

## **CHAPTER 15**

# **RIGHT TO REQUEST RESTRICTIONS ON THE USE AND/OR DISCLOSURE OF PROTECTED HEALTH INFORMATION**

### **I. GENERAL RULE**

An individual or his/her Personal Representative (PR), if any, has a right to request that DMH restrict how it uses and discloses the individual's Protected Health Information (PHI). This right applies to situations when DMH can use an individual's PHI without an Authorization for treatment, payment and health care operations (e.g., internally within DMH) and for discussions with family members involved in the individual's care. If an Authorization is required to release, use or disclose PHI, then the individual, or his/her PR, if any, can restrict the use and disclosure by not signing the authorization or by limiting the Authorization. DMH cannot agree to restrict use or disclosure of PHI that is required by law or that is necessary for health, safety or oversight reasons.

DMH does not have to agree to any such request. Each request for restriction on the use and/or disclosure of PHI will be reviewed independently. It is not anticipated that this right will be exercised widely and that, if exercised, it generally will be approved. This is because most disclosures of PHI by DMH to a third party require DMH to obtain an Authorization. Also, because of the wide range of services provided by DMH and the variety of ways they are provided, it will be difficult to ensure (1) that a restriction will not interfere with providing the individual with the necessary care and treatment and/or (2) department wide compliance with a restriction. (See also Section III.D.2.)

### **II. SPECIFIC REQUIREMENTS**

#### **A. Request Requirements**

A request by an individual or his/her PR to restrict the use and/or disclosure of PHI must be made in writing on a form prescribed by DMH, unless an accommodation has been approved in accordance with Section III.B. A request may be made at any time.

#### **B. Agreement By DMH**

DMH is not required to agree to any such request. DMH cannot agree to a request to restrict a use or disclosure of PHI that is:

- required by law;
- required by a court order;

- to a public health authority for public health purposes;
- to a health oversight agency for oversight purposes;
- made to avert a serious threat to health or safety;
- for certain law enforcement purposes and certain specialized government functions;
- about a decedent and is made to a coroner, medical examiner or an organ/tissue bank; or
- for certain research purposes.

If DMH agrees to such a request, the PHI will be restricted as agreed. The restriction applies to applicable PHI that DMH has at the time the request is granted and to PHI created or received while the restriction is in place.

DMH, however, does not need to comply with a restriction if the individual is in need of emergency treatment and a Health Care Provider providing treatment needs the restricted PHI. DMH must request that such Health Care Provider not make any future disclosures of the PHI. In addition, DMH must inform the individual or his/her PR, if any of any such disclosures.

### **C. Termination of a Restriction**

- 1. With Consent of the Individual.** DMH may terminate an agreement to restrict the use or disclosure of PHI if agreed to by the individual or his/her PR, if any. The individual or PR may agree to the termination either in writing or verbally. If verbal, the agreement must be documented by DMH.
- 2. Without Consent of the Individual.** DMH may unilaterally terminate an agreement to restrict the use or disclosure of PHI by informing the individual or PR, if any, of such in writing. The termination, however, is only effective with respect to PHI that is created or received after the individual or PR has been informed. The difficulty of separating this information is another example of why requests for restrictions need to be reviewed carefully and granted only when appropriate.

## **III. DMH PROCEDURES FOR PROCESSING REQUEST TO RESTRICT THE USE AND/OR DISCLOSURE OF PHI**

### **A. Who Can Make a Request**

Any individual who has PHI that is maintained by DMH in a Designated Record Set has the right to request that the use/and or disclosure of PHI be restricted. 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 underlying 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), then the minor rather than the PR has the right to make requests to restrict the use or disclosure of such PHI.

## **B. Request Form**

A request by an individual or PR to restrict the use and/or disclosure of PHI must be made in writing on the Restriction of Use & Disclosures Request Form at the end of this Chapter. The form must be signed and dated by the individual who is the subject of the PHI or, if he/she has a PR, by his/her PR. The desired restriction must be specified as well as the reason for requesting it. Copies of the Restriction of Use & Disclosures Request Form shall be available at all Area and Site Offices and at all 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 amendments. Such requests shall be made to the Administrator-in-Charge, or designee, of the DMH location where the request is being filed.

## **C. Where a Request Can Be Filed**

A request to restrict the use/disclosure of PHI may be filed at any DMH Area or Site Office, Facility or State-operated Program or with the DMH Privacy Officer. All requests received shall be date stamped upon receipt and forwarded immediately to the applicable decision-maker defined in Section III.D.

## **D. Approval or Denial by DMH**

### **1. Authority to Make Determinations.**

- a. **Affects Only One DMH Location.** The decision to approve or deny a request to restrict the use and/or disclosure of PHI will be made by the following individuals (decision-maker):
  - i. Area Director, or designee, if an Area Office maintains the applicable PHI.
  - ii. Site Director, or designee, if a Site Office maintains the applicable PHI.

- iii. Program Director, or designee, if a Program maintains the applicable PHI.
  - iv. Administrator-in- Charge, or designee, in consultation with the Facility Medical Director, or designee, if a Facility maintains the applicable PHI.
  - v. The applicable Designated Record Set Coordinator, or designee, if a Central Office Division maintains the applicable PHI.
- b. **Affects Multiple DMH Locations.** If the request affects more than one locale, then the following procedures shall be used:
  - i. The decision-maker who first receives the request is responsible for processing the request with all other applicable decision-makers and the individual or PR. However, if the request is submitted to a locale that does not have any Designated Record Sets that will be affected by the request, the request shall be forwarded promptly to an appropriate decision-maker, who will be responsible for processing the request.
  - ii. Approval of a request must be agreed to by all applicable decision-makers. If the decision-makers cannot agree, the matter shall be referred to the DMH Privacy Officer who shall make the final decision in consultation with the Commissioner or designee.
  - iii. The decision-maker must notify the individual or PR of the decision to approve or deny the request. If a request is approved, the DMH Privacy Officer must be notified of the approval.
- 2. **Standard of Review.** In determining whether or not to grant a request, the decision-maker shall consider the reason for the request and the ability of DMH to implement such a restriction. The latter shall include consideration of how the restriction would impact DMH's ability to provide treatment or services to the individual and the ability of DMH to ensure compliance with the restriction. If a decision-maker is unsure as to whether DMH can comply with a particular type of request, the decision-maker shall contact the DMH Privacy Officer for guidance.
- 3. **Notice and Documentation.** The approval or denial of a request to restrict the use or disclosure of PHI shall be noted on the request form as indicated and it shall be signed and dated by the applicable

decision-maker. The decision-maker must notify the individual or PR of the decision in writing. The Response to a Communication/Restriction Request letter at the end of this Chapter may be used for this purpose. The reason for the decision does not need to be stated. If the request is granted, the restriction that is agreed upon must be specified in the notice. The notice shall inform the individual that the decision is final and not subject to further review, however, it also shall state that an individual or PR may file a complaint with DMH and/or the U.S. Secretary of Health and Human Services and explain how such complaints may be filed.

A copy of the request and decision must be kept in all DMH Designated Record Sets affected by the request in accordance with the relevant DMH record disposal schedule. At a minimum, the request and decision must be kept for six years from the date of the decision, or if applicable, from the date that the restriction is last in effect.

4. **Decision is Final.** The decision of DMH to approve or deny a request to restrict the use or disclosure of PHI is final and is not subject to appeal. An individual or PR however, may file a complaint. See Chapter 16, Privacy Complaint Process.

5. **Termination of a Restriction.**

- a. **With Consent.** DMH may terminate a restriction with the agreement of the individual or PR, if any. The individual or PR may agree to the termination in writing or verbally. To the extent feasible, written agreement of the termination shall be sought. If there is a verbal agreement to terminate a restriction, the details of the verbal agreement (date, time, place, DMH Workforce Member(s) that participated in the discussion and the reason why a written agreement to terminate could not be obtained) shall be documented in writing and signed and dated by one of the DMH Workforce Members.
- b. **Without Consent.** DMH may terminate a restriction without the consent of the individual or PR. DMH must notify the individual or PR in writing. The termination will be effective only, however, with respect to PHI that is created or received after the individual or PR has been informed.
- c. **Documentation.** The termination agreement or notice, or a copy of the agreement or notice, must be maintained in all applicable DMH Designated Record Sets in accordance with the relevant DMH record disposal schedule. However, the agreement or notice must be kept at a minimum be for six years.

#### **IV. LEGAL REFERENCE AND ATTACHMENTS**

HIPAA 42 CFR 164.522(a)

Restriction of Use & Disclosures Request Form

Response to a Communication/Restriction Request