical or mental disability. The Health Care Power of Attorney (HCPOA), which waives the confidential provisions of the Health Insurance Portability and Accountability Act (HIPAA), and a HIPAA waiver and release are the keys to full disclosure of your PHI if you are unable to give verbal consent to its release.

### Request for Protected Medical Information Denied

A woman called my law office shortly after eight o'clock in the morning on a rainy, cloudy day. Her husband had had a serious stroke early in the morning and was unconscious when the medics took him to the hospital. She had dressed quickly and rushed to the hospital where her husband was admitted and moved to the intensive care unit. When she arrived at the hospital, her questions to the hospital staff and team of doctors had not been answered. She needed an HCPOA with a HIPAA waiver or a HIPAA waiver and release to receive her husband's PHI.

In another case, a husband and wife were involved in a serious automobile accident, and the husband was critically injured. When the wife was denied access to his PHI, she came to see me.

Lastly, two adult children needed to relocate their eighty-four-year-old mother from her home to a care facility in order to provide adequate care for her. When the daughters were refused their mother's PHI, they could not complete the admission process.

### The Health Insurance Portability and Accountability Act

HIPAA was enacted by Congress in 1996 and became effective on April 14, 2003. This article will discuss the effect of HIPAA on a caregiver who is requesting a patient's PHI while tending to an individual who is unable to give verbal consent to the release of his PHI and does not have an HCPOA with a HIPAA waiver or a HIPAA waiver and release.

### HIPAA's Three Major Purposes

The three primary purposes of HIPAA are the following:

1. To protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use of that information.
2. To improve the quality of health care in the United States by restoring trust in the health-care system among consumers, health-care professionals, and the multitude of organizations and individuals committed to the delivery of care.
3. To improve the efficiency and effectiveness of health-care delivery by creating a national framework for health privacy protection that builds on efforts by states, health systems, individual organizations, and individuals.

### Important Definitions

Being familiar with the terminology is essential to successfully navigating the system. Definitions for some key terms are as follows:

- **Covered entity** is a health plan, health-care clearinghouse, or health-care provider.

- **Health plan** is an individual plan that provides or pays the cost of medical care.
- **Protected health information (PHI)** is individual, identifiable information—recorded orally or in writing by a covered entity or received by a covered entity—that relates to the past, present, or future physical or mental health of an individual’s health-care service.
- **Health Care Power of Attorney (HCPOA)** is a written and notarized document giving your health-care agent the authority to make medical decisions for you in the event you are physically or mentally unable to make them on your own. It is the key to PHI.
- **HIPAA waiver and release** is a written and notarized document that authorizes PHI disclosure to your personal HIPAA representative at any time.

## Rules of Disclosure

The general rule under HIPAA is that PHI will not be disclosed unless (1) the individual gives verbal consent or (2) the individual has a properly prepared and signed HIPAA waiver agreement or has HIPAA waiver language incorporated into an HCPOA.

## An Exception to the Rule

There are several areas where PHI can be disclosed without compliance with HIPAA. For the purposes of this article, however, there is one relevant exception: A “family member, other relative, or a personal friend of the individual who is involved in the individual’s health care” can gain access to PHI if the covered entity, based upon its “professional judgment” and its “experience with practice” determines that, under the particular circumstances of the case, the patient would not object.

This is a very limited exception because the terms *professional judgment* and *experience with practice* are vague and must be proven on a case-by-case basis. Most covered entities do not have the time, skill, or interest in such a process.

## An Example of HIPAA Waiver Language

When you review a client’s HCPOA to determine if it meets the HIPAA disclosure requirement, the language used should be similar to that of the following paragraph:

*Power of access to and disclosure of protected health information and other personal information. To request, receive, and review any information, including both verbal or written, regarding my personal affairs or my physical or medical health—including medical and hospital records and any “protected health information” as defined by the Health Insurance Portability and Accountability Act (HIPAA)—and to execute any releases or other documents that may be required to obtain such information, and to disclose or deny such information to such persons, organizations, firms, or corporations as my Agent shall deem appropriate. The Agent shall have powers granted by all applicable state and federal law, including HIPAA, and is appointed as my “personal representative” with all the authority granted to such person under HIPAA.*

## Summary

As Certified Senior Advisors, we have the opportunity, on a daily basis, to ask our clients about their estate-planning documents. If it is uncertain whether the HIPAA issue has been addressed, you can refer the client to a CSA attorney who emphasizes estate-document preparation and planning for senior adults. Our clients will be grateful because we will have assisted them in laying the foundation for better peace of mind. 🌿



*John Parr is an attorney in Olympia, Washington, specializing in lifetime independence through estate planning. He is also a certified athletic trainer for older adults. He can be reached at 360-357-3036 or jmp@50pluslaw.com.*