

Empowering Patients Through Information Sharing: Cures Act Compliance Series

January 2022 / Information Blocking Exceptions Q & A

The following questions were submitted by participants before and during the January 12 webinar and January 18 Ask the Experts sessions. The answers provided are for informational purposes only; they do not, and are not intended to, constitute legal advice. Only your attorney can provide assurances regarding the application of this information to your particular circumstances.

For a more detailed discussion of the questions below, you may want to review the session recordings available in the [Cures Act Information Blocking section](#) of the CHCANYS website. This area also includes Q&A documents from other sessions in the Cures Act Educational Series.

The [ONC's Information Blocking FAQs](#) page also provides excellent information.

Q: How do the exceptions relate to psychological therapy and psychiatry notes?

A: The ONC Cures Act Final Rule defines Electronic Health Information (EHI). The definition aligns with the HIPAA definition of Protected Health Information in a designated record set and excludes psychotherapy notes. Excluding psychotherapy notes when fulfilling a request for access, exchange or use of EHI does not require an exception to the information blocking provision. The Privacy Rule defines psychotherapy notes as notes recorded by a health care provider who is a mental health professional documenting or analyzing the contents of a conversation during a private counseling session or a group, joint or family counseling session and that are separate from the rest of the patient's medical record. Psychotherapy notes do not include any information about medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished or results of clinical tests; nor do they include summaries of diagnosis, functional status, treatment plan, symptoms, prognosis and progress to date. This information is considered part of the definition of EHI and must be shared if legally permissible or if you cannot meet the conditions of one of the eight information blocking exceptions. Psychotherapy notes also do not include any information that is maintained in a patient's medical record. See 45 CFR 164.501. Also see [ONC IB.FAQ16.1.2021JAN](#) and this [article on MagMutual's web site](#).

Q: Is it permissible to exclude our therapy and psychiatry notes from our article 31 behavioral health clinic and the therapy notes from our FQHC?

A: See response above regarding psychotherapy notes. Article 31 is a New York law; if this law does not permit sharing of behavioral health information that is part of the patient's medical record without meeting certain conditions and those conditions are not met, then the Information Blocking Privacy Sub-Exception: "Precondition not satisfied" may apply. Consult with your legal counsel for guidance.

Q: Patients ages 13-17 may allow parents to see one part of the chart but not another. How are health centers handling this?

A: The attendees were invited to respond to this question. We suggest the health centers share their current processes for segmenting access to information for parents of patients ages 13-17 with one another. From an information blocking perspective, if the law permits a parent of patients ages 13-17 to see certain information and no other information in the child's medical record, the parent can request access to the EHI they are permitted to see. The health center is required to provide the parent with access to the permitted EHI unless the Center can meet one of the eight information blocking exceptions. If the health center is not able to segment the EHI that can be shared with the parent from the information that can't be shared with the parent, the Center may qualify for the Infeasibility exception. However, the health center must still comply with the HIPAA Privacy Rule and provide the information to the parent in some other format, such as on paper or on a CD.

Q: What are the considerations for delaying electronic release of sensitive test results?

A: Delaying release of test results could be considered interference under the information blocking regulation. A determination as to whether a delay would be an interference that implicates information blocking by a provider would require a fact-based, case-by case assessment of the circumstance. In the case of sensitive test results, we suggest these be handled on an individual basis and the provider communicate with and obtain agreement from the patient for a delay in releasing the results so the provider can review the results and possibly discuss with the patient beforehand. This should be the exception rather than the rule. Providers that have a blanket policy to delay release of test results for a period of time, such as 72 hours after results are available, will likely be out of compliance with the information blocking regulation. From an information blocking perspective, providers should eliminate all delays in fulfilling requests for EHI, such as releasing test results. See the [Davis Wright Tremaine LLP article](#) that further elaborates on this topic. Also see the following ONC FAQs: [IB.FAQ22.1.2021MAR](#), [IB.FAQ23.2.2021NOV](#), [IB.FAQ24.1.2021JAN](#), [IB.FAQ25.1.2021JAN](#), and [IB.FAQ26.1.2021JAN](#). Health centers should consult with their legal counsel regarding their policies for releasing test results to ensure their policies comply with the information blocking regulation.

Q: We switched EMRs years ago, and have discovered some corrupted files during the conversion. Could we send patients directly to the old EMR company to access their files?

A: No, you own and are responsible for your patients' data in your systems and have or did have a business associate relationship with the EMR vendor, not your patients. It's your responsibility or the responsibility of your IT department to go back to the EMR vendor and address the issue with the corrupted files and get access to a copy of the source files that are not corrupted. If your former or current EMR vendor is preventing you from accessing, exchanging or using your patients' data, then they are likely violating the information blocking regulation. You can communicate this to them if they are not cooperating; if unable to come to a resolution with the vendor, you can file an information blocking complaint against the vendor on the [ONC's Information Blocking Portal](#). Also see ONC FAQs: [IB.FAQ11.1.2020NOV](#) and [IB.FAQ12.1.2020NOV](#) concerning which vendors meet the definition of health

IT developer of certified health IT and are considered subject to the information blocking regulation and ONC's conditions and maintenance of certification requirements.

Q: Are health centers at risk if the certified vendor is unable to provide this information?

A: No, not likely. If there is an issue with the integrity of the data in the provider's possession and the corrupt data cannot be corrected by the IT department, releasing the corrupted data could potentially endanger the life or physical safety of the patient. If only some EHI is affected and can be segmented, the remainder of the EHI should be provided. The provider may meet the conditions of the Preventing Harm exception or the Infeasibility exception (if the corrupt data cannot be segmented) or both depending on the circumstances. If the health center does not have the requested EHI in its systems, then the information blocking provision requirements do not apply. If the data exists but is not held or controlled by the provider and is held by a former EMR vendor that is not providing access to the provider to the data, then the health center is not likely implicating the information blocking provision and instead the EMR vendor is the actor that is likely not complying and interfering with access, exchange and use of the EHI.

Q: Can patients access their data directly from the EMR company or HIE and bypass their doctor's office?

A: No, patients cannot go to your EMR vendor to request access to their EHI, unless the provider has a contract with the EMR vendor as its business associate to provide record release services or to manage the interoperability elements for access, exchange or use of EHI, such as the patient portal or FHIR server endpoints for API access. The patient's relationship is with the covered entity (in this case, their provider). If the HIE offers individual access services, the patient could get access to their EHI via the HIE if the HIE can identify and authenticate the patient. We are not aware of any HIEs presently offering individual access services to patients, and if they are, it is likely through the patient's provider or providers. EHI access and exchange when it comes to health information networks and health information exchanges is evolving. The national Trusted Exchange Framework and Common Agreement (TEFCA) was just officially released in January 2022 and will be implemented over this year. The first release of TEFCA includes and addresses individual access services.

Q: How do we reconcile the HIPAA info-sharing requirements (5/10 day timeframe) and Cures Act info-sharing requirements (without undue delay)?

A: The ONC Cures Act Final Rule specifically applies to EHI as defined in the rule (see ONC FAQ [IB.FAQ39.1.2021NOV](#)). The information blocking regulation has its own standalone provisions related to timely access, exchange or use of EHI. If a provider can more promptly fulfill requests for legally permissible access, exchange or use of EHI but chooses to engage in a practice that delays fulfilling the requests, that practice could constitute an interference under the information blocking regulation, even though the provider met the timeframe specified by HIPAA (see ONC FAQ [IB.FAQ26.1.2021JAN](#)). Therefore, the health center providers should fulfill requests for access, exchange or use of EHI without

unnecessary and unreasonable delays, unless the provider can meet the conditions of one of the eight exceptions.

Q: What happens when a patient asks you to remove certain terms or info in the note that they say are not true?

A: The patient will have to address his or her request to correct certain terms or information to the specific doctor or other provider who wrote the note. Your health center's Health Information Management (HIM) department or HIM specialist should have specific procedures for correcting information in the patient's medical record. The process for correcting information in the EMR should follow the same basic procedures your health center follows for correcting information in a paper medical record. The EMR system should have the ability to track corrections or changes to an entry once the entry has been entered or authenticated. When correcting or making a change to an entry in the EMR system, the original entry should be viewable, the current date and time should be entered, the person making the change should be identified and the reason should be noted. In situations where there is a hard copy printed from the electronic record, the hard copy must also be corrected. The health center is not responsible for correcting information in a note that came from another source and can direct the patient to contact the provider responsible for the note.

Q: Do patients need to sign a consent form to obtain a copy of their test results or records request through a patient portal?

A: Requiring a patient to sign a consent for release of EHI to self or a patient's authorized caregiver or imposing an onerous process on the patient to obtain individual access to his or her EHI (unless required by law) is likely to be viewed as interference unless the provider meets the conditions of an information blocking exception. We discourage requiring a patient to sign consent to release to self unless it is required by law. Having the patient register for his or her patient portal account is a reasonable process unless it is overly and unreasonably onerous for the patient. Additionally, account access should be fairly immediate for the patient unless a delay is necessary to validate the patient and enable the access, exchange or use of EHI or to meet the conditions of a law.