AN EXPOSITION OF THE LEGAL ISSUES IN THE MANAGEMENT OF HEALTH RECORDS IN NIGERIA

Abiola Abioye
Department of Library, Archival & Information Studies,
University of Ibadan.
biolaabioye@yahoo.com

Abstract
Like personnel, equipment and facilities, records constitute a crucial factor in healthcare delivery. Timely availability of records and the proper capturing of data relating to patients depend on the efficiency of the records management system of a health institution. Besides, pertinent legal issues arise in the management of health records which health records managers must be abreast of so as not to run foul of the law and/or involve their healthcare institutions in legal liability. This paper, therefore, focuses on legal issues associated with various aspects of health records management like access, patient's confidentiality and records retention with a view to bringing them to the attention of those involved in health records management in healthcare institutions in Nigeria. It examines the general principles of law governing health records management and also makes reference to the provisions of relevant laws in Nigeria and elsewhere. It concludes that the law relating to some of these aspects is still evolving in Nigeria as specific legislations on them are absent compared to what obtains in some developed countries. Finally, it calls on stakeholders in the field of health records management to forge a common front to help develop the law in the field as a basis for providing guidelines for healthcare institutions in the management of their health records.

Introduction
Good health is one of the basic human requirements. It unarguably ranks top on the list of human priorities. The huge resources committed to the maintenance and sustenance of health facilities is a true testimony to the paramount role played by the health sector in the overall well-being of a nation and its people. Central to healthcare delivery are data captured from which health information is generated. Information is critical to development and service delivery, and it plays

no less dominant role in the health sector. Timely access to health information facilitates healthcare delivery. The greatest obstacle to access to information is poor records management. Health records department and health information profession, therefore, occupy a unique position in the management and provision of health information for healthcare delivery.

Law has a domineering influence on virtually every field of human endeavours. There is hardly any subject or discipline without its own legal aspects. The management and use of health records is not an exception. This paper, therefore, focuses on the legal aspects of health records management with particular reference to Nigeria while not being oblivious of the situation in other countries in order to emphasize the international best practice.

Health Records

Health records constitute an important group of specialized records. They are generated in the course of health care delivery and they facilitate the functions connected thereto. Atinsola (2001) defines health records as "the scientifically complied health facts of a patient(s) in the hospital(s) attended from the date of birth till the date of death, orderly arranged in a file jacket or case folder, which is (sic) scientifically protected and filed for easy retrieval at any time of the day." According to the American Heritage Dictionary, health record is "a chronological written account of a patient's examination and treatment that includes the patient's medical history and complaints, the physician's physical findings, the result of diagnostic tests and procedures, and medications and therapeutic procedures." Amatayakul (2001), however, defines health records in relation to legal purpose. According to her, legal health record (LHR) is "individually identifiable data, in any medium, collected and directly used in and/or documenting healthcare or health status."

Health records are, sometimes, referred to as medical records. Other popular terms include hospital and patient records. It should be appreciated that these terms are not all synonymous as some are wider in scope than the others. The term 'hospital records', for instance, can refer to both the housekeeping and operational records in a hospital. Whereas the term, in a narrow context, refers to records containing such information as the personal data of a patient, the patient's history

of illnesses, the doctor's notes, list of treatment and records of tests carried out.

Whatever the context in which the term is used, good record keeping is an essential factor for good medicare. Like personnel, facilities and equipment, a good records management programme is essential to a high quality health delivery system. The efficiency of any health facility is often a function of how easily accessible records are for decision-making.

Records Management

Records management enhances and guarantees easy access to records for decision making. It makes for efficiency and economy in the use of recorded information and promotes transparency, accountability and good governance. In the peculiar circumstances of medical records, records management facilitates healthcare delivery system and constitutes one of the critical indices by which the performance of any healthcare organization can be measured.

Benedon (1987) defines records management as the systematic control of information and records from creation to final disposition while Penn, Pennix and Coulson (1994) define it in terms of the management of information captured in reproducible form that is required in the conduct of the business of an organisation. According to the Australian Standard AS 4390 – 1996 (now superseded by the International Records Management Standard, ISO 15489) which was the first records management standard in the world and the benchmark for defining records management, it is "the discipline and organizational function of managing records to meet operational needs, accountability requirements and community expectations". The focus of records management, as identified by the Standard, includes the following:

(a) Managing the records continuum, from the design of record keeping system to the end of records' existence.
(b) Providing a service to meet the needs and protect the interest of the organization and its clients.
(c) Capturing complete, accurate, reliable and useable documentation of organizational activity to meet legal, evidential and accountability requirements.

(d) Promoting efficiency and economy, both in the management of records and in the organizational activity as a whole, through sound records keeping practices.

Records management, therefore, entails the control of records throughout their life cycle as graphically highlighted in **Figure 1.**

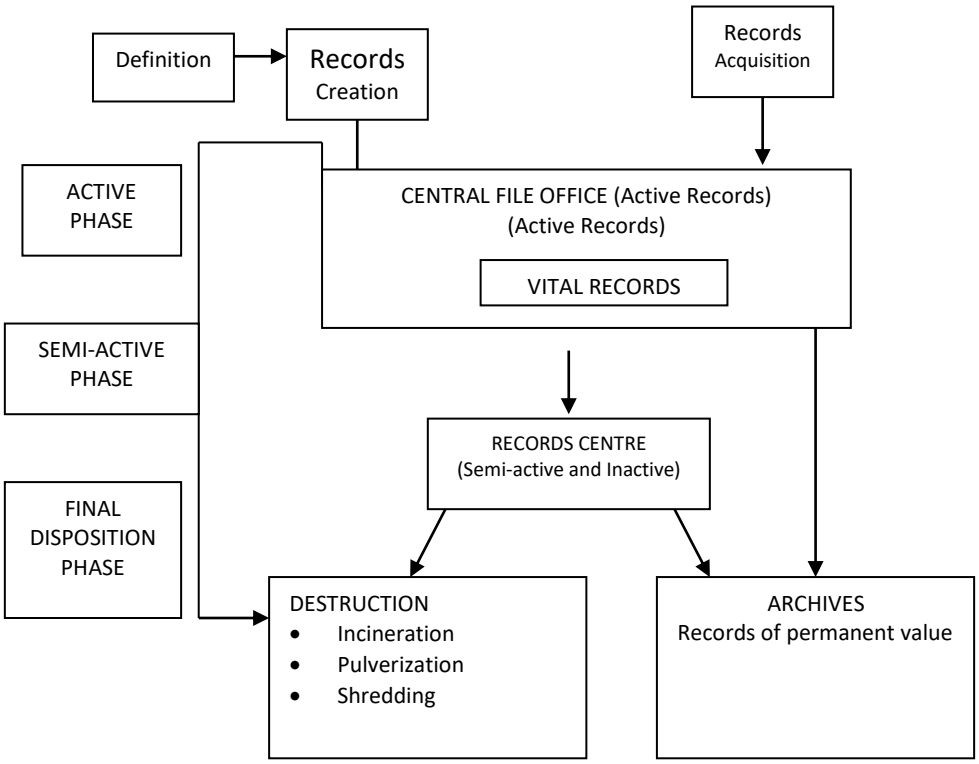

Fig. 1: Records Life Cycle Management Model

The essence of records management is to make records serve the purposes warranting their creation as cheaply and efficiently as possible and to dispose of them as soon as they have served their primary purposes.

Legal Issues

Health records management has its own legal aspects which are regulated by legislations, regulations and policies. The common legal issues in health records management relate to access, confidentiality and records retention. In developed countries of the world, legislations are well-developed on various aspects of health records management. In developing countries, particularly Nigeria, specific legislations are still evolving, but there are scattered general legal provisions that have implications for health records management.

Access

The term 'access' has been defined as availability of records for consultation as a result of legal authorization. This then means that access to records is usually not granted except with legal authorization which may be explicit or implicit. Legal authorization depends on the nature and status of records. Access to current official records is based on the need to know. By this principle, only those who have official functions to perform in relation to the records are afforded access to them. Each organization may, however, have its own policy governing access to its records. Access policy varies from one organization to another. Organizational culture, therefore, has a dominant role in facilitating access to records. Each health facility is at liberty to institute access regulations which are enforceable within the organization as long as they are not inconsistent with any applicable legal provisions. In some countries, patients have the right of access to their records. To deny a patient access to his record will, therefore, be unlawful and a contravention of his right of access.

As for non-current public records that have attained the status of archives and are, in fact, in the custody of the National Archives of Nigeria, access to such records is governed by the provisions of Section 29 of the National Archives Act, 1992. Section 27 (1) of the Act grants members of the public free access to public archives in the National Archives to which there had been free access when the archives were in the custody of the public office from which they had been transferred. The Act stipulates that public archives of the age of twenty-five years and above are to be open for the inspection of the public. If health records are found in the National Archives, such records are to be governed by the access provisions of the Act. However, if health facility from which they originated stipulates a longer period of closure, the

National Archives is under a legal obligation to abide by such stipulation. The Act also recognizes the need to protect the privacy of individuals when it stipulates in Section 27 (3) that public archives relating to the private life of individuals are not to be made available for the inspection of members of the public except with the written permission of the persons concerned or their heirs or executors if known to the Director of National Archives.

Official Secrets

For health facilities that are publicly owned, the provisions of the Official Secrets Act and the Public Service Rules also have implications for access to records. Section 1 of the Act stipulates that:

> 1. Subject to subsection (3) of this section, a person who -
>
> (a) transmits any classified matter to a person to whom he is not authorized on behalf of the government to transmit it, or
>
> (b) obtains, reproduces or retains any classified matter which he is not authorized on behalf of the government to obtain, reproduce or retain, as the case may be, shall be guilty of an offence.
>
> 2. A public officer who fails to comply with any instructions as to the safeguarding of any classified matter which by virtue of his office is obtained by him or under his control shall be guilty of an offence.

A classified matter is defined in the Act to mean "any information or thing which under any system of security classification from time to time in use by or by any branch of government, is not to be disclosed to the public and of which disclosure to the public would be prejudicial to the security of Nigeria."

Complementing the Official Secrets Act is the Public Service Rules (PSR), 2006 which contains provisions protecting classified records. It stipulates that every officer is subject to the Official Secrets Act and prohibits unauthorized disclosure of official information. As a

necessary safeguard against information leakage, the PSR requires every permanent secretary/head of extra-ministerial office to ensure that all officers, employees and temporary staff in his or her ministry/extra-ministerial office who have access to classified or restricted papers subscribe to the Oath of Secrecy in the appropriate form before being granted access and that the declarations so signed are safely preserved.

Therefore, if there are classified records among the health records of a public health institution, the provisions of the Official Secrets Act as well as those of the Public Service Rules are applicable to such records. A contravention of these provisions attracts sanctions which include criminal liability. The Official Secrets Act, for instance, stipulates a prison term of fourteen and two years respectively on conviction on indictment and summary conviction respectively. The PSR on the other hand defines unauthorized disclosure of official information as a serious act of misconduct and the ultimate penalty for this is dismissal.

Equally important on the issue of non-disclosure of official secrets in Nigeria are the provisions of Section 97 of the Criminal Code Act which make it an offence for any person employed in the public service to publish or communicate any fact which comes to his knowledge by virtue of his office and which it is his duty to keep secret or any document which comes to his possession by virtue of his office which it is his duty to keep secret except to some person to whom he is bound to publish or communicate it. Health information officers in a healthcare facility in the public domain must, therefore, be careful not to act contrary to the spirit and letter of this Act in the management of health records.

Patient Confidentiality

Patient confidentiality is an important legal and ethical issue not only in health records management but in healthcare delivery generally. Healthcare practitioners are under an obligation to maintain the confidentiality of health information of a patient. The code of medical ethics stipulates that information disclosed to a physician in the course of patient-physician relationship is of utmost confidentiality. Besides, the information, in law, is privileged and must be kept secret. By extension, those saddled with the responsibility of keeping such

information owe the duty of non-disclosure without authorization. Confidentiality has been defined in a simple way as the act of ensuring that information is accessible only to those authorized to have access. The philosophy informing the principle of patient confidentiality is to make patients to be free to make frank disclosure to their physician with the knowledge that the confidentiality of the information disclosed is assured. In some countries, there are data protection legislations and privacy policy which grant people (patients inclusive) the right to have data collected about them protected and to make informed choices about who should have access to such data and under what conditions or circumstances.

Consent to Disclose

Disclosure of patient confidential information can be made with the consent of the patient or by a court order. Consent may be express or implied. For instance, there is an implied consent that medical personnel involved in the treatment or care of a patient should have access to his or her medical records even if the patient has not given express authority. There is also an implied consent when a patient is transferred from one physician or health facility to another since disclosure is necessary to ensure continuation of treatment.

Express consent can personally be given by a patient or through the next-of-kin, particularly in the case of a minor. Taking a decision on consent through the next-of-kin, may, sometimes, bring hardship, particularly in case of consent to administer certain treatment as the decision of the next-of-kin may turn out not to be in the best interest of the patient. As for court order to make disclosure, the custodian of health information has no choice than to comply. The relevant provisions regarding enforcing attendance of witnesses in court are contained in Sections 186 to 190 of the Criminal Procedure Act while Section 191 of the Act stipulates the penalty for refusal of a witness to attend. That disclosure is being made based on the order of the court may, however, be a valid defence in the event of claim for damages by a patient for unauthorized disclosure of health information relating to him. Sometimes, the circumstances may justify disclosure. For instance, the court has upheld a hospital's freedom to disclose a patient's confidence to prevent harm to the patient or others (Vistica versus Presbyterian Hospital).

Confidentiality and Freedom of Information

In order to promote openness, transparency and the people's right to know, a freedom of information (FOI) legislation is now an essential feature of a democratic society. In Nigeria, the FOI legislation is still at the bill stage. It is hoped that when passed it will transform the landscape in information provision, particularly in the public sector. Taking a peep into the countries in which FOI legislations are already in operation, the benefits are immense while the challenges of implementation are enormous. In the United Kingdom and South Africa, for example, the provisions of the legislation have been tested in courts. The question is whether there is no potential conflict between confidentiality and freedom of access to information.

FOI legislation grants the citizens the right of access to information. The Nigerian FOI Bill, for instance, stipulates in Section 2 that "every citizen of the Federal Republic of Nigeria, has a legally enforceable right to, and shall, on request, be given access to record under the control of a government or public institution." An applicant, according to the provision of the section, need not demonstrate any specific interest in the information being requested for. The head of the government or public institution to which a request is made is required, within seven days after the request is received, to give a written notice to the requester stating whether or not access to the record will be granted and to facilitate access if request is granted (Section 5). A person entitled to the right of access can institute proceedings in a court to compel the head of any government institution or public body to honour his obligation under the Act.

For the avoidance of doubt, the term 'public record or document' is extensively defined in Section 34 of the Bill to mean 'a record in any form having been used, received, possessed or under the control of any public or private bodies relating to matters of public interest and includes-

a) any writing on any material;
b) any information recorded or stored or other devices; and any material subsequently derived from information so recorded or stored;
c) any label, marking or other writing that identifies or describes anything of which forms part, or to which it is attached by any means;

d) any book, card, form, map, plan, graph or drawing;
e) any photograph, film, negative, microfilm, tape or other devices in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced.

The question as to potential conflict between the FOI legislation and the provisions of other legislations protecting official records can be answered by looking at Section 30(2) and Section 31 (1) of the FOI Bill. Section 30 (2) states that:

Nothing contained in the Criminal Code or the Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, any public record and or/information which he reasonably believes to show

a. violation of any law, rule or regulation;
b. mismanagement, gross waste of funds, and abuse of authority; or
c. a substantial and specific danger in public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act.

Section 31 (1) provides that:

> The fact that any record in the custody of government and or/ public institution is kept by that institution under security classification or is classified document within the meaning of the Official Secrets Act does not preclude it from being disclosed pursuant to a request for disclosure under the provisions of this Act, but in every case, the head of the security government and/or public institution to which a request for such record is made shall decide whether such record is of a type referred to in Sections 14, 15, 16, 17, 18, 19, 20 or 21 of this Act.

It should be noted that sections 14, 15, 16, 17, 18, 19, 20 and 21 referred to in Section 31(1) of the Bill deal with the exemptions to the right of access which constitute a common feature of most FOI legislations.

The fact is that it is not practicable to allow unfettered access to information without some other interests being jeopardized. It is in appreciation of this fact that some exemptions to the right of access are instituted. The exemptions under the FOI Bill are in respect of information or record relating to international affairs and defence, law enforcement and investigation, and economic interest of the country. Others include personal information, third party information, advice and legal practitioner/client privilege.

Of particular interest to the present discourse is the exemption contained in section 16 of the Bill. Section 16 (1) states that:

Subject to subsection (2), the head of a government and or public institution shall refuse to disclose any record requested under this Act that contains personal information. Information exempted under this subsection shall include –

(i) files and personal information maintained with respect to clients, **patient**, residents, students or other individuals receiving social, **medical**, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from federal agencies or government and or public institutions.
(ii) ----------
(iii) ----------
(iv) ----------
(v) ----------

Section 16 (2), however, stipulates that:
The head of a government and/or public institution may disclose any record requested under this Act that contains personal information if –

(a) the individual to whom it relates consents to the disclosure;
(b) the information is publicly available.

This reinforces the general principle that the consent of a patient is required to disclose patient's information.

From the foregoing, the plausible conclusion is that the potential conflict between confidentiality and freedom of information seems to have been taken care of by the exemptions to the right of access instituted in the FOI Bill. While the FOI legislation is intended to remove impediment to access to information, particularly that in the public domain to ensure openness, other key interests that can make for stability in the society and which can be prejudiced by granting an

unfettered access are thus protected through the exemptions to disclosure.

Records Retention

Another fundamental legal issue involved in health records management relates to records retention, i.e. the question of how long to retain health records. In some countries, there are specific legislations governing the retention of health records. Healthcare facilities are required to comply with the provisions of these legislations.

In Nigeria, the National Archives Act addresses the issue of records retention generally when it states in Section 5 that a public office shall designate an officer of such seniority as the Minister may determine to be the departmental records management officer whose functions shall include submission to the minister for approval, retention and disposal schedules applying to all records that are not covered by the general schedules provided for in Section 8 (1) of the Act. The implication is that public healthcare facilities have the obligation of preparing retention schedules for health records which are their operational records, even though the Act is silent about their retention period.

The retention period of records is dependent on applicable laws and regulations, administrative policy of the health facility and some other considerations. Roach, Hoban, Broccolo, Roth and Blanchard (2006) identified the following as factors to consider in formulating a retention policy:

1. The applicable statutory and regulatory requirements;
2. Statutes of limitation and potential future litigation;
3. Requirements of the provider's professional liability insurer;
4. The need for medical research and teaching;
5. Storage capabilities;
6. Cost of microfilming, computerization and other long term storage methods;
7. Recommendations of providers-specific healthcare associations.

In some countries, there are applicable statutes and regulations which are taken into consideration in determining how long to retain records. In the United States of America (USA), for instance, there are existing legislations at both the federal and state

levels which have implications for records retention. Under the Medicare Conditions of Participation, for example, hospitals are required to retain the original record or a legally reproduced form for a minimum of five years (Roach, et al, 2006). There are also special retention provisions relating to particular kinds of records such as X-rays, as well as special procedures and provisions regarding patient records of minors and deceased persons.

All statutory and regulatory obligations must be taken into consideration and complied with in arriving at a retention period. The benchmark for compliance, as advised by Roach et al (2006), is that which is stipulated in the applicable statutes and regulations, even though the statutory and regulatory minimum retention period may be surpassed as dictated by other considerations.

Conclusion

Health records are largely the operational records of specialized agencies or institutions saddled with the responsibility of healthcare delivery, which is an essential professional service. As such, their management requires special attention. Like any other field of human endeavour, there are legal issues involved in health records management. It is, therefore, imperative that health records management practitioners should be familiar with relevant statutes and regulations. In Nigeria, specific legislations on critical legal issues are few if not non-existent. Reliance, therefore, seems to be on general principles of law. Stakeholders in health records management must come together to design a programme of action that will ensure that the law in this field is well-developed in Nigeria. The Health Information Management Association of Nigeria (HIMAN), in particular, should be proactive, taking a cue from the leadership role the American Health Information Management Association (AHIMA) is playing in the US in designing and implementing systems and standards that can ensure quality health information management. It is only by doing so that necessary guidelines can be formulated and developed into legislations that will guide and assist healthcare institutions in the management of their health records.

References

Abioye, Abiola (2010). Confidentiality and Protection of Official Records in the Freedom of Information Era: Nigeria's Situation. *African Journal of Library, Archives and Information Science,* Vol. 20, No. 1, pp 29-39.

Amatayakul, Margret et al (2001). 'Definition of Health Records for Legal Purposes (AHIMA practice Brief)' *Journal of AHIMA* 72, No.9 pp.88A-H.

Australian Standard AS 4390 – 1996. Available at http://www.archivists.org/saagroups/ers/AS 4390.ppt Accessed 17 October 2010.

Atinsola, E.K.T. (2001). An Overview of Medical Records in Nigeria. Paper presented at a Training Workshop on Medical Records Management for Effective Health Care Delivery Services in Osun State Nigeria, held at NUJ Press Centre, Osogbo, September 4-6.

Benedon, W. (1987). Records Management – the Information Connection. *International Records Management Journal,* Vol. 3, No 3, pp 3-7.

Criminal Code Act, Cap C38, Laws of the Federation of Nigeria 2004.

Criminal Procedure Code, Cap C41, Laws of the Federation of Nigeria 2004.

Federal Republic of Nigeria (2006). Government White Paper on the Report of the Presidential Committee on the Review of the Public Service Rules.

International Council on Archives Glossary of Terms.

National Archives Act 1992.

Nigeria's Freedom of Information Bill (2007). *National Assembly Journal*, Vol. 4, No 10, C679-C700.

Official Secrets Act Cap 03, Laws of the Federation of Nigeria 2004.

Penn,I.A., Pennix, G.B. and Coulson, J. (1994). Records Management Handbook, 2nd edition, Aldershot: Gower Publishing Limited.

Roach, William H. Jr. et al (2006) Medical Records and the Law (Fourth Edition). Sudbury: Jones and Bartlett Publishers.

The American Heritage Medical Dictionary. Available at http://medical-dictionary.the freedictionary.com/Health+record Accessed 16 October 2010.