

Government Document Production Requests



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Margaret Richardson, Senior Counsel
Qualitest Pharmaceuticals

OVERVIEW

- Preparation and Records Management
- Types of Requests for Documents
- Response upon receipt
- Document Collection and Production

Preparation and Records Management



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PREPARATION BEFORE RECEIVING A REQUEST FOR INFORMATION AND RECORDS MANAGEMENT

- Develop and implement a Records Management Policy
 - Ensure that training is provided and the policy is appropriately implemented
 - Create a standard schedule for document destruction and ensure the schedule is documented in a policy
 - Consider auto delete settings on email accounts and purge days as part of the policy and prior to receiving an RFI

PREPARATION AND RECORDS MANAGEMENT

- Provide training on appropriate email communication
- Ensure the organization understands how to preserve documents after receiving a Request for Information

Types of Requests for Information



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TYPES OF REQUESTS FOR INFORMATION

- Agencies ask for access, documents or testimony
 - Letters/immediate access/search warrant
 - OIG subpoenas (documents +/-or testimony)
- Prosecutors ask for documents +/-or testimony
 - May still use administrative subpoenas
 - CIDs (civil)
 - Grand jury subpoenas (criminal)

EXAMPLE: LETTER FROM CMS CONTRACTOR

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**SafeGuard
Services**
LLC

July 29, 2010

Re: Request for Information

Dear:

The New England Benefit Integrity Support Center (NE BISC) was established to carry out Medicare Program Safeguard activities. We are conducting a review of Medicare providers pursuant to the Centers for Medicare & Medicaid Services' (CMS) statutory and regulatory authority.

Program Safeguard Contractors (PSCs) are authorized by CMS, under Section 1893(b)(1) of the Social Security Act, to conduct reviews "of activities of providers of services or other individuals and entities furnishing items and services for which payment may be made under Medicare, including medical utilization review and fraud review..."

Please provide the following information:

- All business contracts and/or agreements with other providers, suppliers, physicians, businesses, individuals, or entities from 1/2007 through 7/2010. If verbal agreements exist within your organization, a written document should be presented summarizing the business arrangement.
- A list of all current and past employees from 1/2007 through 7/2010. The list should include full name, job title, dates of birth, address, telephone number, date of hire, date of termination and/or date of resignation.
- The name(s) of any outside billing/management companies and a list of all individuals who work for your account from these outside billing/management companies from 1/2007 through 7/2010. The list should include full name, job title, dates of birth, address, telephone number, date of hire, date of termination and/or date of resignation.
- A list of all practice locations to include the office hours of practice, addresses and telephone numbers

New England Benefit Integrity Support Center
800 Connecticut Boulevard, 3rd Floor, Suite #301
E. Hartford, CT 06108

www.edssafeguardservices.ede-gov.com

L-NEBISC-0183 Request for Provider Practice Information V03
SCS Internal Information

EXAMPLE: OIG SUBPOENA



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

Office of Investigations
600 West Santa Ana
Boulevard
Suite 1100
Santa Ana, CA 92701

[REDACTED]
Custodian of Records
[REDACTED]
[REDACTED]

Dear Sir or Madam:

Accompanying this letter is a subpoena addressed to you, returnable at the Los Angeles Regional Office, Office of Inspector General, Office of Investigations before my designee, Special Agent (SA) Steven Ryan. The subpoena has been issued pursuant to the authority provided to the Inspector General under Public Law 95-452 (see 5 U.S.C. App. 3 § 6(a)(4)), as amended by Public Law 100-504.

Under the health information privacy regulation that implements the Health Insurance Portability and Accountability Act of 1996, known as HIPAA, providing the information requested by the attached subpoena is a permitted disclosure since it is "required by the law" to be produced pursuant to an I.G. subpoena (see 45 C.F.R. §§ 164.103, 164.512(a)) and will be used for "health oversight" activities by OIG, which meets the definition of a "health oversight agency" (see 45 C.F.R. §§ 164.512(d), 164.501).

Where indicated, electronic records that are fully legible and complete copies of the records requested by the subpoena will be accepted, provided that, if necessary, the original records will be made available to employees of my office, upon request, during normal business hours. If electronic records are not requested or not available, paper copies that are fully legible and complete will be accepted. If electronic records or acceptable copies are not available, original documents (including copies as maintained in your files) should be produced.

Failure to appear at the time and place specified in the subpoena may be taken as a failure to comply with the subpoena. However, as a convenience, you may assemble the documents requested and mail them via certified mail or personally deliver the documents on or before [REDACTED]

Special Agent Steven Ryan
U.S. Department of Health and Human Services
Office of Inspector General
Office of Investigations
600 West Santa Ana Boulevard
Suite 1100
Santa Ana, CA 92701

Managing the Company Response



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RESPONSE UPON RECEIPT OF A REQUEST FOR INFORMATION

- Review entire request and prepare a Litigation Hold memo
- Provide notice to the insurance company of a claim or potential claim
- Reach out to investigator with outside counsel as intermediary and attempt to gather data
 - Client's status (witness/subject/target)
 - Scope of investigation
 - Civil, criminal, both
 - Qui tam

SAMPLE LITIGATION HOLD MEMO

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY WORK PRODUCT**

Date: _____ **To: Legal Hold Recipients**

From: Legal Department

**PLEASE DO NOT IGNORE OR DELAY RESPONDING TO THIS REQUEST.
THIS IS AN IMPORTANT LEGAL MATTER REQUIRING IMMEDIATE ATTENTION.**

The Legal Department has received notice of a lawsuit filed by _____ against the company, alleging (be specific as possible to ensure appropriate documents are preserved).

Under the rules governing federal litigation, we have an obligation to preserve all information in our custody and control related to this issue. Do not destroy or alter any documents relating in any way to this issue. This includes any and all documents in whatever form and whatever location, including computer files, emails, zip disks, "drop" files, "dead" files, personal notes, handwritten notes, informal files, or any such files kept by you at home or any other location regarding this matter. This also includes original documents, drafts of documents, and copies of documents that differ in any way from the originals (e.g., contain handwritten notes, etc.).

You will also need to take steps to ensure that any employees under your supervision preserve all relevant data. Please communicate this obligation to any employees who you believe may have relevant information, including assistants that maintain documents or email on someone else's behalf.

DO NOT MAKE COPIES FOR US. DO NOT CHANGE, MODIFY, REMOVE, OR DESTROY ANY ORIGINAL DOCUMENTS, EVEN IF YOU PREPARED THEM PERSONALLY FOR YOUR OWN USE.

FAILURE TO PRESERVE ALL REQUESTED DOCUMENTS REGARDING THIS MATTER COULD SUBJECT THE COMPANY TO MONETARY PENALTIES AND COURT-IMPOSED SANCTIONS.

If you have any questions about your obligations or responsibilities regarding this memorandum, please contact the Legal Department.

Thank you for your assistance.

RESPONSE UPON RECEIPT OF A REQUEST FOR INFORMATION

- Begin process of internal review of document availability
 - Electronic v. paper
 - Custodians of the documents
 - Retrieve from off-site storage
 - Outside counsel should begin creating privilege log
 - Consider using vendor for large production requests and to ensure collection is auditable and complete
- Consider if interviews or a formal internal investigation needs to take place
 - Consider engaging outside counsel to complete the formal investigation. This can be especially important given the type of allegations or level of management implicated.

RESPONSE UPON RECEIPT OF A REQUEST FOR INFORMATION

- Determine the “Scope” of the matter
 - If certain it is a simple issue, keep the approach simple
 - If not certain or cannot tell:
 - Brainstorm with outside counsel
 - Assume it could lead somewhere bad, until you know with certainty that it won't
 - Proceed as though the company is a subject of an investigation (could turn criminal)
 - Assume the government will get information from other sources too – you are not alone

RESPONSE UPON RECEIPT OF REQUEST FOR INFORMATION

- Involve outside counsel if it is anything other than routine
 - You want the buffer
 - The government usually views outside counsel as being “more independent” of the client so errors in production are not usually viewed as acts of obstruction
 - Keep in mind the “lessons learned” from the indictment of Lauren Stevens

Document Collection and Production



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DOCUMENT COLLECTION AND PRODUCTION

- Do not send documents without explaining them
 - Including to outside counsel
 - Including efforts to comply with RFI
- Bates label documents
- Provide direction to ensure relevant data has been captured
- Create separate database for documents to gov't
 - Or segregate within master database

DOCUMENT COLLECTION AND PRODUCTION

- Maintain a dialogue with the agency
 - Recognize that scope of RFI might not be precise
 - Consider whether to educate agent or to negotiate broad, burdensome, or irrelevant requests
 - Propose sampling? Interviews in lieu of production?
 - Can the scope be narrowed
 - Work with agent to develop key word searches and search parameters
 - Consider if the proposed search terms are overbroad or are not likely to yield relevant results
 - Confirm in writing any agreements with agent or deviations from RFI

DOCUMENT COLLECTION AND PRODUCTION

- Key considerations for cover letters responding to RFIs
 - Avoid categorical representations: “Here is every responsive document to Request No. 1.”
 - If needed, provide a detailed description of the process used and the results of that process
 - Describe in detail any agreements or revisions to the original RFI

DOCUMENT COLLECTION AND PRODUCTION

- Never produce documents without also learning the story behind them – you will need to complete your own internal investigation to completely understand the risk and provide appropriate guidance
 - Do they match your story?
 - Do they cover the universe?
- Have you made all reasonable efforts to comply?
- Are you turning yourself into a subject or target?
- Try to avoid invoking advice of counsel defense at an early stage

DOCUMENT COLLECTION AND PRODUCTION

- Collecting documents in a “forensically sound” manner – can you establish a chain of custody and ensure that no documents were deleted or not produced?
 - Use vendors for larger cases
 - Consider specialized software for narrowly tailored RFIs
 - Cost-effective option
 - In all cases, attorneys will need to provide direction to ensure relevant data has been captured
 - In some cases, may require manual searches of paper documents

Lessons Learned



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LESSONS LEARNED FROM STEVENS INDICTMENT

- Don't promise anything at the beginning
- Don't promise to produce documents from third parties
- Don't promise the client did not violate the law
- If you change approach, be transparent about it
- Use outside counsel as a buffer, not just as lawyers providing advice
- Be cautious in potentially big-ticket cases

CONSEQUENCE OF MAKING A MISTAKE IN PRODUCTION

- Civil
 - Can be corrected
 - Might result in a fine
- Criminal
 - Converts responder into a target
 - Charges for obstruction, contempt
 - Additional liability for company, individual, in-house attorney, outside counsel
 - Requestor = same person determining punishment

Questions?