Privacy matters and matters of privacy in a digital era: the paradigm in all its shades of grey when releasing health information

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Introduction
Privacy is both an expectation of the patient and a right provided for under legislation. In New South Wales the Health Records and Information Privacy Act 2002 (NSW) (HRIPA) is the primary legislation that governs privacy over personal health information. The Government Information (Public Access) Act 2009 (NSW) (GIPAA) and Privacy and Personal Information Protection Act 1998 (NSW) (PPIPA) are the other major pieces of legislation that provide related governance. While these two Acts do not specifically address ‘health information’ they do address privacy and access as well as security. The NSW Ministry of Health (2015) policy manual, Privacy Manual for Health Information, is applicable to all public health organisations in NSW. This manual provides and relates all relevant legislations and policies around privacy for health information and is the everyday ‘go to’ guide.

Most public hospitals in NSW use some form of an EMR to record patients’ medical data. Northern Sydney Local Health District maintains an EMR whereby a portion is created by direct data entry and the rest is scanned into the patient’s electronic medical record. It does not provide the capacity to cover release of information (ROI) requests and so paper records are created for the medico-legal section of the patient’s record. In today’s digital and electronic environment patients are expecting to encounter digital records and electronic application or processing; they have become accustomed to this through their everyday life. Banking, car registration, online insurance claims, enrolling in university, submitting assignments and applying for a subpoena at court are all examples of modern technology’s ability to transform paper and queues of people-based tasks into an electronic and digital process and record respectively. The notion of a clinical record in the form of an EMR, in the absence of electronic or digital service provision for the processing of ROI requests in the same facility seems conflicting, and to the patient (the client), unfathomable. So why is there such disparity, what are the restraints and limitation with an electronic record and process for ROI service?

The impact of policies and legislation on electronic processing of release of information requests
The main issue is how to process ROI requests, ensuring compliance with all relevant policies and legislation while also maintaining consistency in their application. In recent experiences I have come across differing interpretations of policy and legislation. By way of example, the NSW Health Privacy Manual for Health Information Section 5.4.1, Elements of Consent, defines a valid consent as one that is freely given, informed and reasonably specific, that the patient has the capacity to consent and that consent provided in a timely manner. Section 5.4.3 Express Consent and Section 5.4.4 Deciding if Consent is Needed provide guidance as to when consent is required by outlining situations where consent is not required. Section 11.2.2.1 Where a Third Party Seeks Access advises that these request types need patient consent prior to releasing information (NSW Ministry of Health 2015). Furthermore it outlines what the consent should contain. The relevant sections of the NSW Health Privacy Manual in relation to the topic of consent may imply that consent for a third party request to access information must reflect the request. This would show evidence that the consent was reasonably specific to that request, timely, freely given, informed about what information they are consenting to release and identify the patient. A patient’s solicitor sends a letter providing the details of the patient, information sought, purpose, and the accompanying consent letter identifies the patient by name, is dated within three months of the request and states that they consent to the release of any information requested by their solicitor. Could this type of consent be considered valid on its own; is it valid because it is accompanied by the requestor’s letter; or is it considered invalid? These
questions demonstrate that various interpretations could be made about policy and its application when processing a ROI request.

Interoperability of legislation and policy, and application of that interoperability when processing a ROI request raises the question about when, to whom and if they can be applied during a review when the initial request is almost always processed under a single Act. An exemption in GIPAA, HRIPA and PIPPA provides for their interoperability but not when interoperability can be applied. All the while GIPAA states that once a valid application is received under GIPAA it cannot be transferred. Recent case law from the NSW Civil and Administrative Tribunal (NCAT) is clearly evident of this. In Khoo v. South Western Sydney Local Health District (2015) NSWCATAD 183, the decision to not disclose the information to the applicant under HRIPA was overturned due to overriding public interest on the basis of open government found under GIPAA.

The application of public interest disclosure test in GIPAA is permitted by s. 12(1); the exemptions table in s. 14 provides a list of information that would balance the scales against disclosure. This includes a contravention of a protection principle under HRIPA. The original applications under HRIPA and GIPAA were both refused. HRIPA requires consent from the legal guardian as per ss. 31 (2c) and 8, yet this had not been a justifiable exemption as a contravention of a Health Privacy Principle (HPP) or Act. So by whom and how is it decided during the initial processing of the request if and when public interest disclosure under GIPAA overrides the contravention of a HPP of the HRIPA legislation? This raises the question of how legislation can be applied consistently and equally when an individual’s judgement and interpretation are the basis for a decision. Add to this the dynamic nature of technology, policies, legislation especially case law, and the question that arises is how can this be accounted for in a system to process ROI requests electronically. The need for human input to make the ultimate decision even in the electronic processing of ROI requests remains.

Health Privacy Principles in Schedule 1 of HRIPA provide the basic rules in the application of privacy, including security and access under HPP 5, Retention and Security, HPP 9, Accuracy and HPPs 6, 7, 10 and 11 regarding access, use and disclosure, and release of information. So it goes without saying that privacy laws govern the health information held within the medical record, not discriminating between paper or electronic formats, so is equally applicable to both. The Ministry of Health under the Client Registration Policy and Guideline, and the Health Care Records – Documentation and Management Policy provide further guidance as to the minimum requirements for when and how a patient should be registered and how to document in a health care record (NSW Health 2012, 2007a,b).

Another recent NCAT case provides further evidence for the need of human input into any electronic processing of a ROI request in making final decisions. In AJD v. Royal Prince Alfred Hospital (2014) NSWCATAD 125 it was found that a breach of privacy occurred when the information of the applicant (mother) held within her children’s record was released to the father who had legal rights to access his children’s records. The issue of appropriate documentation, review of the record during the processing of the request phase and judgement as to whom the information belonged so as to redact accordingly was raised. It was decided that even though the information was important in providing the children with appropriate and necessary care, it did in fact belong to the applicant (the mother) and hence should have been redacted prior to release. It was also mentioned that if relevant policy on documentation had been followed this may not have occurred. A computer or electronic system could not have reviewed the records to make determinations as per the findings in this case, that the documentation standards were not followed and whether or not that information should therefore have been redacted.

The future for electronic ROI processing

Processing of ROI in a digital environment can aid or abet policy and procedure just the same as in the paper world. The area of risk lies with the ultimate decision maker in the processing phase of the request. The digital and electronic environment can provide electronic document management and storage, business processing management systems and electronic receipt and delivery of information. It can also provide an audit trail, track progress, report on workload and performance, and even assist in the decision making process. This can be through checklists and/or built in minimum requirements and pathways based on request types and what is required for them by law and policy. It could aid in the process of review of a record where the format is electronically readable, so allowing the user to do keyword searches. However where there is a decision to be made, the decision is ultimately the user’s and not the system’s; for example when deciding whether to redact or not.

Online applications could be the way of the future, on the proviso that certified copies of the required documents for that request type are uploaded as per the NSW Health Privacy Manual for Health Information (NSW Ministry of Health 2015). Electronic receipt of a request without certified copies should be allowed for by approved sources such as the police and Commissioners, as they do not require consent or identification. This could be done through secure and/or encrypted emails and transmissions; otherwise the basic document management and storage option would be to scan

1 This case is discussed in more detail by Libby Brookes and Elizabeth O’Brien in the following pages. Ed.
the request or correspondence received in the paper format and environment.

Electronic delivery of the information is the final aspect of the process. This can only be achieved by having digital records for release. It could be by secure/encrypted email, accessing an online portal or share file system where the information has been ‘dropped’ in for pick up, or simply on CD or USB. Regardless of the method, all aspects of any part of the system will be governed by HPP 5 (Retention and Security), HPP 9 (Accuracy) and HPPs 6, 7 10 and 11, regarding use, access and disclosure (Health Records and Information Privacy Act NSW, 2002 No 71) and the NSW Health Privacy Manual for Health Information (NSW Ministry of Health 2015). How the system works to process a request must be compliant with HPPs 5, 6, 7, 10 and 11, ensuring security of and access to information, as in the HRIPA, and the NSW Health Privacy Manual for Health Information (NSW Ministry of Health 2015).

Conclusion

To conclude, any electronic system and digital record is regulated by privacy laws and governed by policy, most of which are published in ‘black and white’ but are interpreted in ‘shades of grey’. The varying shades of grey allow room for interpretation that flows on to the processing of a request and/or during the system development in which requirements are defined. In that room the inherent risk of misinterpretation can be found. Whether by an electronic system or in the paper environment the final decision is always being made by humans and so this furthers the risk of different interpretations. The ultimate goal is to achieve consistency, accountability and integrity in the decision making process. Where requirements are clear, such as the fee or identification of a patient, these should be standardised and built in into any system. Otherwise checklists, prompts and pathways should be incorporated, allowing for automated and electronic documentation, tracking, audits and reporting. An electronic and digital system can aid the processing by providing access levels, and decision support and checklists, as well as speeding up the process through automation of tasks such as generating correspondence. In addition to this, regardless of the decision and its validity, it may be overturned by NCAT as most requests are processed under the one legislation yet reviewed under many; thus the question of interoperability of GIPPA, PIPPA and HRIPA would also need to be accounted for in the context of any electronic system. How, when, and why this is done will also require interpretation. A system may aid the process by means of efficiencies; it does not necessarily help to counteract the associated risk of the grey areas.

References


Legislation


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