

MoFo

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Healthcare Privacy and Security After September 11

**The HIPAA Colloquium
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Overview

- **Relationship between security and privacy**
- **The Healthcare Example**
 - HIPAA in a world of changed priorities
 - Post 9/11 politics
- **The USA Patriot Act Example**
- **The Homeland Security Example**
- **Observations – Privacy and Security Today**
 - More emphasis on security
 - Implications for privacy?
- **Concluding Thoughts**

I. Relationship between Privacy and Security

- **Privacy** – providing individuals some level of info and control re: uses and disclosures of PII
- **Security** – prevention of unauthorized access, use, and disclosure of PII
- **Privacy vs. Security**
 - Perspective of more information gathering and sharing
- **Privacy and Security**
 - Perspective of good security leading to good privacy and vice versa

II.A. The Healthcare Example – HIPAA in a World of New Priorities

- **Rule issued before Sept. 11. How well does it work today?**
- **Consider biological warfare – e.g. anthrax**
- **Consider need to report suspicious, i.e., terrorist, activities**

Public Health

- **Sec. 512(b) fairly broad**
- **PHI can be disclosed to a public health authority “authorized by law to collect or receive such information”**
- **Permitted purposes include reporting disease, injury, vital events, and conduct of public health surveillance, investigations & interventions**
- **Disclosure also permitted, if authorized by law, to a person exposed to or at risk for a disease**

Public Health -- Conclusions

- **The rule permits what needs to be disclosed, if it is “authorized by law” -- check that**
- **Proper data handling needed by public health agencies:**
 - Privacy -- good practices for patient data
 - Security -- make sure network is protected and data cannot be tampered with

Reporting Suspicious Activity

- **What if a suspected terrorist is in the hospital? Can you report that?**
- **Example: patient exposed to anthrax, and you suspect person involved in making or distributing spores**

When Can You Report?

- **National security exception**
- **Avert serious threats to health or public safety**
- **Law enforcement rules generally**

National Security Exception

- **Section 512(k)(2)**
- **May disclose PHI “to authorized federal officials for the conduct of lawful intelligence, counter-intelligence, and other national security activities”**
- **Those activities as defined in law -- what you expect as “intelligence”**

Averting Serious Threats

- **Section 512(j) permits voluntary disclosure by a covered entity**
- **General emergency circumstances:**
 - “Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public”; and
 - “Is to a person or persons reasonably able to prevent or lessen the threat”
- **Confessions to violent crimes**
 - Can’t disclose where confession is made as part of therapy for propensity to commit violent conduct

Averting Serious Threats

- **Conclusion: the rule allows disclosure to avert serious threats, including by terrorists**

General Law Enforcement

- **Sec. 512(f) generally requires “in response to law enforcement official’s request”**
- **Covered entity can’t volunteer the information, except where required by a reporting law or requested by law enforcement**

General Law Enforcement

- **Court order, grand jury subpoena, administrative subpoena for full file**
- **To locate or identify a suspect, fugitive, material witness, or missing person:**
 - Name, SSN, limited other information

Summary on Reporting Suspicious Activity

- **For anthrax suspect:**
 - Likely national security
 - May have evidence, in good faith, of imminent threat
 - Can respond to law enforcement requests more broadly
- **The rule holds up better than you might have expected to this new challenge**
- **But, still limits on your disclosure to the police**

II.B. Healthcare Politics After 9/11

- **Bush Administration preserved rules**
- **Related electronic data exchange rules were extended; privacy specifically not extended**
- **March NPRM**
 - Nothing changed in response to new anti-terrorism priorities
 - Modest changes to address paperwork burden resulted in significant front page criticism (largely unjustified)

III. USA PATRIOT Act

- **Response to recognized need to update law enforcement authorities in light of Internet and other electronic communications**
- **Compare:**
 - Policy review prior to 9/11
 - Law passage after 9/11

Policy Review Prior to 9/11

- **2000 proposal had number of new law enforcement authorities, but also privacy safeguards**
 - E-mail interceptions protected as phone interceptions
 - Trap & trace orders – judicial review instead of prosecutor certification
- **Bipartisan approval in House Judiciary, though made more privacy protective**

Law Passage After 9/11

- **USA PATRIOT Act**
 - Proposed one week after 9/11
 - Passed 10/25
 - Little opportunity for public debate
- **Much broader range of law enforcement authorities without any privacy protections (except sunset on some provisions)**

IV. Homeland Security

- **Hearings held to look at privacy implications**
- **Results – House-passed bill includes:**
 - Privacy Officer
 - Privacy Impact Assessments
 - No National ID
 - No “TIPS” Program

V. Security and Privacy Today

- **Focus on more information sharing for security reasons**
- **Also recognition of privacy and security working together towards national security goals**
 - Protection against unauthorized access, use and disclosure
 - Audit trails
 - Tiered access – Need-to-know analysis
- **Example: ID theft**

Concluding Thoughts

- **Security upgrades provide opportunities for building greater privacy protection in**
- **Recognize the compatible applications of privacy and security**
 - Privacy as a *source* of good security -- BNA Special Report (07/02)
- **Where security and privacy seem at cross-purposes, one need not “win” over the other**
 - Perform thoughtful analysis regarding accomplishing both objectives