

YOUR RIGHTS REGARDING REQUESTING MENTAL HEALTH RECORDS AND CHALLENGING THE DENIAL OF A REQUEST IN MASSACHUSETTS

**Prepared by the Mental Health Legal Advisors Committee
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An individual has a right to confidentiality with respect to their own mental health records. This right provides that, in most cases, only the individual, the individual's personal representative and the individual's treatment providers may know the content of the record. In addition, an individual has rights regarding requesting these records.

Federal standards, known as the "Privacy Rule," establishes national rules for the protection and dissemination of personal health information.¹ Because the Privacy Rule implements the requirement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),² the standards are often called HIPAA standards.

REQUESTING ONE'S OWN MENTAL HEALTH RECORDS

Putting requests in writing on the proper form

Most providers are covered by the HIPAA Privacy Rule and must comply with the rule's requirements regarding record requests. Pursuant to the rule, requests for mental health records must be made in writing.³ Large entities tend to have their own forms. So, prior to making a request for records, contact the provider to request the provider's request form.⁴ The provider/facility may require the use of its own form.

Individuals and representatives seeking records should make all requests and subsequent contacts in writing and keep copies of all correspondence.

Request for psychotherapy records

Under the Privacy Rule, requests for psychotherapy records must be made using a separate document than requests for other records.⁵ However, under the Privacy Rule, such psychotherapy records must be provided under the same standards as other mental health records.

¹ 45 CFR Part 160 and Part 164, Subparts A and E. (final publication Aug. 14, 2002).

² Public Law 104-191 (enacted August 21, 1996).

³ 45 CFR 164.508(b)(1).

⁴ See 45 CFR 164.508(c).

⁵ 45 CFR 164.508(b)(3)(ii).

Time frames for response

HIPAA's response time is 30 days, but may be extended to beyond 30 days if an individual is given written notice with an explanation of why the extension is necessary. Only one extension is permitted.

What to do if denied

If an individual or the individual's personal representative believes that a request for a copy of the records has been improperly denied, the individual or representative may seek review of that decision. The HIPAA Privacy Rule explicitly provides a process for the review of a denial: the covered entity must designate a licensed health care professional who did not participate in the original decision to deny access as a reviewing official.⁶

Additional rules regarding denials under state law

State law and regulations, discussed below and written prior to the implementation of the Privacy Rule, provide more direction on the various processes by which denials are reviewed.

Inpatient facilities operated, funded, or licensed by DMH and IRTPs

An individual may request a record from an inpatient facility operated by the Department of Mental Health (DMH), contracted for by DMH, or licensed by DMH or an Individual Residential Treatment Program (IRTP) by writing to the facility director, who shall be the DMH Commissioner's designee to determine whether access to records is appropriate.⁷ If the facility director denies the request, the individual may appeal the decision to the DMH Commissioner.⁸ The Commissioner may be reached at 25 Staniford Street, Boston, MA 02114, (617) 626-8000.

Community programs operated, licensed, or funded by DMH

An individual may request a record from a community program operated by, contracted for by, or licensed by DMH by writing to the program director. If the program director denies the request, the individual should appeal the decision to the DMH Commissioner.

Residential program licensed by the Department of Early Education and Care (EEC)

⁶ 45 CFR 164.524(a)(4).

⁷ 104 CMR 27.17(7)(a); DMH Policy 95-5R, III.E.14.

⁸ 104 CMR 27.17(7)(b).

An individual may request a record from EEC licensed residential program by writing to the person designated in the program's procedures. If the request is denied, the individual may seek a remedy pursuant to the program's procedures or file a complaint with the EEC Regional Director for the region within which the program is located.

Facilities operated or licensed by Department of Public Health (DPH)

An individual may request a record from a facility operated or licensed by DPH by writing to the head of the facility. If the request is denied, the individual may file a complaint with the DPH Division of Health Care Quality at 10 West Street, 5th Floor, Boston, MA 02111, (617) 727-5860.

Other health care providers

An individual may request a record from a health care provider by writing to that provider directly. If any protected health information request is denied, the facility/provider has to give written notice to the individual about what was denied and why. If the facility/provider fails to do so, the individual should seek legal advice. The individual may also file a complaint with the division of the Massachusetts Board of Registration that licenses that provider. However, not all grounds for denial are reviewable.

REQUESTING SOMEONE ELSE'S INPATIENT FACILITY MENTAL HEALTH RECORDS

A public and private mental health facility must maintain copies of a patient's records for at least 20 years after the record is closed due to discharge, death or the last date of service of the patient.⁹ Some facilities may maintain records longer. To determine if records still exist, contact the facility. If the facility has closed, contact DPH, unless the facility was run by DMH, in which case one should contact DMH Central Office.

A patient's records are private and not open to inspection by another person (who is not the patient's legally authorized representative or attorney) without the patient's permission, with limited exceptions.¹⁰ One exception is through judicial order.¹¹ An order may be sought whether or not there is a pending judicial proceeding.¹² When there is no pending proceeding, DMH advises individuals who want to obtain such an order, to pursue it in Probate Court.¹³

⁹ Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(3).

¹⁰ Mass. Gen. L. ch. 123, § 36(1); 104 CMR 27.17(9).

¹¹ Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(9)(a).

¹² Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(9)(a).

¹³ Correspondence from DMH Legal Office to Mental Health Legal Advisors Committee (Feb. 2, 2010).

Typically, the process involves filing for a Special Administration, a specific kind of order, in the Probate Court of the county in which the patient lives or lived.¹⁴

Another exception is by authorization of the DMH Commissioner.¹⁵ To authorize access, the Commissioner must determine that it is in the best interest of the patient or resident to allow somebody else to see his or her records before giving that person permission and that such access is permitted by HIPAA.¹⁶ The Commissioner must also determine that it is impossible or impractical to get permission from the patient or his or her legal representative.¹⁷

When requesting medical records, you have no obligation to tell the facility/provider why the records are wanted.¹⁸ This includes releases that specifically ask for this information and have boxes to check listing various reasons.

¹⁴ Correspondence from DMH Legal Office to Mental Health Legal Advisors Committee (Feb. 2, 2010).

¹⁵ Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(9)(c).

¹⁶ Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(9)(c). DMH regulations provide a non-exhaustive list of examples of when disclosure would be in a patient's best interest. 104 CMR 27.17(9)(d).

¹⁷ Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(9)(c).

¹⁸ 45 CFR s. 164.524(b)(2)(iii) A covered health care provider may not require an explanation from the individual as to the basis for the request as a condition of providing communications on a confidential basis.