

Empowering Patients Through Information Sharing: Cures Act Compliance Series

March 2022 / [Preparing for Cures Act Regulatory Compliance, Part 2 Q & A](#)

The following questions were submitted by participants before and during the March 16 webinar and March 23 Ask the Experts sessions. The answers provided are for informational purposes only; they do not, and are not intended to, constitute legal advice. Only your attorney can provide assurances regarding the application of this information to your particular circumstances.

For a more detailed discussion of the questions below, you may want to review the session recordings available in the [Cures Act Information Blocking section](#) of the CHCANYS website. This area also includes Q&A documents from other sessions in the Cures Act Educational Series.

The [ONC's Information Blocking FAQs](#) page also provides excellent information.

Q: People have asked not to send all info to the patient portal (i.e., no social history). Is that information blocking?

A: Your organization has until October 6, 2022 to make the data elements represented in the USCDI available on the patient portal if technically able to. This includes the following clinical notes:

- Consultation Notes
- Discharge Summary Notes
- History & Physical
- Imaging Narratives
- Laboratory Report Narratives
- Pathology Report Narratives
- Procedure Notes
- Progress Notes

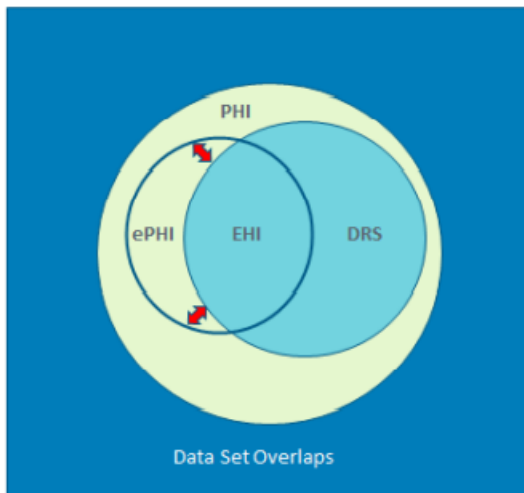
If social history is included in one of these note types, such as the H&P, then it should be included and available electronically to the patient without unnecessary delay.

If the health center is, as a matter of practice, not going to publish this information to the patient portal but has the technical ability to do so: If a patient requests the information electronically and there is any delay in providing it because it was not published to the patient portal but could have been, this could be considered information blocking unless the health center meets one of the exceptions. (Note: We cannot say for certain this WILL or WILL NOT be information blocking because it depends on the facts and the circumstances and will be evaluated on a case-by-case basis by the OIG if a complaint is submitted.)

Beginning October 6, all ePHI that is part of your Designated Record Set (DRS) must be provided to the patient if requested. The best course of action for the health center is to make all EHI available on the patient portal that your health center is technically able to push to the portal and anything else can be provided in an "alternate manner," again if technically able.

There is going to be a bit of a conundrum for the health IT vendors when it comes to determining what goes into the EHI export functionality of their certified health IT, given that what ePHI is considered part of the DRS is fluid and provider dependent. See diagram:

Data Universes under HIPAA and Information Blocking



Definition

- PHI—45 CFR 160.103
- DRS—45 CFR 164.501
- ePHI—electronic subset of PHI
- EHI—intersection of ePHI and DRS

Challenges

- ➡ DRS to some extent is fluid by implementation thus scope of EHI can change by provider, even though it may involve the exact same data set, ePHI, available.

Q: Is there a list of suggested items to make visible in a patient portal?

A: Yes, start with data elements in the United States Core Data for Interoperability Version 1-July 2020 Errata standard (https://www.healthit.gov/isa/sites/isa/files/2020-10/USCDI-Version-1-July-2020-Errata-Final_0.pdf).

Q: If a patient doesn't want something shared or included in the chart, can the provider still put something in the chart if it's in a protected area?

A: Yes, a patient can request the provider not share certain information in the chart, and the provider can elect to honor the request as described in the Privacy sub-exception “Respecting an individual’s request not to share” of the information blocking provision, for information the provider is permitted to share but not required by law to share. The provider and the organization’s Notice of Privacy Practices should inform the patient that the health center may be required by law to share certain information regardless of the patient’s request to keep information private, such as for public health communicable disease reporting and other reasons outlined in the HIPAA Privacy Rule or applicable state laws. Concerning a patient’s request to not include certain information in the chart, any information a patient provides that a provider uses in whole or in part to make decisions about the patient’s care should be included in the chart.

The ability to segment information in the electronic chart will depend on the functionality and features of the EHR your health center uses; and therefore, we advise consulting with your IT department or health IT vendor. Note the HIPAA Privacy Rule defines psychotherapy notes as “notes recorded by a health care provider who is a mental health professional documenting or analyzing the contents of a

conversation during a private counseling session or a group, joint, or family counseling session, and that are separate from the rest of the patient’s medical record.” Psychotherapy notes, if kept electronically, must be placed in a separate protected area. A provider is not permitted to share psychotherapy notes without patient consent.

Q: Is there a crosswalk between HIPAA and the Cures Act?

A: The ONC FAQs provide a crosswalk table for the “Preventing Harm” exception, “Type of Harm condition” which aligns with HIPAA harm standards in 45 CFR 164.524(a)(3) (<https://www.healthit.gov/curesrule/faq/which-patient-access-cases-does-preventing-harm-exception-recognize-substantial-harm>). There is not a crosswalk for the “Privacy” and “Security” exceptions, but these exceptions are consistent with the HIPAA Privacy and Security rules. ONC noted in its Cures Act Rule that the Privacy exception operates in a manner consistent with the framework of the HIPAA Privacy Rule. They designed the Privacy sub-exceptions to ensure individual privacy rights are not diminished as a consequence of the information blocking provision, and to ensure the information blocking provision does not require the use or disclosure of EHI in a way that would not be permitted under the HIPAA Privacy Rule. On the other hand, in cases where the HIPAA privacy rule permits you to share PHI, such as for treatment, payment and health care operations, the information blocking provision requires you to provide access to, exchange or use of EHI unless you are prohibited from doing so under an existing law or are covered by one of the information blocking exceptions.

Q: If we are unable to redact specific sensitive confidential data points from the patient portal, is it appropriate to disable portal access for adolescent patients under the privacy exception?

A: If there is not a way to technically segment the information in an adolescent patient’s portal account that, by law, the adolescent patient can and wants to keep private, then disabling access by the parents or legal guardians to the adolescent’s account is a practice that could be covered by Privacy sub-exception, “Respecting an individual’s request not to share.” However, you would be required to provide any other EHI to the parents or legal guardians that is not kept private by the adolescent patient (or that by law cannot be kept private by the adolescent patient) in another manner requested in accordance with the Content and Manner exception and the HIPAA Privacy Rule. If it is not feasible to provide the EHI electronically in the manner requested, then the Infeasibility exception may apply. However, if you qualify for the Infeasibility exception, this does not relieve your organization from the obligation to fulfill the request in the form and format requested, such as printed copies or PDF copies on a flash drive or CD with the private information redacted, in accordance with the HIPAA Privacy Rule.

Q: If a patient requests that a staff member be blocked from accessing their records (family member, friend, ex, etc.), do we need to mind the timeframe per Cures Act in “acting” on this request?

A: The ONC Cures Act Rule does not specify the timeframe a provider must meet for restricting disclosure of a patient’s EHI to a particular person after receiving the request for the restriction. The HIPAA Privacy Rule may specify a timeframe, but you will have to ask your Privacy Officer. The ONC Cures Act Rule only specifies that “Actors” must document a patient’s request to restrict access in a

reasonable timeframe. As a general practice, if a provider agrees to honor a patient's request to restrict a person's access to his or her EHI, then the organization should implement this restriction within the technology as soon as practical, or immediately if possible. Many health care organizations have policies in place that restrict staff that are family members, friends or ex-spouses of a patient from accessing a patient's records unless caring for the patient, and the organization audits access to patients' electronic records. Such a policy on EHR access typically includes enforcement action against a staff member that violates the organization's policy and HIPAA, up to and including termination. We suggest consulting with your Privacy Officer.

Q: Can you clarify what information parents are entitled to with minors? When can minors choose what is shared with their parents?

A: This is not a topic the information blocking regulation addresses, other than to say an actor must fulfill a legally permissible request for access, exchange or use of EHI, unless the actor qualifies for an exception to sharing. The Rule advises actors to be familiar with local, state and federal laws that preclude sharing certain health information or have preconditions that must be met prior to sharing the health information. We suggest you consult with your attorney on what information parents are entitled to for their minor children and when minors can choose what is shared with their parents under New York State law and any applicable federal laws.

Q: Our organization is building up our policy and procedure manual to incorporate this information. What are the areas that need to be included in a Cures Act/Information Blocking compliant policy?

A: We are providing the health centers a Cures Act Information Blocking Compliance Readiness Checklist along with supplemental information that should inform you on what areas you need to cover in your policies and procedures. You can also reference the notes in the PowerPoint decks provided for the January, February and March educational webinars, as well as the [Legal Health Information Exchange compliance library](#) (contact Amy Frieman at Afrieman@chcanys.org to request an account).

Q: So [42 CFR] Part 2 records are also considered psych notes and optionally can be provided to the patient (per request) or placed on the patient portal (whether requested or not)?

A: 42CFR Part 2 records are substance use disorder patient records which are maintained in connection with the performance of any Part 2 program. The records are not the same as psychotherapy notes as defined under the HIPAA Privacy Rule.

42 CFR does not prohibit a Part 2 program from giving a patient access to his or her records, including the opportunity to inspect and copy any records that the Part 2 program maintains about the patient; therefore, these records could be placed on the patient portal. Just like psychotherapy notes, the patient must consent to sharing the Part 2 records and would need to provide consent for anyone with proxy access to the patient's portal account. If the patient does not want to provide consent, then you should provide the patient with copies of the record in another form and format if the patient requests a copy.

Q: When will Medent put out its information on FHIR and app connectivity for patients?

A: We do not have information for specific health IT vendors' release status or schedule for the Cures Act updates, including the FHIR APIs for Patient and Population Health Services. The ONC's Interim Final Rule requires the developers of certified health IT to complete and make these updates available to their health care customers no later than December 31, 2022. You will need to consult with Medent concerning its status and schedule. The Cures Act Information Blocking Compliance Readiness Checklist we are providing includes several questions you should review with your health IT vendors.

Q: Are regional health information exchanges able to share information directly with patients (technically and legally)?

A: The Qualified Regional Health Information Network entities (QEs) in New York participating in the New York Statewide Health Information Network (SHIN-NY) are required to facilitate the access of patients and their Personal Representatives to patients' Protected Health Information maintained by the QE through one of the mechanisms set forth in Section 5.2 of the Privacy and Security Policies and Procedures for Qualified Entities and their Participants in New York State under 10 N.Y.C.R.R. § 300.3(b)(1). We assume this means they are legally and technically able to do this now, and are required to do so, because they meet the definition of an "Actor" under the Information Blocking regulation and must comply. Here is a link to the latest version, V3.9, of the policies and procedures published in January 2022—see Section 5: https://www.health.ny.gov/technology/regulations/shin-ny/docs/privacy_and_security_policies.pdf.

The Cures Act Information Blocking Compliance Readiness Checklist includes several HIN/HIE-related questions; we suggest meeting with your regional HIN representative to discuss the technical capabilities they have to fulfill EHI requests.

Q: This may be related to your examples: If a parent is not on the registration form (divorce, etc.) are we blocking if we ask for court papers establishing custody/parental permissions?

A: Please consult with your attorney on what the New York law requires when releasing EHI to a non-custodial parent. The law will determine whether it is permissible to request copies of court papers to establish whether a non-custodial parent has the court's approval to be involved in the child's health care decisions and have access to the child's records. If the court has ordered that only the custodial parent can access the child's health records and make decisions about the child's health care, not providing the other parent access to the child's records would not meet the definition of information blocking because you are not legally permitted to provide access.

Q: If the data in the SHIN-NY is restricted due to potential harm on the practice side, but still provided to the local QE HIE because of the provider-to-provider access of information, I'm curious how we will share that the information should not be shared with the patient due to potential harm.

A: First, we suggest being familiar with the specific requirements of the Preventing Harm exception and how and when it applies. A licensed provider making a harm determination must reasonably believe that interfering with access, exchange or use of EHI by the patient, the patient's legal representative (or both if the information is about another person referenced in the patient's information), or other legally permissible access, exchange or use will substantially reduce the risk of harm to the patient or another person. The SHIN-NY/regional HINs must comply with the requirements of the Information Blocking regulation as well and will need to know if certain data they hold should not be shared due to a harm determination by a licensed provider, and who may not have access, exchange or use of the specific data (the patient, patient's legal representative or both if the data is about another person referenced in the patient's record). They will also need to be aware of any data integrity issues or patient matching/misidentification issues that arise and could cause harm. The health center should discuss any such harm determinations they have made with its regional HIN, so the HIN can appropriately restrict the access, exchange or use of the specified data and comply with the information blocking regulation.

Q: What type of psych notes do we need to segregate and not have automatically flow to the portal?

A: All psychotherapy notes should be segregated and maintained in a separate restricted location if entered and stored electronically. They should not automatically flow to the patient portal unless the mental health professional that wrote the notes decides to share the notes with the patient. The mental health professional is not required to share the notes, but may do so, and the patient does not have individual access rights to the psychotherapy notes under the HIPAA Privacy Rule. If the mental health professional decides to share his or her psychotherapy notes with his or her patients via the patient portal, this should be his or her individual decision, and the professional should ensure the patient has consented to share these notes with anyone else having proxy access to the patient's portal account, such as the patient's Personal Representative, before releasing them to the portal. If others have proxy access and the patient does not consent to sharing the psychotherapy notes, then the mental health professional should provide these notes in another form and manner to the patient and not release them to the patient's portal account.

We remind you that psychotherapy notes are narrowly defined to a specific type of note and do not include other behavioral health information, such as information about medication management, session start and stop times, test results, summaries of the patient's diagnosis or symptoms or information about the patient's progress that should flow to the patient portal.

Q: One of the struggles I have is granting access to governmental subcontractors to have free and unfettered access to our EHI for, say, Pop Health data mining. Any thoughts?

A: This is a common concern for health care organizations that use contractors but can also be a concern with employees having too much access as well. Whether an employee or a contractor, you should provide the minimum access necessary to accomplish the work. In the case of population health data mining or building health data warehouses, the contractor typically needs broad access to the data. The

government subcontractors are your Business Associates and have to sign and comply with your Business Associate Agreement as well as contract terms and conditions. The individuals they assign to the work should have background checks and complete HIPAA privacy and security training.

Comment provided in Chat:

- Mistine Keis: Apple iHealth does that with Follow My Health with the authentication. However, to get the API feed setup with Apple iHealth was extremely difficult and took months long of activities and signatures.
 - Denise Webb: We had a similar experience with Apple at a health system where I was the CIO. Apple is very protective of their intellectual property and wanted any employee at the health system involved in setting up the connection to sign a Non-Disclosure and Confidentiality Agreement. The technical aspects were not challenging—it was all the legal back-and-forth between attorneys that was time consuming and onerous.