Overdose Fatality Review Teams: Indian Health Service

How can an OFR team obtain medical records, including behavioral health records, from the Indian Health Service?

Response

Overdose fatality review (OFR) teams can obtain medical records, including behavioral health records, from the Indian Health Service (IHS) in the same fashion as teams obtain such records from non-IHS medical providers, with one possible complicating factor.

IHS medical records containing protected health information (PHI) are safeguarded by the Health Insurance Portability and Accountability Act (HIPAA) for 50 years after an individual dies. Therefore, to obtain the medical records of a decedent that contain PHI from the IHS, an OFR team must rely on one of the following options:

- State statute, state regulation, or local ordinance that specifically allows an OFR team to receive the information and applies to the IHS. (The second part of this is the complicating factor, discussed more thoroughly below.)
- State statute, state regulation, or local ordinance that allows a public health authority to access medical records for certain purposes (such as health surveillance or death investigations)
- Authorization form signed by the decedent's authorized personal representative

Behavioral health records, meanwhile, fall into one of two categories:

- Behavioral health records that do not contain 42 Code of Federal Regulations (CFR) Part 2 records, such as records about treatment for depression or anxiety
- Behavioral health records that do include 42 CFR Part 2 records

Behavioral health records that DO NOT contain Part 2 records are treated the same as other medical records. The disclosure of behavioral health records at the IHS that DO contain Part 2 records is covered by 42 United States Code (U.S.C.) § 290dd-2 and 42 CFR Part 2. Under these laws and regulations, OFR teams have only two options to attempt to obtain these records. These options are as follows:

- Relying on a state law that requires the collection of death or other vital statistics or permitting inquiry into the cause of death that allows Part 2 records to be shared with an OFR team and applies to the IHS
- Obtaining consent from the decedent's executor or personal representative or, where no such person is appointed, the decedent's next of kin

Additional Information

The IHS is a federal agency within the U.S. Department of Health and Human Services that is responsible for providing federal health services to American Indians and Alaska Natives.[1] The Indian Health Manual (Manual),[2] a reference for IHS employees that provides specific policies and procedures, makes clear that the IHS is subject to the requirements of both the HIPAA Privacy Rule and 42 CFR Part 2. The Manual notes that "it is IHS policy to . . . fully comply with the requirements of the HIPAA General Administrative Requirements, the HIPAA Privacy Rule, and the Privacy Act."[3] In addition, the Manual provides that "requests by a personal representative for access to records

governed by the Confidentiality of Alcohol and Drug Abuse Patient Records, 42 CFR Part 2, shall only be released in compliance with those regulations."[4]

HIPAA provides that patient authorization to use or disclose PHI is not required if such use or disclosure is required by law.[5] It appears clear that this provision applies to the IHS generally, as the "Revised Notice of Privacy Practices" template in the Manual for IHS personnel to give to patients sets out that "the IHS may use or disclose health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."[6] This tracks exactly with HIPAA provisions, as does the definition of "required by law" contained in the Manual.

A complication arises because American Indians and Alaska Natives are not always subject to state law. According to the U.S. Bureau of Indian Affairs, as U.S. citizens, American Indians and Alaska Natives are subject to federal, state, and local laws in most instances. On federal Indian reservations, however, only federal and tribal laws apply to members of the tribe, unless Congress provides otherwise.[7] Moreover, within the Manual's section on reporting to state prescription drug monitoring programs, the document notes that "states often require providers to report to the State's Prescription Drug Monitoring Program under State law. The IHS is not generally subject to State law . . . ."[8] Thus, it seems possible (or perhaps likely) that a state law requiring HIPAA-covered entities generally, or the IHS specifically, to provide medical records to an OFR team might not be enforceable against the IHS. It may be necessary for an attorney with expertise in the interplay between state law and the IHS to weigh in on the effectiveness of a state law provision as to IHS records. A similar issue arises with respect to the enforceability of 42 CFR Part 2's much narrower provision allowing disclosure of Part 2 records based on a state law that requires the collection of death or other vital statistics or permitting inquiry into the cause of death.

The option for an OFR team to rely on state statute, state regulation, or local ordinance that allows a public health authority to access medical records for certain purposes may be the better option versus using a state's OFR-specific law. Indeed, in the Manual's patient notice template, the IHS informs patients that it may disclose patient health information to "public health or other appropriate government authorities (Federal, State, local or Tribal) as follows: . . . to government authorities that are authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, or conducting public health surveillance, investigations, and interventions."[9] Perhaps this apparent concession is because the state/local law in question applies to the public health authority, rather than purportedly applying to the IHS.[10]

Finally, there do not appear to be any differences in the way in which patient authorization (under HIPAA) or consent (under 42 CFR Part 2) is obtained for deceased patients, between those treated at the IHS versus those treated by non-IHS medical providers.

Definitions

Behavioral health records: Medical records that address mental health and/or substance use disorder (SUD).

HIPAA-covered entity [45 CFR § 160.103]: A health plan, health care clearinghouse, or health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

Individually identifiable health information [45 CFR § 160.103]: Health information that:

- Identifies the individual or provides a reasonable basis to identify the individual.
- Relates to the individual's past, present, or future physical health or condition; the provision of health care to the individual; or the individual's past, present, or future payment for health care.

Part 2 program [42 CFR §§ 2.11 and 2.12(b)]: An individual or entity that holds itself out as providing, and actually provides, assessment, treatment, or referral to treatment for SUD and receives federal assistance (as defined by regulation). Most SUD treatment providers qualify as Part 2 programs.

Part 2 records: Behavioral health records that include information about SUD treatment provided by a Part 2 program, in particular, records that identify a person as having, having had, or having been referred for treatment of an SUD.

PHI [45 CFR § 160.103]: Subject to a few exceptions, PHI is individually identifiable health information maintained or transmitted in any form or media. In the context of HIPAA-protected information, PHI does not include information about a person deceased for more than 50 years.

Endnotes

1. https://www.ihs.gov/aboutihs/overview/.
2. https://www.ihs.gov/ihm/.
3. Indian Health Manual, § 2-7.1(D), https://www.ihs.gov/ihm/pc/part-2/chapter-7-health-insurance-portability-and-accountability-act-privacy-rule-and-the-privacy-act/#2-7.1D.
4. Indian Health Manual, § 2-7.25(D)(4), https://www.ihs.gov/ihm/pc/part-2/chapter-7-health-insurance-portability-and-accountability-act-privacy-rule-and-the-privacy-act/#2-7.25D.
5. 45 CFR § 164.512(a) (2023).
6. Indian Health Manual, § 2-7.18, https://www.ihs.gov/ihm/pc/part-2/chapter-7-health-insurance-portability-and-accountability-act-privacy-rule-and-the-privacy-act/#2-7.18.
7. https://www.bia.gov/frequently-asked-questions ("Do laws that apply to non-Indians also apply to Indians?").
8. Indian Health Manual, § 3-32.1(C), https://www.ihs.gov/ihm/pc/part-3/p3c32/#3-32.1C.
9. Indian Health Manual, § 2-7.18, https://www.ihs.gov/ihm/pc/part-2/chapter-7-health-insurance-portability-and-accountability-act-privacy-rule-and-the-privacy-act/#2-7.18.
10. In the typical OFR-specific law (that is, a state statute, state regulation, or local ordinance that specifically allows an OFR team to receive the information), the law in question directs the covered entity to provide information to an OFR upon request. This type of state law demand directed at the IHS may not work for the reasons mentioned above.