## FAQ **: Are health care providers subject to the information blocking regulations even if they do not use any certified health IT?**

**21st Century Cures Act Information Blocking: Final Rules**

**What is the general information I need to know about this law?**

**Crucial introduction:**

This law is in effect April 5, 2021.

WE WISH WE HAD ALL THE ANSWERS FOR YOU, BUT -

Here is what the AMA states, in their official paper regarding the clarity of this law:

“Next steps: The info blocking regulations are very complex and will take time to fully implement and understand. Many health care systems, medical professional associations, and experts in compliance are still seeking clarity and guidance from the federal government.

Consider how your organization will stand up a compliance program, document your actions, and importantly, consider how your practices can be improved to better respond to patient requests for their data.”

The ONC (Office of the National Coordinator) law and a sister law through CMS (Center for Medicare Services) both go into effect on the same day. The CMS law mostly is for insurance companies and other type entities and, for the most part, as a physician, if you fulfill the requirements for ONC you should be in pretty good shape.

We are not attorneys. This law is very new and confusing and it is unclear how it will be enforced - we recommend legal counsel for any areas of concern, etc.

You may need the help of professionals, in the world of compliance, to assure your best chances.

From all indications - meeting the requirements of this law will necessitate several well DOCUMENTED steps: a self-audit, a mitigation/action plan, formalized written policies, formalized written procedures, customized forms and doctor/staff outlined and documented training.

FOR HELP, contact <https://drtythecomplianceguy.com/getstarted>

The law is made to stop covered entities and their business associates from blocking patients access to or ability to get, copies of their electronic health information (EHI).

This law is created to improve the flow of information and thus improve coordination of care.

While this law is to enhance the ability for authorized parties to access information, this law also goes into detail regarding eight ‘exceptions’ that you are required to evaluate prior to releasing any information. If an exception exists then you are to NOT release the information and document what was requested, who requested it and why you denied the request and notify them. This will take a specialized form.

It is also very important to understand these exceptions as they are the way you might be able to justify your failure to meet certain requirements under this law.

As an example, if a patient wants copies of something, sent to them electronically and you cannot accomplish that, the only way to stay within the law is if your failure to comply falls within one or more of the exceptions and you document it on a proper form.

In this case you may be able to negotiate with the patient to deliver their information in a different format if you can justify such negotiation under the exception of “Content and Manner” or possibly more than one exception.

You first need to know if you have to comply, then you can start to understand in what circumstances you might need the exceptions.

**Who has to comply?**

**I am all paper, I don’t have a computer and/or don’t store ANY patient information electronically - do I have to comply?**

For the most part NO.

This law is relative to electronically stored information.

This law does not directly state anything regarding paper records and only , constantly, refers to ‘records in electronic form’ and never states that your records MUST BE in electronic form.

This law requires that you send ELECTRONIC HEALTH INFORMATION  electronically, with proper authorization and that you allow patients access to their ELECTRONIC data for free and on an immediate basis. You do NOT BLOCK them from getting to their records.

There are certain times you DO NOT RELEASE patient information (like in the HIPAA law).

Under this new law there are ‘exceptions’ defined for which you must review a request to release information and then NOT release it.

Following those exceptions will still apply to you and you need to have a 21st Century CURES Act compliance manual, program, etc., to show you have documented any parts of the law that you are complying with, but this will not include complying with electronic access or delivery of your data - which is at the heart of this law - because you do not have any electronic data.

This is from ONC website:

Yes, any individual or entity that meets the definition of at least one category of[actor](https://www.healthit.gov/cures/sites/default/files/cures/2020-03/InformationBlockingActors.pdf)—“health care provider,” “health IT developer of certified health IT,” or “health information network or health information exchange” —as defined in [45 CFR 171.102](https://www.ecfr.gov/cgi-bin/text-idx?SID=4546012e04ae061b03aaac51553c838b&mc=true&node=se45.2.171_1102&rgn=div8)  is subject to the information blocking regulations in 45 CFR part 171. The information blocking regulations in 45 CFR part 171 apply to a health care provider, as defined in the Public Health Service Act and incorporated in 45 CFR 171.102, regardless of whether any of the health IT the provider uses is certified under the ONC Health IT Certification Program.

**Experience with the enforcement of this law may show, over time, that they do not even review complaints regarding offices with no electronics and refer that complaint on to HIPAA regulators, etc., at this time that is unknown.**

Here is a further opinion from the legal counsel for the American Optometric Association:

**What if my practice uses only paper charts?**

Practices may continue using paper charts, and if you do not use electronic records, the 21st Century Cures Act likely has little impact on your practice. The concern for doctors is not to be an “information blocker.” As described in the definition above, information blocking relates only to electronic records. Since you are not using electronic health records, you wouldn’t be information blocking or in violation of the Cures Act.

Per [Ann Tran Lien, JD, Managing Director Legal Affairs](https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/cid/38?Category=ann-tran-lien%2c-jd%2c-managing-director-legal-affairs) | *The Therapist*

**What if I am all paper, with no computers?**

It is important to note that the Rule, only applies to electronic health records/information.

You don’t have much to do - but see the FAQ below:

“I have some patient private information on computers, but not all of the types of information that is required in this law is available in my office electronically and I don’t have an EMR/EHR software, instead I have stand-alone software packages like billing software, scheduling software, chart note software, etc., do I have to comply and do I have to buy upgraded electronic systems?”

**I am all paper, do I have to buy computers and electronic software to meet the requirements of this law?**

NO. but see the FAQ below: “I have some patient private information on computers, but not all of the types of information that is required in this law is available in my office electronically and I don’t have an EMR/EHR software, instead I have stand-alone software packages like billing software, scheduling software, chart note software, etc., do I have to comply and do I have to buy upgraded electronic systems?”

**My present EMR/EHR system will not perform all of the functions required under the law, do I have to immediately upgrade or buy a new system?**

NO, but see the FAQ below: “I have some patient private information on computers, but not all of the types of information that is required in this law is available in my office electronically and I don’t have an EMR/EHR software, instead I have stand-alone software packages like billing software, scheduling software, chart note software, etc., do I have to comply and do I have to buy upgraded electronic systems?”

**I have some patient private information on computers, but not all of the types of information that is required in this law is available in my office electronically and I don’t have an EMR/EHR software (or I have one that is not certified), instead I have stand-alone software packages like billing software, scheduling software, chart note software, etc., do I have to comply and do I have to buy upgraded electronic systems?**

This gets sticky and less clear. The question of what you have to do in the event your software, including EMR/EHR, cannot meet the requirements under the law is less clear. The information from pediatric success series at the bottom of this section is very helpful to answer this question - as a preview, here is one response by them that includes a thought on paper only or inadequate systems:

**It is stated that you do not have to buy or upgrade equipment at this time. Straight off ONC website:**

No. The information blocking regulations **do not** require actors to have or use health IT certified under the ONC Health IT Certification Program. Actors subject to the information blocking regulations are not required to immediately upgrade their certified health IT (as of the applicability date, i.e., April 5, 2021). Please review the questions under the "[Electronic Health Information](https://www.healthit.gov/curesrule/resources/information-blocking-faqs?options=2450b60a-e96a-4f4c-ab17-40aac81e40be)" heading for more information.

**It is also stated in the law that certain types of information must be made available, such as progress and chart notes, that many offices do not enter into their electronics presently. It is pretty clear that if you have a certified EMR system, that is capable of this, then you MUST comply with this and figure out how to enter and make the following information available:**

From April 5, 2021, to October 6, 2022, the types of clinical information that are subject to the information-blocking provisions in the Rule are limited to the EHI identified in the U.S. Core Data for Interoperability (USCDI).  They include the following:

* Consultation notes
* Discharge summary notes
* History and physical notes
* Imaging narrative
* Laboratory report narrative
* Pathology report narrative
* Procedure notes
* Progress notes

**It is less clear when you have to make these particular notes available if your equipment is not able to do so at this time. It appears they are going to give time before starting fines.**

**One indication is that they refer to records that a doctor does NOT have in electronic format, in the event they have SOME information in electronic format:**

“Under the information blocking regulations in 45 CFR part 171, the actor is only required to fulfill a request with the requested EHI that they have and that can be permissibly disclosed to the requestor under applicable law. However, for protected health information they have, but do not maintain electronically, all HIPAA requirements would still be applicable, including the right of access.”

“[An actor](https://www.healthit.gov/cures/sites/default/files/cures/2020-03/InformationBlockingActors.pdf) is not automatically required to fulfill a request using the specific content and vocabulary standards identified in the [United States Core Data for Interoperability (USCDI)](https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi) standard for the representation of data classes and data elements, nor are they required to use certified technology or any specific functionality.”

They also indicate that you and the patient can agree on an alternate way to supply information.

“This means that, for the purposes of information blocking, before October 6, 2022, an actor may fulfill a request with the EHI identified by the data elements represented in the USCDI standard, first in the manner requested and, if not, in an alternate manner agreed upon with the requestor, following the order of priority specified in the exception.”

Some considerations:

1. Since there are many types of records required to be released in electronic form and it is not clearly understood or enforced YET, you might consider dictating notes relative to progress, treatment visits etc. directly into an electronic data software that is accessible.
2. Consider having a data entry person take your written notes and transcribe/enter them for you…
3. Consider a ‘scribe’ to follow you and enter electronic notes

WHAT REMAINS UNCLEAR IS IF YOU HAVE SOME DATA ELECTRONICALLY, THAT IS NOT EMR CERTIFIED, DO YOU ONLY HAVE TO DELIVER THE ELECTRONIC DATA YOU HAVE, IF REQUESTED.

*OR DO YOU HAVE TO IMMEDIATELY FIND A WAY TO ENTER THE OTHER REQUIRED DATA INTO A SYSTEM TO PROVIDE ACCESS DIRECTLY FOR PATIENTS AND OR DO YOU HAVE TO NOW ENTER THE REQUIRED DATA (TREATMENT NOTES, PROGRESS NOTES, ETC.) TO BE ABLE TO DELIVER THAT ELECTRONICALLY to meet the law?*

**Pediatrics is very highly impacted by this law and here is some information from Pediatrics Success Series:**

**What about information that is stored off-site in paper charts?**

That is not EHI that you currently possess if it's on paper and off-site. So, the 21st Century Cures Act does not apply to that information.

There is likely going to be some work that most practices will have to do to become fully compliant. However, everyone should have at least a written policy, identified gaps, and a plan in place to protect against risk if there is a complaint.

In order to be compliant with the 21st Century Cures Act, if a patient requests an electronic copy of their records, you must be able to provide them electronically. You may not have the ability to provide them that way currently, and may negotiate with the family a reasonable alternative but that should be documented  according to your policy and procedure and you should be working to be able to include that capability in the future.

**What about old paper charts that we have scanned in to an external hard drive or scanned into a chart?**

It is not reasonable for all scanned documents in a patient's chart to be made available electronically, at this time with currently available technology. While the Cures Act refers to the "data elements" in the USCD1v1 and not the manner in which those data elements are stored (you likely have some covered data elements in those scanned documents), there is no reasonable way to electronically share them at this time.

If a patient or patient representative were to request, for example, "all my prior records from my previous PCP" electronically, it would be reasonable to respond that you have no technically feasible way to provide them electronically. It would be then incumbent upon you, following your practice policy, on how you could meet their needs. If you have a policy, it's reasonable, includes these kinds of issues and you follow it, you would likely not find a case for information blocking substantiated.

We will discuss more about exceptions (which this scenario likely falls under), in future educational opportunities.

**How does the requirement impact practices who are not currently on an EHR (i.e. still have paper records)?**

If a practice has paper records, but has some data in an electronic format (such as a Practice Management System to send/receive claims), then they must have a way to electronically provide the data they do have (CPTs, ICDs, etc.).

Per: [Ann Tran Lien, JD, Managing Director Legal Affairs](https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/cid/38?Category=ann-tran-lien%2c-jd%2c-managing-director-legal-affairs) |*The Therapist*

“The ONC finalized the definition of EHI to align it with the definition of “electronic protected health information” in a designated record set as defined per HIPAA, regardless of whether the records are used or maintained by a HIPAA-covered entity. If an actor does not maintain EHI, the Rule does not apply.”

**We have been teaching for over 10 years that the government and insurance industry intent *appears* to be moving to eliminate paper notes and paper filing.**

**Step one** was obvious. They paid you to put in EMR systems.

**Step two** was severely limiting your ability to file ins., especially Medicare, by paper means.

**Step three** is the 21st Century Cures Act to encourage the use of OpenNotes where patients can access everything a doctor writes (for the most part) and therefore making it information blocking to not allow access to all information.

We believe a future step will be to only accept insurance billed via a certified EMR system, therefore forcing you to EMR or to hire an outside company that can convert your data to an acceptable format.

Maybe a true cash practice could still exist, but likely your patients will NOT be able to file their ins. from your receipts and you will not be able to file if you do not have EMR.

It is also likely they will find more ways with more rules that make it harder and harder to exist without electronic records..

For some of you it might be time to bite the bullet?

**I have a certified electronic Medical records software program - do I have to comply?**

YES! This law was mainly passed with YOU in mind.

**What if a patient demands I send them something (or they want to access information) electronically and I don’t have it in an electronic format?**

If you have EMR/EHR then you likely need to figure that out fast and provide it. If you do not presently have the capability then you will need to deny the request and site the ‘exception’ regarding manner of delivery and or lack of capability/functionality and try to quickly negotiate with the patient regarding an alternate way to get them the information. **Some of this remains unclear.**

Please also see FAQ: **I have some patient private information on computers, but not all that is required in this law is available in my office electronically and I don’t have an EMR/EHR software, instead I have stand-alone software packages like billing software, scheduling software, chart note software, etc., do I have to comply and do I  have to buy upgraded electronic systems?**

**What are the eight exceptions and how can I use those if I can’t comply with a patients’ electronic access/delivery request?**

**If you deny access to a patient or to deliver their information electronically you will like have to site one of these exceptions to justify your non release or non-fulfillment.**

In the Cures Act, ONC provides guidance on Information Blocking by defining eight specific exceptions.

**1) Preventing Harm Exception**

It will not be information blocking for an actor to engage in **practices that are reasonable and necessary to prevent harm to a patient or another person**, provided certain conditions are met:

* The actor must hold a reasonable belief that the practice will substantially reduce a risk of harm.
* The actor’s practice must be no broader than necessary.
* The actor’s practice must satisfy at least one condition from each of the following categories:
	+ Type of risk
	+ Type of harm
	+ Implementation basis
* The practice must satisfy the condition concerning a patient right to request review of an individualized determination of risk of harm.

**2) Privacy Exception**

It will not be information blocking if an actor does not fulfill a request to access, exchange, or use EHI in order **to protect an individual’s privacy**, provided at least one of the following conditions are met:

* **Precondition not satisfied**: If required by a state or federal law to satisfy a precondition (such as a patient consent or authorization), an actor may choose not to provide EHI if the precondition has not been satisfied under certain circumstances.
* **Health IT developer of certified health IT not covered by HIPAA**: If an actor is not required to comply with the HIPAA Privacy Rule, the actor may choose to interfere with EHI exchange for a privacy-protective purpose if certain conditions are met.
* **Denial of an individual’s request for their EHI consistent with HIPAA**: An actor that is a covered entity or business associate may deny an individual’s request for access to his or her EHI in the circumstances provided under 45 CFR 164.524(a)(1) and (2) of the HIPAA Privacy Rule.
* **Respecting an individual’s request not to share information**: An actor may choose not to provide access, exchange, or use of an individual’s EHI if doing so fulfills the wishes of the individual, provided certain conditions are met.

**3) Security Exception**

It will not be information blocking for an actor to interfere with the access, exchange, or use of EHI in order **to protect the security of EHI**, provided certain conditions are met:

* The practice must be:
	+ Directly related to safeguarding the confidentiality, integrity and availability of EHI.
	+ Tailored to specific security risks.
	+ Implemented in a consistent and non-discriminatory manner.
* The practice must either implement a qualifying organizational security policy or implement a qualifying security determination.

**4) Infeasibility Exception**

It will not be information blocking if an actor does not fulfill a request to access, exchange, or use EHI **due to the infeasibility of the request**, provided certain conditions are met:

* The practice must meet **one** of the following conditions:
	+ **Uncontrollable events**: The actor cannot fulfill the request for access, exchange, or use of electronic health information due to a natural or human-made disaster, public health emergency, public safety incident, war, terrorist attack, civil insurrection, strike or other labor unrest, telecommunication or internet service interruption, or act of military, civil or regulatory authority.
	+ **Segmentation**: The actor cannot fulfill the request for access, exchange, or use of EHI because the actor cannot unambiguously segment the requested EHI.
	+ **Infeasibility under the circumstances**: The actor demonstrates through a contemporaneous written record or other documentation its consistent and non-discriminatory consideration of certain factors that led to its determination that complying with the request would be infeasible under the circumstances.
* The actor **must provide a written response to the requestor within 10 business days** of receipt of the request with the reason(s) why the request is infeasible.

**5) Health IT Performance Exception**

It will not be information blocking for an actor **to make health IT temporarily unavailable or to degrade the health IT’s performance**, provided certain conditions are met:

* The practice must:
	+ Be implemented for a period of time no longer than necessary **to achieve the maintenance or improvements** for which the health IT was made unavailable or the health IT’s performance degraded.
	+ Be implemented in a consistent and non-discriminatory manner.
	+ Meet certain requirements if the unavailability or degradation is initiated by a health IT developer of certified health IT, HIE, or HIN.
* An actor may take action against a third-party app that is negatively impacting the health IT’s performance, provided that the practice is:
	+ For a period of time no longer than necessary to resolve any negative impacts.
	+ Implemented in a consistent and non-discriminatory manner.
	+ Consistent with existing service level agreements, where applicable.
* If the unavailability is in response to a risk of harm or security risk, the actor must only comply with the Preventing Harm or Security Exception, as applicable.

**6) Content and Manner Exception**

It will not be information blocking for an actor to **limit the content of its response to a request** to access, exchange, or use EHI or the manner in which it fulfills a request to access, exchange, or use EHI, provided certain conditions are met:

* **Content Condition:** Establishes the content an actor must provide in response to a request to access, exchange, or use EHI in order to satisfy the exception.
	+ Up to **24 months** after the publication date of the Cures Act final rule, an actor must respond to a request to access, exchange, or use EHI with, at a minimum, the EHI identified by the **data elements represented in the United States Core Data for Interoperability (USCDI) standard**.
	+ On and after **24 months** after the publication date of the Cures Act final rule, an actor must respond to a request to access, exchange, or use EHI with **EHI as defined in § 171.102**.
* **Manner Condition:** Establishes the manner in which an actor must fulfill a request to access, exchange, or use EHI in order to satisfy this exception.
	+ An actor may need to fulfill a request in an **alternative manner** when the actor is:
		- Technically unable to fulfill the request in any manner requested.
		- Cannot reach agreeable terms with the requestor to fulfill the request.
	+ If an actor fulfills a request in an alternative manner, such fulfillment must comply with the order of priority described in the manner condition and must satisfy the Fees Exception and Licensing Exception, as applicable.

**7) Fees Exception**

It will not be information blocking for an actor **to charge fees, including fees that result in a reasonable profit margin**, for accessing, exchanging, or using EHI, provided certain conditions are met:

The practice must:

* Meet the ***basis for fees condition***.
	+ For instance, the fees an actor charges must:
		- Be based on objective and verifiable criteria that are uniformly applied for all similarly situated classes of persons or entities and requests.
		- Be reasonably related to the actor’s costs of providing the type of access, exchange, or use of EHI.
		- Not be based on whether the requestor or other person is a competitor, potential competitor, or will be using the EHI in a way that facilitates competition with the actor.
* ***Not be specifically excluded.***
	+ For instance, the exception does not apply to:
		- A fee based in any part on the electronic access by an individual, their personal representative, or another person or entity designated by the individual to access the individual’s EHI.
		- A fee to perform an export of electronic health information via the capability of health IT certified to § 170.315(b)(10).
* ***Comply with Conditions of Certification*** in § 170.402(a)(4) (Assurances – certification to “EHI Export” criterion) or § 170.404 (API).

**8) Licensing Exception**

It will not be information blocking for an actor **to license interoperability elements** for EHI to be accessed, exchanged, or used, provided certain conditions are met:

The practice must meet:

* The **negotiating a license conditions**: An actor must begin license negotiations with the requestor within 10 business days from receipt of the request and negotiate a license within 30 business days from receipt of the request.
* The **licensing conditions**:
	+ Scope of rights
	+ Reasonable royalty
	+ Non-discriminatory terms
	+ Collateral terms
	+ Non-disclosure agreement
* **Additional conditions relating to the provision of interoperability elements**.

**Is an actor required to fulfill a request for access, exchange or use of EHI with all the EHI they have for a patient or should the amount of EHI be based on the details of the request? In addition, what if an actor only maintains some of the requested information electronically?**

**Who are they after?**

Actors (doctors, IT program producers, etc.) who block patients from immediately accessing or drag their feet on providing copies of patient private health information, when requested with a proper authorization, that is stored in ELECTRONIC format. EHI (Electronic Health Information).

**Straight from the ONC website:**

Some things that will get you in trouble:

“The fulfillment of a request for access, exchange or use of EHI, including what EHI is shared, should be based on the request. However, any activity by the actor that seeks to artificially restrict or otherwise influence the scope of EHI that may be requested may constitute interference and could be subject to the information blocking regulation in 45 CFR part 171.

In terms of fulfilling requests for EHI, it is important to remember that the requirement to fulfill requests for access, exchange, and use of EHI is in any case limited to what [the actor](https://www.healthit.gov/cures/sites/default/files/cures/2020-03/InformationBlockingActors.pdf) may, under applicable law, permissibly disclose in response to a particular request. Under the information blocking regulations in 45 CFR part 171, the actor is only required to fulfill a request with the requested EHI that they have and that can be permissibly disclosed to the requestor under applicable law. However, for protected health information they have, but do not maintain electronically, all HIPAA requirements would still be applicable, including the right of access.

**For IT developers:**

“Notably, the information blocking rules apply to a health IT developer of certified health IT [**across the developer’s entire business and product line(s)**](https://www.federalregister.gov/d/2020-07419/p-1724). This means that such developers are accountable for their information blocking practices associated with all of their technology offerings, including those products that are not ONC-certified”

**For the period of time when information blocking is “limited to the United States Core Data for Interoperability (USCDI),” how is an actor expected to fulfill a request for the USCDI if they do not yet have certified health IT in place that includes an API with the USCDI standard?**

**What Information is Included in the ‘Right of Access’: The “Designated Record Set”?**

**From ONC website:**

“Individuals have a right to access PHI in a “designated record set.” A “designated record set” is defined at 45 CFR 164.501 as a group of records maintained by or for a covered entity that comprises the:

* Medical records and billing records about individuals maintained by or for a covered health care provider;
* Enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or
* Other records that are used, in whole or in part, by or for the covered entity to make decisions about individuals. This last category includes records that are used to make decisions about any individuals, whether or not the records have been used to make a decision about the particular individual requesting access.

The term “record” means any item, collection, or grouping of information that includes PHI and is maintained, collected, used, or disseminated by or for a covered entity.

Thus, individuals have a right to a broad array of health information about themselves maintained by or for covered entities, including: medical records; billing and payment records; insurance information; clinical laboratory test results; medical images, such as X-rays; wellness and disease management program files; and clinical case notes; among other information used to make decisions about individuals. In responding to a request for access, a covered entity is not, however, required to create new information, such as explanatory materials or analyses, that does not already exist in the designated record set.”

**Do I have to make electronic information available ‘proactively’ (before a patient requests it)?**

No, but it would be nice! The patient submitting a request has to pretty well be provided access immediately and they use the word ‘immediate’ in other areas of the law:

**FROM ONC:**

“Do the information blocking regulations (45 CFR Part 171) require actors to proactively make electronic health information (EHI) available through “patient portals,” application programming interfaces (API), or other health information technology?

No. There is no requirement under the information blocking regulations to proactively make available any EHI to patients or others who have not requested the EHI. We note, however, that a delay in the release or availability of EHI in response to a request for legally permissible access, exchange, or use of EHI may be an interference under the information blocking regulations (85 FR 25813, 25878). If the delay were to constitute an interference under the information blocking regulations, an actor’s practice or actions may still satisfy the conditions of an exception under the information blocking regulations (45 CFR 171.200-303).”

**I understand that lab reports, etc. have to be part of the patient’s record and accessible by them - what do we have to do to meet regulations regarding immediate posting of the reports, etc.?**

You must be able to post outside reports that you receive ELECTRONICALLY to the patients’ electronic medical records platform for their access and you must not delay posting due to lack of doctor review or other interference.

It becomes more fuzzy if you have electronic systems that are NOT an EMR. You will then have to evaluate, based on the exception regarding the lack of technology ability or ‘manner’ of release.

In general if you do not have the technological capability to post them electronically and the patient requested the information electronically,  you would have to deny access under one of the ‘exceptions’ regarding lack of functionality and try to quickly negotiate with the patient on how to deliver in an alternate fashion, such as by email, fax, scan, etc.

If the patient information is held by a third party and you have no access to the information then the you cannot provide it and are not required to provide access.

If information is stored in paper files and you do not have the ability to post it electronically then it is not available to the patient and you cannot supply it.

**Remember**: unless you meet an exception, this is what you have to provide; all information that has to do with the management and treatment of the patient that you store electronically, if you do not have it electronically available you need to document what exception you are using for that item:

From April 5, 2021, to October 6, 2022, the types of clinical information that are subject to the information-blocking provisions in the Rule are limited to the EHI identified in the U.S. Core Data for Interoperability (USCDI).  They include the following:

* Consultation notes
* Discharge summary notes
* History and physical notes
* Imaging narrative
* Laboratory report narrative
* Pathology report narrative
* Procedure notes
* Progress notes

This appears to be that you need to be electronically posting this information, unless you meet one of the exceptions, whether you ordered tests, requested or the patient had forwarded (provided) the test results.

What about PI and worker’s compensation information?

That does not appear to be covered under this law. Those requirements are state law controlled.

**Doesn’t HIPAA regulate a patients’ right to access?**

Yes. Patients already have the right to access, exchange, and release their records, in electronic or paper form. The new laws are intended to enhance patients’ rights of access, promote innovation in healthcare technology, and create more convenient and smoother ability for all parties to send and receive/access information.”

January 26, 2021 |[Ann Tran Lien, JD, Managing Director Legal Affairs](https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/cid/38?Category=ann-tran-lien%2c-jd%2c-managing-director-legal-affairs) | *The Therapist*

**What about sharing information - capability requirements?**

To be implemented are requirements to share clinical data through application programming interfaces (APIs). These are software intermediaries that allow two parties to communicate via apps. (e.g., a doctors’ EHR communicating with a third-party smartphone).

For detailed information on actors, visit [https://www.healthit.gov/cures/ sites/default/files/cures/2020-03/InformationBlockingActors.pdf](https://www.healthit.gov/cures/%20sites/default/files/cures/2020-03/InformationBlockingActors.pdf).

Fact Sheet: [https://www.healthit.gov/ cures/sites/default/files/cures/2020-08/Health\_ Care\_Provider\_Definitions\_v3.pdf](https://www.healthit.gov/cures/sites/default/files/cures/2020-08/Health_Care_Provider_Definitions_v3.pdf).

[Ann Tran Lien, JD, Managing Director Legal Affairs](https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/cid/38?Category=ann-tran-lien%2c-jd%2c-managing-director-legal-affairs) |*The Therapist*

**What Is “Information Blocking”?**
For healthcare providers, information blocking is a practice that is likely to interfere with the accessibility, exchange, or use of EHI. “Interfere with” means to prevent, materially discourage, or otherwise inhibit.10 Some examples of information blocking:

* A healthcare provider unnecessarily slows or delays a patient’s or other healthcare provider’s access to or exchange of EHI. And No exception can be shown.

A healthcare provider refuses to release EHI to another treatment provider for the purpose of treatment or diagnosis because the patient has not provided written authorization. No exception can be shown. (An important note: per HIPAA and California laws, where the law permits disclosure/release of EHI, the ONC Rule requires the disclosure/ release. In this example, healthcare providers are permitted to share treatment information with each other for the purpose of diagnosis or treatment of the patient without a written authorization from the patient. While HIPAA would have allowed the provider to make the decision as to whether to disclose, the ONC now requires the provider to release the information to the other provider upon request, unless one of the exceptions discussed below applies.)

[Ann Tran Lien, JD, Managing Director Legal Affairs](https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/cid/38?Category=ann-tran-lien%2c-jd%2c-managing-director-legal-affairs) |*The Therapist*

**What Happens If I Don’t Comply?**
Currently, there are not specific enforcement identified for providers, instead they are sent to the appropriate agency and subject to “appropriate disincentives” as set forth by HHS. I can tell you that OCR has been issuing fines between 30k – 150k for blocking access NINETEEN times over the last year or so!

Health IT developers and health information networks may be subject to a civil monetary penalty not to exceed $1,000,000 per violation. An overview of the Rule, its complete text, and fact sheets: <https://www.healthit.gov/curesrule/overview/aboutoncs-cures-act-final-rule>.

**Does any part of the CMS Final Rule really effect physicians?**
CMS will publicly report applicable clinicians and hospitals that are suspected of information blocking.

***'Dr. Ty The Compliance Guy'***

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