

RESPONDING TO FAMILY MEMBERS' REQUESTS FOR A DECEASED PATIENT'S MEDICAL RECORDS



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If you are the administrator for a group practice, a nursing home, a surgery center, an imaging center or another health care facility, you probably have had to respond to requests for a deceased patient's medical records from a surviving family member. Maybe mom died from an inheritable disease and her adult daughter would like to see mom's medical records to understand more about her own risk of developing the same condition. Perhaps dad died soon after undergoing treatment and now son is asking to get copies of dad's records. Possibly, even, parents of a deceased adult patient are asking for copies of their child's medical records. There are any number of reasons family members may want copies of a deceased relative's medical records. It is not an uncommon request, and providers often want to allow family members access to their loved one's records, but providers also want (and need) to comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA). How HIPAA and Nebraska law treat this issue may surprise you.

State and federal data privacy laws, such as HIPAA, are implicated whenever a request is made to obtain medical records. With few exceptions, the patient's "personal represen-

tative" (the term used in HIPAA) may request and receive copies of those records and is generally treated as standing in the patient's shoes. However, the power of attorney or other authority that grants such person legal status as the patient's personal representative does not extend beyond the patient's death—it dies with the patient. Who, then, may serve as the deceased patient's personal representative to request his or her medical records?

HIPAA continues to apply with respect to a patient's health information for 50 years after his or her death and, as a general rule, takes precedence over state laws governing the release of medical records. In some instances, however, HIPAA actually relies on state law. Whether a deceased patient's medical records may be lawfully disclosed to a family member is one such instance.

Under HIPAA, an executor or administrator of the individual's estate or other person who has legal authority to act on behalf of the individual or estate must be treated as a personal representative of the deceased individual, but even then only with respect to health information that is directly relevant to that person's representation and responsibilities. Thus, if a family member of the deceased patient is neither an executor nor an administrator of the decedent's estate, then, in order to access the patient's records, he or she must have legal authority to act on behalf of the decedent. Whether a family member has such legal authority is a matter of state (not federal) law.

Under Nebraska law, a "patient request" for medical records includes a request by the patient's guardian or "authorized representative." However, Nebraska law does not offer any indication of who constitutes an "authorized representative" other than in the context of a duly appointed executor or administrator of the estate. Indeed, at least one proposed (but never passed) legislative bill acknowledges this gap in Nebraska law.

In 2012, Legislative Bill 1103 (LB1103) was introduced to revise the definition of "patient request" to expressly include the request of "a family member of a deceased patient." LB1103 thus confirmed that Nebraska law is silent as to whether the spouse, parent, child, or sibling of a deceased patient has any legal authority, in the absence of being appointed as the executor or administrator of the estate,

to obtain the deceased patient's records. LB1103 would have allowed family members a way to access their deceased relative's medical records without needing to open an estate and be appointed as its executor or administrator.

However, LB1103 was never brought to a vote and, thus, never became Nebraska law. Accordingly, it remains the case that family members are not, as a matter of Nebraska law, automatically granted any legal authority to act as personal representatives of a deceased relative for purposes of HIPAA. In other words, merely being a close family member of the deceased patient does not entitle such person to have access to, or receive copies of, the deceased patient's medical records in Nebraska.

In recognition of the difficulty family members often have in obtaining access to health information of a deceased relative because they do not qualify as a "personal representative," the U.S. Department of Health and Human Services revised HIPAA to allow certain persons to receive a limited amount of health information of the deceased patient. Specifically, a covered entity may (but is not required to) disclose to a family member, other relative, or close personal friend of the patient, who was involved in his or her care or payment for his or her health care prior to the patient's death, health information of the deceased individual to the extent such information is relevant to that person's involvement, unless doing so would be inconsistent with any prior expressed preference of the individual that is known to the covered entity.

As explained by the department, this provision ensures that family members can find out about the circumstances surrounding the death of a loved one, unless the individual, prior to death, objected to such information being shared with the family member. Of course, this begs the question: what was the family member's involvement? Along those lines, the department was careful to note that providers generally should not share details of the patient's past, unrelated health information. It is worth noting that this provision does not give health care providers carte blanche to disclose a deceased patient's medical records to his/her family members. When in doubt, providers should consult an attorney. 