A Reporter's Guide to Medical Privacy Law

AP PHOTOS

Since stringent medical privacy regulations went into effect in 2003, the media have been forced to learn the new rules, work around them in some cases, and in others battle them in court.

Yet the Health Insurance Portability and Accountability Act's privacy rule remains a prickly issue for reporters, hampering routine reporting assignments and big investigative pieces.

Journalists have challenged the privacy rule in court in a handful of cases and at least twice have won rulings requiring the release of information under state public records laws.

continued inside

CINCINNATI ENQUIRER PHOTO BY GLENN HARTONG

The Ohio Supreme Court ruled in March that *The Cincinnati Enquirer* was entitled to lead notices that the local health department had withheld under HIPAA. Using that information, the *Enquirer* ran a series detailing the city's lead problem and its effect on children such as Marquise Taylor (above), a five-year-old with elevated levels of lead in his body.

When Congress passed HIPAA in 1996, the law required the Department of Health and Human Services to enact federal health privacy regulations, known as the Standards for Privacy of Individually Identifiable Health Information, or the privacy rule. Media organizations objected that the proposed rule overly restricted access to information. Still, the law went into effect in 2003.

Initially, HIPAA caused immense confusion. Many entities that assumed they were covered by the law were not, and most feared the harsh criminal penalties — including jail time — associated with violating the law.

Because of the language of the act, which was mainly concerned with controlling the electronic transfer of health information, agencies that perform similar functions may be subject to different standards under HIPAA.

Each agency can set itself up differently so some are completely HIPAA-compliant, while others can compartmentalize so that only parts of the organization are obligated to comply with the act.

For instance, HIPAA may apply to county ambulance services that bill electronically, but may not apply in other counties without electronic billing. And where HIPAA may prevent the release of health information in one state, another state's public records laws could make the same information public.

"There's been tremendous confusion," said Robert Gellman, a privacy consultant who worked for the House Committee on Government Operations when HIPAA was drafted. "It's been dying down, but it's still going on. There was an initial panic and there was a lot of initial misunderstanding and it takes a long time to beat that out of the system."

Journalists say agencies are withholding records that were never intended to be covered under HIPAA because they are unsure about the law — or use it as an excuse.

Initially, some refused to turn over documents such as accident reports and some would not give journalists even basic information about accidents.

"The general news people — I feel terrible for them," said Chris Halsne, an investigative reporter for KIRO-TV in Seattle. "It's terribly frustrating for them when they know that the information is legally available, it's just not going to be — based on . . . who knows what?"

Halsne's biggest HIPAA-related problem came when he was working on a November 2005 story examining the frequency and rationale behind prescribing narcotics to state prisoners.

The numbers — what the prison bought and how much it cost — were a financial matter and clearly public, he said.

Halsne got the numbers but also wanted a log book of medications disbursed in the prisons that includes the prisoner name, identification number, reason for the medication, the prescription, the date, and the amount of drugs.

"They do that mostly not for medical reasons, but for accounting purposes because they don't want to be missing a bunch of pills," he said.

He requested the log book with the names and identification numbers redacted.

"Even then, when there was no identi-

This guide was compiled by Reporters Committee legal intern Hannah Bergman and was made possible by a grant from the Robert R. McCormick Tribune Foundation.

fying information, their first fallback was HIPAA," he said.

HIPAA and state laws

Halsne was able to report the story without the records but said the data would have made it "more complete."

"If I cared enough and we would have fought this one on prison drugs, we would have won," he said. "They just didn't want to give it to us."

But some journalists have successfully battled agencies in court.

The battles primarily involve disputes over the privacy rule's "required by law" provision. That provision allows HIPAA-covered entities to disclose "protected health information" to the extent that such use or disclosure is required by law.

Though the decisions are not binding outside of the courts' jurisdictions, they may be influential for other courts considering the issue and signal the courts' skepticism of attempts to restrict access to information that was public before HIPAA.

In March, Ohio's highest court ruled in favor of *The Cincinnati Enquirer*, which fought the local health department over whether notices issued to property owners of residences where children had tested at high levels for lead in their blood were public.

In covering a housing court, reporter Sharon Coolidge had noticed only building department cases on the docket and not cases brought by the health department.

It quickly became clear that HIPAA was the reason no health department cases were being docketed. When Coolidge learned the missing cases might involve a lead issue, she knew there was a story, somewhere, about the city's lead problem.

When she initially requested the lead notices, the health department refused, citing the reference in the notices to children's blood test results.

"It's pretty scary to go the lawsuit route because what if they said no?" Coolidge said. "Then I would be setting precedent."

Initially the newspaper lost, as she feared. When the state Supreme Court agreed to hear the case, Coolidge said she was surprised.

The court ruled that the notices did not contain "protected health information" and that even if they did, the notices would still be public because "the Ohio Public Records Law . . . requires disclosure of these reports, and federal law, HIPAA, does not supersede state disclosure requirements," Justice Terrence O'Donnell wrote for the unanimous court.

The court wrestled with how to read the federal and state laws.

"We are confronted here with a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law," O'Donnell wrote.

The court concluded that neither Congress nor the Department of Health and Human Services intended to preempt state disclosure laws. The court also noted that in the guidance issued along with the privacy rule, HHS said when a conflict arose between the federal Freedom of Information Act and HIPAA, FOIA was an example of a disclosure "required by law."

In June, the paper ran a three-story series based on the records, detailing the plight of families whose children have been harmed by lead.

What is HIPAA?

HIPAA history

Congress passed the Health Insurance Portability and Accountability Act in August 1996. The law provided that if Congress failed to pass health privacy legislation in three years, the Department of Health and Human Services would issue rules under the authority given to it in HIPAA.

Congress did not pass another privacy bill and in October 1999, Health and Human Services released a draft rule, called the Standards for Privacy of Individually Identifiable Health Information and known as the "privacy rule." After receiving tens of thousands of comments on the draft, the department issued a final rule in December 2000 with modifications following in August 2002.

Comments from the media — including The Reporters Committee for Freedom of the Press, the Newspaper Association of America, the National Newspaper Association, and the American Society of Newspaper Editors — argued that the proposed rule too harshly restricted access to information.

Despite media concerns, health care organizations were required to comply with the privacy rule beginning in April 2003. According to its authors, the goal of the privacy rule — the part of HIPAA that governs public release of information and can prove so frustrating for reporters inquiring about a patient's condition — was to give patients more control of the release of their medical information. Thus, the rule frequently requires written consent forms.

Affected parties

HIPAA applies to health care organizations, including providers, health plans, public health authorities, life insurers, billing agencies, service organizations, ambulance services and medical universities. If the organization electronically bills for health care or transmits health information, HIPAA applies regardless of the organization's size.

The privacy rule allows a HIPAA-covered organization that has another function in addition to providing health care to designate itself as a "hybrid entity." The entity defines what its "health care component" is and makes sure that component complies with HIPAA. A "wall" is set up between the health care component of the organization and the non-health care component. Information is not shared internally by the two sides, and the non-health care component is not bound by HIPAA. If the organization does not designate itself as a hybrid, the entire operation must comply with HIPAA.

For example, a university may designate itself a hybrid entity. Its hospital and medical school may be designated as compliant, but they would not share information with another part of the university, such as an athletics department or nursing school, that did not comply with HIPAA.

"Affiliated covered entities" are legally separate entities that have a common ownership. For example, a university hospital and a university medical foundation could have a common owner but be legally separate entities. In that case, both entities must comply with HIPAA.

Penalties

For unintentionally violating the privacy rule, civil penalties of $100 per violation can be assessed up to a $25,000 annual maximum fine.

For intentional violations and misuse of individually identifiable health information, criminal penalties can lead to a fine up to $250,000 and imprisonment for up to 10 years.

A safe harbor provision exists for inadvertent disclosures made by covered entities that exercise reasonable diligence in attempting to comply with the law.

An investigation in June by *The Washington Post* found that no one has ever been fined for violating HIPAA. However, the *Post* reported that the Justice Department has prosecuted two criminal cases, one against a Seattle man who stole credit card information from a cancer patient and another against a Texas woman who sold an FBI agent's medical records. ◆

John Greiner, the *Enquirer*'s attorney, said he thinks the decision will help the paper access other documents, such as police incident reports, that are frequently withheld citing HIPAA despite efforts to educate the police that HIPAA does not apply to those sorts of materials.

"I think [it helps] in the sense that a court said it's OK to turn this stuff over," Greiner said.

The decision is also likely to solidify pre-HIPAA court rulings that 911 call records are public, he said, because of the way the court read the state freedom of information law in conjunction with HIPAA.

A Texas appeals court looked to the Ohio decision, as well as the government guidelines, in a recent case involving a Dallas television station that sought statistics about alleged sexual assaults at state psychiatric hospitals.

In June, the court said the information sought did not seem to qualify as protected information under HIPAA.

But even if the information is protected, the court wrote, the agency must determine whether there is an exception to the privacy rule that allows the release. If the request is made under the Texas Public Information Act, it falls under the "required by law" exception.

Other courts have sidestepped the issue. In Louisiana, Gannett River States Publishing, which owns several newspapers in the area, sued the East Baton Rouge Parish emergency medical services department after officials refused to release 911 tapes, citing HIPAA.

But the appeals court did not address the applicability of HIPAA, opting instead to declare the calls confidential under state law in December 2005.

Potential for punishment

Much of local agencies' reluctance to release health and medical information comes from the potential penalties they face under the federal regulations.

"Everybody has had the same problem of no one knows what HIPAA says really well," said Gellman, the privacy advocate. "In the absence of a firm, clear lawyer standing next to you saying you won't go to jail, people just say no."

But an investigation by *The Washington Post* published in June found that after three years and almost 20,000 complaints to Health and Human Services, no one has ever been fined for violating HIPAA and only two criminal cases have been brought against alleged violators. Neither involved releasing information to the media.

The department told the *Post* it prefers to work with institutions for voluntary compliance instead of enforcing the law strictly.

AP PHOTO BY PABLO MARTINEZ MONSIVAIS

The Washington, D.C., Fire Department, shown here responding to a mercury spill in 2005, stopped allowing media ride-alongs after the Department of Health and Human Services received complaints about a newspaper report containing patient information.

Many media outlets fear hospitals and other health care providers will be able to retaliate against them in civil actions if they publish protected health information.

But in 2004, a federal judge in Denver held that a private party cannot sue under HIPAA.

The University of Colorado Hospital sued the publisher of the *Rocky Mountain (Denver) News* to prevent the newspaper from printing an internal report, arguing that publishing the information would be a violation of HIPAA. The court neither granted the injunction nor allowed the hospital to continue its case against the newspaper.

U.S. District Judge Walker Miller wrote there was no evidence Congress intended for a private party to be able to enforce HIPAA, particularly through the privacy rule. Though the federal judge's ruling is not binding elsewhere, the judge's decision has been cited by other courts throughout the country.

Working around HIPAA

Since health care agencies continue to stonewall reporters, media organizations have tried to find solutions to get records without resorting to lawsuits.

When it comes to breaking news stories, Halsne, the Seattle TV reporter, says the station now sends producers down hospital halls, trying to find information without asking the public relations staff.

Reporters also have cultivated additional sources, such as security guards in the basement, who they rely on to confirm basic information.

In Atlanta, reporters have frequently met with hospital staff in an attempt to resolve issues before they arise in breaking news, said Tom Clyde, an attorney who represents *The Atlanta Journal-Constitution* and WSP-TV.

"There's no question it's been helpful," Clyde said. "It has improved things, especially in the emergency situation."

But Clyde says the turnover at hospitals and government agencies can be high, which

means a lot of time is spent retraining staff and getting people comfortable with established practices.

For example, David Milliron, the computer-assisted reporting editor at the *Journal-Constitution*, said he has had difficulty securing vital statistics from Georgia this year, including birth, death and marriage records — something the newspaper has done for at least nine years.

The newspaper uses the data to do stories on topics such as marriage and divorce rates and teen pregnancy, and to publish interesting feature pieces, such as statistics about the babies who were born on Sept. 11, 2001.

Recently, with new employees working for the state, there are new problems, Milliron said.

"They want to apply some de-identification that wouldn't allow you to create any statistics below the three-digit ZIP code level," Milliron said. Across Georgia, that means there would only be a handful of geographic groups the newspaper could analyze.

"It's very disconcerting to the newspaper when the newspaper has spent great expense — legal and time wise — working out an agreement," he said.

Even some agencies have complained that overzealous enforcement of HIPAA prevents them from publicizing positive work and hurts the public's right to know.

The Department of Health and Human Services received complaints after the *Washington City Paper* published stories with identifying information about patients obtained during a ride-along with the Washington, D.C., Fire Department.

The information came not from emergency personnel but from the patients themselves, said Alan Etter, a spokesman for the department.

"A reporter walked up to the patient in a public area, and this person as an adult — obstinately aware of the ramifications — gave the reporter his name," Etter said.

But Health and Human Services did not care, and the fire department has stopped media ride-alongs on ambulances because of the federal government's concerns, Etter said.

"It makes it difficult for a PR guy like me to show his fire department in action," he said. "This is a publicly funded service — people who pay taxes in the city ought to be able to see." ◆

What records are available under HIPAA?

Hospital directory information

According to the Department of Health and Human Services, hospital directory information containing basic facts about current or recent patients treated by a hospital should be released. This includes patients' names, locations within the hospital, general conditions (including whether a patient has been treated and released or has died), religious affiliations and room telephone numbers. The American Hospital Association (AHA) advises its members that information about the location a patient was released to and the date and time of death should not be disclosed.

The department's guidelines require that patients be informed about the information in the directory and be allowed the chance to object to disclosure. In an emergency, if the patient has not had a chance to consent, the hospital may still release the information if it deems the release is in the patient's best interest.

The AHA also advises its members that directory information can only be released if a reporter identifies the patient by name and that the room number of a patient should never be disclosed to the media without patient permission as a matter of policy. The association's practices may be more restrictive than the law requires, but journalists should know what hospitals are being told.

Hospital billing data

Statistical information related to hospital billing data is not covered by HIPAA, which means hospitals can release it. This information, collected by some state hospital associations and the federal government, can detail the number of procedures performed, death rates and other information, but no names can be attached to the data. Generally, it is available from the National Center for Health Statistics (www.cdc.gov/nchs).

Death, autopsy and coroner records

State laws vary widely on the availability of death, autopsy and coroner records. Even before medical privacy rules, the availability of these records was being curtailed. However, the Department of Health and Human Services says that if state law "provides for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention," HIPAA does not prevent it.

A 2004 Nebraska attorney general opinion found that cause of death was protected health information under the act. However, the opinion also determined the information should be released because Nebraska's open records law mandated it.

Ambulance and Emergency Medical Services records

Often medical information in these records will be protected under state laws, but other information in the records, such as the time it took an ambulance to reach a scene, can be released. Whether ambulance service is covered by HIPAA generally depends on if the ambulance service bills the patient.

In a 2005 opinion, the Maryland attorney general, in deciding whether dispatch records known as "event reports" from the Baltimore County Fire Department could be released, wrote that HIPAA does not apply because the fire department does not bill electronically for its services. Because 911 dispatchers and paramedics provide health care, the attorney general said, medical information in these records is confidential under state law. However, the attorney general said the state law does not protect the identity of the person who called 911 or the identity of the person transported.

The same year, the Mississippi attorney general reached a similar conclusion. Analyzing whether a county emergency medical service record could be released under HIPAA, the attorney general opinion concluded the act's "required by law" exception would allow the release of information that was public under the state's public records law.

Ambulance ride-alongs

In at least one case, the Department of Health and Human Services has cracked down on reporters riding along on medical emergency calls.

Washington, D.C.'s fire and EMS unit received a letter from the department after a reader complained when the *Washington City Paper* ran a story with patient information the reporter obtained from the patient.

As a result of the letter, the city no longer allows media ride-alongs on medical calls, though it will allow limited access to fire calls.

In June 2004, Health and Human Services sent a letter to the American Ambulance Association that addresses questions about ride-alongs. The letter concludes that without patient authorization, disclosure of health information to the media during a ride-along is not allowed. It is unclear how authorization would be obtained in many emergency situations. ◆

AP PHOTO BY PABLO MARTINEZ MONSIVAIS

The media were allowed into a Washington, D.C., hospital last year to shoot the recovery of two conjoined twins, but in many other cases, reporters have found it difficult or impossible to obtain access to hospitals for stories.

Health care journalists' access to hospitals curtailed under HIPAA

For health care journalists, the Health Insurance Portability and Accountability Act has changed the way they do their jobs and made telling the stories of patients and those who provide their care more difficult.

Reporters say they devote more time than ever before negotiating for access for health-related articles, often to no avail.

"From stories our members tell us, some hospitals use HIPAA as a convenient way to obstruct reporters. Journalists are spending more time arguing over inaccurate interpretations of the law with hospital media relations specialists," said Carla K. Johnson, a board member of the Association of Health Care Journalists.

On the other side of the issue is the American Hospital Association. Alicia Mitchell, a spokeswoman for the AHA, says most of the time hospitals will work to make sure important health care stories get told despite HIPAA.

"If somebody is coming to profile the pediatrics unit, then the hospital would need to work kind of hard to do that. And HIPAA, quite frankly makes it harder than it was in the past," Mitchell said.

Hospitals are constantly concerned about patient privacy, she said, pointing out that people in hospitals are ill, there to recuperate, and not always prepared to deal with reporters.

"Some patients would be happy to talk with reporters but even when there's a patient that wants to talk with a reporter, there may be one in the same hallway that doesn't," Mitchell said. That, in most cases, is what the hospital staff is worried about when dealing with the media and access, she said.

"In their attempt to control, they really damage the relationship and they damage journalism."

— St. Louis Post-Dispatch reporter Deborah Shelton

Deborah Shelton, who covers health care issues for the *St. Louis Post-Dispatch*, said rather than negotiate for insufficient access to health care institutions, she has simply not reported some stories.

For example, at St. Louis University Hospital, medical students set up a clinic to provide health care to uninsured people. When the public affairs office pitched a story to Shelton about a fundraising auction for the clinic, she suggested a story profiling the clinic.

She wanted to spend a day there, walking around and talking with the students and patients. With a patient's consent, she also wanted to be in the exam room to see how the students interacted with the patient. But the hospital told her the patient's consent did not relieve them of their HIPAA responsibilities.

Shelton said that is not true. "Clearly, if the patient signs a HIPAA form allowing me to be there, there's no reason I can't be there," she said.

She was not able to persuade the hospital to give her more access and never wrote the story. Shelton said she doubts HIPAA was the problem. Instead, she believes that hospital officials were citing the law because they were concerned she would see something they did not want her to, such as the potentially awkward moments that occur when a medical student is just learning how to work with patients.

Such problems have increased in the past year, she said.

"It's not because there's a lack of clarity," Shelton said. "It's because HIPAA is an excuse."

Shelton also pointed to another experience she had writing about a neonatal unit at St. Louis Children's Hospital. She had three meetings with hospital staff to work out logistics, a tactic many people recommend, to head off HIPAA problems before they arise. But it did not work.

One important procedure for Shelton was that she, rather then the hospital staff, approach each family and ask their permission to be in the story. At a meeting, hospital staff agreed to this condition, she said, and everything went well on the first

AP PHOTO BY TOM GANNAM

Restrictions at the St. Louis Children's Hospital have hampered some local journalists' reporting. One reporter said she will turn to more acommodating hospitals for feature stories in the future.

day — until 5 p.m.

"All of a sudden, one nurse decides she wasn't comfortable with it," Shelton said.

The ground rules she had worked out seemed to fly out the window, she said. The next day, the hospital's public relations staff took over asking families to be in the story. Not another family agreed.

"Everything I got, the story we ended up running, came from everything I got the first day," she said.

Afterward, she had several meetings with

AP PHOTO BY PHELAN M. EBENHACK

Often, officials say HIPAA requires them to enact strict barriers to enter hospitals — even for the most innocuous stories. Media attorneys say it is difficult for journalists to assert a legal right to access hospitals.

staff to express how upset she was with the way things turned out.

Mitchell said the hospital association advises its members that they should be the ones asking for patient permission, just as the association advises members to always escort a reporter inside of a hospital.

"The responsibility is on the hospital and it's because the hospital is the entity with responsibility of protecting the patient's privacy rights," Mitchell said. "When the reporters are on campus, they're supposed to be accompanied by members of the media team, really in order to protect the patient's privacy, which is paramount."

Tonda Rush, a media attorney and director of public policy for the National Newspaper Association, said it is not necessarily advisable to commit to any contract or agreement to writing. To make the agreement legally binding, the reporter would have to also make promises to the hospital, which would provide little flexibility for the reporter.

"If I were the attorney for the media, the last thing in the world I'd want is a contract for that," she said.

Rush said when it comes to entering hospitals, there is little a reporter can do.

"Hospitals are a problem area because there's not really a legal access right," she said.

The information and access reporters enjoyed before HIPAA was more a matter of tradition than a right, she pointed out.

Reporters have to be more creative in getting information now, Rush said. For example, if a reporter is being escorted around the hospital by public affairs staff and not allowed to talk to patients, the reporter can write down patient names, room numbers, and other information they observe and follow up later.

"There's nothing to stop a reporter from approaching a patient," Rush said. "They just can't do it at the hospital."

She also said reporters can have patients willing to share their own medical records request them and then share the copies with the reporters. That is more access then reporters had before HIPAA, when patients had trouble getting their own records, Rush said.

Shelton has her own way of dealing with uncooperative hospitals. Now, she says, if she wants to do a story similar to her profile of the neonatal unit, she will turn to another hospital, one that will want the attention and will be more flexible.

Shelton emphasizes she has a choice of where she reports these types of enterprise stories, which hospitals don't seem to recognize.

"In their attempt to control, they really damage the relationship and they damage journalism," she said. ◆

General access to hospitals

The American Hospital Association has guidelines for its members on how to respond to media requests generally. Journalists need to know what hospitals are being told but should note that the association's guidelines may be more restrictive than the law requires. The guidelines include:

Access to patients' rooms

Hospitals should not give out a patient's room number without the patient's permission.

Direct contact with patients

Hospitals should not allow reporters to contact patients directly. A representative of the patient should handle media calls. The hospital should deny media access to a patient if the hospital thinks it would interfere with the patient's care.

Inside of the hospital

Hospital staff should always accompany reporters when they are inside the hospital. The staff can deny access to any area they believe patients have an expectation of privacy, including the emergency room, intensive care units and nurseries.

Photographs and interviews

Both photographs and interviews require written consent of the patient. Background photos taken in public spaces are not addressed directly by HIPAA, but in general the hospital cannot release identifiable photos without patient permission. Hospital staff, rather then reporters, should approach people for permission.

Directory information when a patient has opted out

Patients can elect to not have their information included in the hospital directory, or have their information listed but not available to the press. If the patient does not want information given to the press, the hospital should ask the relationship to the patient of anyone who is calling for a condition report.

If a patient has opted out of the directory, the hospital should not respond with that information because it would disclose the patient's presence. The AHA recommends saying, "Federal medical privacy regulations allow the hospital to release to the media only information in the hospital's directory" and "the hospital does not have any information about the person in its directory." ◆

AP PHOTO BY BILL HABER

During Hurricane Katrina, when floodwaters in New Orleans caused emergency officials to take away patients of Charity Hospital by boat, journalists covering the disaster ran into fewer barriers relating to HIPAA than they usually encounter.

Attitudes toward privacy rules may change in times of disaster

Jane Hansen spent four months after Hurricane Katrina delving into how two hospitals in New Orleans coped in the tense hours and days following the storm.

In the end, she wrote 22 stories for *The Atlanta Journal-Constitution* that ran in May and June under the title, "Through Hell and High Water."

The stories were accompanied by pictures taken by hospital staff during events and given freely to the newspaper.

The only people who brought up the Health Insurance Portability and Accountability Act throughout the disaster were in her newsroom.

"I kept waiting because my husband is a doctor and he runs into HIPAA all of the time," Hansen said. "I don't think anyone ever uttered the word HIPAA except at my end — the editor's end."

Hansen's series told the stories of about a dozen people who worked to save 347 patients at Charity Hospital and more than 150 patients at Tulane Hospital, two hospitals located across the street from each other in downtown New Orleans.

"The only time I ran into confidentiality was when I was mucking around trying to verify who died," she said. But with persistence, she was able to confirm what she needed, she said.

Hansen wanted to meet one of the survivors from Charity who had been taken on a truck through the water, had his collapsed lung re-inflated in the middle of the street, and was carried to the rooftop of Tulane's hospital before being flown away by helicopter.

When she tracked him down, she went to see him in his hospital bed, along with a photographer.

"I had so much information on him from the doctors who were treating him, and they didn't hesitate to talk about him," she said.

Hansen was surprised — pleasantly — that she did not face the HIPAA-related problems she feared.

"I think because it was such an extraordinary tale, the issue of confidentiality just didn't come up," she said. "The notion of confidentiality seemed silly . . . given the life and death situation they were all up against."

In part, her experience may be due to two bulletins the Department of Health and Human Services issued in the days following Katrina, and which department officials say are applicable in future disasters.

According to the bulletin, health care providers can share information to locate a patient's friends or family. When possible, verbal permission should be obtained from the patient, but the bulletin says it is not necessary.

"Thus, when necessary, the hospital may notify the police, the press, or the public at large to the extent necessary to help locate, identify or otherwise notify family members and others," the bulletin read.

AP/THE DAILY TOWN TALK PHOTO BY TIA OWENS-POWERS

The Department of Health and Human Services issued bulletins during Hurricane Katrina that said HIPAA did not prevent the release of certain information to locate patients' families. Hospital officials say that may be part of the reason that medical officials were more forthcoming with information during the storm and its aftermath.

AP PHOTO BY DAVID J. PHILLIP

In addition, the bulletin said health care providers can share information with anyone to prevent or lessen a threat to the patient or the public's health and safety. Health care providers can also provide directories of patients, the bulletin reminded.

Alicia Mitchell, a spokeswoman for the American Hospital Association, said following Katrina, the hospitals were more flexible.

"Patient records didn't follow patients. It was a time of disaster, and hospitals did what they thought was right to help the patient and shared information appropriately," she said.

The guidelines put out by the government also helped, she said. "HIPAA is not supposed to get in the way of the flow of information that is helpful for the public good in times of disasters," she said.

The hospital association advises its members to work with the media during disasters.

For example, the association says after an explosion, a hospital might want to disclose general information, including the number of patients being treated there due to the event.

In cases where a hospital is trying to identify a patient, the association says it is not clear what information the hospital can release under HIPAA. A hospital might want to release general characteristics such as gender, height and weight, but would not be able to release a photo without the patient's permission. But the association recommends that a hospital use its professional judgment in the best interest of the patient.

Mitchell also pointed to another disaster resource — a patient locator Web site the Greater New York Hospital Association maintained in the days following Sept. 11. The public could enter names and receive basic information about the people if they were patients. Such a Web site should be HIPAA-compliant, she said. ◆

Top secret

What kind of information has been withheld under the Health Insurance Portability and Accountability Act?

• Chris Halsne, an investigative reporter for KIRO-TV in Seattle, reported that Seattle hospitals were failing to notify the police when patients in police custody were discharged. On at least one occasion, hospital officials warned a murder suspect that detectives were on the way, allowing the suspect to escape, Halsne reported.

For the story, he obtained a copy of a hospital's internal memo that said, "we cannot and should not be calling" law enforcement "to pick up arrested patients without their authorization."

"They stand on HIPAA falsely and are releasing some pretty dangerous people," he said.

• In Georgia, a local sheriff's department cited HIPAA when reporters for *The Atlanta Journal-Constitution* asked whether deputies had received a medical clearance for the firing range.

The record "shows nothing whatsoever about medical information, it just said they were cleared," said David Milliron, the newspaper's computer-assisted reporting editor.

• In a *St. Paul (Minn.) Pioneer Press* story on the Minnesota Vikings football team in May, Coach Brad Childress cited HIPAA as a reason for not releasing the players' weights. ◆

AP PHOTO BY TOM OLMSCHEID

Vikings coach Brad Childress

Confusing laws keep information confidential on college campuses

A college football game illustrates the strange interpretations of HIPAA. The star quarterback is sacked during a play and 50,000 spectators and a national TV audience see his leg snap. But the coach will not talk about the player's injury because he thinks HIPAA prevents him.

In reporting on universities — whether the topic is football or campus crime — journalists are finding the Health Insurance Portability and Accountability Act an obstacle to gaining records and information.

One of the HIPAA challenges unique to university coverage is that certain student records have long been considered confidential under a different federal law, the Family Educational Rights and Privacy Act, known as FERPA or the Buckley Amendment.

This can lead to confusion on everyone's part about which law applies and why, particularly because one department might withhold information under FERPA, while another can cite HIPAA in holding the same information confidential.

For example, health records kept by the student health center are student records covered under FERPA. If those records are disclosed to an athletic coach, FERPA controls what the coach can discuss publicly.

However, the same student health information at a university hospital might be controlled by HIPAA but not FERPA, said Jerry Woods, an attorney with Kilpatrick Stockton in Georgia and former counsel for the Medical College of Georgia.

"A lot of universities are very concerned because they're dealing with two different laws and they're trying to administer these laws," Woods said.

Even when FERPA does not apply, two schools can be subject to very different rules about the release of information because agencies have flexibility in the way they set themselves up under HIPAA.

AP PHOTO BY ALEX BRANDON

Since HIPAA went into effect, some colleges have said the law prevents them from releasing information about college athletes' injuries. In 2005, a spokesman for Louisiana State University refused to tell a newspaper about the knee injury of running back Alley Broussard (above).

Universities can make their entire organizations subject to HIPAA, or they can be "hybrid entities" with HIPAA-compliant health care components and non-health components that are free from the regulation.

For instance, the University of Kentucky has defined its athletic training facility and employees as part of the non-health care unit of the university, so it does not have to comply with the same regulations as the health care component.

If an athletic department is not considered part of the health care component, its employees are not subject to HIPAA — even when they get information from a health care provider who is covered, Woods said.

HIPAA does not control the coach once that information has been disclosed, in the same way it does not control a journalist who has the information. But the coaches

AP/THE DAILY TEXAN PHOTO BY MARK MULLIGAN

When a substance initially appearing to be the poison ricin was found at the University of Texas in Austin last year, the university told the student newspaper not to print the names of the students involved because of medical privacy laws. *The Daily Texan* managed to get the names from other sources.

might think it does.

"They believe in good faith they can't disclose the information, and they may get legal advice to that effect," Woods said.

But in the other scenario — if a university made no distinction between the athletic department and other health care services for HIPAA purposes — a coach may be prohibited by HIPAA rules from disclosing certain information about players.

'Our hands are tied'

With those complicated rules, it is not surprising that HIPAA can be as confusing for college officials as it is for journalists.

A 2003 Associated Press story reported that officials at some schools, such as Kansas State University, thought HIPAA applied to them, but other universities did not.

For example, an August 2005 article in *The (Baton Rouge) Advocate* reported that Louisiana State University sports information director Michael Bonnette would not discuss a football player's knee injury.

"He's got a knee injury, and that's all we're saying," he told the newspaper. "Due to these new medical laws, our hands are tied."

To Keith Webster, the head athletic trainer at the University of Kentucky and former chairman of the government committee for the National Athletic Trainers Association, these types of responses are frustrating.

"I hate the term 'I can't release it because of HIPAA.' The reason you can't release it is because the patient or player refused to authorize the release," Webster said.

When someone invokes HIPAA, he wants to know the precise reason. "What are you really saying? Are you hiding behind it, or did the athlete refuse to release that information, or is it a policy?" Webster said.

Finding other ways

Mark Goodman, executive director of the Student Press Law Center, said the center would advise reporters to always argue that HIPAA does not apply to information about an athlete's injury.

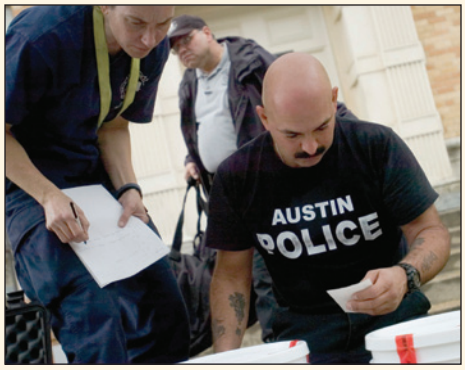
"But in all honesty, we would recognize that interpretation of the law is suspect," he said.

Goodman is not particularly anxious to push the issue in court for fear it might lead to bad precedent — especially since many reporters "are finding other ways to get the information," Goodman said.

Journalists, for instance, can inquire if universities have obtained permission from students through release forms, which many universities require of student athletes as a condition of participating in college sports.

While a university will require the student to allow the information to be released to coaches, schools will sometimes refuse to release that information to the media if the student wishes, Webster said.

But if college officials do end up speaking to reporters, waivers such as those used at Kentucky can protect school administrators.



AP/THE DAILY TEXAN PHOTO BY MARK MULLIGAN

Rudy Vasquez of the Austin Police Department readies samples of a powdery substance found at a University of Texas dorm. During the February 2006 scare, school officials refused to release some information, citing HIPAA.

"If we did release information to the media and the athlete complained about it, we can always fall back on that document," Webster said.

At the University of Texas in Austin, a university official told reporters for the student newspaper *The Daily Texan* not to print the names of students who were possible victims in a ricin poison scare because of HIPAA.

The reporters already had the names from other sources, said Richard Finnell, the newspaper's adviser, and they were able to go to another university official to resolve the HIPAA conflict — a practice that has become popular as many reporters seek alternative sources after running into dead ends with university officials.

"We tell our reporters to kind of deal with it — smile at them and say, 'yeah,' and then do what you have to do," Finnell said. ◆

Sources and Citations

90 Md. Op. Att'y Gen. 45 (2005).

Abbott v. Texas Dep't of Mental Health and Retardation, No. 03-04-00743-CV, 2006 WL 2504417 (Tex. App.-Austin, Aug. 30, 2006)

Hill v. E. Baton Rouge Parish Dep't of Emergency Med. Servs., 925 So. 2d 17 (La. App. 1 Cir. 2005).

Miss. Op. Att'y Gen. No. 2005-0595.

Neb. Op. Att'y Gen. No. 04018 (2004).

State ex rel. Cincinnati Enquirer v. Daniels, 108 Ohio St. 3d 518 (2006).

Univ. of Colorado Hospital Authority v. Denver Publishing Co., 340 F Supp. 2d 1142 (D. Co., 2004).

The Reporters Committee for Freedom of the Press is committed to helping journalists understand the laws that affect newsgathering. And we have a wide array of publications that can help.

We've got special reports like **Homefront Confidential**, an examination of access and information policy issues in a post-September 11 world.

Our **Reporter's Privilege Compendium** offers a detailed look at each state's shield laws and court decisions that affect the ability of reporters to keep their sources and information confidential.

For help with gaining access to government records and meetings, we've got **How to Use the Federal FOI Act**. Or for state law help, there's the **Open Government Guide**, a complete guide to each state's open records and meetings acts. Also, **Access to Electronic Records** tracks developments in the states regarding computerized release of data.

And of course, there's the **First Amendment Handbook**, a guide to almost every aspect of media law with practical advice for overcoming barriers encountered every day by journalists.

For these and many more publications, visit our Web site. Read these guides online — for no charge — or purchase a copy to read in print.

Visit our online First Amendment newsstand at:
www.rcfp.org/publications