

Considerations for Waivers of Informed Consent and Authorization

Contents:

Waiver of Informed Consent.....	1
Office for Human Research Protections (OHRP) regulations.....	1
Government projects	1
All other projects (with example).....	2
Food and Drug Administration (FDA) regulations	4
Waivers of Parental Permission	4
Waivers when child subjects reach the age of majority.....	5
Waiver of Documentation of Informed Consent.....	6
Office for Human Research Protections (OHRP) regulations.....	6
Criteria 1 (with example).....	6
Criteria 2 (with 2 examples)	7
Food and Drug Administration (FDA) regulations	8
Waiver of Assent.....	9
Waiver of HIPAA Authorization	10

Waiver of Informed Consent (typically involving NO contact with subjects)

Office for Human Research Protections (OHRP) Regulations:

Government projects (uncommon):

Under 45 CFR 46.116(c) for government projects, the IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent or waive the requirement to obtain informed consent provided the IRB finds and documents specified criteria. The criteria specified at 45 CFR 46(c) are:

1. the research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine: (i) public benefit or service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and
2. the research could not practicably be carried out without the waiver or alteration.

OHRP offers the following example to explain why it may be impracticable to obtain consent from subjects for a government project:

“This criterion means that the practical circumstances of the research are such that the research is not feasible if the informed consent of the subjects must be obtained. For example, a study of identifiable private information about program benefit recipients using 20-year-old records might meet this criterion, if current contact information for those recipients is not available.”

<http://answers.hhs.gov/ohrp/questions/7273>

All non-government projects (most common):

Under 45 CFR 46.116(d), the IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent or waive the requirement to obtain informed consent provided the IRB finds and documents specified criteria. The criteria specified at 45 CFR 46(d) are:

1. the research involves no more than minimal risk to the subjects;
2. the waiver or alteration will not adversely affect the rights and welfare of the subjects;
3. the research could not practicably be carried out without the waiver or alteration; and
4. whenever appropriate, the subjects will be provided with additional pertinent information after participation.

The following example is from: Elliott, MM. Research without consent or documentation thereof. In: Bankert EA, Amdur RJ (ed.), *Institutional Review Board: Management and Function*. Sudbury, MA: Jones and Bartlett: 2006.

The researcher plans to determine whether some specific blood chemistry values change in individuals undergoing clinically indicated abdominal surgery and if there is a correlation of changes with the increased incidence of complications after surgery. The researcher plans to review the medical records of all individuals who have undergone abdominal surgery in the past 2 years. From a preliminary estimate, there are about 5,000 abdominal surgeries performed per year at the hospital. The researcher will collect limited data for this research. The types of data to be collected include such items as the diagnosis before surgery, the type of abdominal surgery, specific blood chemistry values before the surgery, the same specific blood chemistry values after the surgery, a description of problems after surgery, and the age ranges of the individuals. The researcher will code the data so that only the researcher knows the link in the unlikely event the data must be verified for accuracy. The results of the research will not affect the clinical care of the individuals because the information will not be examined until after subjects leave the hospital.

In this example, the IRB may find that a waiver of informed consent is appropriate and that the criteria from 45 CFR 46.116(d) have been met based on the following:

1. *The research involves no more than minimal risk to the subjects;*

The research involves minimal risk, as the review of subjects' medical records is for limited information. The information is not sensitive in nature, and the data are derived from clinically indicated procedures. There is an extremely low probability of harm to subjects' status, employment, or insurability. The precautions taken to limit the record review to specified data and the coding of the data further minimize the primary risk, which is a breach of confidentiality.

2. *The waiver or alteration will not adversely affect the rights and welfare of the subjects;*

The rights and welfare of the individuals would not be adversely affected because the clinically indicated surgical procedure and the associated blood chemistry values were already completed, regardless of the research. None of the results of the research would affect the clinical decisions about the individual's care because the results are analyzed after the fact. Subjects are not being deprived of clinical care to which they would normally be entitled.

3. *The research could not practicably be carried out without the waiver or alteration; and*

The research could not be practicably carried out without the waiver. Identifying and contacting the thousands of potential subjects, although not impossible, would not be feasible for a review of their medical records for information that would not change the care they would already have received. Further, after two years, many subjects will have changed their telephone numbers or moved without providing forwarding addresses.

[See additional explanation about practicability below.]

4. *Whenever appropriate, the subjects will be provided with additional pertinent information after participation.*

It would not be appropriate to provide these subjects with additional pertinent information about the results of the research as this study is exploratory and would have no effect on the subjects. The surgical procedure and care afterward have both been completed for these subjects. There is no anticipated benefit to subjects that would change what has already occurred.

In general, the most difficult waiver criterion for researchers to meet pertains to the requirement to demonstrate that the research could not practicably be carried out without the waiver.

The Canadian Institutes of Health Research (CIHR) has published criteria for determining when obtaining informed consent for use of existing data/specimens is impracticable. While the NJH IRB doesn't conduct studies that fall under these regulations, these are very helpful considerations as to whether it is impracticable to obtain informed consent.

These additional considerations include:

1. The size of the population being researched;
2. The proportion of individuals likely to have relocated or died since the time the personal information was originally collected;
3. The risk of introducing potential bias into the research thereby affecting the generalizability and validity of results;
4. The risk of creating additional threats to privacy by having to link otherwise de-identified data with nominal identifiers in order to contact individuals to seek their consent;
5. The risk of inflicting psychological, social or other harm by contacting individuals or families with particular conditions or in certain circumstances;
6. The difficulty of contacting individuals directly when there is no existing or continuing relationship between the organization and the individuals;
7. The difficulty of contacting individuals indirectly through public means, such as advertisements and notices; and
8. Whether, in any of the above circumstances, the requirement for additional financial, material, human, organizational and other resources needed to obtain such consent will impose an undue hardship on the organization.

[CIHR Best Practices for Protecting Privacy in Health Research, p15. September 2005.](http://www.oci.ca/ehip/presentations/Best_Practices.pdf)
http://www.oci.ca/ehip/presentations/Best_Practices.pdf

Important note: Explanations that “it would be too inconvenient” or “this is just a chart-review study” are not by themselves appropriate justifications for “impracticability.”

Food and Drug Administration (FDA) Regulations:

Unlike the HHS regulations, the FDA regulations do not provide for a waiver of informed consent (except for an emergency research context). For all other FDA-regulated research, informed consent is required.

There are circumstances, however, where it would be impracticable to obtain informed consent for non-emergency FDA-regulated research on data and/or specimens. For these unique circumstances, the FDA has issued guidance, "Guidance on Informed Consent for *In Vitro* Diagnostic Device Studies Using Leftover Human Specimens that are Not Individually Identifiable" that indicates that the FDA will not *enforce* the requirement for informed consent for in vitro diagnostic device studies if all of the following elements are present:

1. The investigation meets the criteria for investigational device exemption (IDE)
2. The study uses leftover specimens (or from repositories or other research)
3. The specimens are not individually identifiable. (Coded specimens are not individually identifiable if no one associated with the investigation can link the specimen to the subject, directly or indirectly.),
4. Specimens may be accompanied by clinical information if the information does not make the subjects identifiable, the patients' caregivers are different from and do not share information with researchers,
5. Specimens are provided without identifiers and the supplier has established policies and procedures to prevent release of personal information, and
6. The study has been reviewed by an IRB.

These requirements are consistent with the OHRP Guidance on Research Involving Coded Private Information or Biological Specimens" (2004)

Waiver of Parental Permission for Research on Children:

OHRP: <http://answers.hhs.gov/ohrp/questions/7268>

For research involving children, an IRB may waive the requirements for obtaining parental or guardian permission under any of the following four provisions:

1. The IRB makes and documents the required findings for a waiver of informed consent under 45 CFR 46.116(c) or (d) as described above.
2. The IRB determines that a research protocol is designed to study conditions in children or a subject population for which parental or guardian permission is not a reasonable requirement to protect the subjects (for example, neglected or abused children), and the following 2 additional criteria are also met:
 - a. an appropriate mechanism is in place to protect the children, and
 - b. the waiver is not inconsistent with federal, state, or local law (45 CFR 46.408(c)). The choice of an appropriate substitute mechanism (for example, appointing a child advocate or an assent monitor) for protecting children participating in research would depend on the nature and purpose of the activities described in the protocol, the risk and anticipated benefit to the research subjects, and the child's age, maturity, status, and condition (45 CFR 46.408(c)). Note that an IRB may waive the requirement for obtaining parental or guardian permission under 45 CFR 46.408(c) even if the research involves more than minimal risk to the child subjects.
3. The IRB finds and documents that the research meets the requirements of the HHS Secretarial waiver under 45 CFR 46.101(i) that permits a waiver of the general requirements for obtaining informed consent in a limited class of research in emergency settings.

Waivers when Children turn the Age of Majority:

OHRP: <http://answers.hhs.gov/ohrp/questions/7270>

Informed consent should be viewed as an ongoing process throughout the duration of a research project. When a child reaches the age of majority (age 18 in Colorado), the prior parental permission and child assent are not equivalent to legally effective informed consent for the now-adult subject. Investigators should seek and obtain the legally effective informed consent for the now-adult subject for any ongoing interactions or interventions with the subjects.

While most researchers do plan to obtain informed consent for ongoing interactions with now-adult subjects, few are aware that the same legal requirement to obtain informed consent exists after subjects' completion if the research continues to meet the regulatory definition of "human subject research." For example, OHRP has specified that the definition of "human subject research" includes the analysis of specimens or data for which the subject's identity is readily identifiable to the investigator(s), directly or indirectly through coding systems.

The requirements for HIPAA Authorization are different. A parent's authorization for use and disclosure of a child's health information remains in effect after the child reaches the age of majority. It is not necessary to obtain HIPAA authorization from a now-adult subject.

The IRB offers a few strategies for managing data/specimens when children reach the age of majority and there is no ongoing interaction:

1. Obtain written informed consent from the now-adult subjects. Permissible options may include face-to-face contact, mail, scan, or fax.
2. Strip all identifiers from that subject's data/specimens and destroy the code key so that the data no longer meet the federal definition of a "human subject."
3. The IRB may consider, if appropriate, a waiver of informed consent in order for certain research activities to continue.

The IRB requires submission of a plan that describes how the requirement for informed consent will be addressed when a child involved in human subject research reaches the age of 18. Depending on the nature of research and the timing of a child's completion relative to his/her 18th birthday, the IRB may recommend a combination of the strategies listed above.

Waiver of Documentation of Informed Consent (typically involving contact with subjects)

Under a waiver of documentation of informed consent, a subject will provide informed consent, but the IRB may waive the requirement to obtain written documentation of informed consent (a signature from the subject).

OHRP Regulations:

For federally funded research, under 45 CFR 46.117(c), an IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

1. That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or
2. That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

Of the two criteria listed above, consider the following examples of appropriate situations to allow a waiver of documentation of informed consent.

Regulation and example for Criteria 1:

Regulation 46.117(c)(1): ...*That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern.*

Interpretation of Regulation: OHRP notes that some subjects might refuse a copy of the consent form once signed out of concern that their possession of the form could compromise their privacy. This is fully consistent with the idea behind one of the bases for a waiver of the requirements for documentation of informed consent that harm would result to the subject if his/her identity were compromised by the documentation itself.

(<http://answers.hhs.gov/ohrp/questions/7276>)

Research Example: *A researcher plans to interview homeless teenagers living in a shelter. The purpose of the research is to evaluate illicit drug use. The researcher plans to recruit subjects through flyers posted at the shelter. Potential subjects will contact the researcher directly. Informed consent will be obtained verbally. The interviews will be audiotaped, and the researcher will ask subjects to use a pseudonym during the interviews. Also, each subject will be assigned an ID# on the audiotape.*

Interpretation of Example: It would be appropriate for the IRB to approve a waiver of documentation of informed consent for this study because the only record linking the subject to the research would be the consent document. The principal risk would be potential harm resulting from a breach of confidentiality if the consent documents were disclosed, purposefully or inadvertently.

Regulation and example for Criteria 2:

Regulation 46.117(c)(2): ...*That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.*

Interpretation of Regulation: There are a number of minimal risk activities that do not involve procedures for which written consent is normally required outside of the research context. As examples, it would be highly unusual to obtain informed consent outside of research for:

- (a) *drawing a blood sample* (<http://answers.hhs.gov/ohrp/questions/7276>)
- (b) *asking shoppers in a mall about the ambient lighting or temperature*
(<http://answers.hhs.gov/ohrp/questions/7276>)
- (c) *asking patients to complete surveys or questionnaires*
(<http://answers.hhs.gov/ohrp/questions/7249>)

Research Example 1: *A researcher conducting a survey (that does not qualify for an exemption under 45 CFR 46.101(b)) would like to mail a survey questionnaire to a random sample of adults. The Invitation to Participate letter clearly states that by responding to the questions and mailing the survey back, the recipients have agreed to participate.*

Interpretation of Example 1: Based on the IRB's review of the survey and Invitation to Participate letter, the IRB determined that this particular activity presents no more than minimal risk of harm to subjects. The survey does not ask the subject to answer any sensitive questions and the subject is not asked to perform other activities. Normally, there is no requirement for written consent for completion of surveys outside the research context. By completing and returning the survey, subjects have consented to participate in the research. With consideration of all these factors, it would be appropriate for the IRB to approve a waiver of documentation of informed consent for this activity.

If the IRB has approved this alteration of the consent process and has waived the need for documentation of consent, then such procedures are permissible under the regulations. By sending back a completed survey the recipient has implied that he or she consents to participate but has not signed an informed consent document. Although some might call this "implied informed consent," OHRP would consider this to be a permissible informed consent process if the IRB has approved the informed consent alteration and waived the requirement for documentation of informed consent.

(<http://answers.hhs.gov/ohrp/questions/7249>)

Note: When designing an information sheet or invitation letter, OHRP does not require these materials to include all of the elements of consent listed at 45 CFR 46.116(a). Be aware that the NJH IRB has often required all (or nearly all) elements of informed consent for an information sheet or invitation letter if there will not be a verbal exchange of information (as in studies involving a mailed survey and there is no other contact).

Research Example 2: *A researcher would like to screen subjects by telephone to see if they qualify to participate in a research study. The researcher has created a telephone script to describe the planned communication. Subjects will be informed about the purpose of the call and will be asked to provide verbal consent for the telephone screening.*

Interpretation of Example 2: Based on the IRB's review of the telephone script, the IRB determined that this particular screening activity presents no more than minimal risk of harm to

subjects. The script does not ask the subject to answer any sensitive questions and the subject is not asked to perform other activities. Normally, there is no requirement for telephone screening outside the research context. By providing verbal consent over the phone, subjects have consented to participate in the research-related screening activities. With consideration of all these factors, it would be appropriate for the IRB to approve a waiver of documentation of informed consent for the telephone screening.

FDA Regulations:

FDA allows the IRB, for some or all subjects, to waive the requirement that the subject, or the subject's legally authorized representative, sign a written consent form if it finds that the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside the research context. See 21 CFR §56.109(c).

FDA notes that a waiver of documentation of informed consent may be applied to certain screening situations. The NJH IRB applies this regulation to telephone screening for FDA-regulated studies.

Unless the screening tests involve more than minimal risk or involve a procedure for which written consent is normally required outside the research context, the IRB may decide that prospective study subjects need not sign a consent document [21 CFR 56.109(c)]. If the screening indicates that the prospective subject is eligible, the informed consent procedures for the study, as approved by the IRB, would then be followed.

<http://www.fda.gov/ScienceResearch/SpecialTopics/RunningClinicalTrials/GuidancesInformationSheetsandNotices/ucm116332.htm>

Waiver of Assent

Although the regulations state that children are unable to provide legally effective informed consent to participate in research, some might be able to give their assent. Assent means a child's affirmative agreement to participate in research. Mere failure to object should not, absent affirmative agreement, be construed as assent (45 CFR 46.402(b)).

Child assent is required, except in the following three circumstances described at 45 CFR 46.408(a):

1. the capability of some or all of the children is so limited that they cannot reasonably be consulted;
2. the intervention or procedure involved in the research holds out the prospect of direct benefit to the health or well-being of the children and is available only in the context of the research. Even where the IRB determines that the subjects are capable of assenting, the IRB may still waive the assent requirement under certain circumstances in accord with 45 CFR 46.116 and 45 CFR 46.408(a).
3. the research meets the same conditions as those for waiver or alteration of informed consent in research involving adults, as specified in the regulations at either 45 CFR 46.116(c) or 45 CFR 46.116(d).

<http://answers.hhs.gov/ohrp/questions/7278>

Waiver of HIPAA Authorization

An IRB, acting as the Privacy Board, may provide a waiver or alteration of authorization.

Documentation of a waiver must include:

1. *A statement identifying the IRB or privacy board and the date the waiver or alteration was approved.*
2. *Waiver Criteria: A statement by the IRB or privacy board that it has determined:*
 - (a) *the use or disclosure of PHI involves no more than minimal risk to the privacy of individuals based on, at least, the presence of the following elements:*
 - (i) *an adequate plan to protect the identifiers from improper use and disclosure;*
 - (ii) *an adequate plan to destroy the identifiers at the earliest opportunity consistent with the conduct of research, unless there is a justification for retaining the identifiers or such retention is otherwise required by law; and*
 - (iii) *adequate written assurances that the PHI will not be reused or disclosed to any other person or entity, except as required by law, for authorized oversight of the study, or for other research for which the use or disclosure of the PHI is permitted under the Privacy Rule;*
 - (b) *The research could not practicably be conducted without a waiver or alteration; and*
 - (c) *The research could not practicably be conducted without access to and use of the PHI.*
3. *A brief description of the PHI for which use or access has been determined to be necessary by the IRB or privacy board.*
4. *A statement that the waiver or alteration has been reviewed or approved under either normal or expedited review procedures, in the case of an IRB pursuant to the Common Rule, and in the case of a privacy board subject to certain procedures that parallel the Common Rule (see 45 CFR §164.512(i)(2)(iv)(B) and (C)).*
5. *Documentation of the alteration or waiver must be signed by the chair or other member of the IRB or privacy board.*

Most of these requirements are met by the design of the waiver of HIPAA authorization application form. The IRB Chair or designated IRB member needs only mark the appropriate boxes on the application form review section to document his/her decision appropriately.

As with waivers of informed consent, the most difficult waiver criterion for researchers to meet pertains to the requirement to demonstrate that the research could not practicably be carried out without the waiver or alteration. NIH offers the following guidance to explain when it may be impracticable to obtain HIPAA authorization from subjects:

“For example, if a study involved the use of PHI pertaining to numerous individuals where contact information is unknown, and it would be impracticable to conduct the research if Authorization were required, a Privacy Board could waive the Authorization requirements for research participants if the Privacy Board determined that all the Privacy Rule waiver criteria had been satisfied.”

http://privacyruleandresearch.nih.gov/privacy_boards_hipaa_privacy_rule.asp