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## **HIPAA Privacy Enforcement Begins**

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*Two recent HIPAA conferences reveal surprises about HIPAA enforcement as complaints flow in to DHHS...*

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400 people crowded a room in Baltimore on September 16 at the national HIPAA Summit. And when Susan McAndrew, Esq stepped to the podium, all eyes turned to her and the room went quiet. Why? Because she is Senior Advisor for HIPAA Privacy Policy at OCR and the point-person at the DHHS Office for Civil Rights who is charged with handling HIPAA privacy complaints now that the April 14 deadline has passed.

And she clearly has her hands full. For one thing, no one expected so many complaints this quickly. As she joked, "we thought people went on vacation in July and August...." Her boss, Rick Campanelli, head of OCR, also commented recently on the situation and characterized the types of complaints.

### **What are they complaining about?**

Since April 14, consumers have filed about 1200 complaints. This is lot considering that filing a formal complaint is not a particularly easy or obvious thing for a consumer to do.

What are they complaining about? There are some surprises here. Campanelli outlined three of the top consumer complaints (most of which are about direct care providers). They are:

1. Patients could not get access to their records;
2. Patients did not receive notices of privacy practices;
3. Patients filed complaints about "overheard conversations", i.e., disclosures in a treatment room or reception area that were not adequately safeguarded.

Unfortunately, although these 1200 complaints are real, you can't obtain data on them. In fact, McAndrew said that OCR has no specific plans at this point to post any statistics about the volume, source, type, or locale of the complaints being handled by OCR. Will data be available eventually? Undoubtedly yes, if for no other reason than that the Freedom of Information Act will require it.

## **What OCR is doing**

Call this the “grace period”—before the Department of Justice gets involved. Because right now, OCR is handling complaints by telephoning the offending entities and discussing what to do to prevent further complaints.

The good news is that so far no fines have been levied and no one from OCR has done any on-site inspections. For now—until they’ve staffed up the department—all complaints are being handled via phone calls to encourage HCOs to voluntarily comply. Nevertheless, McAndrew made absolutely clear that procedures are now in place for OCR to turn over serious violations to the Department of Justice. As to additional staffing to handle complaints and dispense Technical Assistance, they anticipate hiring 40 new people by the end of 2003 for this purpose

In addition, they have now—finally—begun adding to their staff (they expect to have 40 new hires by the end of the year). They have also begun actively revising their FAQs to help clarify the many murky areas that have produced frustration and confusion. In addition, they are beefing up their “Technical Assistance” program to help healthcare organizations understand and comply with the law.

## **Enter Complaint #3 and WEDI SNIP’s new Guidance**

Turns out what patients actually file complaints about is NOT what you have been advised to fix. For example, most HCOs—and their lawyers and HIPAA consultants—thought that complaint number three (“overheard conversations in a treatment setting”) was a non-issue. That is, they thought either (1) it didn’t matter or that (2) nothing could be done about it that fit the definition of a “reasonable safeguard.” In addition, DHHS/OCR’s official “Guidances”, FAQ’s and Technical Assistance on this topic have been unclear and thus have added to the confusion.

More good news: four months *before* the mid-September HIPAA conference in Baltimore, an important group called WEDI SNIP, that is virtually unknown to the public, held its own HIPAA conference in Washington, DC. And they released clear policy guidance on “oral communication.” What is WEDI-SNIP? This is the organization specifically designated by Congress (and named right in the text of the Law), as the advisor to which the DHHS *must turn* for guidance on technical matters involved in implementing HIPAA. So what they say on any aspect of HIPAA carries a lot of weight.

At this mid-May conference, WEDI-SNIP released a document that had been under review for eight months by WEDI-SNIP’s Privacy Subcommittee. Read it, because it specifically sheds light on this topic of HIPAA’s misunderstood, frequently overlooked “oral communication” privacy requirement.

## **Seven facts**

It turns out that:

1. Most of what you think about this subject is probably wrong;
2. Numerous myths about this subject abound among healthcare professionals and their advisors in the legal, IT and HIPAA consulting community;
3. These myths create a “blind spot” about a subject consumers say really matters to them;
4. This “blind spot” opens the door for costly personal injury and even class-action suits against HCOs;
5. Specific, widely understood standards are readily available from three leading standards organizations ISO, ANSI and ASTM and they carefully define what “speech privacy” is and *how OCR inspectors and personal-injury lawyers as well as healthcare professionals can measure speech privacy with simple electronic instruments;*
6. Solving the “oral communications/speech privacy” problem is actually very simple and can be done inexpensively;
7. A tool kit of simple and affordable solutions is available--some of which you can order over the internet.

## **Add this to your shopping cart**

You can obtain a copy of this document from the WEDI SNIP web site\* or by requesting a copy from the authors ([dsykes@acentech.com](mailto:dsykes@acentech.com) or [tmsam@aol.com](mailto:tmsam@aol.com)). Your HIPAA compliance team and others involved in risk assessment will certainly appreciate it and will want to add it to your organization’s HIPAA GAP Analysis and compliance planning effort.

Whatever you do, don’t let your facilities people spend money to “fix” this problem until you and they understand the tools used to measure and fix the problem. To mitigate your own risk and comply with the Law, it’s up to you to understand (a) how inspectors can measure and monitor the performance of what you do, and (b) how easy and inexpensive it is to solve the problem in ways that will protect you in court.

This new WEDI SNIP document has two benefits you and your colleagues will appreciate. First, it is the *only* one on this neglected aspect of HIPAA (so you won’t have to chase down a lot of conflicting advice and then pay an attorney to interpret it for you). And second, it comes from the authoritative source to which the enforcement people at DHHS and OCR are required by law to listen. Nevertheless, if you have an appetite for more information on this subject, there is abundant supplemental scientific literature available. Because it has been researched exhaustively for over four decades by a number of government agencies like DARPA and GSA (which in 1972 published an official document on it called “the beige book”), as well as by numerous academic institutions and professional organizations.

## **Better late than never**

Wouldn't it have been nice if you'd had access to information about this murky, overlooked subject earlier? Sure. But who knew patients would actually file formal complaints about it—or that the U.S. Office for Civil Rights would be calling people and saying 'patients are complaining about you'? The best news is that you can fix this easily, quickly and inexpensively because "reasonable safeguards" are readily available.

\*WEDI SNIP posts a copy of this new policy guidance at the following address:  
[http://www.wedi.org/snip/public/articles/dis\\_publicDisplay.cfm?docType=6&wptype=2](http://www.wedi.org/snip/public/articles/dis_publicDisplay.cfm?docType=6&wptype=2)

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## **About the authors:**

*In addition to co-authoring the WEDI-SNIP document described above, the authors of this article teach an AIA-certified seminar on the subject entitled "The New Consumer Privacy Laws, GLBA & HIPAA" and also speak frequently at conferences about this subject.*

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