

CHAPTER 11

THE RIGHT OF INDIVIDUALS OR PERSONAL REPRESENTATIVES TO ACCESS PROTECTED HEALTH INFORMATION MAINTAINED BY DMH

I. GENERAL RULE

Subject to certain exceptions, an individual has the right to access his/her Protected Health Information (PHI) maintained by DMH in a Designated Record Set. The right exists for so long as the PHI is maintained in a Designated Record Set. If the individual has a Personal Representative (PR), then in most instances, the PR rather than the individual has the right to access the individual's PHI.

II. SPECIFIC REQUIREMENTS

A. Right To Request Access.

1. **Who Has the Right.** Except as provided in Section II.B. an individual, or if the individual has a PR, his/her PR, has the right to inspect and to obtain a copy of the individual's PHI that is maintained in a DMH Designated Record Set. In certain limited circumstances that are described in Section II.C., a Minor, rather than a Minor's PR, has the right to access PHI maintained by DMH.

An individual's PR may give permission for the individual to access his/her PHI. The permission should be given in writing. However, in circumstances where it is clinically appropriate, permission may be received verbally in which case it shall be documented by the applicable DMH Workforce Member in the individual's DMH record.

An executor or administrator has the right to access all PHI about the decedent that is maintained in a DMH Designated Record set.

2. **The Request.** A request of an individual or PR to access PHI must be made in writing.

B. When Access Can Be Denied

1. **Denial - No Right to Appeal:** Individuals and PRs do not have the right to access the following types of PHI:
 - a. **PHI Obtained Under an Agreement of Confidentiality.** PHI that DMH obtained from someone, other than the individual who is

the subject of the PHI or a Health Care Provider, under a promise of confidentiality where access to the PHI likely would reveal the source of the information. The promise of confidentiality must be documented in the PHI.

- b. **Research.** PHI that was created or obtained during an active research study or clinical trial involving treatment if the individual or PR, when agreeing to participate in the research, signed a non-disclosure agreement as a condition of participation. This exception is temporary. The PHI becomes available when the research study or clinical trial is completed.
- c. **PHI Compiled in Anticipation of Litigation.** PHI that was created in anticipation of or for use in a civil, criminal or administrative action or proceeding.
- d. **Under the Direction of a Correctional Institution.** If the individual is incarcerated in a Correctional Institution and the Correctional Institution directs DMH not to provide access because the Institution has determined that it would jeopardize the health, safety, security, custody, or rehabilitation of the inmate, other inmates, or the safety of any officer, employee, or other person at the Institution or any person responsible for transporting the inmate, DMH may deny the individual's requests to obtain a copy of his/her PHI. The directions of the Correctional Institution must be documented in writing.
- e. **The Federal Clinical Laboratory Improvements Amendments of 1988 and Federal Privacy Act.** PHI that is restricted in accordance with the Federal Clinical Laboratory Improvements Amendments of 1988 (42 USC263a) or the Federal Privacy Act (5 USC 552a.) These statutes rarely are applicable to DMH.

Decisions to deny access to PHI of the types listed above must be documented in writing. Such decisions are final. They are not subject to further review.

2. Denial - Right To Appeal.

- a. **Grounds for Denial.** A request for access may be denied for a safety reason as outlined below. A denial for a safety reason may be appealed by the requester for further review by DMH.
 - i. **Harm to the Individual or Another Person.** A request to access PHI may be denied if a licensed health care professional, exercising professional judgment, determines

that access to the PHI reasonably is likely to endanger the life or physical safety of the individual who is the subject of the PHI or another person. Access may be denied in whole or in part by considering the particular circumstances.

ii. **Request for PHI that Makes Reference to and May Cause Substantial Harm to Another Individual.** A request to access PHI may be denied if the requested PHI makes reference to another person who is not a Health Care Provider and a licensed health care professional, exercising professional judgment, determines that access to the PHI reasonably is likely to cause substantial harm to such other person. Access may be denied in whole or in part considering the particular circumstances.

iii. **Request for PHI by a Personal Representative and Likely to Cause Substantial Harm to Subject of the PHI or another Person.** A request to access PHI may be denied if the request is made by a PR, and a licensed health care professional, exercising professional judgment, determines that giving access to the PR reasonably is likely to cause substantial harm to the subject of the PHI or another person. Such access may be denied in whole or in part considering the particular circumstances.

b. **Appeal Process.** DMH must designate a licensed health care professional(s) to act as an appeal official(s) for the review of denials for a safety reason. The appeal official must determine within a reasonable period of time whether to deny or allow access. DMH must act in accordance with the appeal official's decision.

3. **Denial Notice.** Denial of access must be provided in writing. It must be written in plain language, explain the basis of the denial, state any right to appeal the denial, and if there is a right to appeal, explain how the individual or PR may exercise such right. The notice also shall provide a description of how the individual or PR may file a Privacy Complaint with DMH or the U. S. Secretary of Health and Human Services.

4. **Access Must be Provided to the Extent Possible.** An individual or PR must be given access to all PHI requested after excluding the PHI for which there was a ground for denying access.

C. Minors

- 1. 16 and 17 Year Olds Who Voluntarily Admit Themselves to a Facility Pursuant to 104 CMR 27.06.** A 16 or 17 years old who voluntarily admits him or herself to a Facility pursuant to 104 CMR 27.06 may access his/her PHI that concerns his/her admittance, but not PHI that concerns treatment, unless another exception listed in this Section II.C. is applicable. The Minor's PR may request access to all of the Minor's PHI maintained by DMH, including the PHI concerning the Minor's admittance.
- 2. Minors Who Consent to Treatment.** If a Minor legally consented to treatment (minor was emancipated, was a mature minor pursuant to 104 CMR 25.04, or was specifically permitted by Massachusetts law to consent to treatment), the Minor, rather than the Minor's PR, has the right to access the PHI that DMH maintains relevant to such treatment.

D. Administrative Documentation.

DMH must maintain policies and procedures that document the following:

- 1.** The Designated Record Sets that are subject to access by Individuals (See Chapter 5, Designated Record Sets); and
- 2.** The title of persons or offices responsible for receiving and processing requests for access.

III. DMH PROCEDURES FOR RESPONDING TO REQUESTS FOR ACCESS TO PHI

A. Who May Request Access and the Required Format of the Request.

Any individual who has PHI that is maintained by DMH in a Designated Record Set has the right to inspect or request a copy of that PHI, with the exceptions listed in Section II.B. However, if an individual has a PR, only the PR may make such requests, with the exceptions listed in Section II.C. (See also Section II.A.1, with regard to the PR consenting to the individual accessing his/her PHI.) The request must be made in writing. The DMH Request to Inspect or Receive a Copy of Protected Health Information Form that is located at the end of this Chapter may be used to make a request, but it is not required.

Copies of the DMH Request to Inspect or Receive a Copy of Protected Health Information Form shall be available at DMH's Central Office, all

Area and Site Offices, all Facilities and State-operated Programs and the DMH Internet web site.

DMH has an affirmative duty to ensure that the requester is the individual who is the subject of the PHI, the PR, or the Executor or Administrator of the estate of the individual who is the subject of the PHI. This may be done by comparing signatures, asking for photograph identifications and for copies of court appointments, etc. (See Chapter 10, [Verification of Identity and Authority of the Requester.](#))

B. Where Requests May Be Filed

A request to access PHI may be submitted at any DMH Area or Site Office, Facility or State-Operated Program. A request also may be filed directly with the DMH Privacy Officer.

C. DMH Workforce Members Responsible for Reviewing Requests

The following DMH Workforce Members may review requests to access PHI:

- 1. The DMH Privacy Officer** may review requests for PHI maintained in any DMH Designated Record Set.
- 2. DMH Records Coordinators** may review requests for PHI kept in a DMH Designated Record set maintained in the locale for which they are responsible.
- 3. DMH Designated Record Set Contact Persons** may review requests for PHI kept in the Designated Record Sets for which they are responsible.
- 4. DMH Case Managers** may review requests for PHI kept in case management files that they maintain. **Case Manager Supervisors** may review requests for PHI kept in case management files maintained by their Site Offices.
- 5. DMH Facility Medical Records Administrators** may review requests for PHI kept in a Designated Record Set maintained by their Facilities.
- 6. DMH Program Directors** may review requests for PHI kept in a Designated Record Set maintained by their Programs.

If a request is for PHI maintained at more than one location (e.g., a request for inpatient medical records from two different Facilities; or a request for

inpatient, case management and billing records) either the DMH Privacy Officer or a Records Coordinator shall review the request. The Privacy Officer or Records Coordinator will coordinate DMH's response to the request and, when appropriate, provide access to the individual or the PR.

A request for access received by a DMH Workforce Member other than those listed above shall be referred promptly to an appropriate reviewer.

Nothing in this Chapter shall preclude the Administrator-in-Charge of an Area, Site, Facility or Program from processing a request to access PHI that is received by his/her respective Area, Site, Facility or Program and/or from designating another person to do so.

D. Reviewer Duties

Duties of a reviewer include the following:

- 1. Determining if the Request was Properly Made.** The Reviewer must determine if the request was made in the proper format and by the proper individual. (See Section III.A).
- 2. Determining if the PHI is Maintained by DMH.** The reviewer must determine if the requested PHI is maintained by DMH in a Designated Record Set and if so, in what Record Set(s) and in what locations. If the PHI is not maintained by DMH, but it is known where such PHI is maintained, the reviewer must notify the requester where to re-direct the request.
- 3. Clarifying the Scope of the Request.** The reviewer may ask the requester for clarification as to the scope, applicable years, relevant DMH locations, the desired format of access, and anything else that will help facilitate timely access. If a request is made for all PHI held by DMH and it cannot be clarified as to what DMH Designated Record Sets are applicable, the reviewer (the DMH Privacy Officer or Records Coordinator) will need to make an inquiry of all Record Coordinators to determine if there is any PHI about the applicable individual in the Designated Record Sets for which they are responsible.
- 4. Determining if the PHI is Accessible.** The reviewer must determine if any of the PHI requested is of the type described in Section II.B.1. A request for such PHI shall be denied unless approved by the DMH Privacy Officer. The DMH Privacy Officer may grant access to such PHI if, in his/her discretion, it is determined necessary for the health or safety of the individual and there is no legal prohibition to the access.

If access to PHI is denied because it is of the type described in Section II.B.1., the decision is final and not subject to further DMH review.

5. Obtaining Safety Determinations. The reviewer is responsible for obtaining, when necessary, the safety determinations that are described in Section II.B.2.a. A reviewer shall deny a request for access (in whole or in part) if directed to do so by a licensed health care professional, as specified below:

- a. **PHI Contained in an Inpatient Designated Record Set.** If a request is made for PHI concerning an inpatient hospitalization, the attending or discharging psychiatrist of the individual who is the subject of the PHI, or if such psychiatrist is not available, the Facility Medical Director or a licensed health care professional designated by the Facility Medical Director, must determine whether:
 - i. any of the requested PHI includes information which reasonably is likely to cause substantial harm to the subject of the PHI, or another person, if the relevant information cannot be redacted (e.g., an inspection of the original records is requested);
 - ii. any of the requested PHI is about another person and the release of the PHI reasonably is likely to cause substantial harm to such other person if the relevant information cannot be redacted; or
 - iii. the request is made by a PR and if the release of the requested PR reasonably is likely to cause substantial harm to the subject of the PHI or another person if that relevant information cannot be redacted.

The licensed health care professional's findings shall be noted on the DMH Request to Inspect or Receive a Copy of Protected Health Information Form. If there is a finding that substantial harm is likely, the extent to which access needs to be denied must be stated as part of the findings.

- b. **PHI Contained in a Designated Record Set Other Than an Inpatient Designated Record Set:** If the request is (i) for PHI that reasonably is likely to cause substantial harm to the subject of the PHI or another individual and that information cannot be redacted (e.g., an inspection of the original records is requested); (ii) for PHI that includes information about another person and the release of the information reasonably is likely to cause substantial harm to the other person, and that information cannot be redacted; or (iii) made by a PR and there is concern that release of the requested

PHI to the PR could result in substantial harm to the subject of the PHI or an other person, the applicable Area Medical Director, or a licensed health care professional that the Area Medical Director designates for this purpose, shall determine whether access reasonably is likely to result in the specified harm to the subject of the PHI or another person. This determination shall be noted on the DMH Request to Inspect or Receive a Copy of Protected Health Information Form. If it is determined that specified harm is likely, the extent to which the access needs to be denied must be clearly stated as part of the determination.

A request to access PHI, shall be processed using the second page of the DMH Request to Inspect or Receive a Copy of Protected Health Information Form.

- 6. Responding to the Request.** The reviewer is responsible for responding to a request in accordance with Section III.D. If the request involves DMH Designated Record Sets maintained in several different locations, the reviewer (DMH Privacy Officer or a Records Coordinator) is responsible for working with the Records Coordinator of the other applicable locations to determine what will be the response to the request and, if appropriate, for providing access.

E. Response

- 1. Time Frame.** Within thirty (30) days of the receipt of a request by DMH, the reviewer must take one of the following actions:
 - a. Send an Approval notice (Section III.E.2.a.) and provide access (Section III.E.3). Access must be provided at a time and place that mutually is convenient for DMH and the requester.
 - b. Send a denial notice (Section III.E.2.b.).
 - c. Send a notice of an extension. DMH can extend the time to act on a request for up to 30 days if the requested PHI is located on site or accessible at the DMH location where the request was received (on-site) and up to 60 days if the PHI is not maintained or accessible at the DMH location where the request was received or maintained (off-site). To extend the time frame for responding to a request, DMH must notify the requester in writing within the first 30 days of receipt of the request of (i) the reason for the delay and (ii) the date when a responsive action will be taken. Only one extension may be taken per request. However, access to PHI located on-site must be provided or a denial notice must be given within 60 days of receipt of the request. Similarly, access to PHI

located off-site must be provided within 90 days of receipt of the request. The DMH Access Request Extension Letter located at the end of this Chapter shall be used to give notice of an extension.

- d. A combination of the above, as is appropriate.

2. Notice of Approval or Denial

- a. **Approval.** When access is granted, DMH shall respond to the request in writing and arrange with the requester: (i) the time and place the PHI will be available for inspection, (ii) when and where the requested copies can be picked-up or, (iii) if agreed to ahead of time, where the copies can be mailed. If a fee is being charged that must be noted in the response. The DMH Access Request Approval Letter at the end of this Chapter can be used for this purpose.
- b. **Denial in Full or in Part.** The DMH Access Request Approved/Denied in Part Letter or the DMH Denial Letter located at the end of this Chapter shall be used to deny a request for access in full or in part.
- c. **PHI Not Maintained by DMH.** If DMH does not maintain the requested PHI, but knows where it is maintained, DMH must inform the requestor to where his/her request should be redirected.

3. Access

If access is approved, the reviewer shall ensure that access is arranged. The time and place mutually must be convenient or if requested, the PHI can be mailed.

If the requested PHI is maintained in more than one Designated Record Set, the PHI only has to be produced once in response to a request.

- a. **Inspection.** The right to inspect the original record (e.g., an electronic record, electronically) may be denied if, technically, access cannot be provided in a read-only format and/or if access to the records of other individuals cannot be precluded. In such a situation, hardcopies of the original records shall be provided. DMH staff may be present when a record is being inspected to ensure the integrity of the record. DMH staff may offer to read or interpret the record when necessary for the understanding of the individual or PR. In no circumstances may an individual be denied

access to a record solely because he/she declines the offer of staff to read or interpret the record.

- b. **Hard Copy or Other Formats.** Access shall be provided in the format requested, if it is readily producible.
- c. **Summary or Explanation.** A summary or explanation may be provided in lieu of access, if agreed to in advance. The individual or PR can be charged for the preparation of a summary or explanation only if the individual or PR agrees to the fees in advance.
- d. **Fees.** A fee shall be assessed for copies and for the preparation of summaries and explanation in accordance with the applicable DMH Fees Policy and Schedule. DMH may charge for copying, including the cost of labor and supplies and for postage if mailed.

F. Appeal of a Denial

- 1. **What Can Be Appealed.** Only a denial of access for a safety reason (Section II.B.2.a.) may be appealed by the requester for further review by DMH. All other denials are final.
- 2. **Appeal Officials.** If a denial for a safety reason involves a request for PHI about an inpatient hospitalization, the appeal shall be filed with the applicable Facility Medical Director, or if the Facility Medical Director was involved in the original decision, to the applicable Area Medical Director or his/her designee. The designee must be a licensed health care professional and such individual must not have been involved in the initial denial.

The appeals for all other denials for a safety reason shall be filed with the Deputy Commissioner for Clinical and Professional Services or his/her designee. The designee must be a licensed health care professional and such individual must not have been involved in the initial denial.

The denial notice shall specify with whom an appeal can be filed.

- 3. **Procedures and Time Frames.** An appeal official must make a written determination whether to uphold or overturn the denial within a reasonable period of time. However, this period shall not exceed 30 days from the date the appeal was received by DMH. The appeal official must notify the individual who filed the appeal and the DMH Workforce Member who originally denied the request of his/her decision.

- G. Documentation and Retention.** A request for access made by an individual or PR and the response to such a request, or copies of such request and/or response, shall be retained in all affected DMH Designated Record Sets. In addition, if access is provided, it shall be noted in the applicable Designated Record Sets. Similarly, an appeal and an appeal decision if any, shall also be kept in the applicable DMH Designated Record Sets. This documentation shall be retained in accordance with the applicable DMH record retention schedule, but at a minimum, for six (6) years.

IV. LEGAL REFERENCE AND ATTACHMENTS

HIPAA 45 CFR 164.524

104 CMR 27.17

104 CMR 28.09

DMH Request to Inspect or Receive a Copy of Protected Health Information
Form

DMH Access Request Approval Letter

DMH Access Request Approved/Denied In Part Letter

DMH Access Request Denial Letter

DMH Access Request Extension Letter