



# Unique Identifiers: Legal Issues

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John Petrilu, J.D., LL.M.  
Professor  
Florida Mental Health Institute  
[petrilu@fmhi.usf.edu](mailto:petrilu@fmhi.usf.edu)



# Applicable Laws

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- HIPAA
  - Privacy standards
  - Security of electronic data
- Federal substance and alcohol confidentiality regulations
- State laws



# Some Basic Concepts: Protected Health Information

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- Any oral or recorded information relating to the past, present, or future physical or mental health of an individual; the provision of health care to the individual; or payment for health care
- Includes the traditional medical record, personal notes, and billing information
- The security regulation applies only to protected health information in electronic form



# Individually identifiable

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- a subset of “health information,” including demographic information, **(1)** that is created or received by a health care provider, health plan, employer, or health care clearinghouse; **(2)** that relates to the physical or mental health or condition of an individual; the provision of health care to an individual; or the payment for the provision of health care to an individual; and **(3)** that identifies the individual, or might reasonably be used to identify the individual.



# 42 CFR 2.11

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- Records: Any information whether recorded or not relating to a patient received or acquired by the program
- Any information identifying a patient as alcohol or drug abuser, obtained by program for diagnosis, referral, or treatment



# HIPAA Covered Entities

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- Health plans (group health plan, Medicare, Indian Health Service plan...)
- Health care clearinghouses
- Health care providers who transmit health information in electronic form
- *Courts are not covered entities*
- *Special rules for corrections*
- *JCAHO is not a covered entity (but is a business associate)*



# HIPAA Consent Requirements

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- Not required for disclosures or uses that are necessary to carry out treatment, payment, or health care operations
- Health care operations include quality improvement, case management, care coordination, credentialing, peer review, compliance, underwriting, business planning and development, business management and general administrative activities
- 42 CFR permits intra-program exchange and disclosures to qualified service organizations
- 42 CFR requires written consent for most disclosures



# Non-Individually Identifiable Information: HIPAA

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- A qualified person uses generally accepted statistical and scientific principles and methods for rendering information not individually identifiable and determines risk of identification is very small that information can be used to identify an individual *OR*



# *Or Remove the Following:*

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- Names
- Geographic subdivisions smaller than a state
- All elements of dates (except year) for dates directly related to the individual
- Telephone and fax numbers
- Email addresses
- Social security numbers
- Medical record numbers
- Health plan beneficiary numbers
- Account numbers
- Certificate/license numbers
- Vehicle identifiers/serial numbers
- Device identifiers/serial numbers
- URLs
- IP address numbers
- Biometric identifiers (finger/voice prints)
- Full face images
- Any other unique identifying number, characteristic, or code



# Non-Identifiable Under 42 CFR

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- Any information that does *not* identify an individual as an alcohol or drug abuser, either directly or by reference to other publicly available information



# HIPAA: Limited Data Sets

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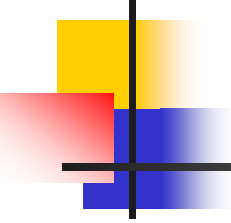
- May include
  - admission, discharge, and service dates;
  - dates of birth and, if applicable, death;
  - age (including age 90 or over); and
  - five-digit zip code or any other geographic subdivision, such as state, county, city, precinct and their equivalent geocodes (except street address).



# Requires Data Use Agreement

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- establishes the permitted uses and disclosures of such information by the recipient, consistent with the purposes of research, public health, or health care operations;
- limits who can use or receive the data; and
- requires the recipient to agree not to re-identify the data or contact the individuals.



# “Not to be used for identification”: Social Security

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- Privacy Act 1974: It shall be unlawful for any Federal, State or local government agency to deny any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose his Social Security number.



# Social Security as an Identifier

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- "It should be noted that the 1993 WEDI [Workgroup for Electronic Data Interchange] Report, ... indicated 71% of the payers responding to the survey based the individual identifier on the Member's Social Security Number. However 89% requested the insured's Social Security Number for application of insurance. Clearly the Social Security Number is the current de facto identifier..."
  - *David Miller testimony, National Committee on Vital Health Statistics hearing, 1998*



# A Recent Headline

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- Glitch puts Social Security numbers online
- Suffolk homeowners put at risk after county Web site exposes their Social Security data in public documents
- Mortgages and deeds that contain Social Security numbers for an estimated 7,000 to 8,000 individuals have been "scanned" and posted on the county clerk's Web site.

*Newsday, 2/15/06*



# Recent State Legislation

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- Arizona prohibits disclosure of SSN to the public and printing of SSN on identity cards
- California has similar legislation
- Colorado requires insurance companies to remove SSN from identity card
- Georgia requires cleansing of records with SSNs
- Missouri regulates business requests for internet transmission of SSN
- New Jersey prohibits use on class rolls
- Utah restricts use of SSN by health insurers
- Texas prohibits display of SSN on cards



# State Access to PHI

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- *Health oversight agency*: an agency or authority of the United States, a State, a territory, a political subdivision of a State or territory...or a person or entity operating under a grant of authority from or contract with such public agency....that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant.  
(164.501)



# Health Oversight Agency (cont)

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- “Overseeing the health care system,” which is included in the definition of health oversight, encompasses activities such as: oversight of health care plans; oversight of health benefit plans; oversight of health care providers; oversight of health care and health care delivery; ... ***and a health oversight agency's analysis of trends in health care costs, quality, health care delivery, access to care, and health insurance coverage for health oversight purposes.***
  - HHS commenting on the functions of a health oversight agency



# Health Oversight Agency (cont)

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- A covered entity may disclose PHI to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:
  - The health care system;
  - Government benefit programs for which health information is relevant to beneficiary eligibility;
  - Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or
  - Entities subject to civil rights laws for which health information is necessary for determining compliance.
- (164.512d)



# PHI May Also Be Disclosed

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- To the extent the disclosure is required by State or other law. The disclosure must comply with and be limited to what the law requires. See 45 CFR 164.512(a).



# Federal Substance Use Law

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- Permits disclosure to
  - Governmental agency that provides financial assistance or has regulatory authority, *or*
  - Private entity that provides financial assistance, is a third party payer, or a peer review organization
    - 42 CFR Part 2.53



# Some Additional Tools

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- Business Associate Agreements
- Patient Safety Organizations



# Business Associate Agreements

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- Can be used for disclosure in which a party provides a “function or activity involving the use or disclosure of individually identifiable health information, including claims processing or administration, utilization review, quality assurance, billing, benefit management, and repricing... (164.501)
- Other functions as well, for example, provision of legal advice
- 42 CFR permits qualified service organization agreements



# Patient Safety Organization

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- Permits DHHS Secretary to certify these organizations
- Designed to permit privileged exchange of information within the PSO
- Relevant information includes
  - Efforts to improve patient safety and quality
  - Collection and analysis of patient safety work product
  - Development and dissemination of patient safety information, e.g. protocols, best practices, etc
  - Use of such information to encourage “a culture of safety and of providing feedback and assistance to effectively minimize patient risk”
    - *Public Law 109-41, Section 921-925.*



# Summary

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- Legal authority exists to require submission of information
- Social Security numbers increasingly restricted
- Creation of a unique identifier raises privacy concerns
- As much a practical issue as a legal issue