



# PCR Data QuickGuide:

**FAQs on Owning, Amending, Retaining and Sharing Patient Care Report Data**



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# Disclaimers

**Not Legal Advice.** This Guide is not legal advice and is only intended to offer general best practices. This Guide does not create an attorney-client relationship or a professional consulting relationship with Page, Wolfberg, & Wirth, LLC, nor will it guarantee that your organization is compliant with all applicable laws or requirements related to the subjects discussed in this Guide. Laws, regulations, and other requirements discussed in this Guide are subject to change and it is your responsibility to keep current and remain compliant with the law.

**State Law.** This Guide does not analyze or address the rules of every state, county, or local jurisdiction. Most requirements concerning medical records are highly dependent upon state law, and EMS agencies must check with local counsel licensed to practice law in their jurisdiction concerning their medical record requirements.

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# Introduction

Page, Wolfberg & Wirth (PWW) was asked by the National EMS Information System (NEMSIS) Technical Assistance Center (TAC) to research frequently asked questions (FAQs) related to data in Emergency Medical Services (EMS) patient care reports (PCRs). NEMSIS provided PWW with a list of specific questions submitted by state/territory EMS data managers concerning the creation, amendment, maintenance, and transfer of PCR data. PWW analyzed these questions under applicable laws and guidance, and developed general answers and best practices contained in this Guide.

There are a lot of misconceptions about PCRs and PCR data. For example, we've heard it said that the *EMS agency* solely owns the PCR and has an exclusive right to control the data. Some practitioners<sup>1</sup> and EMS agencies also believe there is a specific point at which the PCR becomes a "legal document." There are a host of differing ideas regarding who can amend a PCR. Also, there is inconsistent advice about how long PCR data must be maintained.

The goal of this Guide is to dispel many of the fallacies, clear up confusion, and tackle the divergent views and opinions that exist in EMS concerning PCR data. We begin with a depiction of the typical "life cycle" of electronic patient care report (ePCR) data and then delve into the prevalent questions brought up over the last two decades.

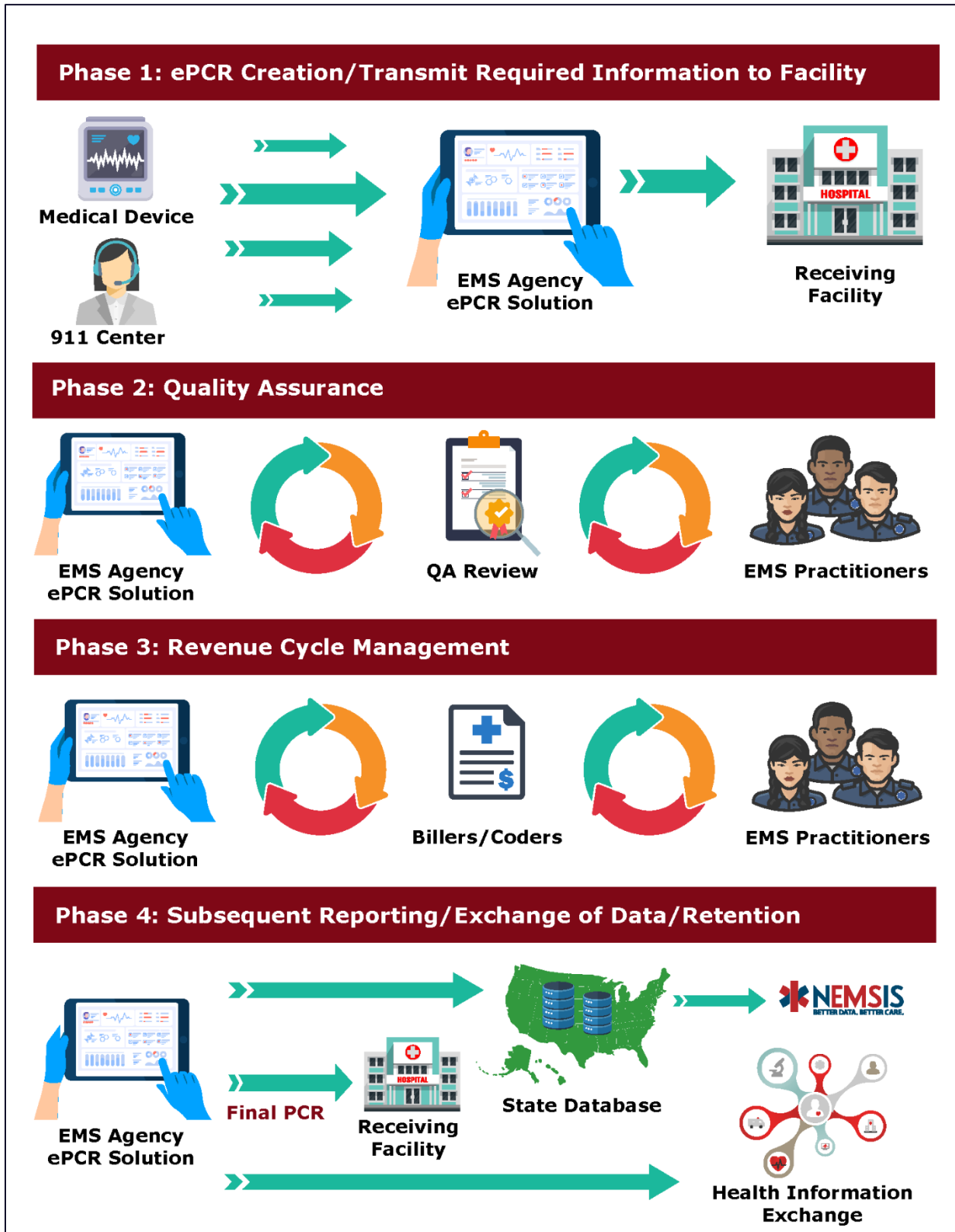
**Note:** While this Guide focuses heavily on *electronically* documented data, we recognize that some PCR and other EMS documentation is still created, received, and retained in hard copy format. Most of the concepts, rules, and best practices discussed in this Guide can be equally applied to both electronic and hard copy EMS documentation. The term ePCR will be used when the context specifically applies to the electronic format of a patient care report.



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<sup>1</sup> This Guide refers to EMTs, paramedics, and other patient care providers of the EMS agency as "practitioners."

# Typical Life Cycle of ePCR Data



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# Legal Status of PCRs

- Does the EMS agency “legally own” the PCR data?
- When does a PCR become a “legal document”?
- Who is legally responsible for handling requests for PCR data?
- If I sign the PCR, am I “legally responsible” for everything?
- Is there a legal definition of a “closed” PCR?

## Does the EMS agency legally own PCR data?

While EMS agencies have significant control over their PCR data, they do not have an *exclusive* and *absolute* right to determine how that information is used or disclosed. Patients, other healthcare providers, and additional third parties also have rights (and obligations) concerning PCR data under state and federal law. In addition, there are important distinctions between the ownership of medical *records* and *data*.

EMS agencies are more “custodians” than “owners” of PCR data.

### What the Law Says About Ownership

While federal laws regulate the use, disclosure, and safeguarding of medical data, federal law generally does not govern *ownership* of *medical records*. Medical record ownership is regulated by state law, and a majority of state laws do not specifically address ownership.<sup>2</sup>

- **20 states** have laws that address ownership of medical records and most of these laws indicate that the “healthcare provider” (e.g., physician, dentist, etc.) or the “facility” (e.g., hospital, nursing home, etc.) that created the record owns the record.<sup>3</sup>
- **29 states and the District of Columbia** do not specifically address ownership of medical records.<sup>4</sup>
- New Hampshire law states that medical records are the “property of the **patient**.”<sup>5</sup>



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<sup>2</sup> The Journal of Urgent Care Medicine, *Who Owns Patient Medical Records?* Retrieved from: <https://www.jucm.com/owns-patient-medical-records/>.

<sup>3</sup> Milken Institute School of Public Health, *Who Owns Medical Records: 50 State Comparison*. Retrieved from: <http://www.healthinfolaw.org/comparative-analysis/who-owns-medical-records-50-state-comparison#>.

<sup>4</sup> *Id.*

<sup>5</sup> N.H. Rev. Stat. Ann. § 151:21.



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## Patient Rights

Patients have defined rights concerning their PCRs under state and federal law. For example, the federal Health Insurance Portability and Accountability Act (HIPAA)<sup>6</sup> grants patients - or patients' personal representatives<sup>7</sup> - the right to:

- Inspect and obtain a copy of their medical records from their healthcare provider;<sup>8</sup>
- Request amendments to their records;<sup>9</sup>
- Direct that healthcare providers send medical records to another person;<sup>10</sup> and
- Request that a healthcare provider restrict how it uses and discloses their health information.<sup>11</sup>

Most states have similar laws granting patients some control over their medical records, and all states grant patients the right to access and/or obtain a copy of their records.<sup>12</sup> Regardless of *ownership* under state law, EMS agencies must grant patients the right to their PCR data under HIPAA and state law.

## Third Party Rights and Duties

State laws and local guidelines also require EMS agencies to provide PCR data to third parties. These third parties may subsequently use and disclose that data as they are permitted or as required by law. Generally, EMS agencies can disclose PCR data to such third parties without the consent of the patient. In most cases, the law does not require the consent of individual EMS agencies or of their patients for third parties to use and disclose the data in exercising their responsibilities.

If there is an **agreement** (such as a contract or business associate agreement) between the EMS agency and a third party, that agreement can dictate how PCR data is used by the third party. For example, a business associate agreement (BAA) between an EMS agency and its outsourced Revenue Cycle Management (RCM) company could forbid the RCM company from using the EMS agency's data for product development, data aggregation, and marketing.

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<sup>6</sup> Health Insurance Portability and Accountability Act. Pub. L. No. 104-191, § 264, 110 Stat.1936.

<sup>7</sup> A personal representative is a person who has authority under the law to act on behalf of a patient who is an adult or an emancipated minor in making decisions related to health care. Generally, HIPAA requires healthcare providers to treat a patient's personal representative as the patient with respect to the patient's rights under HIPAA. 45 CFR 164.502(g).

<sup>8</sup> See, e.g., 45 CFR § 164.524; Tex. Health & Safety Code Ann. § 181.102.

<sup>9</sup> 45 CFR § 164.526 (agencies do not have to amend a record when it is determines it is true and accurate).

<sup>10</sup> 45 CFR § 164.524(c)(3)(ii).

<sup>11</sup> 45 CFR § 164.522(a)(1) (although covered entities must allow individuals to request restrictions of the use or disclosure of their PHI, in most circumstances they do not have to agree to the requested restrictions).

<sup>12</sup> See, e.g., Ala. Admin. Code r. 420-5-7.05; AS § 18.23.005; C.G.S.A. § 20-7c; Ind. Code § 16-39-1-1.



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Some examples of how third parties can use and disclose PCR data from EMS agencies include:



**Regional and State Oversight Bodies.** Most EMS agencies must share PCR data with regional EMS oversight agencies (such as EMS councils or local EMS oversight agencies) and state EMS offices.<sup>13</sup> The local EMS oversight agency and state EMS office may use that data to perform any function permitted by law without the permission of the individual EMS organizations in their jurisdiction which submit that data. For example, state EMS offices may usually use PCR data for conducting assessments of the EMS system, performing population-based activities, or conducting quality assessment. The state EMS office may also share PCR data with third parties consistent with the law. For example, state offices may share PCR data with the National Emergency Medical Services Information System (NEMSIS).



**Facilities and Other Providers.** Most EMS agencies must share PCR information with receiving facilities and other providers – such as another EMS agency when relinquishing care to that agency.<sup>14</sup> Other healthcare providers may use the PCR data from the EMS agency to treat the patient, glean insurance and demographic information, and conduct quality assessment and improvement activities for their organization. Other healthcare providers must also safeguard protected health information (PHI) from the PCR under HIPAA.<sup>15</sup>



**Vendors and Contractors.** Many EMS agencies engage ePCR solutions, outsourced RCM companies, and other individuals and organizations to perform services that involve creating and using the agency’s PCR information. These organizations are called business associates under HIPAA.<sup>16</sup> Business associates are obligated to only use and disclose PCR information as permitted or required by law, and they must comply with any contractual restrictions outlined in a service agreement or BAA in place with the EMS agency.<sup>17</sup> Business associates must also safeguard PCR data in the same manner as the EMS agency.<sup>18</sup>

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<sup>13</sup> See, e.g., 28 Pa. Code § 1021.41.

<sup>14</sup> *Id.*

<sup>15</sup> Covered entities under HIPAA are required to comply with HIPAA’s required safeguards. 45 CFR §§ 160.102, 160.103.

<sup>16</sup> A “business associate” is a person or entity that performs certain functions or activities that involve the use or disclosure of protected health information on behalf of, or provides services to, a covered entity. 45 CFR § 160.103.

<sup>17</sup> 45 CFR § 164.502(a)(3) states: “A business associate may use or disclose protected health information only as permitted or required by its business associate contract or other arrangement. . . or as required by law. “

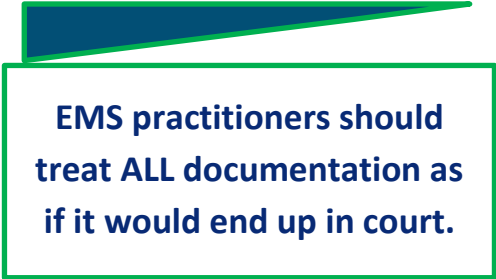
<sup>18</sup> 45 CFR § 164.302.

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# When does a PCR become a “legal document”?

Unlike signing a contract or executing a deed or will, there is no definite moment when a PCR becomes a “legal document.” There are actions that have legal significance and indicate that a PCR is complete. But *any* EMS documentation could become a “legal document” because it might be relevant to an investigation, proceeding or other legal action.

It is critical that ***all documentation on a PCR be true, accurate, and as complete as possible when it is composed.*** As addressed later in this Guide, if a PCR is determined to be incomplete or inaccurate, it should be amended immediately. Both the original PCR and amendment(s) – or even field notes, PCR drafts and other “unofficial” documentation - can become “legal documents” for various reasons. There have been many legal cases where it is necessary to compare “final” PCRs to earlier drafts and notes. Depending on the circumstances, those earlier documents can constitute “evidence” and become “legal documents.”



**EMS practitioners should treat ALL documentation as if it would end up in court.**

## Legal Requests for PCRs

PCRs are often requested because they are (or could be) relevant for administrative, civil, or criminal actions such as: arbitrations, mediations, trials, proceedings, and investigations. PCRs may be requested through subpoenas, discovery requests, summonses, warrants, writs, court or administrative orders, administrative requests, civil investigative demands, or other “legal process.” Patients and their personal representatives can also obtain a copy of their own PCRs from EMS agencies *without* legal process.<sup>19</sup> The organization or individual who receives the legal process for the PCR – the EMS agency or another third party – must supply the record if it exists and it is required to be produced under applicable rules.

Whether or not a PCR must be produced and whether it can then be used in an investigation, pretrial discovery, or a case or other proceeding depends on the rules governing the “discoverability” and “admissibility” of evidence in that jurisdiction.<sup>20</sup> Those rules are detailed and beyond the scope of this Guide. The bottom line is, regardless of discoverability or admissibility, any EMS documentation might need to be produced and used for a legal action, so it must be as accurate and complete as possible when composed.

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<sup>19</sup> 45 CFR § 164.524.

<sup>20</sup> Discoverable and admissible evidence could be any testimonial, documentary, or tangible evidence that may be introduced to establish a point put forth by a party to the proceeding. For records to be discoverable, there must generally be probable cause to produce the record and for a record to be admissible, it must be relevant and not excluded by the rules of evidence. See, Richard Glover, *Murphy on Evidence* (2015).

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## Examples of Legal Requests for PCRs or Other Documentation

- **Government Audits and Investigations** – Medicare contractors and other federal and state auditors often request PCRs from EMS agencies to determine whether the claims submitted for reimbursement meet the applicable rules for reimbursement. Incomplete and inaccurate documentation can lead to denials for reimbursement, demands to repay reimbursement, and even criminal and civil penalties for the EMS agencies and practitioners in cases of fraud.



- **Criminal Investigations** – Law enforcement officials (police, agents, prosecuting attorneys, etc.) may need to review PCRs to investigate alleged crimes to determine whether to arrest and/or bring formal criminal charges against someone when the PCR may contain details about a potential crime. PCRs are also used by law enforcement to establish that there are reasonable grounds (or “probable cause”) for a judicial official to issue a subpoena, summons, warrant or court order to obtain evidence. Finally, practitioners may be subpoenaed during an investigation to give statements about an event, and they often need to consult the PCR when providing information to law enforcement to recall details about the incident.



- **Civil Pretrial Discovery** – Private individuals can sue one another (called a “civil action”) for physical, emotional, and financial injuries. For example, a driver in a motor vehicle accident can sue the other driver who caused the accident for any physical injuries and vehicle damage sustained because of the accident. Attorneys and parties to the civil action often request PCRs to establish the extent of the injuries, discover details about how the injury occurred, and to determine potential fault for the injury. EMS practitioners may also be subpoenaed to give deposition testimony about an event during discovery, and they often need to consult the PCR to give this testimony.



- **Civil and Criminal Court Proceedings** – At trial, an attorney may want to use (and/or enter into evidence) a PCR or other documentation to establish an element of a case and prove or disprove guilt/fault. EMS practitioners are often subpoenaed to testify in criminal and civil proceedings because their PCR documentation and personal observations are relevant to the case. In rare cases, EMS practitioners have been criminal defendants, and the PCR and other documents could be used as evidence to prove guilt or innocence.



- **Administrative Reviews/Proceedings** – Government agencies – such as state departments of health – often investigate patient incidents to determine whether an EMS practitioner adhered to applicable protocols, standards, and guidelines during a patient encounter. Often these agencies rely heavily on the PCR to make that determination.



## Actions that Carry Legal Significance

There also are actions that - when taken by a practitioner or the EMS agency - carry legal significance because the actions signify that the practitioner and/or agency believe that the PCR is complete and true.

**Signing the PCR.** When practitioners sign the PCR or any subsequent amendments (electronically, digitally, or physically),<sup>21</sup> the practitioner is essentially attesting that the information is true, complete, and accurate at that point in time, to the best of the practitioner’s personal knowledge. While signing the PCR does not suddenly convert the unsigned PCR into a “legal document” (since it already is one), it is a strong indication from the practitioner that the PCR has been reviewed and determined to be complete to the best of the practitioner’s personal knowledge.



**Billing a Claim.** Claims for reimbursement are based on information contained in a PCR. Submitting a claim to a payer signifies that the EMS agency (or RCM company) reviewed the PCR and determined that the information submitted is true, accurate, and complete, and that it meets the applicable requirements for reimbursement by that payer.

A detailed Health Insurance Claim Form (HC-90) is shown. The form is titled "HEALTH INSURANCE CLAIM FORM" and includes various sections for patient information, insurance details, and provider information. The form is filled out with red text and includes checkboxes and dropdown menus. The form is titled "HEALTH INSURANCE CLAIM FORM" and includes various sections for patient information, insurance details, and provider information. The form is filled out with red text and includes checkboxes and dropdown menus.

In addition, for federal and state payers - such as Medicare and Medicaid - the EMS agency is attesting that it is compliant with all applicable laws and guidance when submitting a claim for payment.<sup>22</sup> Payment of a claim by federally funded payers is conditioned upon the EMS agency’s adherence to all reimbursement rules and all federal and state requirements for licensure, certification, and staffing of the EMS agency and its personnel.

<sup>21</sup> Electronic signatures are usually a typed name sometimes with a notation such as “/s/”. In contrast, a digital signature is an electronically captured (*i.e.*, stylus to tablet) and/or scanned copy of a signature.

<sup>22</sup> The Medicare Enrollment Application signed by EMS agencies states that: “I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with . . . laws, regulations and program instructions (Including, but not limited to, the federal Anti-Kickback Statute, 42 U.S.C. section 1320a-7b(b) (section 1128B(b) of the Social Security Act). . .” Available at: <https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/cms855b.pdf>.

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# Who is legally responsible for handling requests for PCR data?

Most requests for PCRs are directed to and handled by EMS agencies as the custodian of records for PCRs of their own patients, but other entities (*e.g.*, RCM company, ePCR vendor, etc.) may receive a request for PCR data.

When an EMS agency or other entity receives a request for PCR data, it must determine whether it: (1) has the information or record in its possession to produce; and (2) has a legal duty to fulfill the request. If both are true (the recipient has the record, and there is a legal duty to produce it), whatever entity receives the request must usually provide the data to the requestor.

## Legal Process for PCRs

As previously discussed, attorneys, law enforcement, health oversight bodies and other enforcement agencies will request PCRs for legal and other proceedings, investigations, audits, and other actions. PCRs can be requested through “legal process,” such as subpoena.

The entity receiving legal process should ask legal counsel to determine whether the applicable rules of administrative, civil, or criminal procedure in the jurisdiction require the entity to produce the PCR. If legal counsel determines it must be produced, and is not subject to any legal privileges, protections, or exemptions from disclosure (such as formal peer review records in many states),<sup>23</sup> the entity should produce what is requested, provided the entity has the information in its possession. This includes producing *any* information requested, even if it falls outside of the PCR – including other notes or records, body worn camera videos, documentation from other healthcare providers, and other records.



Failure to comply with legal process requests could result in penalties. It is critical to handle these requests within the times designated in the subpoenas or requests, and to be responsive to legal process when the agency has a legal duty to respond.

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<sup>23</sup> Peer review statutes in states may exempt from disclosure records, communications, reports, and recommendations made during formal peer review committee activities if the requirements in the statute for peer review were met. EMS agencies should review any peer review laws in their state with legal counsel to determine if protection is afforded to EMS agencies and their personnel. Most states have laws that provide peer review protection for physicians, nurses, and associated hospitals. Some state laws provide protection for “health care providers,” and include EMS agencies and EMS practitioners under that term. In other states, EMS agencies and EMS practitioners (EMTs, paramedics) are not specifically enumerated in the law as health care providers.

## State Public Open Records Requests

All 50 states and territories have some form of open records law (ORL). These laws are sometimes referred to as "sunshine laws," "right to know," or "freedom of information act" (FOIA) laws. Typically, state ORLs require **public** agencies to make certain records available for public inspection, or to provide records to a member of the public upon request. Examples of EMS public agencies include state, county, city, and other municipal-based fire and EMS agencies. Entities that are not subject to open records laws – such as many private EMS agencies – generally do not have to fulfill open records requests.

Public EMS agencies and other entities who are covered by a state ORL must determine what, if any, data or information must be provided pursuant to an open records request and provide only that information to a requestor. Medical records – including PCRs – are often exempted from required disclosure under ORLs.<sup>24</sup> Some ORLs require that the public agency redact sensitive information (such as medical information, social security numbers, etc.) in the PCR and still produce parts of the record that do not contain confidential information (such as dispatch and response times).<sup>25</sup>

Finally, HIPAA defers to state ORLs when permitting disclosure of PHI. When a state ORL mandates the agency disclose the health information pursuant to an ORL request, the agency is permitted by HIPAA to make the disclosure of the health information. Where the state ORL only permits, and does not mandate, the disclosure of PHI pursuant to an ORL request - or where the ORL exempts PHI from the state law's disclosure requirement - such PHI disclosures are not permitted under HIPAA, and the agency should not release the PHI.<sup>26</sup>

**pennsylvania**  
OFFICE OF OPEN RECORDS

**Standard Right-to-Know Law Request Form**

Good communication is vital in the RTKL process. Complete this form thoroughly and retain a copy; it may be required if an appeal is filed. You have 15 business days to appeal after a request is denied or deemed denied.

SUBMITTED TO AGENCY NAME: \_\_\_\_\_ (Attn: AORO)

Date of Request: \_\_\_\_\_ Submitted via:  Email  U.S. Mail  Fax  In Person

**PERSON MAKING REQUEST:**

Name: \_\_\_\_\_ Company (if applicable): \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_ Email: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

How do you prefer to be contacted if the agency has questions?  Telephone  Email  U.S. Mail

**RECORDS REQUESTED:** Be clear and concise. Provide as much specific detail as possible, ideally including subject matter, time frame, and type of record or party names. RTKL requests should seek records, not ask questions. Requesters are not required to explain why the records are sought or the intended use of the records unless otherwise required by law. Use additional pages if necessary.

\_\_\_\_\_

**DO YOU WANT COPIES?**  Yes, printed copies (default if none are checked)  
 Yes, electronic copies preferred if available  
 No, in-person inspection of records preferred (may request copies later)

Do you want **certified copies**?  Yes (may be subject to additional costs)  No  
RTKL requests may require payment or prepayment of fees. See the [Official RTKL Fee Schedule](#) for more details.

Please notify me if fees associated with this request will be more than  \$100 (or)  \$ \_\_\_\_\_.

**ITEMS BELOW THIS LINE FOR AGENCY USE ONLY**

Tracking: \_\_\_\_\_ Date Received: \_\_\_\_\_ Response Due (5 bus. days): \_\_\_\_\_

30-Day Ext.?  Yes  No (If Yes, Final Due Date: \_\_\_\_\_) Actual Response Date: \_\_\_\_\_

Request was:  Granted  Partially Granted & Denied  Denied Cost to Requester: \$ \_\_\_\_\_

Appropriate third parties notified and given an opportunity to object to the release of requested records.

NOTE: In most cases, a completed RTKL request form is a public record. Form updated Feb. 3, 2020  
More information about the RTKL is available at <https://www.openrecords.pa.gov>

<sup>24</sup> See, e.g., 401.30 Fla. Stat. states: "Records of emergency calls which contain patient examination or treatment information are confidential and exempt from [disclosure under the Florida Sunshine Law]."

<sup>25</sup> See, e.g., 65 Pa. Stat. § 67.708(18) states that: "time response logs, pertaining to audio recordings, telephone or radio transmissions received by emergency dispatch personnel, including 911 recordings" are exempt from disclosure under the PA Right to Know Law, unless "the agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure."

<sup>26</sup> See, FAQ from the Office for Civil Rights at: <https://www.hhs.gov/hipaa/for-professionals/faq/506/how-does-the-hipaa-rule-relate-to-freedom-of-information-laws/index.html>.



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# If I sign the PCR, am I “legally responsible” for everything?

Generally, each EMS practitioner is legally responsible for *their own* actions or omissions – in both patient care and documentation – even though all EMS practitioners on the crew sign (or should sign) the PCR.

EMS practitioners sometimes assert (and believe) that signing a PCR makes them “legally responsible” for everything that happened and all that is stated on the PCR. Signing a PCR does not mean that the practitioner is accepting responsibility for everything that another practitioner did (or didn’t do) during the patient encounter, or necessarily “agreeing” with everything that is documented. Signing the PCR is an acknowledgment that you were a member of the crew and carries an implication that the practitioner reviewed the PCR, and, to the best of the practitioner’s knowledge, it is accurate.

## General Rules About Legal Responsibility

Generally, each practitioner is legally responsible for their *own* acts or omissions - including any assessments, procedures, or interventions performed or not performed, regardless of who signed the PCR. Each practitioner is responsible to meet their legal duties, which are established through statutes, regulations, protocols, medical direction, and standards of care. Breach of a legal duty could invoke liability for ***the practitioner who breached*** the obligation.



For example, if an ambulance is staffed by an EMT and a paramedic, and the paramedic performed an intervention for the patient based on the paramedic’s impressions, the paramedic is generally responsible for the decision to perform the intervention, properly performing the intervention, and the consequences arising from its execution. The same is true if the paramedic failed to perform an intervention that may have been indicated by the patient’s condition.

In this example, the EMT is generally not responsible for the actions or inactions of the paramedic, simply because the EMT signed the PCR. The EMT is responsible for their own actions or inactions. If an EMT is present during the performance of an intervention within their scope of practice, and the EMT knew the intervention was clearly contraindicated and failed to speak up, the EMT may incur liability if the failure to intervene was a breach of a legal duty. Again, if the EMT is liable, it is because of ***the EMT’s own actions or inactions***, not because the EMT signed the PCR.



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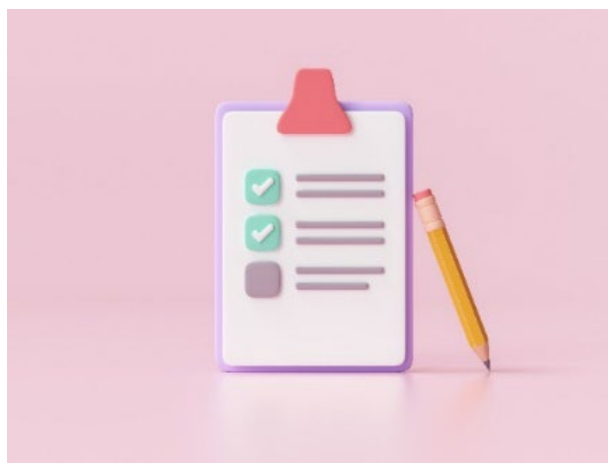
Where there is a legal duty to oversee, direct, or verify the actions of another EMS practitioner, breach of the oversight duty could mean liability for the practitioner breaching the duty. For example, if a preceptor has a responsibility for supervision of the care provided by an EMT, the preceptor could be liable if the preceptor failed to oversee the EMT during a procedure (especially if something goes wrong). Both the EMT and preceptor could be liable for any harm caused to the patient during the procedure.

Finally, each practitioner can be held legally responsible for their own documentation and documentation review. For example, if the paramedic documents the administration of oxygen in the back of the ambulance and no oxygen was administered during transport, the paramedic would be responsible for the inaccuracy in the PCR. In addition, if the other crewmember knew about the error in documentation and took no steps to remedy it before signing off on the PCR, both practitioners bear responsibility for the documentation error.

### Why All Crew Members Should Sign the PCR

Requiring that all crew members review and sign the PCR is a strongly recommended best practice for ensuring that the PCR is a complete and accurate record of the patient encounter. When providing medical care, everyone involved with the patient must be accountable for the care they provide, and all crew members should sign the PCR to verify a complete medical record that becomes part of the patient's record. In addition, some state and local EMS oversight agencies require all EMS practitioners sign the PCR.

In addition, Medicare requires services that are provided to a beneficiary be authenticated by the persons who provided that care. That includes signing for direct patient care, driving the ambulance,<sup>27</sup> and assisting with the patient encounter.<sup>28</sup> Even if the practitioner was not the primary caregiver, each crewmember is still responsible for the safety of the patient, and for the services documented on the PCR that each crewmember provided. When practitioners sign the PCR, they are obligated to review it. Having more than one set of eyes on the report helps tremendously in reducing errors and omissions and helps to diminish issues that might stem from incomplete or inaccurate documentation.



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<sup>27</sup> The Medicare ambulance benefit is a transportation benefit and without a transport there is no payable service. See, Medicare Benefit Policy Manual, Chapter 10 §10.

<sup>28</sup> Medicare Program Integrity Manual, chapter 3, section 3.3.2.4.

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# Is there a legal definition of a “closed” PCR?

There is no “legal” definition concerning when an ePCR record is “closed.” An ePCR record is “closed” when ePCR software rules or the EMS agency’s policy dictates.

In EMS, the term “closed” PCR is commonly understood to mean:

1. The point when the EMS practitioner **submits** the (hopefully fully **complete**) ePCR record to the next level in the cycle (typically quality assurance review/billing); **or**
2. When the ePCR record is locked after a predetermined period of time by software system rules, and the practitioner can no longer modify the record.

Whether or not a PCR is deemed to be “closed” is a separate matter from the report’s status as a “legal record,” as discussed above.

**Submitted Complete PCRs.** Electronic data collection systems are configured to guide EMS practitioners through the patient data collection process by prompting practitioners to input information that needs to be captured before the ePCR record can be closed and submitted. The information that needs to be populated by the practitioner in the record should be based on what is necessary to:

- Comply with local guidelines, and state, and federal law;
- Facilitate and document good clinical patient care;
- Conduct meaningful quality assurance (QA) and quality improvement (QI); and
- Obtain information necessary for potential payer reimbursement for the service.








**Locked ePCR Records.** Most EMS agencies have a policy (written or unwritten) that an ePCR record is locked after a determined period during which practitioners are required to complete ePCR records (*e.g.*, end of shift, or perhaps 24 hours after the patient encounter). The period during which an EMS agency permits the ePCR record to be “open” for the practitioner to complete is set in accordance with legal requirements and best practices for obtaining accurate and complete documentation.



**NOTE:** Although ePCR software/application companies often have close call “rules,” these companies do not establish laws, rules, or requirements that are legally binding upon the EMS agency. In most cases these “rules” are user defined, based on the preferences of individual organizations.

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## Best Practices for Completing/Locking/Closing ePCR Records

- 1. The sooner the better.** Documentation should ideally be completed during (or as soon as possible after) the patient encounter to ensure accuracy and completeness. An EMS agency's policy should require practitioners to complete the ePCR record as soon as they are not engaged on a call. All PCRs should be completed by the end of the practitioners' shift to prevent a large gap in time between the EMS response and completion of the trip report. 
- 2. Require compliance with state law.** Many state laws require a PCR be completed within 24 hours. State law requirements should set the *outer* limit for your agency's policy on completing a PCR. 
- 3. Lock each ePCR record by end of shift.** Another day's worth of calls will have already clouded the practitioner's memory of the details of a call that happened "yesterday and several calls ago." Locking the ePCR record by the end of the shift is the best way to hold practitioners accountable for prompt completion of PCRs.
- 4. Amendments after the PCR is closed.** If the PCR is not completed by the time the PCR is "closed," the policy should require an amendment in compliance with the Medicare Program Integrity Manual, Chapter 3 §3.3.2.5 (and not a reopening of the ePCR record). 
- 5. Exceptions may be allowed for good cause.** There may be times where it was impossible or infeasible for the practitioner to complete the PCR within the time outlined in your policy. Your policy should permit exceptions for good cause – such as illness, exposure to infection, on-duty injury, or other similar extenuating circumstances. 
- 6. Stress truthfulness.** Your policy should state that practitioners should include all details they can remember about the call (and never document things in a PCR that they can't remember), and never omit information relevant to the patient encounter. 

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# Amending PCRs

- Why should we amend PCRs?
- When should a PCR be amended?
- Who can amend a PCR?
- What should be included in an amendment?
- Do agencies have to inform third parties about amendments?
- Is the EMS practitioner responsible if someone else later amends the PCR?
- Can a state EMS office doing quality improvement instruct the EMS agency to update an ePCR record missing required data elements?
- Should ePCR software track amendments to the ePCR record?

## Amendment Defined

An amendment is an alteration of the PCR by modification, correction, addition, or deletion. There are many terms that are used for amending PCRs, including: “corrections,” “addendums,” “retractions,” “deletions,” and “late entries.” For this Guide, the term “amendment” is the overarching term indicating that the PCR has been changed after it was completed. In addition to documenting the amendment, the EMS agency should always maintain and be able to reproduce the original, unamended PCR written by the practitioner(s) at the time of service.

## Why should we amend PCRs?

EMS practitioners and EMS agencies have a legal and ethical duty to ensure that every PCR is true, accurate and complete.<sup>29</sup> The PCR is a fundamental part of patient care and an integral part of the patient’s medical records.



The PCR is relied upon by other medical providers treating the patient. In addition, complete and accurate data collection systems gather critical data for local, state, and federal agencies who study and work to improve the delivery of prehospital care. Effective quality improvement depends on a complete and accurate depiction of the patient encounter. Complete and accurate PCRs are also essential to demonstrate the practitioner’s and EMS agency’s compliance with protocols. The PCR will be the primary legal record if the practitioner or agency ends up in a deposition or court proceeding.

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<sup>29</sup> See, e.g., Under 28 Pa. Code § 1021.41, “The EMS provider who assumes primary responsibility for the patient shall complete an EMS PCR for the patient and ensure that the EMS PCR is accurate and complete.”

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EMS agencies also have a legal obligation under Medicare, Medicaid, and other rules to ensure that documentation is accurate and complete. The Centers for Medicare and Medicaid Services (CMS) states in its guidance that:

“While all services provided are expected to be documented in the medical record at the time they are rendered. . . [o]ccasionally, certain entries related to services provided are not properly documented. In this event, the documentation **will need to be amended, corrected, or entered after rendering the service.**”<sup>30</sup>

CMS provides clear requirements for these delayed entries, and they are discussed in this section of the Guide.

## Amended for the Right Reason

PCRs **should** be amended when necessary to:

- Add information that was mistakenly omitted;
- Correct information that is inaccurate; and
- Delete information that is untrue.

PCRs should **never** be amended to:

- Falsify information;
- Misrepresent the patient’s condition;
- Cover up mistakes;
- Include something that isn’t true;
- Delete facts; or
- Include information the practitioner clearly does not remember.

EMS Example
A supervisor discovers in a quality assurance review that the paramedic documented administering double the clinically indicated dose of medication. After asking the medic about the dose, the practitioner admits they made the clinical error (and did indeed mistakenly administer double the indicated dose), and that is what they documented. The PCR should not be amended to make it appear that the correct dose was administered.

The bottom line is that if the original PCR is incomplete or inaccurate, the EMS agency must ensure that the PCR is amended to accurately reflect the patient encounter. EMS agencies can (and should) ask practitioners to amend documentation when appropriate, after they’ve completed the original PCR.

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<sup>30</sup> Medicare Program Integrity Manual Chapter 3 - Verifying Potential Errors and Taking Corrective Actions (emphasis added); available at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/pim83c03.pdf>.

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# When should a PCR be amended?

## Errors and Omissions

Amendments should be made as soon as the EMS agency determines that the PCR is inaccurate or incomplete. If the practitioner, or someone else who reviewed the PCR (such as a biller), believes the PCR is incomplete or inaccurate, they should communicate it to the appropriate individual.

While there is generally no set timeline for making amendments, the later the amendment is made after the patient encounter, the less likely the amendment is going to be based upon an accurate, reliable recollection of the events. As time passes, memories about the patient encounter can diminish and become more unreliable. Medicare reviewers, auditors, and lawyers can challenge the accuracy of amendments and give them less weight if they are created long after the patient encounter.<sup>31</sup>

The bottom line is amendments should be made as soon as possible after discovery of an error or omission. The individual making the amendment must be able to verify its accuracy, and it never hurts to check with your legal counsel when you have questions about making an amendment.

## Patient Requests for Amendment

Amendments may also have to be made to a PCR when requested by a patient under limited circumstances. Patients have the right to request that their medical records be amended under HIPAA and some state laws.<sup>32</sup>

**Accepting a Request for Amendment.** If the EMS agency agrees with the patient that the record should be amended, the agency must append the change to the record or provide a link to the amendment location and inform that patient about the amendment. Amendments should only be made if the EMS agency verifies that the requested amendment is accurate.

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<sup>31</sup> See, e.g., CMS Medical Record Reviewer Guidance In effect as of 01/10/2020 Version 2.0. Accessed at: <https://www.cms.gov/files/document/medical-record-reviewer-guidance-january-2020.pdf>.

<sup>32</sup> 45 CFR § 164.526; See, e.g., 12 VAC 35-115-90.

**Denying a Request for Amendment.** If the EMS agency disagrees with the patient about the amendment and determines that the record is accurate and complete as written, it should deny the patient’s request for the amendment and send a written denial to the patient including a statement that the patient has a right to submit a statement of disagreement.

If the individual continues to dispute the accuracy of the information in the PCR, and the individual files a statement of disagreement, the EMS agency must attach that disagreement to any subsequent disclosure of the PCR.

## Who can amend a PCR?

### Clinical Information

The practitioner(s) who wrote the documentation and provided the clinical care should be the one to amend patient care information. It is unacceptable (and potentially fraud) for a third party that was not involved in the treatment and evaluation of the patient to amend the clinical information in a PCR.

Of course, it may not be possible in every case that the EMS practitioner who served as the lead caregiver and who wrote the chart be the one who completes the amendment. There are cases when a practitioner is no longer employed by the EMS agency (or sadly, no longer alive) at the time the PCR is identified as requiring an amendment. But these cases should be the exception, and in all other cases, the caregiver who provided the care and wrote the original PCR should be the one to amend it when amendments are necessary.

Medicare’s Medical Record Reviewer Guidance states that:

“An amendment must be based on an observation of the patient on the date of service and signed by the [practitioner]. **Only the attending or treating [practitioner] can amend the medical record. . . It is unacceptable for a third party that was not involved in the treatment and evaluation of the patient (e.g., coder, reviewer) to amend the medical record** or query the provider for additional diagnoses or clarifications not documented in the original medical record.”<sup>33</sup>

### “I Wasn’t Drunk”

A patient that your agency transported has been arrested on DUI charges and they’ve asked to see a copy of the PCR from that night. Your crew recorded on the PCR that the patient was slurring his speech and had an unsteady gait. The patient claims he was “stone cold sober” and asks your agency to amend the PCR to take out these observations. Your agency checks with the crew, who verifies that this is exactly what they observed. Your agency is permitted to deny the request for amendment since you have determined that the record is accurate and complete.

<sup>33</sup> See, e.g., CMS Medical Record Reviewer Guidance In effect as of 01/10/2020 Version 2.0. Accessed at: <https://www.cms.gov/files/document/medical-record-reviewer-guidance-january-2020.pdf>.



If another person (such as a biller or supervisor) discovers what they believe to be incomplete or inaccurate clinical information in a PCR, they should send the PCR back to the practitioner to determine if an amendment is appropriate. An EMS practitioner should only amend the PCR if they are certain that it is incomplete or inaccurate based upon firsthand recollection of the patient encounter. No amendment should be made by the practitioner if they do not remember the information, or they conclude that information is accurate and complete as originally written.

Finally, another individual should never instruct the practitioner what to say in an amendment. Instead, the third party should state what the perceived inaccuracy or omission is and ask the practitioner if there are additional details that they remember that could remedy the error or omission.

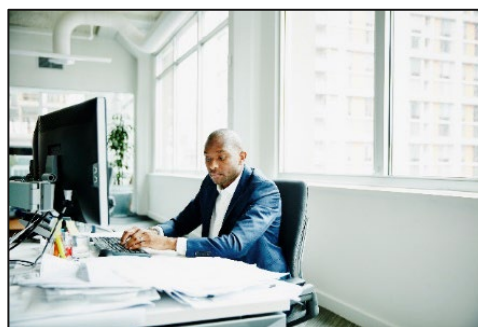
EMS Example
If a biller sees that the certificate of medical necessity for the transport, completed by the physician, states that the patient was bed confined, and the EMS practitioner documented that the patient ambulated without assistance to the stretcher, the biller should not ask the practitioner to remove the statement about the patient's ambulatory status to make the PCR consistent with the doctor's certificate of medical necessity.

## Demographic Information

Amendments may be made by practitioners *and others affiliated or contracted with the EMS agency* - such as third-party billers and internal quality assurance reviewers ***after verifying the error and the accuracy of the amendment.***

For example, changes to demographic information can be made in a billing system, and a biller may correct or add an incorrect or missing:

1. Date of service;
2. Patient name;
3. Patient address;
4. Point of pickup;
5. Destination;
6. Insurance carrier.



Sometimes this type of change is made elsewhere - such as in the account detail or appropriate fields of the billing software, and it may not constitute an amendment to the PCR. Wherever the change is made, the EMS agency must always retain the original PCR as it was written by the practitioner (without the change). Change to the demographic information made by other departments in the EMS agency, or by a third party to facilitate accurate claim submission,

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should not overwrite or replace, on the PCR document itself, what was originally documented by the practitioner.

## What should be included in an amendment?

In addition to the information that was added, deleted, or changed, there must be sufficient information contained in the amendment to verify that it was completed in a timely manner, by an individual who was authorized to make the amendment, and for a legitimate reason.

The Medicare Program Integrity Manual provides clear guidelines about what should be included in all amendments, corrections, and delayed entries in documentation. The CMS Manual states that all amendments to electronic medical records must:

- Distinctly **identify** any amendment, correction, or delayed entry; and
- Provide a reliable means to clearly identify the **original content**, the **modified content**, and the **date** and **authorship** of each modification of the record.<sup>34</sup>

**Medicare Program Integrity Manual**  
**Chapter 3 - Verifying Potential Errors and Taking**  
**Corrective Actions**

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*(Rev. 11529; Issued: 07-28-22)*

When making an amendment, an EMS agency must make sure it does not eliminate the ability to produce the original PCR when required. It should have a reproducible audit trail for every amendment that tracks time, date, author, and includes the reason for the amendment. This information is usually tracked by ePCR software through unique user credentials. This is why an ePCR record should never be “unlocked” to add late entries and make them appear as contemporaneous documentation, as discussed earlier. Instead, late entries should be done through the appropriate software process that includes all required elements outlined in Section 3.3.2.5 of Chapter 3 of the Medicare Program Integrity Manual.

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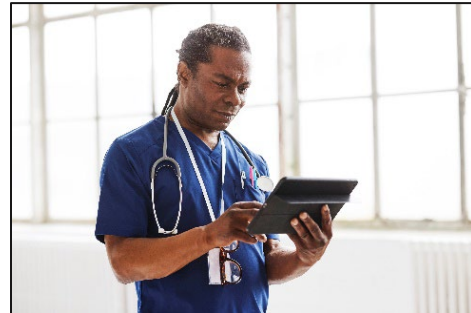
<sup>34</sup> Medicare Program Integrity Manual Chapter 3, Section 3.3.2.5, - Verifying Potential Errors and Taking Corrective Actions (emphasis added); available at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/pim83c03.pdf>.

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## Do agencies have to inform third parties about amendments?

Yes. The EMS agency must inform a third-party about an amendment when the third party would have a need to know that information because they relied upon the original PCR for a clinical, operational, or reimbursement-related reason. For example, the EMS agency should notify a receiving facility, RCM company, regional council, and state EMS office to whom the EMS agency provided the original, unamended PCR.

In addition, when a correction is made to a PCR pursuant to a HIPAA patient request for amendment, the law requires the EMS agency to make reasonable efforts to ensure the corrected information is provided generally to its business associates, and to others who are known to have the PHI that was amended.<sup>35</sup>



The EMS agency is also responsible to take appropriate measures to remedy any billing issues created by the amendment. If the amendment provides additional details that would now render the transport covered by insurance (where it was previously believed to not be a covered service), the EMS agency should submit a claim for the service if it is still within the timely filing deadline. Conversely, if the EMS agency billed the service to insurance because it met coverage requirements based on the original PCR, and now the amendment renders the service noncovered, the EMS agency must take appropriate action to reverse the claim and make a refund where appropriate.

## Is the EMS practitioner responsible if someone else later amends the PCR?

Generally, no - unless the practitioner reviewed and approved the change made by the other individual. That is the primary reason it is critically important that an ePCR tracks later entries by unique user. The individual who made the change is generally responsible for the truth and accuracy of the amendment, and the reason for the revision. The practitioner is responsible for the truth, accuracy, and completeness of the *original* PCR they created and signed.

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<sup>35</sup> See 45 CFR. § 164.526.

# Can a state EMS office doing quality improvement instruct the EMS agency to update an ePCR record missing required data elements?

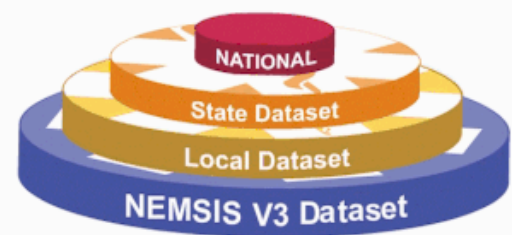
Generally, yes. State EMS offices have broad oversight authority and likely could instruct an EMS agency to update the missing data element. If an update is made, it should be through an amendment. If the amendment is clinical, the practitioner who created the original record should make the update whenever possible. The original PCR should remain unchanged and the time, date, author, and reason for the update should be tracked.

The EMS agency should only update the data element if it can verify the element is correct. For example, if the missing data element was clinical, and it could be verified from other information in the narrative, then the update could be made by the practitioner who authored the PCR. But, where the practitioner has no recollection, and the clinical data element cannot be verified by other documentation, the update should not be made. If the data element was demographic, such as a Zip code, that element could be verified by dispatch information or other means, and it could be made by someone with the authority to amend records at the agency.



## Preventing Missing Data Elements

The EMS agency should ensure that their ePCR software is NEMSIS compliant and allows for documentation of additional state elements. The EMS agency must capture all required state data elements at a minimum. EMS agencies may also incorporate additional data elements (beyond national and state elements) according to the needs of their agency.



**Note:** NEMSIS data elements may not be required (and those elements may not even be applicable) when a PCR is printed for determining coverage by an insurance payer. The information needed to support claim reimbursement, and the data elements required to submit a clean NEMSIS data collection file serve two distinct, and many times unrelated, purposes. Comingling NEMSIS data elements and reimbursement information can create a confusing and inconsistent report when printed together on a single document.

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# Should ePCR software track amendments to the PCR?

Absolutely. This Guide previously discussed how CMS requires proof of the time, date, author, and the reason for the amendment to verify amendments. It is critical that EMS agencies who use an ePCR solution can show Medicare reviewers the original PCR and the elements required to validate any amendment. Otherwise, the amendment could be disregarded by the reviewer, or may even be cause for suspicion of fraud.



It is also critical that ePCR software applications track amendments for patient care, quality improvement, compliance, and legal purposes. EMS agencies must be able to show that they correct mistakes and strive for complete, accurate documentation. The ability to track amendments is essential for recreating the timeline and tying amendments to a specific individual.

Finally, because ePCR vendors are “business associates” under HIPAA, they are **required** to implement “Audit Controls” under the Security Rule. Audit Controls are “mechanisms that record and examine activity in information systems.”<sup>36</sup> Generally audit controls include application, system-level, and user audit trails containing time, date, and author of the amendment.

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<sup>36</sup> 45 C.F.R. § 164.312(b))

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# Retention of PCRs

- Is there a federal PCR record retention requirement?
- What is a best practice for retention length?
- When an EMS agency goes out of business, what are the legal duties concerning PCRs?
- Is the record retention length for EMS agencies the same as for state EMS offices?
- Does bodycam video have to be retained as part of a PCR?

## Is there a Federal PCR record retention requirement?

There is no federal record retention requirement for *medical* records. HIPAA does not establish a record retention requirement for medical records.<sup>37</sup> While there are other federal requirements for retention of employment and safety-related records,<sup>38</sup> and a requirement from CMS to retain “orders” for services for seven years,<sup>39</sup> generally **state** laws establish retention requirements for healthcare records, such as PCRs.

### What do State Laws Say?

State laws vary a lot. Some EMS-specific retention laws require retention for 7 years, others for 10 years.

Some laws have qualifiers for minors and specify how long to retain the records past the age of majority, while in other states, retention of records for minors depends upon the statute of limitations (SOL) for civil actions. For example, in a state that does not specify the length of time for record retention of minors, if the civil statute of limitations on a personal injury action

<b>Pennsylvania.</b> EMS agencies must retain a copy of the EMS PCR for a minimum of 7 years.
<b>Nevada.</b> Healthcare providers are required to maintain medical records for a minimum of five years, or – in the case of a minor – until the patient has reached twenty-three years of age.
<b>North Carolina.</b> Records relating to minors must be retained until the patient has reached thirty years of age.

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<sup>37</sup> 45 CFR § 164.316 (b)(2)(i). HIPAA requires Covered Entities and Business Associates to maintain required documentation for a minimum of six (6) years from the date of its creation, or the date when it last was in effect, whichever is later.

<sup>38</sup> Examples of federal employment-related retention laws include: USERRA, ADA, COBRA, FMLA, OSHA, FICA, FCRA, ERISA, FLSA, FMLA, etc.

<sup>39</sup> 42 CFR § 424.516(f).

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in the state is 2 years, and the age of majority is 18, the retention period would be a minimum of 2 years beyond when the patient turned 18 (18 + 2 = 20). In many cases the retention period may be longer because of the best practices discussed in this Guide.

## What is a best practice for retention length?

The duration for which you must retain PCR records varies by state and, while there is no federal medical record retention requirement, there are some federal law considerations. Proper medical records retention requires following best practices regarding information and data confidentiality, security, and destruction.

EMS agencies should retain medical records for whatever period is longest:

- The length of time required by state law;
- Ten (10) years beyond the date of service if the patient was over the age of majority in your state when the service occurred; or
- If the patient was a minor at the time of service, the length of the statute of limitations for civil actions in the state after the patient reaches the age of majority (or the date on which the statute of limitations begins to run in your state).

Agencies should consult with an attorney licensed in their state for formal legal advice about the length of time required by state law to retain PCRs and when the statute of limitations begins and ends. States may also have data retention laws that apply to hospitals (which would include hospital owned ambulance services) and public agencies (such as county, city, and local municipal departments). If there is a state law that requires the agency to retain PCRs or “all records” for a set period, the agency must comply with those laws.

The 10-year threshold comes from the federal False Claims Act (FCA). Agencies that bill federal healthcare programs – such as Medicare and Medicaid – are subject to the FCA. If your agency is investigated under, or becomes a defendant in, an FCA proceeding, then the government can – in some circumstances – use claims from as far back as 10 years to prove FCA liability.<sup>40</sup> The EMS agency would need the PCRs to answer investigative demands and defend itself in an FCA action. The FCA allows individuals known as “relators” or “whistleblowers” to bring a false claim action (whistleblower lawsuit) against someone on behalf of the government. This means that any person - including an ambulance service’s employees, former employees, or competitors - can allege that your agency was fraudulently submitting claims to the government (*i.e.*, Medicare).

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<sup>40</sup> 31 U.S. Code § 3731(b)(2).



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Some EMS agencies retain their PCRs and related documentation forever. With most agencies using electronic recordkeeping, and with the decreased costs of hard drive, cloud, and other electronic storage solutions, some agencies have decided that the cost-benefit of indefinite record retention favors permanent storage of these records.

## Additional Considerations for Data Retention

**Security.** All sensitive data maintained should be encrypted in accordance with the federal “Guidance to Render Unsecured Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals.”<sup>41</sup> If the data are maintained on a cloud server, the EMS agency must have a business associate agreement in place with the vendor that outlines the rights of the EMS agency to that data, and exactly how the vendor can use or disclose that data on behalf of the agency.



Agencies can also store older data (such as data they no longer need to access) on a server that is disconnected from the internet to mitigate the potential for breaches.

**Retention for Longer Period in “Special Situations.”** EMS agencies should also retain PCRs in “special situations” for the length deemed necessary, which may exceed the time under their retention policy or required under state law. For example, agencies should retain PCRs when:

- It pertains to an incident that is subject to active or pending litigation;
- The PCR was requested through legal process (subpoena, summons or warrant) or another official agency request (such as an audit through CMS) before the data retention period expires;
- The incident involves an active patient complaint;
- The PCR contains information documenting evidence of a crime; or
- Your attorney advises maintenance of the PCR beyond the normal retention period.



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<sup>41</sup> Available at: <https://www.hhs.gov/guidance/document/guidance-render-unsecured-protected-health-information-unusable-unreadable-or>.

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# When an EMS agency goes out of business, what are the legal duties concerning PCRs?

Like record retention, requirements concerning PCR retention if the EMS agency is purchased, dissolved, merged, or otherwise ceases doing business are controlled by state law, and state laws vary. The first step EMS agencies should take when they are wrapping up business is to consult their attorney and determine what requirements exist and options the agency has concerning its PCRs.

## General Guidelines for Closure

**Patient Notification.** Patients should generally be notified about the closure. Some states require an attempt to notify patients.<sup>42</sup> Unless state law is specific about notice, the agency may notify patients through local news media, its website (which should remain active after closure for patients looking for records), letters and social media.



**Destroy Old Records.** Before the transfer of PCRs, all records that are beyond the required date of retention should be destroyed in accordance with HIPAA's guidance on rendering the data unreadable.<sup>43</sup> For example, if the agency retains records for 10 years after the date of service, records that are more than 10 years old could be destroyed, provided there is no exception (e.g., for minors).



**Check Insurance.** EMS agencies should also contact their liability insurance carrier. Both the agency and the carrier must have access to PCRs after the closure in the event a negligence claim is filed.



**Communicate Record Retention Policy to Custodian.** EMS agencies must clearly communicate their retention policy to the entity taking custody of the records so that they retain in them accordance with that policy and include the policy as part of the contract or agreement with that entity.



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<sup>42</sup> See, e.g., See Va. Code Ann., § 54.1-2405A.

<sup>43</sup> Available at: <https://www.hhs.gov/guidance/document/guidance-render-unsecured-protected-health-information-unusable-unreadable-or>.

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## Potential PCR Disposition Options

**Contact State Departments of Health/EMS.** Many state health departments and licensing authorities govern closures and may outline to whom medical records should be transferred. In some states, a state archive or health department will store health records. More commonly, state regulations require records be transferred to another healthcare provider.



**Include in Sale.** If the agency is sold to another healthcare provider, patient records may be considered assets and included in the sale of the property if permitted under state law. HIPAA permits the sale of medical records for the sale, transfer, merger, or consolidation of a healthcare provider.<sup>44</sup>



**Transfer in Merger.** If the agency is merged or consolidated with another entity, the other entity would normally assume responsibility for the PCRs.



**Transfer to Another EMS Agency.** If there is no sale or merger, PCRs may sometimes be transferred to another EMS agency that agrees to accept the responsibility. Preferably this should be to another agency in the same or nearby geographic area.



**Commercial Custodian.** Some states permit records to be archived with a reputable commercial storage firm that will handle requests for the records. The storage firm will encrypt PCR data and properly handle requests for PCRs.



**Surviving Entity.** If an EMS agency is part of another entity – such as a hospital or municipality – the surviving entity may become the custodian of the PCRs.



## Beware: HIPAA Can Still Apply After Closing

In February 2018, a receiver appointed to liquidate the assets of a business associate under HIPAA agreed to pay \$100,000 out of the receivership estate to the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) to settle potential violations of the HIPAA Privacy Rule.<sup>45</sup> Although the business associate went out of business in 2017, during OCR's investigation into alleged HIPAA violations, it could not escape its obligations under HIPAA. The OCR Director stated: "Covered entities and business associates need to be aware that OCR is committed to enforcing HIPAA regardless of whether a covered entity is opening its doors or closing them. HIPAA still applies."

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<sup>44</sup> 45 CFR 164.502(a)(5)(ii).

<sup>45</sup> OCR announcement available at: <https://www.hhs.gov/guidance/document/consequences-hipaa-violations-dont-stop-when-business-closes>.

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## Is the record retention length for EMS agencies the same as for state EMS offices?

Not necessarily. There are other retention laws and guidelines that apply to state oversight agencies. Many of these laws require retention of public documents and historical records for much longer than a state medical records law would require an EMS agency to retain a PCR, sometimes indefinitely. Some state retention schedules may be much shorter than the medical records retention requirement.<sup>46</sup> State **medical** records retention laws may not apply to state oversight agencies because those laws typically apply to healthcare providers.



States have a state archivist that issues rules concerning record retention guidelines for state agencies. The retention schedules generally apply to records regardless of the format or media in which they exist. These schedules also typically contain express exceptions for records being used for audits or legal actions, and those records must usually be kept until the audit is satisfied or the legal action ends, even if their minimum retention period has passed.

## Does body camera video have to be retained as part of a PCR?

Surprise, it depends on state law. A body camera video would have to be retained as part of a PCR if state law requires these recordings to be included in the medical record. The critical determination is whether body camera recordings fall within the definition of medical records under state law. Your local counsel will need to examine the definition of medical records and any exceptions contained in the law to make that determination.

If a body camera recording is a medical record under state law, the EMS agency must maintain it in accordance with state medical record retention law requirements and potentially must provide a copy of that recording to the patient if state law requires production of everything in a medical record to a patient.

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<sup>46</sup> See, e.g., New York State Health screening for infectious diseases Minimum Retention and Disposition: Destroy 30 days after completion of questionnaire. Accessed at: [http://www.archives.nysed.gov/common/archives/files/general-schedule\\_2016.pdf](http://www.archives.nysed.gov/common/archives/files/general-schedule_2016.pdf).

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## State Law Example – Arizona (A.R.S. § 12-2291)

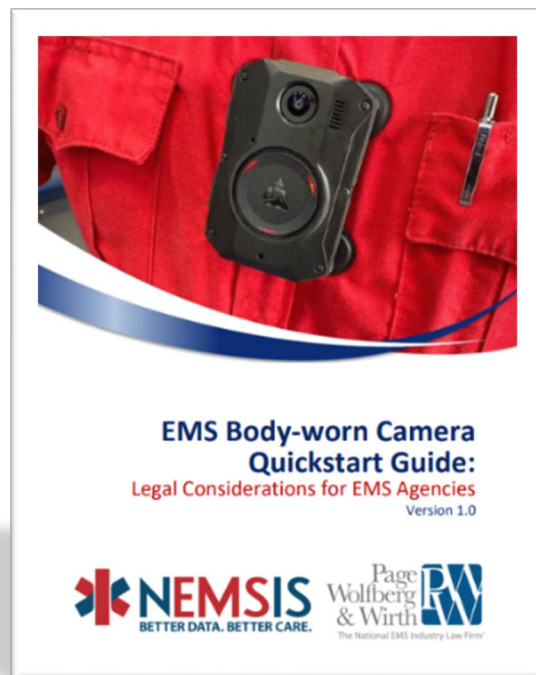
For example, Arizona law states that *medical records* specifically include: “communications that are recorded in any form or medium between emergency medical personnel and medical personnel concerning the **diagnosis or treatment.**”<sup>47</sup> A determination would have to be made by an attorney licensed in Arizona, but if an EMS agency in that state is using body camera recordings for “treatment,” then the agency’s recordings *might* be considered medical records under this law. If the agency is using the cameras strictly for quality assurance and quality improvement and internal retroactive review - which most EMS agencies are - then it is *possible* that this law would not apply to the recordings. This is still an evolving and somewhat gray area of the law and EMS agencies should consult with their local counsel concerning the status of and appropriate retention period for body camera videos.

## Other Considerations

States may also have data retention laws that apply to body camera recordings apart from medical record retention laws. EMS agencies must comply with all applicable data retention laws and maintain recordings for the (longest) length of time required. Agencies must also secure the recordings in accordance with any applicable requirements. For example, Nevada State law requires any “data collector” that maintains “personal information,” to use encryption or some other approved method to safeguard that information.<sup>48</sup>

## Additional Resource

For more information about legal issues surrounding the use and retention of body-worn cameras, consult the joint NEMSIS/PWW white paper “EMS Body-worn Camera QuickStart Guide that is available at [www.ems.gov](http://www.ems.gov).



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<sup>47</sup> A.R.S § 12-2291 (emphasis added).

<sup>48</sup> Nev. Rev. Stat. Ann. § 603A.215.

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# Transferring PCR Data

- Are there concerns if the agency transfers data from a paper PCR to an electronic data collection system?
- If an agency sends de-identified data to an HIE, does that data fall under the same protections as ePCR data?
- If the HIE sends back patient outcome data (outside of the ePCR), does that data fall under the same protections as ePCR data?

## Are there concerns if the agency transfers (transcribes) information from a paper PCR to an electronic data collection system?

Yes, there are several concerns when data from a paper PCR is transferred to digital format, and EMS agencies should follow clear best practices to ensure accuracy and consistency when transferring the data. Agencies that use an ePCR solution should try to input the data electronically whenever possible, and only capture patient care information on paper when absolutely necessary.

### Best Practices for Paper to Electronic Transfer

**Strict Policy on Completion.** Because paper PCRs lack electronic prompts and mandatory fields, there is a risk that the documentation on a paper PCR is incomplete. The agency must have a clear policy detailing what information must be included in a PCR and the paper and electronic records should be completed in conformance with that policy. Practitioners must be trained on the policy, and it must be consistently enforced.



**Accuracy and Consistency.** The ePCR must precisely reflect the paper PCR and any information omitted from the paper PCR, or added to an ePCR, must truthfully and accurately represent the patient encounter. Inconsistencies between the paper and electronic records could raise an inference that a PCR produced from the ePCR solution is an inaccurate account of the patient encounter since the paper PCR was completed closer to the time of patient care. Any third party transferring the paper information to an ePCR should not be “authoring” any clinical portions of the record by adding to or removing clinical information documented on the paper PCR.



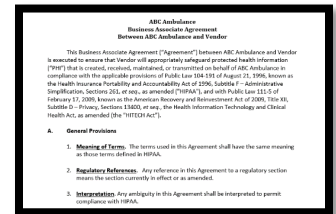
**Practitioner(s) Should Review and Sign.** All practitioners on the call should review and electronically sign the final electronic record regardless of whether the transfer of information was internal or by a third party. If there are any inaccuracies or omissions discovered upon review, the practitioner who made the error should make any necessary corrections prior to everyone signing the electronic record.



**Securely Maintain Paper PCR Data.** Agencies may maintain the information from the original hard copy PCR for purposes of ensuring consistency, conducting quality assurance, and other legal reasons. If the agency's policy is to maintain the original paper PCR the agency should digitize (scan or image) the paper PCR and maintain it in digital format. The digital information from the paper PCR should be backed up and encrypted. The agency should shred, burn, or destroy the original paper PCR unless it is aware of a legal requirement to maintain the paper PCR – such as a state law requirement, or the document is the subject to a litigation hold.<sup>49</sup>



**Business Associate Agreement With Third Party.** If the EMS agency engages a third party to transfer paper PCR information into an ePCR solution, the EMS agency must have a business associate agreement in place with the third party.<sup>50</sup>



**Securely Transmit Original PCR Data to Third Party.** If the EMS agency uses a third party to transfer paper PCRs to an ePCR solution, the agency should scan the paper PCR and send a digital copy to the third party via an encrypted channel. Agencies should work with their third-party vendor to facilitate a secure method of transmission.



<sup>49</sup> A litigation hold -- also known as legal hold, preservation order or hold order -- is an internal process that an organization undergoes to preserve all data that might relate to a legal action involving the organization. A litigation hold suspends the normal retention policies applicable to data to ensure that the data is available for the discovery process prior to litigation.

<sup>50</sup> 45 CFR § 164.502(e).



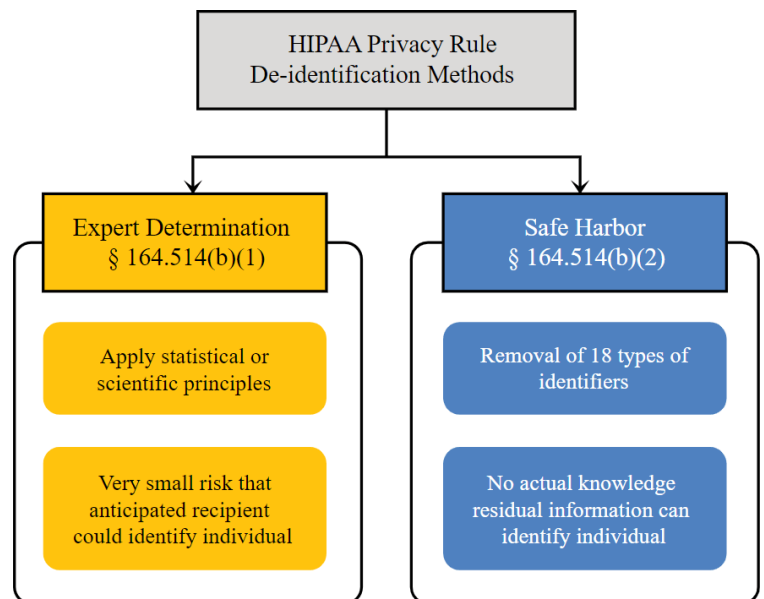
# If an agency sends de-identified data to an HIE, does that data fall under the same protections as ePCR data?

No, if the data were de-identified in accordance with HIPAA’s standards. If the data are not de-identified in accordance with HIPAA’s standards, and the data contain individually identifiable information, the EMS agency must send the identifiable data through a secure, end-to-end encrypted method of transmission.<sup>51</sup>

## De-Identified Data Sent to HIE

If the information sent to the health information exchange (HIE) is de-identified under HIPAA’s de-identification standard, then there are generally no concerns under HIPAA about sending that information to an HIE. The de-identified data would not be subject to the same protections as the rest of the identifiable PCR data, and the data would not be considered protected health information (PHI) under HIPAA. The agency should, however, check state law to determine whether the HIPAA de-identified information would have any protection under state law.

HIPAA provides two de-identification methods: 1) a formal determination by a qualified expert; or 2) the removal of 18 types of identifiers and the absence of actual knowledge by the EMS agency that the remaining information could be used alone or in combination with other information to identify the individual.<sup>52</sup> Either method, even when properly applied, yields de-identified data that retains very small risk of identification. However, regardless of the method by which de-identification is achieved, HIPAA no longer applies to the use or disclosure of de-identified health information, as it is no longer considered PHI.



<sup>51</sup> 45 CFR § 164.312(e)(2)(ii). Covered entities must consider the use of encryption for transmitting electronic PHI, especially over the web.

<sup>52</sup> 45 CFR § 164.514.

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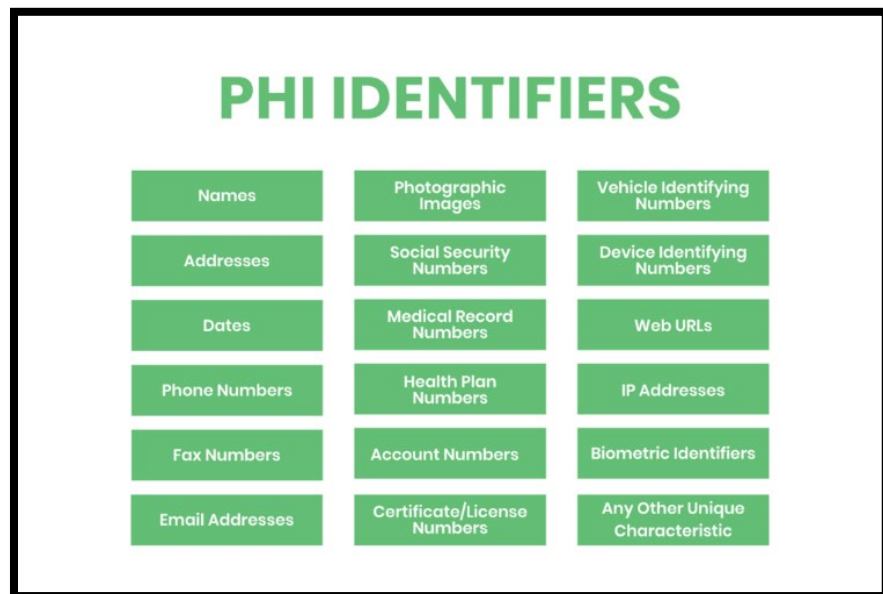
## Re-Identification is Permitted

The HIPAA de-identification rule permits assignment of a unique code to the set of de-identified health information to permit re-identification. Once an EMS agency re-identifies the de-identified information, the health information (now related to a specific individual) would again be protected by HIPAA because it would meet the definition of PHI.

## If the HIE sends back patient outcome data (outside of the ePCR solution), does that data fall under the same protections as ePCR data?

Yes. If the outcome data is not de-identified, then it is subject to the protections of HIPAA and any state laws that protect PHI or personally identifiable information (PII). The data must be secured (thorough encryption) when transmitted back to the EMS agency. The EMS agency must protect the identifiable outcome data in the same manner as the rest of its ePCR data.

Under HIPAA, PHI is defined as individually identifiable information that is created or **received** by a healthcare provider.<sup>53</sup> PHI received from an HIE becomes PHI of the EMS agency, must be secured, used, and disclosed in accordance with HIPAA.



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<sup>53</sup> 45 CFR § 164.103.

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# Conclusion

We hope this Guide dispels many of the myths, misconceptions, and confusion surrounding PCRs and obligations concerning them. The PWW and NEMSIS TAC teams hope you find this Guide to be a practical resource and reference tool to augment your EMS documentation improvement program. We invite you to reach out with any questions that you have.

For additional information, please contact:

- Page, Wolfberg & Wirth at [info@pwwemslaw.com](mailto:info@pwwemslaw.com); or
- The NEMSIS Technical Assistance Center at [support@nemsis.atlassian.net](mailto:support@nemsis.atlassian.net).

## *About the Guide's Author:*

**Page, Wolfberg & Wirth** is the nation's preeminent EMS, ambulance, and medical transportation industry law and consulting firm, serving thousands of private, public, and nonprofit agencies nationwide for over 20 years.

