

CHAPTER 12

RIGHT TO AN AUDIT TRAIL OF CERTAIN DISCLOSURES OF PROTECTED HEALTH INFORMATION

I. GENERAL RULE

An individual or his/her Personal Representative (PR), if any, has the right to an audit trail (i.e., a listing or an accounting) of certain types of disclosures of the individual's Protected Health Information (PHI) that are made by DMH. A disclosure is the release, transfer, provision of access to, or divulging in any other manner of PHI outside of the DMH Workforce. The types of disclosures subject to this rule are limited.

The individual or PR may ask for an audit trail for a period of up to six (6) years immediately preceding the date of the request; provided, however, that DMH is not required to provide an audit trail for disclosures made prior to April 14, 2003.

II. APPLICABLE DISCLOSURES AND CONTENTS OF AUDIT TRAIL

A. Disclosures Subject to the Audit Trail Rule

The following is a list of disclosures for which DMH must account pursuant to a request for an audit trail. This list reflects a good faith analysis of the law and the types of disclosures that are made by DMH (See Appendix C).

The disclosures include those made:

1. To the Department of Social Services - child abuse;
2. To the Executive Office of Elder Affairs – abuse of elderly persons age 60 years or over;
3. To the Disabled Persons Protection Commission – abuse of disabled persons age 18 to 59 inclusive;
4. To the Sex Offender Registry;
5. To a Business Associate and by a Business Associate that is not a Covered Entity, unless disclosure is for treatment, payment or health care operations and/or is done pursuant to an authorization;
6. Related to research performed with a waiver of authorization (unless only limited data set information is disclosed and there is a limited data set agreement in place (See Section VIII.C, Chapter 6, Uses and Disclosures of Protected Health Information.));
7. Related to reviews preparatory of research (See Section II.I. of Chapter 6, Uses and Disclosures of Protected Health Information);

8. Pursuant to M.G.L. c. 123, §36B (duty to warn) – to persons known to be at risk, police, court, emergency service providers or other individuals who can protect the individual;
9. Pursuant to M.G.L. c. 123, §30 and 104 CMR 27.16(2)(d) (AWA reporting) – to District Attorney, next of kin, and persons at risk;
10. Pursuant to M.G.L. c. 19, §10 and 104 CMR 32.06 (1) (felony reporting) – to District Attorney and/or state or local police;
11. To law enforcement, unless the disclosure is made pursuant to an authorization or law enforcement has requested that an accounting not be provided for a specified period of time;
12. To a Protection and Advocacy attorney, pursuant to 42 U.S.C. 10806;
13. To the Mental Health Legal Advisors Committee, pursuant to M.G.L. c. 221, §34E;
14. Pursuant to a court order;
15. Related to forensic patients when not for treatment, payment or health care operations, for example:
 - To District Attorney for commitment hearings and Section 8B transfers;
 - To the court with criminal jurisdiction and District Attorney - notification regarding intention to discharge or intention to lift court-ordered building and grounds restriction; and
 - To the court with criminal jurisdiction - that patient no longer is incompetent;
16. To a Medical Examiner pursuant M.G.L. c. 38, §2;
17. To the Department of Public Health and/or local board of health for reporting infectious or communicable diseases;
18. To a coroner and/or funeral director;
19. To an organ donation agencies; and
20. To next of kin – notice of death for probate purposes, pursuant to M.G.L. c. 123, §27 and notice of abandoned property pursuant to M.G.L. c. 123, §26
21. To EOHHS and/or its agencies pursuant to 101 CMR 16.00 and Chapter 6, Section V.b.6

In addition, an audit trail must be maintained for any other disclosure of PHI that is not excluded below in Section II.B.

B. Excluded Disclosures

The following types of disclosures are excluded from the audit trail rule. Those made:

1. To the individual, PR; and/or the attorney for the individual;
2. Pursuant to an Authorization;

3. To carry out Treatment, Payment or Health Care Operations (See the Glossary (Appendix A) for the definitions of these terms);
4. To persons involved in the care of the individual, with the individual's consent. See Section V. B.10 of Chapter 6, Uses and Disclosures of Protected Health Information;
5. To clergy with the individual's consent;
6. For certain national security or intelligence purposes, if a law requires non-disclosure;
7. As part of a limited data set, in accordance with Section VIII.C. of Chapter 6, Uses and Disclosures of Protected Health Information;
8. Incident to a use or disclosure otherwise permitted; and
9. Disclosures prior to April 14, 2003.

Questions as to whether or not a particular disclosure is excluded from the audit trail rule should be referred to the DMH Privacy Officer or the Legal Office.

C. Suspension of the Right to an Audit Trail

An individual's or PR's right to receive an audit trail of disclosures of PHI to a Health Oversight Agency or law enforcement official must be suspended by DMH for the period specified by such Agency or official, if the Agency or official provides a written statement asserting that the provision of an audit trail would be reasonably likely to impede the activities of the Agency or official and specifies a time period for the suspension. Such a suspension may be requested and implemented based upon a verbal notification for a period of up to thirty (30) days. The verbal request must be documented, including the name of the Agency or official making the request. The suspension may not extend beyond thirty (30) days unless a written statement, as described above, is submitted during that period.

D. Content of an Audit Trail

1. **General.** The audit trail must be in writing and contain the following information for each disclosure:
 - a. the date of the disclosure;

- b. the name and address (if known) of the entity or person who received the PHI;
 - c. a brief description of the PHI disclosed; and
 - d. a brief statement of the purpose for the disclosure that reasonably informs the individual of the basis for the disclosure or, in lieu of such statement, a copy of the written request pursuant to which the disclosure was made (e.g., copy of a court order).
- 2. Multiple Disclosures for the Same Purpose.** If, in the applicable audit trail period, multiple disclosures of PHI were made to the same person or entity for a single purpose, the audit trail may provide:
- a. the information listed in Section II.D.1. for the first disclosure;
 - b. the frequency, periodicity, or number of disclosures made during the covered period; and
 - c. the date of the last such disclosure during the covered period.
- 3. Disclosures for Certain Research Purposes.** If, during the applicable audit trail period, DMH made disclosures of PHI for a particular research purpose for 50 or more individuals, the audit trail, with respect to such disclosures for which the PHI about the individual may have been included, may provide:
- a. the name of the protocol or other research activity;
 - b. a description of the research protocol, including the purpose for the research and the criteria for selecting particular records;
 - c. a description of the PHI types that were disclosed;
 - d. the date or period of time during which disclosures were made
 - e. the name, address and telephone number of the sponsoring research entity and the researcher who received the information; and
 - f. a statement that the PHI may or may not have been disclosed for a particular protocol or other research activity.

If the individual or PR wants to contact the sponsoring research entity and/or the researcher, DMH must provide assistance.

III. DMH AUDIT TRAIL PROCEDURES

A. Maintenance of the Information Required for an Audit Trail.

- 1. Required Log System.** The Designated Record Set Contact Person for the following DMH Designated Record Sets at each Facility, Area and Site Office and State-operated Program must maintain a

mechanism for logging the disclosures of the PHI that are subject to the audit trail rule (See Section II.A.):

- a. Facility - **Medical Records**
- b. Area and Site Offices - **Eligibility Records**
- c. Site Offices - **Case Management Records**
- d. Site Offices - **Other Individual's Records**
- e. State operated Direct Service Programs - **Individual Direct Service Records**

DMH intends to establish a standard mechanism for this purpose and when it does, use of the standard mechanism will be mandatory. Until such time, all mechanisms developed or selected by the Designated Record Set Contact Persons are subject to the approval of the DMH Privacy Officer. The mechanism for logging disclosures must capture per patient, DMH client, applicant or service recipient, the disclosures subject to the audit trail rule. For each such disclosure the information listed in Section II.D. and the name of the DMH Workforce Member making and/or reporting the disclosure must be captured. The mechanism selected may be a computerized tracking system that can be sorted by individual and/or by date, and/or manual logs with one log per individual which are maintained in the individual's applicable records. The selected mechanism must be able to provide the required information for a period of at least six years.

Note: It is expected that these logs will capture the variety of disclosures that are subject to the audit trail rule regardless of whether the disclosures involved PHI maintained in the applicable Designated Record Set (e.g., a disclosure from a Central Office research data base will need to be captured in the applicable Facility, Area, Site or Program log) and/or whether the disclosure were made by DMH Workforce Members at the DMH location where the Designated Record Set is maintained (e.g., if a disclosure is made by someone at Central Office, he/she will need to contact the applicable Facility, Area, Site or Program Designated Record Set Contact Person). These Designated Record Sets were chosen because they are the key files for individuals served by DMH and DMH wants to limit the number of records that need to be reviewed upon request of an audit trail.

2. **Duty to Log Disclosure.** A DMH Workforce Member making a disclosure that is subject to the audit trail rule, and/or providing access to PHI that is subject to the audit trail rule, must ensure that the disclosure is logged as indicated below:

- a. **The Subject of the PHI is a Patient of a DMH Facility.** If the subject of the PHI is a patient of a DMH Facility, the DMH

Workforce Member must ensure that the disclosure and/or access is documented in a timely way through the mechanism developed by the Designated Record Set Contact Person for the Facility's Medical Records for logging disclosures subject to the audit trail rule.

- b. **The Subject of the PHI is a DMH Client - Case Managed.** Unless f., below, is applicable (Section III.A.2.f.), if the subject of the PHI is a DMH Client who is case managed, the DMH Workforce Member must ensure that the disclosure and/or access is documented in a timely way through the mechanism developed by the Designated Record Set Contact Person for the Site's Case Management Records for logging disclosures subject to the audit trail rule.
- c. **The Subject of the PHI is a DMH Client, Non-Case Managed.** Unless f., below, is applicable (Section III.A.2.f.), if the subject of the PHI is a DMH Client who is not case managed, the DMH Workforce Member must ensure that the disclosure and/or access is documented in a timely way through the mechanism developed by the Designated Record Set Contact Person for the Site's Other Individual's Records for logging disclosures subject to the audit trail rule.
- d. **The Subject of the PHI is an Applicant for Continuing Care Services.** Unless f., below, is applicable (Section III.A.2.f.), if the subject of the PHI is an applicant for DMH Continuing Care Services, the DMH Workforce Member must ensure that the disclosure and/or access is documented in a timely way through the mechanism developed by the Designated Record Set Contact Person for the Site's Eligibility Records for logging disclosures subject to the audit trail rule.
- e. **The Subject of the PHI is Not a DMH Client.** Unless f., below, is applicable (Section III.A.2.f.), if the subject of the PHI is not a DMH Client nor an applicant for DMH Continuing Care Services, the DMH Workforce Member must ensure that the disclosure and/or access is documented in a timely way through the mechanism developed by the Designated Record Set Contact Person for the Site's Other Individual's Records for logging disclosures subject to the audit trail rule.
- f. **The Subject of the PHI is Receiving a Service from a DMH State-operated Direct Service Program and the Disclosure and/or Access is Provided by a Workforce Member of that Program.** If the subject of the PHI is receiving a service from a

DMH State-operated Direct Service Program and the disclosure or access is provided by a Workforce Member of that Program, then, although the subject may fall into one or more of the above categories, the Workforce Member must ensure that the disclosure and/or access is documented in a timely way through the mechanism developed by the Designated Record Set Contact Person for the program's Individual Direct Service Records for logging disclosures subject to the audit trail rule.

- g. **Overlap.** If the subject of the PHI meets the definition for more than one of the above categories (e.g., a patient in a facility and also case managed), the information only needs to be logged once. The applicable DMH Workforce Member shall use the logging mechanism that is most accessible to him/her.

B. Request Requirements

1. **Form.** A request for an audit trail must be made in writing using the Audit Trail Request Form at the end of this Chapter. Copies of the Audit Trail Request Form shall be available at all DMH Area and Site Offices, Facilities and state-operated Programs. It also will be posted on the DMH Intranet and Internet web sites.

If reasonable accommodations are needed, DMH will honor requests for alternative methods of making requests for audit trails. Such requests shall be made to the Administrator-in-Charge, or designee, of the DMH location where the request is being filed.

2. **Who Can Request an Audit Trail.** Any individual who has PHI that is maintained by DMH has the right to request an audit trail of PHI disclosures. However, if an individual has a PR, only the PR may make such requests. If, however, the individual is a Minor and the Minor legally consented to the treatment to which the PHI relates (e.g., a mature minor under 104 CMR 25.04 or emergency services under MGL c.112, §12E and 12F), the Minor rather than the PR has the right to receive an audit trail regarding the disclosure of such PHI.

The individual or PR may request that an audit trail is released to another individual or entity, but the Authorization Form shall be used for this purpose.

3. **Time Period that a Request Can Cover.** The duty to provide the audit trail required by this Chapter commences on April 14, 2003. A request for an audit trail can cover a period of up to six years prior to the date of the request, beginning on April 14, 2003.

4. **Where Requests Can Be Filed.** An individual may file a request for an audit trail at any DMH Area or Site Office, Facility or State-operated Program, or directly with the DMH Privacy Officer. A DMH Workforce Member who receives a request shall date stamp it and forward it immediately to the Records Coordinator for his/her Office, Facility or Program.

C. Processing a Request for an Audit Trail

1. **DMH Records Coordinators.** The DMH Records Coordinator, or designee, for the DMH location where a request is received shall process it; provided, however, that if the DMH location has had no contact with the individual who is the subject of the PHI during the applicable audit trail period, the request shall be referred to the appropriate DMH location. If the DMH Privacy Officer receives the request, he/she shall determine the most appropriate DMH location for processing the request.
2. **Processing a Request.** To process a request, a DMH Records Coordinator must consult with all known DMH Facilities, Area and Site Offices, and State-operated Programs, with which the individual, who is the subject of the PHI, had contact since April 14, 2003. or if a shorter period, during the six years immediately preceding the request. The Records Coordinator must determine if such other DMH locations made any disclosures of the individual's PHI that are subject to the audit trail rule in the time period in question. If help is needed in determining the relevant Facilities, State-operated Programs, Site or Area Offices, the Record Coordinator shall seek assistance from the DMH Privacy Officer and/or Central Office Applied Information Technology Division.
3. **Time Frame for Responding.** DMH shall provide an audit trail within sixty (60) days of receiving a request for an audit trail. However, DMH may extend for an additional thirty (30) days the time period for providing an audit trail if, during the initial 60 days period, DMH provides the individual or PR with a written statement as to why the audit trail cannot be provided within the 60 days period and the date by which the audit trail will be provided.
4. **Verification.** DMH has an affirmative duty to ensure that the requester is the individual who is the subject of the PHI or the PR of said individual. This may be done by comparing signatures, asking for photograph identifications or for copies of court appointments, etc. (See Chapter 10, Verification of the Identity and Authority of the Requester.)

5. **Charges.** There shall be no charge for one audit trail provided by DMH during a 12-month period. A fee for any additional audit trails provided during a 12-month period shall be charged in accordance with the applicable DMH Fee Policy and Schedule. To charge a fee, an individual must be informed of the fee in advance and must be given an opportunity to withdraw or modify the request.
6. **Documentation.** The following must be retained in the applicable individual's DMH record(s) (See Section III A. 2.):
 - a. all requests for an audit trail filed with DMH;
 - b. copies of the responses to the requests, including extensions for responding, date that the audit trail is released, method of release and any fee charges; and
 - c. copies of the audit trails that are provided.

Such documents must be retained in accordance with the DMH record disposal schedules, but for a minimum of six years.

7. **Required Tracking of Audit Trail Request.** Each DMH Record Coordinator shall develop a tracking system for audit trail requests received by him/her. The following information should be tracked for each request: (a) who made the request; (b) the date that the request was received; (c) the date range of the audit trail requested; (d) how the request was handled (e.g., referred to another location; audit trail provided, etc.).

IV. LEGAL REFERENCE AND ATTACHMENTS

HIPAA 45 CFR 164.528
Audit Trail Request Form
Audit Trail Response Letter