

***"WHAT ARE REASONABLE COST-BASED COPY CHARGES  
WHEN AN INDIVIDUAL REQUESTS ACCESS TO THEIR  
PROTECTED HEALTH INFORMATION UNDER THE HIPAA  
PRIVACY RULE?"***

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***June, 2003***

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***"WHAT ARE REASONABLE COST-BASED COPY CHARGES  
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**Introduction**

Among the many outcomes hoped to be achieved by the authors of the Health Insurance Portability and Accountability Act (HIPAA) privacy rule was to provide greater access for individuals to their own medical records, and to protect such information from unauthorized access by others. These two seemingly contradictory goals – greater access while ensuring privacy – have raised a number of issues associated with the implementation of the HIPAA privacy rules for which compliance by covered entities was mandated as of April 14, 2003.

It is the former of these goals – greater access for the individual (or their personal representative) and the associated fees for such access – that is the subject of this paper. More specifically, this paper discusses the meaning of HIPAA's reasonable cost-based copy charge rules that are imposed on covered entities when providing individuals with copies of their own medical records.

The relevant final regulations are as follows:

**Sec. 164.524 (c) Access of individuals to protected health information.**

(4) Fees. If the individual requests a copy of the protected health information or agrees to a summary or explanation of such information, the covered entity may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:

- (i) Copying, including the cost of supplies for and labor of copying, the protected health information requested by the individual;
- (ii) Postage, when the individual has requested the copy, or the summary or explanation, be mailed; and

(iii) Preparing an explanation or summary of the protected health information, if agreed to by the individual as required by paragraph (c)(2)(ii) of this section.

Although many states have regulated or mandated a limit on the charges for copying and ROI services, the degree of variation among states is substantial – reaching as high as \$1.18<sup>1</sup> per page plus retrieval and handling fees. In addition, there are those states without any regulation of this topic. Such variation has led to much uncertainty and debate about what constitutes a “reasonable” cost under HIPAA.

In the US Office of Management and Budget’s circular A-122, “Cost principles for non-profit organizations,” “reasonable costs” were defined this way:

**Reasonable costs.** A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the costs.<sup>2</sup>

Other examples of copying costs may help put the question of determining reasonable costs in perspective. Our local public libraries and US Post Offices provide self service copy machines to the public at presumably reasonable prices. Fees for these services range from \$0.15 to \$0.25 a copy for the use of the machine and paper alone. At the time of this writing the Library of Congress charged \$0.50 per page, including labor, to reproduce pages from their vast collection of books and periodicals (minimum \$12 per order) providing a service that is significantly less complicated than that required for the release of protected health information.

Such examples, however, have not diminished the debate over fees for copying medical records. For years, ROI costs have been the subject of class action suits against health care providers, and/or their business associates engaged to manage and administer the release of information

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<sup>1</sup> State of Texas

<sup>2</sup> US Office of Management and Budget, Circular A-122 Revised, “Cost Principles for Non Profit Organizations,” Appendix A-General Principles

(ROI) services. "Even those who are active in the health industry are surprised to learn how controversial the issue of copy charges is because most don't realize the incredible expense associated with responding to medical record requests. This issue is even more difficult when you consider that many hospitals and small providers are already financially strapped," notes health care attorney, Stephen W. Bernstein, co-chair of McDermott, Will & Emery's HIPAA practice. For example, hospitals and ROI companies in Ohio, Wisconsin, and Massachusetts, to name but a few recent examples, have experienced these class action suits resulting, in a few instances, in claims being paid to the plaintiffs as well as settlements that include parameters on prospective copy charges. While the results of these claims have been mixed, they exact a measurable cost burden on both the health care providers and their business associates.

Many non-individual requestors, e.g., attorneys, have inquired about benefiting from the lower fees for individuals, in some cases referencing the individual as their client from whom they have the required ROI authorizations. However, in response to comments made to the proposed HIPAA privacy rule, the U.S. Department of Health and Human Services (the "Department") clarified its view of the copy-charge component of the privacy regulations on this question:

“The Department clarifies that the Rule, at § 164.524 (c)(4), limits only the fees that may be charged to individuals, or to their personal representatives in accordance with § 164.502 (g), when the request is to obtain a copy of protected health information about the individual in accordance with the right to access. The fee limitations in § 164.524 (c)(4) do not apply to any other permissible disclosures by the covered entity, including disclosures that are permitted for treatment, payment or health care operations, disclosures that are based on an individual’s authorization that is valid under § 164.508 or other disclosures permitted without the individual’s authorization as specified in § 164.512.

The fee limitation in § 164.524 (c)(4) is intended to assure that the right of access provided by the Privacy Rule is available to all individuals, and not just to those who can afford to do so. Based on the clarification

provided, the Department does not anticipate that this provision will cause any significant disruption in the way that covered entities do business today.”<sup>3</sup>

The limitation imposed by the HIPAA privacy rule on the fees charged for individual requestors means that only part of the actual copying costs incurred by the covered entity can be passed on to individuals who exercise their individual right of access to their own medical records. This acknowledgement by the Department that they are knowingly prohibiting covered entities from recovering the full cost of retrieving, copying, handling, and shipping responses to medical record requests when an individual requests their records has helped fuel further controversy concerning the categories that are chargeable, the amount that may be permissibly charged, as well as to whom these charge limits apply. This limitation on legitimate cost recovery presents a significant financial quandary for health care organizations already stretched thin in resources.

### **Release of Information (ROI) Process**

Even before the HIPAA privacy rule’s compliance date, the process of verifying release authorizations, retrieving, copying, maintaining equipment, re-filing records and then billing for the release of requested information was a time consuming process. There are countless variations involved with any single information request ranging from finding records associated with non-sequential dates, identifying records that may need to be completed before they can be released, locating record components stored in different locations, or other information

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<sup>3</sup> The Department has clarified this point further in subsequent communications. The Department has defined a “personal representative” in Section 164.502(g) of the regulations to include only those requestors who possess the power to make health care decisions on behalf of the individual, and those requestors who are the executor of the individual’s estate. Additionally, in conversations with Susan McAndrew, Senior Policy Analyst with the Department’s Office for Civil Rights (OCR), she has indicated that attorneys are *not* considered personal representatives. She has further indicated that the limitations on copy charges applicable to individuals’ access requests were not intended as an “alternative method for discovery [in litigation].” The implication of these comments from OCR is that even if records are requested by an individual but are sent directly to the individual’s attorney at the patient’s request, this request is not one associated with access, but instead is a request associated with actual or potential litigation, and therefore, the HIPAA fee limitation is inapplicable in these situations. Such disclosures also require the patient’s HIPAA compliant authorization.

that is integral to the medical record but stored on different media than paper, such as radiology films.

The Association of Health Information Outsourcing Services (AHIOS) concluded that there are at least 37 steps involved with a single request for Release of Information. (See Attachment A.) A condensed and more recent schematic of the process was presented in March 2003 by the Wisconsin Health Information Management Association (WHIMA). (See Attachment B.) The 12 basic steps for any ROI process identified by WHIMA include:

1. Opening Mail
2. Processing Requests
3. Logging in Requests
4. Preparation of Requisition
5. Retrieving the Record
6. *Screening the Record for Authorized components*
7. *Copying the Record*<sup>4</sup>
8. Logging out request
9. Invoice Preparation
10. Mailing the copies
11. Re-filing the Record
12. Miscellaneous Duties

Although HIPAA has not changed the nature of this cycle of activity, the additional burdens on covered entities imposed by other aspects of the privacy rules, and in the future, the security rules, complicate certain steps in the ROI process and require more skilled personnel and supervision. For example, the physical security requirements may result in certain records being placed in locked cabinets, in secure areas and otherwise being limited to certain individuals as a result of HIPAA's minimum necessary standard, such that their retrieval and return may be more time consuming than before. While the regulations suggest that

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<sup>4</sup> Steps 6 and 7 are recognized as the applicable activities for which HIPAA permits reasonable cost-based charges for individual requestors.

appropriate discretion may be used in the practical interpretation of such security matters, individual organizations may reach different conclusions concerning these matters.

Other elements likely to complicate and increase the cost of the ROI process include the additional:

- Training of staff not only to ensure compliance with the privacy rule, but also to assess the applicability of state laws that may or may not be in conflict with the privacy rule;
- “Turn-around” time requirements for record release; and
- Regular audits of ROI activities to ensure compliance with these new regulations, particularly given the penalties for non-compliance. Penalties are \$100 per violation of a standard, up to a maximum of \$25,000 for violations of the same standard.

### **Determining a Reasonable, Cost-Based fee**

§164.524 (c)(4) states that only the costs of copying, including the cost of supplies for and labor of copying, and postage, when the individual has requested the copy, or the summary or explanation, be mailed, may be charged. A fee may also be charged for a summary of the information sought by the individual requestor.

In the August 14, 2002, commentary to the amended privacy rule, the Department stated with regard to §164.524 (c)(4) that:

Fees for copying and postage provided under state law, but not for other costs excluded under this rule, are presumed reasonable. If such per page costs include the cost of retrieving or handling the information, such costs are not acceptable under this rule.

Based on the Department’s guidance, therefore, the per page copy fee adopted by those States which have such statutes, regulations or customary practice will be considered a reasonable cost, unless the State has clearly articulated that such per page fee includes cost categories disallowed by HIPAA, i.e., costs associated with the retrieval and

handling of medical records. Many States with statutes that impose copy fee limitations include a base fee for retrieval and handling, plus a per page copy fee. Thus it is not difficult to differentiate between the “fees for copying provided under state law” and fees for retrieval and handling in those instances where a state has a statute or regulation on point. Furthermore, the guidance set forth by the Department states that in such circumstances, these fees are presumed reasonable for purposes of §164.524 (c)(4).

As noted, the Department’s guidance directs covered entities to use the State’s per page fee as a proxy for their own reasonable costs. However, a few voices familiar with the ROI industry have posited that covered entities that know their own costs for these activities would be expected to use their own costs if such costs are less than their State’s applicable per page fee.

While such interpretations may be understandable in light of the uncertainty surrounding the privacy regulations, they are in conflict with the express guidance set forth within the Department’s comments. A State’s per page fee amount articulated by statute or regulation is “presumed reasonable” under the privacy rule and charging such fee would be precisely in accord with the language set forth by the Department in the comments to §164.524(c)(4). In an effort to provide greater access to records for the individual, neither the Department nor States that have regulated copy charges will allow a covered entity’s higher cost-based fee to override the State’s established fee.

Unfortunately, without time and motion studies and other significant effort and expense, most organizations will be unable to determine with any degree of precision their own actual costs. Thus, the most salient question that must be answered is how best, in short order, should the health industry determine what a reasonable cost-based fee should be under HIPAA, in the absence of State statutory or regulatory guidance and the practical inability for most organizations to identify with any degree of accuracy their true internal costs. This question leads to the

conclusion that in the absence of a covered entity's own true internal costs, existing surveys and benchmarking data can and should be used to provide at least a range of reasonableness.

Therefore, in our view, it will be critical for both covered entities and ROI service organizations to review these studies and then evaluate where, within the wide ranging results of all of these studies, your organization fits. This approach should offer your organization with at least some sense of the range of reasonableness for copy cost charges (until greater definition, if any, is provided from an authoritative source). From a risk management perspective, and as equally important under HIPAA, acting "reasonably" appears to be the key, and at least for now, would appear to satisfy the standards and enforcement posture adopted by the Office for Civil Rights.

## **Discussion**

In an effort to provide individuals with easier access to copies of their medical information, the new HIPAA regulations have raised additional questions about covering the cost of providing this service.

With as many as 37 steps involved in producing copies from predominantly paper records, it is clear that the ROI process is a labor intensive service facing more demands because of HIPAA. This article has touched on only the few steps of the ROI process for which fees may be required for individual requestors. The other steps in the process, particularly the steps involving the retrieval and handling of health information, are time consuming and very costly. In addition, most of the labor cost involved in the process occurs within the retrieval and handling steps whether the record is a couple pages or a couple hundred pages.

Covered entities may not charge individuals for the retrieval and handling costs, but such costs exist nevertheless. As with other health care services that are under-priced, the covered entities will, by necessity, be required to increase fees from other paying, or previously

non-paying, customers to cover the anticipated losses from these ROI requests by individuals. Covered entities that outsource these ROI services may anticipate this issue being raised by their ROI business associates who also must consider their own costs and budgetary considerations.

How much others in need of medical records will be charged to subsidize the below cost charge to HIPAA beneficiaries when they request their own records will be the subject of continuing debate. A survey sponsored by the Ohio Health Information Management Association<sup>5</sup> found that 40 percent of all responses to information requests were to requestors who do not pay actual cost, and this number will likely increase in the post-HIPAA environment. The resulting impact on the others who pay for their records, as well as contribute to the shortfall due to non-payors is substantial.

The best approach will be to develop better information about the true cost of providing this service post-HIPAA implementation. In that regard, more time and motion studies may be necessary to evaluate the appropriateness of the fees proposed in this paper, as well as those fees currently regulated by various States. Such information will be valuable to legislatures as they consider updating their regulated fee structure, as well as avoid the mistaken belief by many that medical record copy charges should not cost more than the corner convenience store or all-night copy shop.

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<sup>5</sup> "An Analysis of the Release of Information Function and the Cost of Copying Hospital Medical Records in the State of Ohio," a project sponsored by the Ohio Health Information Management Association, January 1994

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Dr. C.J. McNair, CMA is a noted expert in modern cost management issues and their impact on business. She was a practicing respiratory therapist before beginning her academic career and has written about health care issues. Her most recent work emphasizes capacity cost management and the analysis and measurement of customer value creation. Recent publications include Value Quest (CAM-I, 2000), an integrative look at modern cost management tools, "Cost and the Creation of Customer Value" (Handbook of Cost Management, 2000) details the findings of recent research in this area, and Total Capacity Management (with R. Vangermeersch; St. Lucie Press, 1998).

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Mr. Bernstein is a partner in the Health Law Department of McDermott, Will & Emery's Boston office and co-chairs the Firm's HIPAA Practice Group and the Firm's Health Ventures Group each on a nationwide basis. He specializes in e-health, health related matters impacted by the Internet, and HIPAA, as well as mergers, acquisitions, affiliations and joint ventures in the hospital and physician areas. He has advised all types of health care providers on their HIPAA compliance activities and has provided extensive operational and strategic advice to biotech, pharmaceutical, and device manufacturers concerning their strategies for addressing HIPAA's impact on their businesses. Mr. Bernstein is a national lecturer on this topic and has written extensively on the impact of HIPAA on hospitals, physicians, biotech and pharmaceutical companies and related clinical research matters. Mr. Bernstein has been featured on *National Public Radio* and was recently quoted in the *Wall Street Journal* and *Washington Post* regarding HIPAA's impact on health care and the health industry. McDermott, Will & Emery's 85+ member Health Law Department is one of the largest in the United States and has been ranked #1 two years in a row by *The American Lawyer*.