

# Understanding HIPAA, NYS Mental Hygiene Law and the Confidentiality of Mental Health Treatment and Information in New York State

## **A How-To Guide for Communication between Families, Patient/Clients, Providers and Others**



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## Background

### **Q: What laws protect the confidentiality of mental health treatment information in New York State?**

**A:** In New York State, treatment records of mental health facilities or programs are protected under both New York State law and federal regulations issued by the Department of Health and Human Services (DHHS). Both establish basic rules of confidentiality and provide for access to records by persons receiving services (or persons who are legally authorized to speak on their behalf with respect to consent for treatment).

For many years, New York State law has protected the confidentiality of mental health treatment records under the NYS Mental Hygiene Law. In 2003, the federal DHHS issued regulations that further enhance the protections that must be given to health information in every state, including mental health information, with the “Health Insurance Portability and Accountability Act,” commonly known as “HIPAA.”

It’s important to note that other State laws protect the confidentiality of general health information, including AIDS/HIV information. Furthermore, separate federal regulations protect the confidentiality of information created by alcoholism/substance abuse providers that receive funding from the federal government.

### **Q: How are the New York State Mental Hygiene law and HIPAA different?**

**A:** Generally speaking, they are more alike than different and together provide strong protections to the confidentiality of mental health treatment information in New York. For example, both New York State Law and HIPAA identify which disclosures of information are permitted without the consent of the patient, and require that any other types of disclosures can only be made if the patient has permitted them through consent or authorization. Both also describe a process by which a patient can access his or her own information.

However, in some cases, NYS Mental Hygiene Law and HIPAA are not consistent. In those cases, HIPAA requirements would preempt (supersede) the inconsistent provision of State law, unless the State requirements are “more stringent” than those under HIPAA. As used here, “more stringent” means that the State law more greatly restricts the ability of third parties to obtain patient information, or that it makes it easier for a patient to access his or her own information. For example, even if a certain disclosure might be allowed under HIPAA without patient consent, if the New York State Mental Hygiene Law does not

allow that disclosure unless patient consent is obtained, it cannot be made unless the patient gives permission to make the disclosure.

Also, under HIPAA, once information is disclosed, it is not necessarily protected from being redisclosed to another party. The New York State Mental Hygiene Law does prohibit information disclosed under its terms from being redisclosed to another party, unless that redisclosure would also be permitted under the law. Again, in this case, New York State Law is “more stringent” and thus would apply. All of this means that a person who lives in New York State is entitled to have his or her mental health treatment vigorously protected from unauthorized disclosure.

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**Q: To whom does the NYS Mental Hygiene Law apply?**

**A:** The NYS Mental Hygiene Law confidentiality requirements apply to clinical records that are created or maintained by a provider that is operated, licensed, or funded by the New York State Office of Mental Health (OMH). “Clinical records” include any information concerning or related to the examination or treatment of a person who is receiving services from a provider under the jurisdiction of OMH.

These provisions would not apply to a private social worker, psychologist, or psychiatrist, nor would they apply to a provider that is licensed by the New York State Department of Health. Although other laws, rules, or ethical standards might apply to these types of providers, the New York State Mental Hygiene Law protections would not.

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**Q: To whom does HIPAA apply?**

**A:** The federal regulations that are known as HIPAA apply to “covered entities,” a term which generally includes providers of health care that do business electronically. This generally means most health care providers are “covered entities,” since it is almost impossible to provide health care today without using some sort of electronic technology. The term “health care providers” includes doctors, hospitals, staff involved in a person’s care, laboratories, pharmacists, dentists, and many others.

HIPAA also applies to “health plans,” which basically means any entity that pays for the cost of health care. Included in this group are health insurance companies, HMOs, group health plans sponsored by an employer, and Medicaid and Medicare. Finally, HIPAA applies to “health care clearinghouses” which loosely means an organization that acts as a “go-between” for health care providers and health plans (for example, a billing service that collects information from a provider and then puts it into a standardized format). Most consumers do not directly interact with health care clearinghouses.

If an entity is “covered” under HIPAA, any health information it creates or maintains that identifies a person as a recipient of health care is protected by the HIPAA provisions and is referred to as “PHI.” Again, in New York State, most mental health providers must follow both HIPAA and the NYS Mental Hygiene Law.

**Q:** **Does HIPAA apply to any information that identifies a person as a recipient of health care, no matter who creates or obtains the information?**

**A:** No. HIPAA only applies to health care providers that do business electronically, payers of health care, or health care clearinghouses. Many types of entities that create or obtain information that identifies a person as a recipient of health care are not covered by HIPAA. For example, because they are not health providers that do business electronically, Law Enforcement and Fire Departments are not bound by HIPAA. They may, however, have their own internal policies to protect any health or mental health information they obtain. However, if an entity such as a Law Enforcement or Fire Department received information from a mental health provider under the NYS Mental Hygiene Law, they would not be able to redisclose that information except if allowed by law.

**Q:** **What are a covered entity’s responsibilities under HIPAA?**

**A:** Under HIPAA privacy regulations, a covered entity must provide all patient/clients with a Notice of Privacy Practices that describes its information policies and practices and gives patients/clients information about their rights under HIPAA. These rights include the right to obtain access to, and amend, their medical records, as well as to request a list (or an “accounting”) that describes to whom their information has been provided. (In fact, one good way to know if a certain provider is a “covered entity” and is required to comply with HIPAA is whether or not a patient has been given this Notice of Privacy Practices on admission. If such a Notice is provided, it’s likely the provider is a “covered entity,” since the provision of this document is only required by HIPAA).

Covered entities can also only use or disclose protected health information as allowed by HIPAA (or “more stringent” State laws). Generally, unless there is a specific exception in law that would permit a disclosure without patient permission, the provider must have the patient’s permission (that is, a “consent” or “authorization”) to disclose the information, and this permission can be revoked at any time. Only the minimum amount of information necessary to fulfill the purpose of the disclosure can be shared.

Although there are some cases where verbal consent would be sufficient,

most times, a written authorization will be needed. It is strongly recommended that a provider ensure that everything is documented and in writing, for the protection and benefit of all involved parties.

**Q: Who can give permission on behalf of a patient to disclose information, or to obtain access to a clinical record?**

**A:** Under both HIPAA and the Mental Hygiene Law, the person who can give permission to share information, or to access information to his/her own clinical record, is the person who has legal authority to make health care decisions on behalf of the patient. In the case of minor patients (under 18 years of age) that person is a parent or guardian. In the case of adult patients who have not been declared to be legally incompetent or medically incapacitated, that is the adult patient him or herself.

**Q: Where can I find more information about HIPAA?**

**A:** Information about HIPAA , and other laws that govern information disclosure, is widely available in a number of places. Here are some suggestions:

- ◆ You can obtain HIPAA information from your provider (remember that providers covered by HIPAA must give patients a copy of their Notice of Privacy Practices) or at your local library.
- ◆ The Office of Mental Health has prepared a Summary of HIPAA that is available on its website at: [http://www.omh.state.ny.us/omhweb/hipaa/phi\\_protection.html](http://www.omh.state.ny.us/omhweb/hipaa/phi_protection.html)
- ◆ Other websites with information about HIPAA include:
  - ◆ [www.hipaa.org](http://www.hipaa.org)
  - ◆ [www.hipaadvisory.com](http://www.hipaadvisory.com)
  - ◆ [www.hhs.gov/hipaafaq](http://www.hhs.gov/hipaafaq)
- ◆ You may also wish to contact:
  - ◆ NYS Office of Mental Health, (N.Y.S. OMH 1-800-597-8481)
  - ◆ NYS Department of Health, (N.Y.S. DOH 1-866-881-2809) or
  - ◆ The United States Department of Health and Human Services: (U.S. HHS (202)619-0257)
  - ◆ There is also a “HIPAA HOTLINE” for any questions you may have about HIPAA: (866)627-7748
- ◆ A brochure entitled “Access to Mental Hygiene Records in New York State: A Guide” is available from the NYS Commission on Quality of Care and Advocacy for Persons with Disabilities: [www.cqcapd.state.ny.us](http://www.cqcapd.state.ny.us).

**Q: Can family members of adult patients obtain information about their relative without the patient's consent?**

**A:** Generally, no. There is no provision in either the New York State Mental Hygiene Law or HIPAA that would permit families of adult patients to have access to their relative's clinical record or to privileged information (i.e., information that should be kept between therapist and patient) contained in it without his or her permission, assuming the patient is not mentally incapacitated.

Under HIPAA, persons have the right to “agree or object” to disclosures to family members or persons involved in their care. Under the New York State Mental Hygiene Law, patient “consent” is generally needed before disclosures to family members can be made, but the form the “consent” must take is not specified. Therefore, as a general rule, an adult patient must give permission before families can be provided with information about them, and the fact that this permission has been obtained should always be documented.

**Q: But why is our family member's clinical information being withheld from us?**

**A:** Family members are often put in a very difficult position when seeking information about a loved one with mental illness who is being treated by a mental health provider. Persons with mental illness who make their own health care decisions (e.g., legally competent adults) generally have the right to decide with whom their clinical information can be shared, and many times this is difficult for family members to understand when they genuinely want to help their loved one in his or her recovery and yet are told they cannot receive any information about him or her. However, in most circumstances, providers are legally obligated to honor the wishes of a patient who withholds permission to make disclosures to family members.

This is also true in cases where the patient is a minor child who is not currently in the legal custody of his/her parent or guardian. In this circumstance, whoever is the current legal guardian of the child (e.g., the social services department) is the only entity that is legally authorized to receive health care information about that child. Even in cases where a family member is authorized to receive disclosures, the NYS Mental Hygiene Law allows the provider to withhold information if sharing it would be detrimental to the patient or another person. For example, a teenage patient may not want his/her parent to know he/she is sexually

active. If the teen asks the provider to keep that information in confidence, and the provider believes that sharing the information with the parent would cause harm to the teen or another person, the provider can use its discretion with respect to sharing the information, depending on all relevant facts and circumstances.

In many cases, it is in the best interests of patients to have family members involved in their care, and sharing information is important to facilitate that involvement. In these cases, patients who are reluctant to share information with family members can be encouraged by their treatment team to reconsider the matter so that information can be provided freely. It is possible as a person's condition stabilizes, he or she will understand the important role and support family involvement can have in his/her care.

**Q: Are there, however, some cases in which family members can obtain information without their relative's consent?**

**A:** Yes, but they are limited. The Director of a State operated psychiatric center is required by law to inform the family of an involuntary-status patient of the fact that their relative has been involuntarily hospitalized, and must further advise the family where the relative has been hospitalized. This disclosure remains permissible under HIPAA because it is required by New York State Mental Hygiene Law.

Absent express objection by the patient (who must be informed ahead of time) or compelling evidence that it would be counter-therapeutic, the family of a voluntary-status patient may be informed of the fact that their relative has been hospitalized and where he/she is. In this case, information can also be obtained from the family in order to obtain facts about the patient that are necessary for his/her treatment.

Further, if a patient is going to be discharged from a facility to the care of his or her family, information regarding the patient can be disclosed to the family to the extent that the information is necessary to provide appropriate care to the patient. For example, the fact that a patient is afraid of cats may be useful for his/her family to know, but it is not necessary for the family to know the clinical causes of the patient's fear). Although prior permission from the patient in this case is desirable, it is not mandatory under the law.

**Q: So if a patient does not give permission to a family member to obtain information about him, is the family member barred from having any input into the care of the patient?**

**A:** Not necessarily. Even when families are unable to obtain permission to receive information about their relative, this does not always mean they



are barred by confidentiality laws from participating in treatment planning for the patient. In fact, unless it is plainly contraindicated, the New York State Mental Hygiene Law not only allows but requires the involvement of an authorized representative of the patient (which can include family members) in treatment planning, because it is presumed that such involvement has important therapeutic benefits. When done in such a manner as to not compromise or reveal information that should be kept between therapist and patient, family involvement can be accomplished without obtaining the express permission of the patient and without violating confidentiality. For example, staff could discuss the programs that are available for the patient, privileges, family visits, legal status, and plans for discharge. Also, if not clinically contraindicated and appropriate, staff could share information provided by the family with the patient, such as relaying messages of support.

**Q: Is there any option for me to obtain a family member's clinical information and or records?**

**A:** Both the NYS Mental Hygiene Law and HIPAA give patients who make their own health decisions the right to: (1) give permission to share their clinical information with others; and (2) access their own clinical information to review themselves. These laws also provide that a person who is legally authorized to make health care decisions for the patient “stands in their shoes” with respect to these rights. In New York, persons who are able to “stand in the shoes” of a patient for these purposes is called a “qualified person,” and includes the individual receiving services, his or her legal guardian, or a parent, spouse, or adult child who has authority to provide consent for care and treatment.

Therefore, as a family member, there are two possible ways in which could obtain a family member's clinical information or records: (1) you can obtain information from your loved one's records if he or she authorizes disclosure of that information to you; or (2) if you are a “qualified person” and are legally authorized to make health care decisions on behalf of your loved one, you “stand in his/her shoes” with respect to his/her right to request access to his/her own clinical record.

In any case where a patient or other “qualified person” requests access to a record, there are some restrictions on this right. Access to certain records and documents may be limited if the information is expected to be harmful to the individual receiving services or others. Access can also be restricted if the person requesting records or documents is alleged to have abused the person receiving services, e.g., in a domestic violence situation.

**Q: My family member signed a consent to allow me to receive clinical information about his care. He was involved in a fight with another patient at the program. The program will not give me any records of documents about the fight, even though I have a copy of the signed consent for clinical information disclosures. Can they do this?**

**A:** It is important to remember that there are different types of records a provider maintains about a person receiving services. Clinical records include any information concerning the examination or treatment of an individual who is receiving services from a provider under the jurisdiction of OMH.

There is another category of records, called “quality assurance” or incident records. These are records and documents created by a provider following the occurrence or discovery of an event or situation concerning an individual who is receiving services, including any incident which affects the individual’s health or safety. In cases where a family member is a “qualified person” (i.e., has legal authority to make health care decisions on behalf of a patient), some information about incidents involving the patient can be made available in accordance with special provisions of the NYS Mental Hygiene Law. It’s important to note that a consent to release clinical records to a family member is not sufficient to allow quality assurance or incident information to be shared, because it is not part of the clinical record. More information about access to incident information can be found on the website of the NYS Commission on Quality of Care and Advocacy for Persons with Disabilities: [www.cqcapd.state.ny.us](http://www.cqcapd.state.ny.us).

**Q: Can I obtain clinical information about a family member who is deceased?**

**A:** HIPAA specifically notes that a clinical record does not lose its confidentiality protections upon the death of a patient. However, there are certain circumstances in which information about a deceased family member can be obtained.

First, in New York State, birth records, death records, and marriage records are considered Vital Records in New York State and generally can be accessed by the public. If you are interested in exploring this option, you can obtain more information on how to obtain these records on the New York State Department of Health’s vital Records website at [www.nyhealth.gov](http://www.nyhealth.gov).

Secondly, if a family member of a deceased patient seeks information from the patient’s record because it is relevant to the family member’s own health care, HIPAA permits providers to release the information to the family member’s physician, provided the physician submits a written request to the provider on the family member’s behalf.

Finally, if the family member is the executor of the deceased patient's estate, or otherwise has legal authority to act on behalf of the patient or his/her estate, (e.g. such as letters testamentary issued by a court), a provider is permitted to release information to the family member upon his/her written request which documents and attests to the legal authority to act on behalf of the deceased patient. Providers can also release information to family member who obtains and provides written consent from the executor or legal representative of the deceased patient.

In all of these cases, providers are required to review the record prior to its release to ensure it does not infringe upon the privacy rights of any other individual who may be named in the record.

## Patient/Client

### **Q:** Who has access to my mental health treatment information?

**A:** Your ability to control how your mental health treatment information is used or disclosed varies, depending upon the purpose of the disclosure and to whom it is being disclosed. There are some situations where your specific authorization is required before a disclosure can be made. In others, you need only be given an opportunity to consent or object before a disclosure can be made. In some cases, disclosures can be made without your specific authorization. And there are other situations where you have no right to consent.

Generally, your specific authorization or consent to the use of your clinical information is not required if it is used for treatment, payment, or health care operations purposes. "Treatment" generally means providing, coordinating, or managing your care by one or more health care providers. In other words, when you are being served by a provider, staff that work for that provider can access the information they need in order to provide you with these services. The provider's psychiatrist, for example, would need to see your entire medical record to provide you with services. A maintenance worker, however, may only need to know your name and what room you are assigned. The term "treatment" also means exchanges of information can be made with other providers who are currently serving you, who previously served you, or who will be serving you. In New York State, however, your consent is needed if any of those providers are not licensed or regulated by OMH.

"Payment" means your information can be shared by your mental health care provider as necessary to obtain payment for services provided to you.

It also refers to actions taken to determine if you are eligible for benefits or coverage. Other “payment” activities include preauthorization of services or determining the medical necessity of services provided.

“Health care operations” is a very broad category that generally involves activities your provider engages in as part of its day to day activities to operate the program. It includes activities like reviewing the competence of health care professionals, training staff, legal services, auditing, and resolving internal grievances.

Your specific authorization or consent is also not needed if your provider obtains services from a “business associate.” Services provided by a “business associate” may include legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, and financial services. These relationships must be established with a written contract, in which the “business associate” agrees to keep protected health information confidential.

In addition, under HIPAA and the Mental Hygiene Law, you do not have the right to consent to disclosures made by your provider to or in connection with matters specifically identified in law as not requiring your consent. Some of these include disclosures that are made:

- ◆ because they are required by law;
- ◆ to a health oversight agency for audits or investigations;
- ◆ in response to a court order;
- ◆ to report child abuse or neglect;
- ◆ to a researcher who has gone through the Institutional Review Board process as required in HIPAA;
- ◆ to correctional institutions (including inpatient psychiatric hospitals) to inmates or persons who have been hospitalized in accordance with an order of a criminal court.

It is also important to note that law enforcement access is permitted in a number of ways under HIPAA. In some cases, information can be disclosed without a warrant or court order.

Your specific authorization is required if the covered entity wishes to use your information for marketing purposes.

While a specific authorization is not required, you must be given an opportunity to agree or object to the inclusion of your name in a facility directory, and to disclosures made to people who are involved in your care.

The HIPAA privacy regulations require covered entities to provide all

patients with a Notice of Privacy Practices that describes how patient information will be used and disclosed and gives patients information about their rights under HIPAA.

**Q: Is there any way for me to know who, or how many, people have seen my protected health information?**

**A:** Both HIPAA and the NYS Mental Hygiene Law generally provide that when information from a clinical record is disclosed, a notation must be made of this disclosure. However, there are a number of exceptions to this requirement, such as disclosures made for treatment, payment, or health care operations purposes. Under HIPAA, consumers have a “right to an accounting” of disclosures of their clinical information, which means consumers have a right to find out who has accessed their clinical records for the past 6 years (again, with exceptions). So, although you do have a right to request this accounting from your provider to see to whom your information has been released, there is no realistic way to count the number of people who may have come across your records.

**Q: Can I request complete confidentiality?**

**A:** You do have the right to request restrictions with respect to disclosures of your clinical information that are made: (1) for treatment, payment, or health care operations purposes; or (2) to family members, other relatives, close personal friends, or others involved with your care or payment for your care. However, a provider is not required to agree to abide by these restrictions.

For example, although you have the right to request complete confidentiality, if the provider needs to disclose your information in order to be paid for providing you with care, since your consent is not legally required to make this disclosure, the provider does not have to agree to your request

**Q: What if a family member or other interested party wants to know my diagnosis or other information about me?**

**A:** Under both the NYS Mental Hygiene Law and HIPAA, in general, a family member or “person involved in your care” can obtain information about you, but only if you consent to these disclosures. Although a formalized written consent document may not be legally required, you still must be given an opportunity to agree or object to such a disclosure, whether verbally or in writing. As a general rule, it is always important that your consent, or objection, be documented to demonstrate that you were given this opportunity for input, as well as to record your response.

With respect to persons who are not involved in your care, both the NYS Mental Hygiene Law and HIPAA allow a consumer to sign a specific authorization that would permit a provider to disclose clinical information to a third party, such as an advocate, an attorney, or someone else. To be valid, an authorization must be in writing (in plain language) and must contain all of the following information:

- ◆ a description of the information to be disclosed that identifies it in a “specific and meaningful” fashion;
- ◆ the name of the provider, person, or person(s) authorized to make the disclosure ;the name of the person or persons authorized to request the disclosure;
- ◆ the purpose of the disclosure;
- ◆ an expiration date, condition or event that relates to the purpose or use of the disclosure or the person(s) authorized to request the disclosure;
- ◆ a statement of the individual’s right to revoke the authorization in writing;
- ◆ a statement that treatment, payment or eligibility for benefits cannot be conditioned on whether or not the person provides the authorization;
- ◆ a statement that information disclosed pursuant to the authorization may be subject to redisclosure by the entity/person receiving the information;
- ◆ if applicable, a statement that identifies any payment or compensation to the provider for the use or disclosure;
- ◆ the signature of the consumer and date signed;
- ◆ if the authorization is signed by a “personal representative,” (i.e. someone with authority to make health care decisions for the consumer) a description of the personal representative’s authority to act for the individual.

Because an authorization is supposed to be specific and must describe what information can be disclosed, you can ask your provider to share only portions of your information to a specific person or entity, that directly relate to the purpose of the disclosure Also, authorizations must have an expiration date (which can be an actual calendar date, a period of time, or an event), so you can permit information to be shared with a person or persons of your choice for a limited or specific time period. You may also revoke your consent to share information at any time during your treatment.

Although some people in our lives may seem intrusive, inquisitive, or

obstructive, it is important to remember that in most cases, they are genuinely concerned. Whenever possible, OMH believes an open line of communication with those who are important in the life of a person with mental illness can be helpful, if all parties involved have a full understanding of each other's wishes. Most times, the most opportune moment to have a discussion such as this would be before a crisis occurs.

## **Q: What are my rights with respect to my protected health information?**

**A:** First, remember that the more you know, the better able you are to ensure your rights are protected. Educate yourself and find out as much as you can about the privacy practices of the providers that serve you. Read notices and ask questions if you don't understand. If you have confidentiality concerns, you should talk with your provider about them.

Remember, however, that the HIPAA privacy rules are still relatively new to providers, and many of them are still struggling to implement them. Although it is important that you stand up for our rights and to make your views about privacy known, whenever appropriate, you should strive to demonstrate patience and understanding. Implementation of the HIPAA privacy rules has required time and effort on the part of providers.

The federal Department of Health and Human Services (DHHS), which is the agency that is responsible for enforcing HIPAA, has generally described your rights as a health care consumer in a brochure that is available on its website at: [http://www.hhs.gov/ocr/hipaa/consumer\\_rights.pdf](http://www.hhs.gov/ocr/hipaa/consumer_rights.pdf). The information in the brochure is summarized below:

If you receive services from a “covered entity,” you have the right to:

- ◆ Ask to see and get a copy of your health records: You can ask to see and get a copy of your medical record and other health information. You may not be able to get all of your information in a few special cases. For example, if your doctor decides something in your file might endanger you or someone else, the doctor may not have to give this information to you. In most cases, your copies must be given to you within 30 days, but this can be extended for another 30 days if you are given a reason. You may have to pay for the cost of copying and mailing if you request copies and mailing.
- ◆ Have corrections added to your health information: You can ask to change any wrong information in your file or add information to your file if it is incomplete. For example, if you and your hospital agree that your file has the wrong result for a test, the hospital must change it. Even if the hospital believes the test result is correct, you still have the right to have your disagreement noted in your file. I n

most cases the file should be changed within 60 days, but the hospital can take an extra 30 days if you are given a reason.

- ◆ Receive a notice that tells you how your health information is used and shared :You can learn how your health information is used and shared by your provider or health insurer. They must give you a notice that tells you how they may use and share your health information and how you can exercise your rights. In most cases, you should get this notice on your first visit to a provider or in the mail from your health insurer, and you can ask for a copy at any time.
- ◆ Decide whether to give your permission before your information can be used or shared for certain purposes: In general, your health information cannot be given to your employer, used or shared for things like sales calls or advertising, or used or shared for many other purposes unless you give your permission by signing an authorization form. This authorization form must tell you who will get your information and what your information will be used for.
- ◆ Get a report on when and why your health information was shared Under the law, your health information may be used and shared for particular reasons, like making sure doctors give good care, making sure nursing homes are clean and safe, reporting when the flu is in your area, or making required reports to the police, such as reporting gunshot wounds. In many cases, you can ask for and get a list of who your health information has been shared with for these reasons. You can get this report for free once a year. In most cases you should get the report within 60 days, but it can take an extra 30 days if you are given a reason.
- ◆ Ask to be reached somewhere other than home: You can make reasonable requests to be contacted at different places or in a different way. For example, you can have the nurse call you at your office instead of your home, or send mail to you in an envelope instead of on a postcard. If sending information to you at home might put you in danger, your health insurer must talk, call, or write to you where you ask and in the way you ask, if the request is reasonable.
- ◆ Ask that your information not be shared: You can ask your provider or health insurer not to share your health information with certain people, groups, or companies. For example, if you go to a clinic, you could ask the doctor not to share your medical record with other doctors or nurses in the clinic. However, they do not have to agree to do what you ask.
- ◆ File complaints: If you believe your information was used or shared in a way that is not allowed under the privacy law, or if you were not able to exercise your rights, you can file a complaint with your provider or health insurer. The privacy notice you receive from them will tell you who to talk to and how to file a complaint. You can also file a complaint with U.S. Government.



## Providers

**Q: Why is communication (with my patients, their family members, or other involved parties) important?**

**A:** We know that, regardless of diagnosis, recovery of any type is an ongoing process. We also know that, for a person with mental illness, continued recovery can only be successful when there are appropriate supports in place. Often, the best supports to help persons in recovery are those people who they hold dearest in their lives – the people in whom they have trust and confidence, and who they often rely upon to meet other needs of their daily activities.

These critical supports can come in many forms; they may be family members, neighbors, friends, even the mail carrier who is the only person with whom the individual has daily contact. Only your patient/client can determine who his/her supports are and with whom he/she wants information shared. Any information that treatment providers are allowed to share with these supports, to help them understand the challenges the patient/client may face, will strengthen his/her ongoing recovery and allows a person with mental illness to be active in his/her own decision-making with respect to health care, career and life.

**Q: Why is it important to not only ensure the confidentiality of my patient's information, but to ensure that my patient knows this is important?**

**A:** Confidentiality of patient's information has always been an important principle in health care. This is exemplified in the "Physician's Hippocratic Oath, which reads:

"What I may say or hear in the course of treatment or even outside of treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about."

Patient/client autonomy, one of the cornerstones of health care ethics, holds that a patient is sovereign over his/her own body, including information about it. In the mental health treatment setting, it has been recognized that the very fact of one's mental illness, and receiving professional help for such illness, can, if generally revealed, cause a person to be subjected to prejudice and ostracism in one's professional and personal life.

It has also been recognized that effective and lasting psychiatric therapy can take place only in an environment of privacy and trust, in which the patient knows that his statements will be held in confidence. It has been observed that “the psychiatric patient confides more utterly than anyone else in the world. He exposes to his therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame.” The possibility of indiscriminate disclosure of such statements would, at the very least, prolong treatment; at worst, it would make thorough exploration of emotional conflicts impossible.

Notwithstanding the critical importance of confidentiality to the therapeutic relationship, it is not absolute. Under certain circumstances, the law may allow or even require that the patient’s right to confidentiality yield to the legitimate and overriding interest of certain parties in obtaining necessary patient information.

Providers should regularly review their HIPAA training schedules to ensure that all relevant staff are sufficiently trained in their privacy policies.

It is important to remember that HIPAA or other privacy laws should not be used as an excuse to hinder or avoid communication in cases where the communication is legally authorized and is essential to the patient’s recovery and treatment.

**Q: If my patient is legally able to consent to a disclosure of his information, and does not consent, am I able to share any specific information with another party?**

**A:** There are a number of circumstances where uses or disclosures of information (e.g., for treatment, payment, or health care purposes) would permit disclosures of information without the consent or permission of the patient. In those cases, information can be shared even if the patient does not consent to the release (in cases where consent or authorization is not required, providers should take care in deciding how to address the issue with a patient so as to not create false expectations; it may damage a relationship if trust if the patient is asked to consent, does not consent, and the release is made anyway).

In cases where patient consent or authorization is required and the patient will not provide permission, depending on the circumstances, a question from a third party can be answered generically. For example, should an interested party inquire as to what a specific diagnosis is, then information such as, what is schizophrenia, how does it affect an individual, etc, could be provided.

However, no response would be permissible were the interested party to ask, “I think my loved one is suffering from schizophrenia, what is your opinion?” or “Does my loved one have Bi-Polar?” In a case such as this, a provider should help the interested party understand, if he or she is not authorized to receive that information, that NYS and federal HIPAA privacy rules prevent you from discussing your opinion of his/her loved one without the patient’s permission.

**Q: How much information do I provide to family members and other interested parties?**

**A:** As mentioned in the previous section, HIPAA prevents you from sharing any direct care or specific information without the express permission of the patient/client unless the requestor is entitled to the information. You also should adhere to the “minimum necessary” rule unless otherwise specified by the patient/client. When it concerns a generic question about a specific diagnosis and its affects (i.e. what is Bipolar Disorder?) You may provide as much information as you feel comfortable supplying without citing specific case information. This would be an opportunity for you to share written or printed informational pamphlets and to make them available for distribution to anyone who may ask.

It is also strongly suggested that the authorized family or other interested party of a patient/client, (who is in a facility) be informed should a medical issue arise. This allows further supports for patient/client and subsequently the treating facility.

**Q: Once I have a signed consent form, does that mean I can disclose everything and anything I know about the client, including his/her most personal feelings and thoughts?**

**A:** No. First, it is important to note that both NYS Mental Hygiene Law and HIPAA require that, except for disclosures made for treatment, payment, or health care operations purposes, only the minimum amount of information necessary to fulfill the purpose of the disclosure must be shared (it should be noted that regardless of purpose, as a general rule, it is advisable to share no more information than may be necessary for a specific purpose).

In cases where consent or authorization is required, the “permission form” that a consumer signs should identify a specific and meaningful description of the information to be used and disclosed, the name of the person or entity who can make the disclosure, the name of the person or entity who should receive the disclosure, and the purpose of the disclosure. The “permission form” must contain an expiration date (which can either be a specific date or identification of a certain event,

such as discharge from the program). If the information to be disclosed can only be made through a valid HIPAA authorization, there are other specific requirements that must be contained in the document, including the statement of the patient's right to revoke the authorization and how this right can be exercised. The dated signature of the patient must also be included.

**Q: Can a client who signed a consent form revoke the consent immediately?**

**A:** NYS Mental Hygiene Law and federal regulations use two different terms to describe how clients can grant their permission to disclose information. State law uses the term “consent,” and there is no prescribed form or format for consents. The HIPAA regulations, however, require a written “authorization” for uses and disclosures other than for treatment, payment, or health care operations purposes, and there are prescribed rules for what must be contained in a valid authorization. OMH operated facilities are covered by both State law and HIPAA, and so OMH’s “permission” form always meets the higher standard of the HIPAA authorization. This may not be the case at every OMH licensed or funded facility, but it is the case in OMH operated facilities.

In any event, if a client has given his or her permission to disclose information, he or she always has the right to revoke that permission. It is up to the program, however, to give consumers prior notice of how to revoke these permissions; for example, a program has the right to require that all revocations be in writing, but only if consumers are told up front that if they give permission, they must revoke it in writing. If the program is required to comply with HIPAA, information about how to revoke permission to disclose information, once given, will be included in the Notice of Privacy Practices that the program is required to give to the consumer upon admission.

It is important to note that when a program receives notice that a consumer has revoked his or her permission to make a disclosure, the program must stop making the disclosures immediately, except to the extent that the program has already acted in reliance on the disclosure – or if the use or disclosure is permitted or required by law to be made without the consumer’s authorization.

**Q: If a family member calls me to give me information about his/her loved one who is a client in our program, is it okay for me to listen?**

**A:** Family members often have the most important information concerning a patient/client’s most recent behaviors and specifics with respect to medications, side effects or previous treatment. Therefore, as a general

rule, communication between providers and family members is essential and should be strongly encouraged whenever possible or practical.

Providers must keep in mind, however, that federal and state confidentiality laws do restrict how patient information can be used and disclosed. Therefore, the key in any interaction with a family member where a patient has indicated no contact can be made is determining whether or not you are providing any information about the patient that the family member did not already know. For instance, if the family member admitted the patient to the program, or drove him to the facility, the family member obviously already knows his loved one is there. In this case, there is nothing preventing a program from receiving information about this patient that can be used to provide care to the patient, provided no information about the patient is disclosed to the party providing the information.

However, if the family member has had no role in the admission of the patient to the program, and the patient has said this family member cannot be contacted, if the family member calls the program and says, for example, “I cannot reach my brother at his house and think he has been admitted to your facility. If he is, I have some information you need to know about him.” In a case like this, if you readily receive the information, the family member will probably deduce that his brother is in your program, and that is an indirect disclosure of patient information. In a case like this, you could say something like, “I can’t disclose whether or not the person is a patient here. However, is there a message you would want to relay if the person is here, or is there a telephone number where you can be reached in the future?”

**Q:** **Does a program need a client’s consent to mail general mental health informational materials, including community resources, to the client’s family members?**

**A:** It is important to remember what is protected under State and federal confidentiality laws. In general, these laws protect clinical information about clients, as well as information that would tend to identify a person as having a mental health condition, either at the current time or in the past.

General mental health informational materials, including information about community resources, on their own, likely would not reveal any information about a particular identified client (of course, it’s always important to check to make sure – for example, sometimes program newsletters contain written or artistic contributions from clients that include their names, so you need to make sure those clients have agreed to public distribution of this information). Therefore, on its face, this is not the type of information that would be protected under State and federal confidentiality laws.

However, the individual facts are always important here. For instance, if a consumer has no ongoing contact with his/her family member, the family member does not know the consumer receives services from a particular program, the consumer has said no contact with the family can be made, and the program sends the family member information about services that are available for parents of hospitalized children, in that case, a disclosure of protected information has indirectly been made (i.e., the program has disclosed to the family member that the consumer has been admitted to the program for mental health services).

**Q:** **Can a program/agency write to a client's family member to ask him/her to attend mental health informational forums or events hosted by the agency without a client's consent?**

**A:** Again, a general invitation to attend informational forums or events hosted by a program probably does not constitute a disclosure of individually identifying client information - but a lot depends on the facts. If the family member knows the client is receiving services at a particular organization, a simple invitation to the family member inviting him/her to certain forums discloses no new information. However, if the family member does not know the consumer receives services at the program, and the consumer has indicated no contact with the family can be made, an invitation of this sort would indirectly disclose protected information and would be problematic.

It is also important to remember that any decision of this nature must have a "clinical overlay." In other words, if the consumer does not want a family member to be contacted, to visit, or to even be on the premises of the facility, that should be taken into consideration before inviting a family member to attend forums or events at the facility and handled accordingly.

Finally, it is interesting to note that HIPAA does have specific rules about how "marketing" must be done, but the term "marketing" does not include communications that promote health in a general manner, announcements of wellness classes or support groups, newsletters, etc - so the type of communication envisioned here would not trigger the need to comply with those specific rules.



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