

Excerpted from: Recordkeeping, Patient Access,
and Other Legal and Risk Management Issues
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APA Practice's Office of Legal & State Advocacy (LSA)

Information Blocking

Where does it come from? ONC Cures Act Final Rule

- This Rule implements certain changes required by the 21st Century Cures Act:
 - Increase data interoperability across EHR systems and apps
 - Enhance patient access to digital health data
 - Compel app developers to create standardized, secure APIs to enable patients to more easily & inexpensively access their health data
- To take effect **April 5, 2021** (but may further extended)
- The Rule applies to:
 - Clinicians/hospitals (including psychologists) that maintain EHRs
 - Health IT developers
 - Health information networks, health information exchanges
 - Patients
- Information blocking prohibitions are a major part of the Final Rule

What is Information Blocking?

- Defined as a practice likely to interfere with access, exchange, or use of electronic health information (EHI) by the patient or patient's representative
- Certain “reasonable and necessary activities” have been identified as exceptions to information blocking
- Those activities are divided into 2 categories:
 - Exceptions that involve not fulfilling requests to access, exchange, or use EHI; and
 - Exceptions that involve procedures for fulfilling requests to access, exchange, or use EHI
- Open notes is the underlying philosophy.

What are the Information Blocking Exceptions?

There are recognized circumstances where practices that affect access, exchange, or use of EHI are *not* considered information blocking.

- Exceptions that involve not fulfilling requests to access, exchange, or use EHI:
 1. Preventing Harm Exception
 2. Privacy Exception
 3. Security Exception
 4. Infeasibility Exception
 5. Health IT Performance Exception
- Exceptions that involve procedures for fulfilling requests to access, exchange:
 1. Content & Manner Exception
 2. Fees Exception
 3. Licensing Exception

What does this mean for psychologists?

- Are there no longer limits on patient access to their records?
 - Myth: Information Blocking gives patients access to all records.
 - Fact: Information Blocking doesn't change what records patients have access to under HIPAA and state law.
- If you already comply with HIPAA regarding what kinds of information your patients can access, you'll likely be covered by the Information Blocking exceptions.
- How you comply with the Information Blocking Rule depends on whether or not your EHR system is certified (by ONC).
 - Most systems commonly used by private practice psychologists are not certified, do not have direct access capability, and are not likely to become certified in near future due to expense.

Non-Certified vs. Certified EHR systems – What’s the Difference?

- Non-certified EHR systems do not typically have the capability to give patients direct & immediate access to their EHR via a mobile app or a patient portal.
- If a patient wants immediate direct access, most solo or small practices may be able to rely on the infeasibility exception.
- What Information Blocking exceptions might apply if I’m working with a certified EHR?
- These are discussions to have with your compliance or legal department, information systems department, or designated EHR/Information Blocking team, if available.

What's the Infeasibility Exception to Information Blocking?

“Infeasible Under the Circumstances”:

- For this exception, you would document that:
 - It would be infeasible to upgrade to a certified EHR
 - due to the cost of such a system
 - and the burden on your practice of changing EHR systems
 - taking into consideration your practice's available financial and technical resources.

Infeasibility Exception cont'd

“Segmentation: Can’t grant access because you can’t unambiguously segment (separate) the requested EHI from EHI that:

- cannot be made available either due to patient’s preference or because the EHI cannot be made available by law; or
- may be withheld under with Harm exception.

Potential applications: comingled test data, multiple patients

Update re psych and neuropsych test data and reports: We’ve had some recent success with the argument that test data and reports are not subject to the Info Blocking Rule because they do not fit into the very medically-oriented US Core Data Set for Interoperability version 1 (USCDI v. 1) that currently defines electronic health information (EHI). Only EHI is subject to the Rule. For more details, see last resource on slide 16 re USCDI and contact LSA – praclegal@apa.org

Infeasibility Exception cont'd

- Uncontrollable Events: Cannot provide access due to unforeseen events like a public health emergency, natural disaster or telecommunication or internet service disruption.

What is the Privacy exception to Information Blocking?

- Denial of patient access to **psychotherapy notes** → not information blocking
 - Psychotherapy notes won't be immediately available to patients without any warning to you.
 - In most states, patients can still access them, but they will be under the traditional system that allows you to review these notes and talk to the patient before providing access
 - Psychotherapy notes may also be useful if you need time to sort out multiple patients, minor proxy issues

Privacy Exception cont'd

- **Consent, verifying authority** and other legal preconditions
 - Necessary to verify legal authority of patient's personal representative, or rights of parents in divorce/custody situations
- **Respecting a patient's request not to share information**
 - Not Information Blocking if the patient has requested limitations on sharing his/her EHI
 - But cannot improperly encourage or induce the patient's request to limit sharing EHI

What is the Preventing Harm Exception to Information Blocking?

- Refusing to disclose EHI where that would endanger the life or physical safety of a patient or another person
 - Determination based on current or prior psychologist-patient relationship

What are some Recordkeeping/Patient Communication Strategies for Adapting to Immediate Direct Patient Access?

- Keep lean records → “minimum necessary” and/or psychotherapy notes
- Document with the expectation that patients will read it w/o your knowledge or ability to offer context & explanation
- For proxy or multiple patients:
 1. Provide clear explanation to patients/proxies
 2. Written agreement re what goes in whose EHR and who has access
 3. Clear policy for yourself re segregating EHI that aligns with the parties’ agreement/understanding
- Offer ability to request restrictions for patients who wish to limit access to their sensitive information

Additional Considerations

- Review your policies governing patient access:
 - Look for unjustified barriers/inconvenience
 - Long forms that patients must fill out to request access?
 - Must patients answer questions or provide information not essential to your response to their request?
 - Does you offer limited or inconvenient times for patients to come in to inspect their records?

Resources

- APA Detailed FAQs about the Information Blocking Rule:

<https://www.apaservices.org/practice/business/hipaa/rule-change-access-records>

- ONC Final Rule Information Blocking Exceptions:

<https://www.healthit.gov/sites/default/files/cures/2020-03/InformationBlockingExceptions.pdf>

- ONC Information Blocking FAQs:

<https://www.healthit.gov/curesrule/resources/information-blocking-faqs>

- ONC – USCDI current data classes & elements

<https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi>

Further questions?

Email LSA at: praclegal@apa.org

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