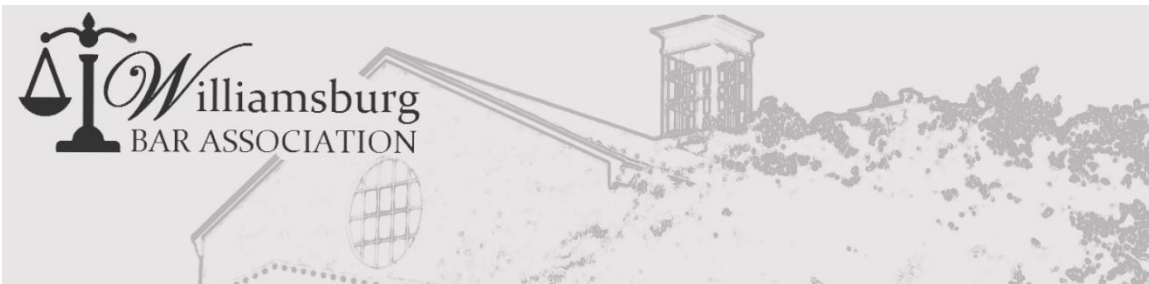




Using the HITECH Act to Reduce the Cost of Obtaining Medical Records

Williamsburg/James City County Circuit Court
Jury Assembly Room
5201 Monticello Ave
Williamsburg, VA 23188

November 13, 2019



www.williamsburgbar.com

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ABOUT THE SPEAKER



Brian J. Gillette, Gillette Law Group, PLLC / Williamsburg

Brian J. Gillette is a disability attorney in Williamsburg, Virginia. A 1992 graduate of William & Mary Law School, he and his firm help people make smart decisions to improve their lives. He focuses his practice on helping individuals with disability claims (Social Security Disability, Supplemental Security Income, and Virginia Retirement System (VRS) Disability Retirement benefits) throughout the Commonwealth of Virginia.

Brian is a Member of the Board of Governors of the Virginia Trial Lawyers Association and Chair of the Virginia Trial Lawyers Association, Social Security Law Section.

He is a sustaining member of the National Organization of Social Security Claimants Representatives and a member of the National Association of Disability Representatives.

He currently volunteers his time as Chairman of the Board of Directors of the Center for Child and Family Services, Inc., based in Hampton, Virginia, and also serves on the Board of the Bon Secours Mary Immaculate Foundation which raises funds to allow Bon Secours Mary Immaculate Hospital in Newport News, Virginia to offer services to the community that might not otherwise be possible.

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At the Gillette Law Group, PLLC, we wake up every day with a sense of WHY we come to work. We come to work to help people make smart decisions to improve their lives. Our goal is to find clients who want to improve their lives and to work together with them so we can all succeed. We are looking for people to stand shoulder-to-shoulder with us in pursuit of a better life. We are not interested in judging people, but in lifting them up and encouraging them forward.

We do this by offering competent and effective legal representation to individuals seeking disability benefits from the Social Security Administration and the Virginia Retirement System. In addition, we have created systems to effectively anticipate the needs of our clients and offer timely and effective solutions to the problems they commonly face. We respect the human dignity of all clients and offer them hope and encouragement while guiding them on the steps to take to help improve their chances of successfully prosecuting their disability claims. We make interaction with our firm simple and convenient and promote our clients' understanding of the process through frequent and effective communication. We also provide referrals to community resources whenever possible. In every interaction with our firm, we want our clients to feel respected and cared for by experienced professionals who truly enjoy helping them to improve their lives.

COURSE AGENDA

12:00 PM to 1:00 PM

Speaker: Brian J. Gillette

Program: **50 Minutes**

Introduction: Discuss why the HITECH Act and its implementing regulations should be of interest to legal professionals and their clients. 5 minutes.

Understand: In-depth review of the HITECH Act and its implementing regulations as it relates to the legal rights of patients/clients to access and control their protected health information (PHI). 25 Minutes.

Utilize: Discuss how to educate your clients and implement practices that encourage clients to exercise their legal right to direct their protected health information to a designated third party of their choice. 10 Minutes.

Enforce: Discuss how to effectively communicate with Covered Entities (e.g., healthcare providers) and Business Associates (e.g., medical record production companies) to ensure that patient-initiated requests are properly processed, correctly billed, and timely completed. 10 minutes.

Question and Answer Time: **10 minutes**

INTRODUCTION



Attention, legal professionals . . .

- Do you, or your firm, spend thousands of dollars every year obtaining copies of your clients' medical records?
- Do your clients ever get upset when you ask them to reimburse you for the costs you have advanced on their behalf?
- Would you like to receive medical records in electronic format while reducing your cost of obtaining and storing those records by 70%, or more?
- Would you, or your firm, like to stop writing off thousands of dollars of unpaid costs?
- Would you like to be able to educate your clients regarding their legal rights to access and control their protected health information (PHI)?
- Would you like to know how to implement practices that encourage clients to exercise their legal right to direct their protected health information to a designated third party of their choice (e.g., you)?
- Would you like to know how to effectively communicate with Covered Entities (e.g., healthcare providers) and Business Associates (e.g., medical record production companies) to ensure that client/patient-initiated requests are properly processed, correctly billed, and timely completed?
- Would you like to know what you can do to assist your clients with the enforcement of their legal rights to access and control their protected health information (PHI)?
- If so, this will be the most important presentation you attend all year!

What Lead Me to the HITECH Act?

- For the last twelve years, my practice has been focused on helping individuals with disability claims (Social Security Disability, SSI, and Virginia Retirement System (VRS) Disability Retirement.)
- Obtaining complete copies of a client's medical records is key to proving their claims. The cost of obtaining medical records is increasing. (On July 1, 2017, [Virginia Code § 8.01-413](#) was amended to increase the search and handling fee from \$10 to \$20.)
- The Social Security Administration maintains claim files in electronic format and offers claimants and their representatives the option of submitting medical records in electronic format which can help to expedite a decision on the claim.
- Sometimes clients get upset when we ask them to reimburse us for the costs we have advanced on their behalf or fail to reimburse you altogether.
- Clients sometimes fail to reimburse the firm for advanced client costs, particularly if their claim is unsuccessful.
- The HITECH Act and its implementing regulations allows patients/clients to access and control their protected health information (PHI) and direct that electronic copies of their protected health information be sent to a designated third party of their choice (e.g., their attorney) at significantly less expense than requesting paper copies.

UNDERSTAND

What is the HITECH Act?

- The Health Information Technology for Economic and Clinical Health (HITECH) Act of 2009 provides the U.S. Department of Health and Human Services (HHS) with the authority to establish programs to improve health care quality, safety, and efficiency through the promotion of health IT, including **electronic health records** and private and **secure electronic health information exchange**.
- The HITECH Act established the Medicare and Medicaid Electronic Health Record (EHR) Incentive Programs to provide incentive payments for eligible professionals, hospitals, and critical access hospitals as they adopt, implement, upgrade, or demonstrate meaningful use of certified electronic health records (EHR) technology.
- On January 25, 2013, modifications to the HIPAA Privacy, Security, and Enforcement Rules were made to implement many of the privacy, security, and enforcement provisions of the HITECH Act.

Enacting Legislation

42 USC § 17935(e)¹:

(e) ACCESS TO CERTAIN INFORMATION IN ELECTRONIC FORMAT In applying section 164.524 of title 45, Code of Federal Regulations, in the case that a covered entity² uses or maintains an electronic health record³ with respect to protected health information⁴ of an individual—

(1) the individual shall have a right to obtain from such covered entity a copy of such information in an electronic format and, if the individual chooses, to direct the covered entity to transmit such copy directly to an entity or person designated by the individual, provided that any such choice is clear, conspicuous, and specific;

(2) if the individual makes a request to a business associate⁵ for access to, or a copy of, protected health information about the individual, or if an individual makes a request to a business associate to grant such access to, or transmit such copy directly to, a person or entity designated by the individual, a business associate may provide the individual with such access or copy, which may be in an electronic

¹ (Pub. L. 111–5, div. A, title XIII, § 13405, Feb. 17, 2009, 123 Stat. 264; Pub. L. 114–255, div. A, title IV, § 4006(b), Dec. 13, 2016.)

² 45 C.F.R. § 160.103

³ 42 U.S.C. § 17921(5)

⁴ 45 C.F.R. § 160.103

⁵ Id.

form, or grant or transmit such access or copy to such person or entity designated by the individual; and

(3) notwithstanding paragraph (c)(4) of such section, any fee that the covered entity may impose for providing such individual with a copy of such information (or a summary or explanation of such information) if such copy (or summary or explanation) is in an electronic form shall not be greater than the entity's labor costs in responding to the request for the copy (or summary or explanation).

HIPAA Privacy, Security, and Enforcement Rules

On January 25, 2013, modifications to the HIPAA Privacy, Security, and Enforcement Rules were made to implement many of the privacy, security, and enforcement provisions of the HITECH Act.⁶

Key Provisions of the HITECH Act and HIPAA Privacy Rule

- A goal of the HITECH Act and the HIPAA Privacy Rule is to expand patients' access to their own medical records.
- **The HITECH Act only applies when a covered entity (e.g., a healthcare provider) uses or maintains an electronic health record** with respect to protected health information (PHI) of an individual.⁷
- The Rule **excepts** from the right of access **psychotherapy notes** and information compiled in reasonable anticipation of, or for use in, a civil, criminal, or administrative action or proceeding.⁸
- The Privacy Rule provides that **an individual** or an individual's personal representative (generally, a person with authority under State law to make health care decisions for the individual) **has the right to access the individual's protected health information** (PHI), maintained by a covered entity in a designated record set, for as long as the PHI is maintained in the designated record set (e.g., medical or billing records). 45 C.F.R. §§ 164.502(g) and 164.524 (a)(i). **A covered entity must act on the request for access no later than 30 days after receipt of such a request and, in certain circumstances, no later than 60 days after the receipt of such a request.**⁹

⁶ See Department of Health and Human Services; Modifications to the HIPAA Privacy, Security, Enforcement, and Breach of Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Discrimination Act, 78 Fed. Reg. 5633 (Jan. 25, 2013) (codified at 45 C.F.R. Pts. 160 and 164), <https://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf> (Last accessed October 21, 2019).

⁷ 42 U.S.C. § 17935(e)

⁸ See 45 C.F.R. § 164.524(a)(i) and (ii) and 164.501.

⁹ 45 C.F.R. § 164.524 (b)(2)

- **The individual has a right to obtain their PHI from a covered entity in an electronic format** and, if the individual chooses, **to direct the covered entity to transmit such copy directly to an entity or person designated by the individual (e.g., their attorney)**, provided that any such choice is clear, conspicuous, and specific.¹⁰
- Regardless of how and to what extent a business associate (e.g., CIOX, Providerflow, RSS Medical, etc.) supports or fulfills a covered entity's obligation to provide access to an individual, a request for access still must be acted upon within 30 days (or 60 days if an extension is applicable) of receipt of the request by either the covered entity, or by a business associate if the request was made directly to the business associate because the covered entity instructed individuals through its notice of privacy practices (or otherwise) to submit access requests directly to the business associate. Further, all of the access requirements that apply with respect to PHI held by the covered entity (e.g., the individual may be charged only a reasonable, cost-based fee that complies with 45 C.F.R. § 164.524(c)(4)) apply with respect to PHI held by the business associate.
- The Privacy Rule permits the covered entity to impose **reasonable, cost-based fees** to provide individuals (or their personal representatives) with access to their PHI. The fee may include only the cost of copying (including supplies and labor) and postage, if the patient requests that the copy be mailed. If the patient has agreed to receive a summary or explanation of his or her protected health information, the covered entity may also charge a fee for preparation of the summary or explanation. The fee may not include costs associated with searching for and retrieving the requested information. See 45 C.F.R. § 164.524(c)(4). (More on fees later.)
- HIPAA pre-empts state law unless state law is more stringent (grants greater rights of access for patients).¹¹
- A covered entity may require individuals to request access in writing, provided the covered entity informs individuals of this requirement.¹² In addition, a covered entity may require individuals to use the entity's own supplied form, provided use of the form does not create a barrier to or unreasonably delay the individual from obtaining access to his PHI.¹³
- A doctor may not require an individual: (1) Who wants a copy of her medical record mailed to her home address to physically come to the doctor's office to request

¹⁰ 42 U.S.C. § 17935(e), See also, Department of Health and Human Services; Modifications to the HIPAA Privacy, Security, Enforcement, and Breach of Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Discrimination Act, 78 Fed. Reg. 5634-5635 (Jan. 25, 2013) (codified at 45 C.F.R. Pt. 164), <https://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf> (Last accessed October 21, 2019), See also, 45 C.F.R. 164.524(c)(3)(ii).

¹¹ 45 C.F.R. §§ 160.202, 160.203.

¹² See 45 C.F.R. § 164.524(b).

¹³ U.S. Department of Health and Human Services. "Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524." <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html> (Last accessed on October 22, 2019.)

access and provide proof of identity in person; (2) To use a web portal for requesting access, as not all individuals will have ready access to the portal; or (3) To mail an access request, as this would unreasonably delay the covered entity's receipt of the request and thus, the individual's access.¹⁴

An Individual's Right to Direct the PHI to Another Person

An individual has a right to direct the covered entity to transmit the PHI about the individual directly to another person or entity designated by the individual. (e.g., their attorney.) The individual's request to direct the PHI to another person must be in writing, signed by the individual, and clearly identify the designated person and where to send the PHI. A covered entity may accept an electronic copy of a signed request (e.g., PDF), as well as an electronically executed request (e.g., via a secure web portal) that includes an electronic signature. The same requirements for providing the PHI to the individual, such as the fee limitations and requirements for providing the PHI in the form and format and manner requested by the individual, apply when an individual directs that the PHI be sent to another person. See 45 C.F.R. § 164.524(c)(3)(ii).

Form and Format and Manner of Access

If the individual requests electronic access to PHI that the covered entity maintains electronically, the covered entity must provide the individual with access to the information in the requested electronic form and format, if it is readily producible in that form and format, or if not, in an agreed upon alternative, readable electronic format. See 45 C.F.R. § 164.524(c)(2)(ii). The terms "form and format" refer to how the PHI is conveyed to the individual (e.g., on paper or electronically, type of file, etc.) Thus:

Requests for Electronic Copies—

Where an individual requests an electronic copy of PHI that a covered entity maintains only on paper, the covered entity is required to provide the individual with an electronic copy if it is readily producible electronically (e.g., the covered entity can readily scan the paper record into an electronic format) and in the electronic format requested if readily producible in that format, or if not, in a readable alternative electronic format or hard copy format as.¹⁵

Where an individual requests an electronic copy of PHI that a covered entity maintains electronically, the covered entity must provide the individual with access to the information in the requested electronic form and format, if it is readily producible in that form and format. When the PHI is not readily producible in the electronic form and format requested, then the covered entity must provide access to an agreed upon alternative readable electronic format. See 45 C.F.R. § 164.524(c)(2)(ii). This

¹⁴ Id.

¹⁵ Id.

means that, while a covered entity is not required to purchase new software or equipment in order to accommodate every possible individual request, the covered entity must have the capability to provide some form of electronic copy of PHI maintained electronically. It is only if the individual declines to accept any of the electronic formats readily producible by the covered entity that the covered entity may satisfy the request for access by providing the individual with a readable hard copy of the PHI.¹⁶

Mail and e-mail are generally considered readily producible by all covered entities.¹⁷

If an individual requests an electronic copy of the individual's PHI that the covered entity maintains only on paper, a covered entity is not required to purchase a scanner to create electronic copies, if a covered entity can readily produce an electronic copy of the PHI for the individual by scanning the records, it must do so.¹⁸

Timeliness in Providing Access

In providing access to the individual, a covered entity must provide access to the PHI requested no later than 30 calendar days from receiving the individual's request. See 45 C.F.R. § 164.524(b)(2).

If a covered entity is unable to provide access within 30 calendar days -- for example, where the information is archived offsite and not readily accessible -- the covered entity may extend the time by no more than an additional 30 days. To extend the time, the covered entity must, within the initial 30 days, inform the individual in writing of the reasons for the delay and the date by which the covered entity will provide access. Only one extension is permitted per access request.¹⁹

A covered entity may not withhold or deny an individual access to her PHI on the grounds that the individual has not paid the bill for health care services the covered entity provided to the individual.²⁰

¹⁶ Id.

¹⁷ U.S. Department of Health and Human Services, "If an individual requests an electronic copy of the individual's PHI that the covered entity maintains only on paper, is the covered entity required to scan the paper records to create an electronic copy of the PHI for the individual?" <https://www.hhs.gov/hipaa/for-professionals/faq/2055/if-an-individual-requests-an-electronic-copy/index.html> (Last accessed on October 21, 2019.)

¹⁸ Id., See also, 45 C.F.R. § 164.524(c)(2)(ii)

¹⁹ 45 C.F.R. § 164.524(b)(2)

²⁰ U.S. Department of Health and Human Services. "Is a health care provider permitted to deny an individual's request for access because the individual has not paid for health care services provided to the individual?" <https://www.hhs.gov/hipaa/for-professionals/faq/2065/is-a-health-care-provider-permitted-to-deny/index.html> (Last accessed on October 21, 2019.)

Fees for Copies

The Privacy Rule permits a covered entity to impose a **reasonable, cost-based fee** if the individual requests a copy of the PHI (or agrees to receive a summary or explanation of the information). The fee may include **only** the cost of:

- (1) labor for copying the PHI requested by the individual, whether in paper or electronic form;
- (2) supplies for creating the paper copy or electronic media (e.g., CD or USB drive) if the individual requests that the electronic copy be provided on portable media;
- (3) postage, when the individual requests that the copy, or the summary or explanation, be mailed; and
- (4) preparation of an explanation or summary of the PHI, if agreed to by the individual. See 45 C.F.R. § 164.524(c)(4).

The fee may not include costs associated with verification; documentation; searching for and retrieving the PHI; maintaining systems; recouping capital for data access, storage, or infrastructure; or other costs not listed above even if such costs are authorized by State law.²¹

Fees for Labor

A reasonable, cost-based fee may include labor for copying the PHI requested by the individual, whether in paper or electronic form, but **may only include labor for creating and delivering the electronic or paper copy in the form and format requested or agreed upon by the individual, once the PHI that is responsive to the request has been identified, retrieved or collected, compiled and/or collated, and is ready to be copied.** Labor for copying does not include costs associated with reviewing the request for access; or searching for and retrieving the PHI, which includes locating and reviewing the PHI in the medical or other record, and segregating or otherwise preparing the PHI that is responsive to the request for copying. See 45 C.F.R. § 164.524(c)(4)(i).²²

²¹ U.S. Department of Health and Human Services. "Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524." <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html> (Last accessed on October 21, 2019.) See also, Final Rule making by DHHS regarding HITECH Act modifications to the HIPAA regulations, *78 Fed. Reg. 5636* (January 25, 2013) and U.S. Department of Health and Human Services. "Are costs authorized by State fee schedules permitted to be charged to individuals when providing them with a copy of their PHI under the HIPAA Privacy Rule?" <https://www.hhs.gov/hipaa/for-professionals/faq/2031/are-costs-authorized-by-state-fee-schedules-permitted/index.html> (Last accessed on October 21, 2019.)

²² See also, U.S. Department of Health and Human Services. "May a covered entity charge individuals a fee for providing the individuals with a copy of their PHI?"

For example, labor for copying may include labor associated with the following, as necessary to copy and deliver the PHI in the form and format and manner requested or agreed to by the individual:

Photocopying paper PHI.

Scanning paper PHI into an electronic format.

Converting electronic information in one format to the format requested by or agreed to by the individual.

Transferring (e.g., uploading, downloading, attaching, burning) electronic PHI from a covered entity's system to a web-based portal (where the PHI is not already maintained in or accessible through the portal), portable media, e-mail, app, personal health record, or other manner of delivery of the PHI.

Creating and executing a mailing or e-mail with the responsive PHI.

Administrative and other costs associated with outsourcing the function of responding to individual requests for access cannot be the basis for any fees charged to individuals for providing that access.²³

Fees for Supplies

A reasonable, cost-based fee may include the cost of electronic media (e.g., CD or USB drive) if the individual requests that the electronic copy be provided on portable media. However, a covered entity may not require an individual to purchase portable media; individuals have the right to have their PHI e-mailed or mailed to them upon request.²⁴

Fees for Labor to Prepare an Explanation or Summary

A reasonable, cost-based fee may include the cost of labor to prepare an explanation or summary of the PHI, if the individual **in advance** both chooses to receive an explanation or summary and **agrees to the fee** that may be charged.²⁵

<https://www.hhs.gov/hipaa/for-professionals/faq/2024/may-a-covered-entity-charge-individuals-a-fee/index.html> (Last accessed on October 21, 2019.)

²³ Id.

²⁴ Id. See also, Final Rule making by DHHS regarding HITECH Act modifications to the HIPAA regulations, 78 Fed. Reg. 5636 (January 25, 2013) and 45 C.F.R. § 164.524(c)(4)(ii)

²⁵ 45 C.F.R. §§ 164.524(c)(2)(iii) and 164.524(c)(4)(iv)

Fees for Postage

A reasonable, cost-based fee may include postage, when the individual requests that the copy, or the summary or explanation, be mailed.²⁶

How Can Covered Entities Calculate the Limited Fee That Can Be Charged to Individuals to Provide Them with a Copy of Their PHI? ²⁷

1. Actual Costs

A covered entity may calculate actual labor costs to fulfill the request, as long as the labor included is only for copying (and/or creating a summary or explanation if the individual chooses to receive a summary or explanation) and the labor rates used are reasonable for such activity. The covered entity may add to the actual labor costs any applicable supply (e.g., paper, or CD or USB drive) or postage costs. Covered entities that charge individuals actual costs based on each individual access request still must be prepared to inform individuals in advance of the approximate fee that may be charged for providing the individual with a copy of her PHI. An example of an actual labor cost calculation would be to time how long it takes for the workforce member of the covered entity (or business associate) to make and send the copy in the form and format and manner requested or agreed to by the individual and multiply the time by the reasonable hourly rate of the person copying and sending the PHI. What is reasonable for purposes of an hourly rate will vary depending on the level of skill needed to create and transmit the copy in the manner requested or agreed to by the individual (e.g., administrative level labor to make and mail a paper copy versus more technical skill needed to convert and transmit the PHI in a particular electronic format).

2. Average Costs

In lieu of calculating labor costs individually for each request, a covered entity can develop a schedule of costs for labor based on average labor costs to fulfill standard types of access requests, as long as the types of labor costs included are the ones which the Privacy Rule permits to be included in a fee (e.g., labor costs for copying but not for search and retrieval) and are reasonable. Covered entities may add to that amount any applicable supply (e.g., paper, or CD or USB drive) or postage costs.

²⁶ 45 C.F.R. § 164.524(c)(4)(iii)

²⁷ U.S. Department of Health and Human Services. "How can covered entities calculate the limited fee that can be charged to individuals to provide them with a copy of their PHI?" <https://www.hhs.gov/hipaa/for-professionals/faq/2029/how-can-covered-entities-calculate-the-limited-fee/index.html> (Last accessed on October 21, 2019.)

This standard rate can be calculated and charged as a per page fee only in cases where the PHI requested is maintained in paper form and the individual requests a paper copy of the PHI or asks that the paper PHI be scanned into an electronic format. Per page fees are not permitted for paper or electronic copies of PHI maintained electronically. HHS Office of Civil Rights (OCR) is aware that per page fees in many cases have become a proxy for fees charged for all types of access requests – whether electronic or paper – and that many states with authorized fee structures have not updated their laws to account for efficiencies that exist when generating copies of information maintained electronically. This practice has resulted in fees being charged to individuals for copies of their PHI that do not appropriately reflect the permitted labor costs associated with generating copies from information maintained in electronic form. Therefore, OCR does not consider per page fees for copies of PHI maintained electronically to be reasonable for purposes of 45 C.F.R. § 164.524(c)(4).

3. Flat Fee for Electronic Copies of PHI Maintained Electronically

A covered entity may charge individuals a flat fee for all requests for electronic copies of PHI maintained electronically, provided the fee does not exceed \$6.50, inclusive of all labor, supplies, and any applicable postage. Charging a flat fee not to exceed \$6.50 is therefore an option for entities that do not want to go through the process of calculating actual or average allowable costs for requests for electronic copies of PHI maintained electronically.

Advance Notice of Approximate Fee²⁸

When an individual requests access to her PHI, and the covered entity intends to charge the individual the limited fee permitted by the HIPAA Privacy Rule for providing the individual with a copy of her PHI, the covered entity must inform the individual in advance of the approximate fee that may be charged for the copy. An individual has a right to receive a copy of her PHI in the form and format and manner requested, if readily producible in that way, or as otherwise agreed to by the individual. Since the fee a covered entity is permitted to charge will vary based on the form and format and manner of access requested or agreed to by the individual, covered entities must, at the time such details are being negotiated or arranged, inform the individual of any associated fees that may impact the form and format and manner in which the individual requests or agrees to receive a copy of her PHI.

The failure to provide advance notice is an unreasonable measure that may serve as a barrier to the right of access. Thus, this requirement is necessary for the right of access to operate consistent with the HIPAA Privacy Rule.

²⁸ U.S. Department of Health and Human Services. “Must a covered entity inform individuals in advance of any fees that may be charged when the individuals request a copy of their PHI?” <https://www.hhs.gov/hipaa/for-professionals/faq/2028/must-a-covered-entity-inform-individuals-in-advance/index.html> (Last accessed on October 21, 2019.)

Further, covered entities should post on their web sites or otherwise make available to individuals an approximate fee schedule for regular types of access requests. In addition, if an individual requests, covered entities should provide the individual with a breakdown of the charges for labor, supplies, and postage, if applicable, that make up the total fee charged.

Effect of State Laws²⁹

State laws that provide individuals with greater rights of access to their PHI than the Privacy Rule, or that are not contrary to the Privacy Rule, are not preempted by HIPAA and thus still apply. For example, a covered entity subject to a State law that requires that access to PHI be provided to an individual in a shorter time frame than that required in the Privacy Rule must provide such access within the shorter time frame because the State law is not contrary to the Privacy Rule.

Unless an exemption exists in the HIPAA Rules, State laws that are contrary to the Privacy Rule access provisions – such as those that prohibit certain laboratories from disclosing test reports directly to an individual – are preempted by HIPAA. See 45 C.F.R. §§ 160.202 and 160.203. Thus, these State laws do not apply when an individual exercises her HIPAA right of access. See 45 CFR Part 160, Subpart B.

UTILIZE

The Request

An individual has a right to direct their medical provider to transmit an electronic copy of their medical records directly to another person (e.g., their attorney) or entity designated by the individual. The individual's request must:

1. Be in writing;
2. Signed by the individual; and
3. Clearly identify the designated person (e.g., their attorney) and where to send the electronic copy of their medical records.

See 45 C.F.R. § 164.524(c)(3)(ii).

Two sample request letters are included in the Appendix:

- Letter #1 – Sample Patient/Client's Request for Access Letter with Citations
- Letter #2 – Sample Patient/Client's Request for Access Letter (Simple)

²⁹ U.S. Department of Health and Human Services Website, : <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html> (Last accessed on October 21, 2019.)

PRO TIPS³⁰:

- 1. The request is not from the attorney, but from the patient/client.**
- 2. The request should be dated to enforce timely action by the covered entity.**
- 3. The request may be forwarded to the covered entity by a third party (e.g., their attorney) on behalf and at the direction of the individual.**
- 4. The request is not on the attorney's letterhead.**
- 5. The request does not include a HIPAA authorization.**
- 6. The request might be best received if mailed by the patient/client in a plain white #10 envelope with the patient/client's return address.**

Steps for Requesting Records Using the HITECH Act

1. Prepare the request for access letter for the client/patient to send to their medical provider.
2. The request letter should be faxed, mailed, or hand-delivered to the medical provider.
3. The attorney should follow up with the medical provider to ensure that the medical provider received the patient's request.
4. The attorney should address any healthcare provider or record production company's objections.
5. The parties should agree on the form and format of production.
6. The attorney should set a reminder to follow up in 30 days if records are not received.

ENFORCE

Common Violations of the HITECH Act and Its Implementing Regulations

- Maintaining an electronic health record with respect to protected health information of their patients, but claiming they have no way of sending them to you electronically.

Where an individual requests an electronic copy of protected health information (PHI) that a covered entity maintains electronically, the covered entity must provide the individual with access to the information in the requested electronic form and format, if it is readily producible in that form

³⁰ See, U.S. Department of Health and Human Services. "When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual's PHI to a third party?" <https://www.hhs.gov/hipaa/for-professionals/faq/2033/when-do-the-hipaa-privacy-rule-limitations-on-fees/index.html> (Last accessed on October 21, 2019.)

and format. When the PHI is not readily producible in the electronic form and format requested, then the covered entity must provide access to an agreed upon alternative readable electronic format. This means that, while a covered entity is not required to purchase new software or equipment in order to accommodate every possible individual request, the covered entity must have the capability to provide some form of electronic copy of PHI maintained electronically; it is only if the individual declines to accept any of the electronic formats readily producible by the covered entity that the covered entity may satisfy the request for access by providing the individual with a readable hard copy of the PHI.³¹

- Stating they need a 3rd party HIPAA Authorization.

Department of Health and Human Services guidance on compliance states, “We note that a covered entity (or a business associate) may not circumvent the access fee limitations by treating individual requests for access like other HIPAA disclosures – such as by having an individual fill out a HIPAA authorization when the individual requests access to her PHI (including to direct a copy of the PHI to a third party). As explained elsewhere in the guidance, a HIPAA authorization is not required for individuals to request access to their PHI, including to direct a copy to a third party – and because a HIPAA authorization requests more information than is necessary or that may not be relevant for individuals to exercise their access rights, requiring execution of a HIPAA authorization may create impermissible obstacles to the exercise of this right.”³²

- Overcharging (e.g. Charging, search and retrieval fees, access fees, inventory fees, per page fees, or higher fees if an attorney receives the records.)

The Privacy Rule permits a covered entity to impose a reasonable, cost-based fee if the individual requests a copy of the PHI. The fee may include only the cost of: (1) labor for copying the PHI requested by the individual, whether in paper or electronic form; (2) supplies for creating the paper copy or electronic media (e.g., CD or USB drive) if the individual requests that the electronic copy be provided on portable media; (3) postage, when the individual requests that the copy, or the summary or explanation, be mailed;

³¹ See, Department of Health and Human Services; Modifications to the HIPAA Privacy, Security, Enforcement, and Breach of Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Discrimination Act, 78 Fed. Reg. 5633 (Jan. 25, 2013) (codified at 45 C.F.R. Pts. 160 and 164), <https://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf> (Last accessed on October 22, 2019).

³² U.S. Department of Health and Human Services. “When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual’s PHI to a third party?” <https://www.hhs.gov/hipaa/for-professionals/faq/2033/when-do-the-hipaa-privacy-rule-limitations-on-fees/index.html> (Last accessed on October 22, 2019.)

and (4) preparation of an explanation or summary of the PHI, if agreed to by the individual. The fee may not include costs associated with verification; documentation; searching for and retrieving the PHI; maintaining systems; recouping capital for data access, storage, or infrastructure; or other costs not listed above even if such costs are authorized by State law.

A search and retrieval fee for copies of PHI maintained electronically is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).

A processing and handling fee for copies of PHI maintained electronically is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).

An access fee for copies of PHI maintained electronically is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).

An inventory fee for copies of PHI maintained electronically is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).

A per page fee for copies of PHI maintained electronically is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).

Where the third party (e.g., attorney) is initiating a request for PHI on its own behalf, with the individual's HIPAA authorization (or pursuant to another permissible disclosure provision in the Privacy Rule), the access fee limitations do not apply. However, where an individual has requested that the copy of PHI be sent directly to a third party designated by the individual (e.g. their attorney) or where the third party (e.g. the attorney) is forwarding - on behalf and at the direction of the individual - the individual's access request for a covered entity to direct a copy of the individual's PHI to the third party, the fee limitations apply.³³

- Violating the deadline for producing records

In providing access to the individual, a covered entity must provide access to the PHI requested no later than 30 calendar days from receiving the individual's request. See 45 C.F.R. § 164.524(b)(2).

If a covered entity is unable to provide access within 30 calendar days -- for example, where the information is archived offsite and not readily accessible - the covered entity may extend the time by no more than an additional 30 days. To extend the time, the covered entity must, within the initial 30 days, inform the individual in writing of the reasons for the delay and the date by

³³ U.S. Department of Health and Human Services. "When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual's PHI to a third party?" <https://www.hhs.gov/hipaa/for-professionals/faq/2033/when-do-the-hipaa-privacy-rule-limitations-on-fees/index.html> (Last accessed on October 22, 2019.)

which the covered entity will provide access. Only one extension is permitted per access request.³⁴

A State law that requires that access to PHI be provided to an individual in a shorter time frame than that required in the Privacy Rule must provide such access within the shorter time frame because the State law is not contrary to the Privacy Rule.³⁵

- Demanding payment of bill for healthcare before releasing PHI.

A covered entity may not withhold or deny an individual access to their PHI on the grounds that the individual has not paid the bill for health care services the covered entity provided to the individual.³⁶

What Do I Do if medical providers don't comply?

Review the covered entities' Notice of Privacy Practices for Protected Health Information to identify the HIPAA Privacy Contact Person. The covered entities' privacy notice must include how the individual may file a complaint with the covered entity and the name, or title, and telephone number of a contact person or office who is responsible for receiving complaints.³⁷ A covered entity must make its notice available to any person who asks for it.³⁸

Send a letter to the HIPAA Privacy Contact Person seeking Compliance with the HITECH Act and its implementing regulations. A sample letter is included in the Appendix:

Letter #3 – Letter Seeking Compliance with HITECH Act Medical Records Request

Also, send a copy of the letter to any business associate (e.g., record production company) engaged by the covered entity (e.g., healthcare provider) to satisfy its obligations under the HITECH Act and its implementing regulations.

Next, attempt to call the HIPAA Privacy Contact Person on the phone to seek a resolution. If unsuccessful, file a complaint with the U.S. Department of Health and Human Services, Office for Civil Rights (OCR).

³⁴ 45 C.F.R. § 164.524(b)(2)

³⁵ U.S. Department of Health and Human Services. "Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524." <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html> (Last accessed on October 22, 2019.)

³⁶ U.S. Department of Health and Human Services. "Is a health care provider permitted to deny an individual's request for access because the individual has not paid for health care services provided to the individual?" <https://www.hhs.gov/hipaa/for-professionals/faq/2065/is-a-health-care-provider-permitted-to-deny/index.html> (Last accessed on October 21, 2019.)

³⁷ 45 C.F.R. §§ 164.530(a)(1)(ii) and 164.520(b)(1)(vi) and (vii)

³⁸ 45 C.F.R. § 164.520(c)

FILING A COMPLAINT WITH THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), OFFICE FOR CIVIL RIGHTS (OCR)

The U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) enforces the Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security, and Breach Notification Rules by:

1. Teaching health and social service workers about health information privacy laws;
2. Educating communities about health information privacy rights; and
3. Investigating health information privacy complaints to identify discrimination or violation of the law and taking action to correct problems.

If you believe that a HIPAA-covered entity or its business associate violated your (or someone else's) health information privacy rights or committed another violation of the Privacy, Security, or Breach Notification Rules, you may file a complaint with the Office for Civil Rights (OCR).³⁹ OCR can investigate complaints against covered entities (health plans, health care clearinghouses, or health care providers that conduct certain transactions electronically) and their business associates.

You should obtain your client's consent before filing a complaint. Your client will need to sign a Complainant Consent Form.⁴⁰

Complaint Requirements

Anyone can file a health information privacy or security complaint. Your complaint must:

- Be filed in writing by mail, fax, e-mail, or via the OCR Complaint Portal⁴¹
- Name the covered entity or business associate involved, and describe the acts or omissions, you believed violated the requirements of the Privacy, Security, or Breach Notification Rules

³⁹ U.S. Department of Health and Human Services, Office for Civil Rights (OCR). "Filing a Complaint." <https://www.hhs.gov/hipaa/filing-a-complaint/index.html?language=es> (Last accessed on October 21, 2019.)

⁴⁰ U.S. Department of Health and Human Services, Office for Civil Rights (OCR), Complainant Consent Form on pp. 3-4: <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/complaints/hipcomplaintform.pdf> (Last accessed on October 21, 2019.)

⁴¹ You may also file a complaint online at the Health and Human Services website: <https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf> (Last accessed on October 21, 2019.)

- Be filed within 180 days of when you knew that the act or omission complained of occurred. OCR may extend the 180-day period if you can show "good cause"

HIPAA Prohibits Retaliation

Under HIPAA an entity cannot retaliate against you for filing a complaint. You should notify OCR immediately in the event of any retaliatory action.

Filing a Health Information Privacy Complaint Online

Open the [OCR Complaint Portal](#) and select the type of complaint you would like to file. Complete as much information as possible, including:

- Information about you, the complainant;
- Details of the complaint;
- Any additional information that might help OCR when reviewing your complaint.

You will then need to sign the complaint and complete the consent form. After completing the consent form, you will be able to print out a copy of your complaint to keep for your records. You will also need to submit a [Complainant Consent Form](#) signed by your client.

File a Health Information Privacy Complaint in Writing

Open and fill out the [Health Information Privacy Complaint Form Package](#).⁴² You will need Adobe Reader software to fill out the complaint and consent forms. You may either:

⁴² U.S. Department of Health and Human Services, Office for Civil Rights (OCR), Health Information Privacy Complaint Form: <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/complaints/hipcomplaintform.pdf> (Last accessed on October 21, 2019.)

- Print and mail the completed complaint and consent forms to:

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

- Email the completed complaint and consent forms to OCRComplaint@hhs.gov (Please note that communication by unencrypted email presents a risk that personally identifiable information contained in such an email, may be intercepted by unauthorized third parties.)

You will also need to submit a Complainant Consent Form signed by your client.

What Happens After the Investigation?

At the end of the investigation, the U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR) issues a letter describing the resolution of the investigation.

If OCR determines that a covered entity or business associate may not have complied with the HIPAA Rules, that entity or business associate must:

- Voluntarily comply with the HIPAA Rules;
- Take corrective action;
- Agree to a settlement.

If the covered entity or business associate does not take satisfactory action to resolve the matter, OCR may decide to impose civil money penalties (CMPs) on the covered entity. If CMPs are imposed, the covered entity may request a hearing in which an HHS administrative law judge decides if the penalties are supported by the evidence in the case.

An example of a letter issued by OCR is included in the Appendix.

CONCLUSION

When individuals exercise their right under the HITECH Act and its implementing regulations to access their protected health information, they obtain the following benefits:

- Ability to be more in control of decisions regarding their health and well-being;
- Lower cost of obtaining copies of their health information;
- Choice of how to receive the records (form and format);
- Ability to direct their protected health information to a designated third party of their choice (e.g., their attorney).

The more law firms educate clients about their legal rights to access and control their protected health information and implement practices that encourage clients to use the HITECH Act and its implementing regulations to direct their protected health information to a designated third party of their choice, the easier it will be for all as covered entities (e.g., medical providers and record production companies) will be forced to establish systems to comply with the law and adequately train their staff. **Stay calm and know that the law is on your side!**

ADDITIONAL RESOURCES

U.S. Department of Health and Human Services; Modifications to the HIPAA Privacy, Security, Enforcement, and Breach of Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Discrimination Act, 78 Fed. Reg. 5633 (Jan. 25, 2013) (codified at 45 C.F.R. Pts. 160 and 164), <https://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf> (Last accessed on October 21, 2019.)

U.S. Department of Health and Human Services, Office for Civil Rights. "HIPAA Administrative Simplification." <https://www.hhs.gov/sites/default/files/hipaa-simplification-201303.pdf> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Individuals' Right under HIPAA to Access their Health Information 45 CFR § 164.524." <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Questions and Answers About HIPAA's Access Right." <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html#newlyreleasedfaqs> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Can an individual, through the HIPAA right of access, have his or her health care provider or health plan send the individual's PHI to a third party?" <https://www.hhs.gov/hipaa/for-professionals/faq/2036/can-an-individual-through-the-hipaa-right/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Is \$6.50 the maximum amount that can be charged to provide individuals with a copy of their PHI?" <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html#maximumflatfee> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual's PHI to a third party?" <https://www.hhs.gov/hipaa/for-professionals/faq/2033/when-do-the-hipaa-privacy-rule-limitations-on-fees/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "When an individual exercises her HIPAA right to get an electronic copy of her PHI, can the individual choose the electronic format of the copy?" <https://www.hhs.gov/hipaa/for-professionals/faq/2056/when-an-individual-exercises-her-hipaa-right/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Do individuals have the right under HIPAA to have copies of their PHI transferred or transmitted to them in the manner they request, even if the requested mode of transfer or transmission is unsecure?" <https://www.hhs.gov/hipaa/for-professionals/faq/2060/do-individuals-have-the-right-under-hipaa-to-have/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Why depend on the individual's right of access to facilitate the disclosure of PHI to a third party – why not just have the individual execute a HIPAA authorization to enable the covered entity to make this disclosure?" <https://www.hhs.gov/hipaa/for-professionals/faq/2041/why-depend-on-the-individuals-right/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "May a covered entity accept standing requests from individuals to access their PHI or to have their PHI sent to a third party of their choice?" <https://www.hhs.gov/hipaa/for-professionals/faq/2070/may-a-covered-entity-accept-standing-requests/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Your Health Information, Your Rights!" https://www.healthit.gov/sites/default/files/YourHealthInformationYourRights_Infographic-Web.pdf (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services. "Right to Access and Research." <https://www.hhs.gov/hipaa/for-professionals/faq/right-to-access-and-research/index.html> (Last accessed on October 18, 2019.)

U.S. Department of Health and Human Services, Office for Civil Rights (OCR). "Filing a Complaint." <https://www.hhs.gov/hipaa/filing-a-complaint/index.html?language=es> (Last accessed on October 21, 2019.)

U.S. Department of Health and Human Services, Office for Civil Rights (OCR). "Complaint Portal Assistant." <https://ocrportal.hhs.gov/ocr/smartscreen/main.jsf> (Last accessed on October 21, 2019.)

U.S. Department of Health and Human Services, Office for Civil Rights (OCR), Health Information Privacy Complaint Form: <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/complaints/hipcomplaintform.pdf> (Last accessed on October 21, 2019.)

APPENDIX

Letter #1 – Sample Patient/Client's Request for Access Letter with Citations

[Client's Full Name]
[Client-Address Line One]
[Client-City], [Client-State] [Client-Postal Code]

[Date]

BY FAX: [Medical Provider-Fax Phone]

[Medical Provider-Whole Name]
ATTN: MEDICAL RECORDS
[Medical Provider-Full Address Block]

Re: **Patient's Request for Access to Protected Health Information**
My Name: [Client's Full Name]
Date of Birth: [Client-Date of Birth]
Dates of Service: [Insert Text-Dates of Service]

Dear Sir or Madam:

The Health Information Technology for Economic and Clinical Health (HITECH) Act, 42 U.S.C. § 17935(e) and implementing regulations codified at 45 C.F.R. §164.524 provide that I have a right to obtain from you a copy of my protected health information in an electronic format and to direct you to transmit such copy directly to an entity or person I designate.

Please transmit a complete electronic copy of my medical records, including any records received from, or created by, another health care provider, but not including billing and insurance records, for the above-referenced date(s) of service, to my attorney.

SEND RECORDS IN ADOBE PORTABLE DOCUMENT FORMAT (PDF) TO:	BY ANY OF THE FOLLOWING WAYS:
Brian J. Gillette Gillette Law Group, PLLC 1315 Jamestown Rd, Suite 102 Williamsburg, VA 23185 (757) 220-4529	E-Fax: 1-866-734-9679 Mail CD-ROM Web-Based Portal Email: help@gillettegroup.com

Please provide access to the records in Adobe pdf format. I ask that the records not be certified or encrypted. I am requesting my records in electronic format only, and I will not pay for paper copies of my records. You are not allowed to charge a search and retrieval fee or a per-page fee. See 45 C.F.R. §164.524(c)(4). Please email or call my attorney's office to advise the amount you intend to charge before sending the records. An invoice for any cost-based charges, in accordance with 45 C.F.R. §164.524(c)(4), should be mailed to me at the address at the head of this letter. You must act on this request no later than 30 days after your receipt of this request. See 45 C.F.R. §164.524(b)(2).

I authorize and direct you, and any third-party vendor you may use, to communicate directly with Brian J. Gillette and any employee of Gillette Law Group, PLLC, regarding any and all issues related to this request, including authorization of any cost-based charges and the time frame for providing the records to their office.

Thank you for your anticipated cooperation.

Very truly yours,

[Client's Full Name]

cc: Brian J. Gillette
Gillette Law Group, PLLC
1315 Jamestown Rd, Suite 102
Williamsburg, VA 23185

Letter #2 – Sample Patient/Client's Request for Access Letter (Simple)

[Client's Full Name]
[Client-Address Line One]
[Client-City], [Client-State] [Client-Postal Code]

[Medical Provider-Whole Name]
ATTN: MEDICAL RECORDS
[Medical Provider-Full Address Block]

Re: **HITECH RECORDS REQUEST**
My Name: [Client's Full Name]
Date of Birth: [Client-Date of Birth]

Dear Records Custodian:

I am a patient of [Insert Text-Name of Medical Provider/Practice].

I request copies of all my medical records covering the following time period:

FROM: [Insert Text-Start Date of Service] TO: [Insert Text-End Date of Service]

Please provide all records in electronic format only using Adobe Portable Document Format (PDF). I ask that the records not be certified or encrypted.

Please transmit an electronic copy of my medical records to my attorney, Brian J. Gillette.

Brian J. Gillette
Gillette Law Group, PLLC
1315 Jamestown Rd, Suite 102
Williamsburg, VA 23185
(757) 220-4529

You may transmit an electronic copy of my medical records to my attorney, Brian J. Gillette, in any of the following ways:

E-Fax: 1-866-734-9679
Email: help@gillettegroup.com
Web-Based Portal
Mailing a CD-ROM

I authorize you and any vendor you use to communicate directly with Brian J. Gillette, and any employee of Gillette Law Group, PLLC, regarding all issues related to this request, including authorization of the cost-based charges and the time frame for providing the records to his office.

[Client's Full Name]

[Date]

cc: Brian J. Gillette
Gillette Law Group, PLLC
1315 Jamestown Rd, Suite 102
Williamsburg, VA 23185

Letter #3 – Letter Seeking Compliance with HITECH Act Medical Records Request

[Merge Date]

BY FAX: [HIPAA Privacy Contact Person-Fax Phone]

[HIPAA Privacy Contact Person]
[Medical Provider-Whole Name]
[Medical Provider-Full Address Block]

Re: **HITECH Act Request for Access to Protected Health Information**
Patient Name: [Client-First Name] [Client-Middle Name] [Client-Last Name]
Date of Birth: [Client-Date of Birth]
Dates of Service: **[Insert Text-Dates of Service]**

Dear [HIPAA Privacy Contact Person]:

On [Insert Text-Date of Request], my client, the above-reference patient, asked you to transmit a complete electronic copy of their medical records to me pursuant to the Health Information Technology for Economic and Clinical Health (HITECH) Act, 42 U.S.C. § 17935(e) and implementing regulations codified at 45 C.F.R. §164.524. I am in receipt of [Insert Text-your/your business associate's] letter, dated [Insert Text-Date of Response], which acknowledges my client's request for an electronic copy of their medical records.

While [Insert Text-you/your business associate] acknowledge that you maintain an electronic health record with respect to protected health information of my client, [Insert Text-you/your business associate] state:

We do not currently have the capability to safely transfer electronic copies of medical records, however, we can mail a paper copy of them to you upon request. The cost for the records are; \$20.00 for processing and handling, \$.50 per page for the first 50 pages, and \$.25 per page after that.

If you would like us to mail you the records, please send your request in writing, along with a signed authorization . . .

(Emphasis in original.)

[Insert Text-Your/Your business associate's] response violates 45 C.F.R. §164.524 in the following ways:

1. Where an individual requests an electronic copy of protected health information (PHI) that a covered entity maintains electronically, the covered entity must provide the individual with access to the information in the requested electronic form and format, if it is readily producible in that form and format. When the PHI is not readily producible in the electronic form and format requested, then the covered entity **must provide access to an agreed upon alternative readable electronic format.**⁴³ This means that, while a covered entity is not required to purchase new software or equipment in order to accommodate every possible individual request, **the covered entity must have the capability to provide some form of electronic copy of PHI maintained electronically;** it is only if the individual declines to accept any of the electronic formats readily producible by the covered entity that the covered entity may satisfy the request for access by providing the individual with a readable hard copy of the PHI.⁴⁴

My staff member, [Insert Text-Name Staff Member], spoke with one of your employees and was told that you are unable to use Adobe Acrobat .pdf format to store the records on a compact disc (CD) and to mail the disc to our office. Your staff did not offer any alternative electronic format or method of delivery, as required.

2. The Privacy Rule permits a covered entity to impose a reasonable, cost-based fee if the individual requests a copy of the PHI. The fee may include only the cost of: (1) labor for copying the PHI requested by the individual, whether in paper or electronic form; (2) supplies for creating the paper copy or electronic media (e.g., CD or USB drive) if the individual requests that the electronic copy be provided on portable media; (3) postage, when the individual requests that the copy, or the summary or explanation, be mailed;

⁴³ 45 C.F.R. §164.524(c)(2)(ii) (emphasis added).

⁴⁴ See, Department of Health and Human Services; Modifications to the HIPAA Privacy, Security, Enforcement, and Breach of Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Discrimination Act, 78 Fed. Reg. 5633 (Jan. 25, 2013) (codified at 45 C.F.R. Pts. 160 and 164), <https://www.gpo.gov/fdsys/pkg/FR-2013-01-25/pdf/2013-01073.pdf> (Last accessed on October 22, 2019).

and (4) preparation of an explanation or summary of the PHI, if agreed to by the individual.⁴⁵ The fee may not include costs associated with verification; documentation; searching for and retrieving the PHI; maintaining systems; recouping capital for data access, storage, or infrastructure; or other costs not listed above even if such costs are authorized by State law.⁴⁶

A processing and handling fee is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).⁴⁷

A per page fee for copies of PHI maintained electronically is not a reasonable, cost-based fee and violates 45 C.F.R. §164.524(c)(4).⁴⁸

3. Department of Health and Human Services guidance on compliance states, "We note that a covered entity (or a business associate) may not circumvent the access fee limitations by treating individual requests for access like other HIPAA disclosures – such as by having an individual fill out a HIPAA authorization when the individual requests access to her PHI (including to direct a copy of the PHI to a third party). As explained elsewhere in the guidance, a HIPAA authorization is not required for individuals to request access to their PHI, including to direct a copy to a third party – and because a HIPAA authorization requests more information than is necessary or that may not be relevant for individuals to exercise their access rights, requiring execution of a HIPAA authorization may create impermissible obstacles to the exercise of this right."⁴⁹

Your request for an additional written request and signed authorization creates an impermissible obstacle to my client's exercise of their right to access.

You must act on my client's request for access no later than 30 days after receipt of the request.⁵⁰ Covered entities that spend significant time before reaching agreement on the electronic format for a response are using part of the 30 days permitted for response.⁵¹ If I do not receive my client's medical records in electronic format by **[Insert Text-30 Days from Request]**, I will not hesitate to file a complaint with the Department of Health and Human Services, Office for Civil Rights (OCR).⁵²

[Insert if applicable—While you have apparently engaged [Insert-Name of Record Production Company] to disclose protected health information on your behalf, and satisfy your obligations under 45 CFR § 164.524., [Insert-Name of Covered Entity] is ultimately responsible for ensuring the availability of its own protected health information.⁵³]

Thank you for your anticipated cooperation and attention to this matter. Please fax (866) 734-9679, email help@gillettelawgroup.com, or call (757) 220-4529 with any questions.

Respectfully,

GILLETTE LAW GROUP, PLLC

Brian J. Gillette

[cc: Insert-Name of Record Production Company (If applicable.)]

⁴⁵ See, 45 C.F.R. §164.524(c)(4). See also, U.S. Department of Health and Human Services. "How can covered entities calculate the limited fee that can be charged to individuals to provide them with a copy of their PHI?" <https://www.hhs.gov/hipaa/for-professionals/faq/2029/how-can-covered-entities-calculate-the-limited-fee/index.html> (Last accessed on October 22, 2019.)

⁴⁶ See, 78 Fed. Reg. 5636 (Jan. 25, 2013), 45 C.F.R. §164.524(c)(4), 45 C.F.R. §160.202

⁴⁷ *Id.*, See also, U.S. Department of Health and Human Services. "How can covered entities calculate the limited fee that can be charged to individuals to provide them with a copy of their PHI?" <https://www.hhs.gov/hipaa/for-professionals/faq/2029/how-can-covered-entities-calculate-the-limited-fee/index.html> (Last accessed on October 22, 2019.)

⁴⁸ *Id.*

⁴⁹ U.S. Department of Health and Human Services. "When do the HIPAA Privacy Rule limitations on fees that can be charged for individuals to access copies of their PHI apply to disclosures of the individual's PHI to a third party?" <https://www.hhs.gov/hipaa/for-professionals/faq/2033/when-do-the-hipaa-privacy-rule-limitations-on-fees/index.html> (Last accessed on October 22, 2019.)

⁵⁰ See 45 C.F.R. §164.524(b)(2)

⁵¹ See 78 Fed. Reg. 5637 (Jan. 25, 2013)

⁵² U.S. Department of Health and Human Services, Office for Civil Rights, Complaint Portal, https://ocrportal.hhs.gov/ocr/cp/complaint_frontpage.jsf (Last accessed on October 22, 2019).

⁵³ See also, 45 C.F.R. §164.502(a)(2)(i)