

HEALTHWEST

Policy and Procedure

No. 04-001

Prepared by:
The Office of Recipient Rights

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| Approved by:

Subject: Confidentiality/Disclosure, and
Privileged Communications

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I. POLICY

Information in the record of a recipient and other information acquired in the course of providing mental health and substance abuse services to a recipient shall be kept confidential and shall not be open to public inspection. All employees, volunteers, student interns and persons under contract with HealthWest who share in the care of a recipient and have a need to know the information to perform their job duties may access recipient records.

I. PURPOSE

To ensure confidentiality, privileged communications, and recipient access to recipient records according to the requirements of applicable State and Federal laws.

II. APPLICATION

All HealthWest employees, volunteers, student interns, and persons under contract with HealthWest.

III. PROCEDURE

- A. All information in the record of a recipient, and other information acquired in the course of providing mental health services to a recipient, shall be kept confidential and shall not be open to public inspection.
- B. A summary of Section 748 of the Mental Health Code shall be made a part of each recipient file.

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- C. A record shall be kept of disclosures and shall include all of the following information:
1. The information released.
 2. To whom the information was released.
 3. The purpose stated by the person for requesting the information.
 4. A statement disclosing how the disclosed information is germane to the purpose.
 5. The subsection of Section 748 of the Mental Health Code, or other **State** law, under which a disclosure was made.
 6. A statement that the receiver of the disclosed information was informed that further disclosure shall be consistent with the authorized purpose for which the information was released.
- D. When requested, information made confidential by Section 748 of the Mental Health Code shall be disclosed only under one of the following circumstances:
1. Pursuant to orders or subpoenas of a court of record, or subpoenas of the legislature, unless the information is made privileged by law.
 2. To a prosecuting attorney as necessary for the prosecuting attorney to participate in a proceeding governed by the Mental Health Code.
 3. To an attorney for the recipient, with the consent of the recipient, the recipient's guardian with authority to consent, or the legal parent of a minor recipient.
 4. To the office of the Auditor General if the information is necessary for that office to discharge its constitutional responsibility.
 5. If necessary in order to comply with another provision of law.
 6. To the Michigan Department of Health and Human Services if the information is necessary in order for the Department to discharge a responsibility placed upon it by law.
 7. To a surviving spouse of the recipient, or if none, closest relative of the recipient in order to apply for and receive benefits, but only if the spouse or closest relative has been designated the personal representative or has a Court Order.
- E. If there is a compelling need for mental health records or information to determine whether child abuse or child neglect has occurred or to take action to protect a minor where there may be a substantial risk of harm, a Department of Health and Human Services caseworker or administrator directly involved in the child abuse or neglect investigation shall notify a mental health professional that a child abuse or neglect investigation has been initiated involving a person who has received services from the mental health professional and shall request in writing mental health records, and information that is pertinent to that investigation. Upon receipt of this notification and request, the mental health professional shall review all mental health records and information in the mental health professional's possession to determine if there are mental health records or

information that is pertinent to that investigation. Within fourteen (14) days after receipt of a request made under this subsection, the mental health professional shall release those pertinent mental health records and information to the caseworker or administrator directly involved in the child abuse or neglect investigation.

- F. Except as otherwise provided in subsection G, confidential information may be disclosed to providers of mental health services to the recipient or to any individual or agency if consent is obtained from:
1. The recipient.
 2. The recipient's guardian with authority to consent.
 3. The parent with legal custody of a minor recipient.
 4. The court-appointed personal representative or executor of the estate of a deceased recipient.
- G. For case record entries made subsequent to March 28, 1996, information made confidential by the Mental Health Code shall be disclosed to an adult recipient, upon the recipient's request, if the recipient does not have a guardian and has not been adjudicated legally incompetent. The holder of the record shall comply with the adult recipient's request for disclosure as expeditiously as possible but in no event later than the earlier of thirty (30) days after the receipt of the request or, if the recipient is receiving treatment from the holder of the record, before the recipient is released from treatment.
- H. Unless section 748(4) of the Mental Health Code applies to the request for information, the Executive Director may make a determination that disclosure of information may be detrimental to the recipient or others. If the record of the recipient is located at the resident's facility, then the Executive Director shall make a determination of detriment within three (3) business days from the date of the request. If the record of the recipient is located at another location, then the Executive Director shall make a determination of detriment within ten (10) business days from the date of the request. The Executive Director shall provide written notification of the determination of detriment and justification for the determination to the person who requested the information.
- I. If a determination of detriment has been made and the person seeking the disclosure disagrees with that decision, he or she may file a recipient rights complaint with the Office of Recipient Rights (ORR) of the Department, the community mental health services program, or licensed hospital, whichever was responsible for making the original determination.
- J. If the Executive Director declines to disclose information because of possible detriment to the recipient or others, then the Executive Director shall determine whether part of the information may be released without detriment. A determination of detriment shall not be made if the benefit to the recipient from the disclosure outweighs the detriment.
- K. Information shall be provided to private physicians or psychologists appointed or retained to testify in civil, criminal, or administrative proceedings as follows:
1. A physician or psychologist who presents identification and a certified true copy of a Court Order appointing the physician or psychologist to examine a recipient for

the purpose of diagnosing the recipient's present condition shall be permitted to review, on the provider's premises, a record containing information concerning the recipient. Physicians or psychologists shall be notified before the review of records when the records contain privileged communication that cannot be disclosed in court under Section 750 of the Mental Health Code.

2. The court or other entity that issues a subpoena or order, the Attorney General's office, when involved, shall be informed if subpoenaed or ordered information is privileged under a provision of law. Privileged information shall not be disclosed unless disclosure is permitted because of an express waiver of privilege or because of other conditions that, by law, permit or require disclosure.
- L. A prosecutor may be given non-privileged information or privileged information that may be disclosed if it contains information relating to participation in proceedings under the Mental Health Code, including all of the following information
1. Names of witnesses to acts that support the criteria for involuntary admission.
 2. Information relevant to alternatives to admission to a hospital or facility.
 3. Other information designated in policies of the provider.
- M. Information may be disclosed at the discretion of the holder of the record:
1. As necessary for the recipient to apply for or receive benefits. The holder of a record may disclose information that enables a recipient to apply for or receive benefits, without the consent of the recipient or legally authorized representative, only if the benefits shall accrue to the provider or shall be subject to collection for liability for mental health services.
 2. As necessary for the purpose of outside research, evaluation, accreditation, or statistical compilation, provided that the individual who is the subject of the information can be identified from the disclosed information only when such identification is essential in order to achieve the purpose for which the information is sought or if preventing such identification would clearly be impractical, but in no event if the subject of the information is likely to be harmed by the identification.
 3. To providers of mental or other health services or a public agency, if there is a compelling need for disclosure based upon a substantial probability of harm to the recipient or other individuals.
- N. If required by Federal law, HealthWest shall grant a representative of Michigan Protection and Advocacy Services (MP&A) access to the records of all of the following:
1. A recipient, or his/her legal representative, has consented to the access.
 2. A recipient, including a recipient who has died or whose whereabouts are unknown, if all of the following apply:
 - a. Because of mental or physical condition, the recipient is unable to consent to the access.

- b. The recipient does not have a guardian or other legal representative, or the recipient's guardian is the State.
 - c. MP & A has received a complaint on behalf of the recipient or has probable cause to believe based on monitoring or other evidence that the recipient has been subject to abuse or neglect.
 - 3. A recipient who has a guardian or other legal representative if all of the following apply:
 - a. A complaint has been received by the MP&A System or there is probable cause to believe the health or safety of the recipient is in serious and immediate jeopardy.
 - b. Upon receipt of the name and address of the recipient's legal representative, P&A has contacted the representative and offered assistance in resolving the situation.
 - c. The representative has failed or refused to act on behalf of the recipient.
- O. The records, data, and knowledge collected for or by individuals or committees assigned a peer review function including the review function under Section 143a(1) of the Mental Health Code are confidential, shall be used only for the purpose of peer review, are not public records, and are not subject to Court subpoena.
- P. The holder of an individual's record, when authorized to release information for clinical purposes by the individual, or her/his legal representative, shall release a copy of the entire medical and clinical record to the provider of mental health services.
- Q. A recipient, guardian, or parent of a minor recipient, after having gained access to treatment records, may challenge the accuracy, completeness, timeliness, or relevance of factual information in the recipient's record. The recipient or his/her legal representative shall be allowed to insert into the record a statement correcting or amending the information at issue. The statement shall become part of the record.
- R. Public Act 488, as amended, requires strict confidentiality of all reports, records and data pertaining to testing, care, treatment, reporting, and research associated with the serious communicable diseases or infections. Serious, Communicable Diseases or Infections include HIV/AIDS, Tuberculosis (TB) and Venereal Diseases (VD).
 - 1. Staff must complete HealthWest form No. 001 in its entirety, in order to disclose information that pertains to a serious communicable disease from the recipient's record.
 - 2. Information may be disclosed to another health care provider when urgent care is required.
 - 3. Disclosure of a recipient's HIV/AIDS status to the local County Health Department for the purpose of partner notification will be done by contracted physicians in accordance with Public Act 89.
 - 4. Information that a recipient is a known health threat to others due to engaging in

recalcitrant behaviors may be disclosed to the local County Health Department in accordance with Public Act 490.

- S. 42 CFR Part 2 protects the confidentiality of substance abuse treatment records and affords "super confidentiality" to covered programs/records beyond that typically afforded by general State law.
1. A Covered Program is any program that holds itself out as providing alcohol and drug abuse diagnoses, treatment, or referral for treatment that is federally assisted, directly or indirectly.
 2. Restrictions on disclosure apply to any information, whether or not recorded, which:
 - a. Would identify the recipient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification of such an identification by another person.
 - b. Is alcohol or drug abuse information obtained by a federally assisted program for the purpose of diagnosis, treatment or referral for treatment of alcohol or drug abuse.
 - c. Is used to initiate or substantiate any criminal investigation of a recipient.
 - d. Is used to conduct any criminal investigation of a recipient.
 3. The regulations do not restrict a disclosure that an identified individual is not and never has been a recipient.
 4. The regulations do not apply to the following disclosures:
 - a. Communication among program staff who need the information to carry out their duties.
 - b. Communication between a program and/or an entity having direct administrative control over the program.
 - c. Communication between a program and a qualified service organization with which there exists a written agreement/contractual relationship.
 - d. A report of the actual or threatened commission of a crime on program premises or against program personnel to law enforcement officers.
 - e. A report of suspected child abuse/neglect.
 5. The following types of disclosures are permitted under carefully controlled circumstances:
 - a. Disclosures with recipient consent including the following:
 - i. Competent adult.

- ii. A guardian who has been appointed by the court through an adjudication process.
- iii. State law permits a minor to consent to his/her own substance abuse treatment.
 - (a) Only the minor may authorize disclosure of the substance abuse record.
 - (b) Parents may not be contacted without the minor's permission, even for payment purposes.
 - (c) Notification is permitted when, in the judgment of the Executive Director/Designee the minor lacks the capacity to make a rational decision on the issue of notification; **AND** the situation poses a substantial threat to the physical well being of the minor or any other person; **AND** this threat may be alleviated by notifying the parent or guardian.
 - (d) In cases of deceased recipients, consents may be signed by individuals in the following order of priority: personal representative appointed by the court, then spouse, then parent, then sibling, then children.
- b. Recipient-identifying information may be disclosed to medical personnel who have a need for information about a recipient in a bona fide medical emergency, which means there is no time to get consent because a condition exists that poses danger to the health of an individual and immediate medical intervention is required. Immediately following disclosure, the staff person must document the disclosure on a progress note in the recipient's record and include:
 - i. The name of the medical personnel receiving the information.
 - ii. The medical personnel's affiliation with any health care facility.
 - iii. The name of the person making the disclosure.
 - iv. The date and time of the disclosure.
 - v. The nature of the emergency prompting the disclosure.
- c. Recipient-identifying information may be disclosed for research activities if the Executive Director or his/her designee makes a determination that the recipient of the information:
 - i. Is qualified to conduct the research.
 - ii. Has a research protocol that prevents the researcher from identifying any recipients in the research report and requires the researcher to protect the confidentiality of the records through

appropriate storage security and through conformance with the non-disclosure standards of the Federal regulations.

- iii. Any Federal, State, or local government agency that provides financial assistance to the program or regulates the activities of the program may perform an on-site review.
- iv. Private funds, third party payor, or peer review organizations performing a utilization or quality control review may perform an on-site review.
- v. A Court Order under the regulations may authorize disclosure of confidential communications made by a recipient to a program in the course of diagnosis, treatment, or referral for treatment only if:
 - (a) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties; **OR**
 - (b) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury; **OR**
 - (c) The disclosure is in connection with litigation or an administrative proceeding in which the recipient offers testimony or other evidence pertaining to the content of the confidential communications.
- d. A Court Order authorizing the disclosure of recipient records for purposes other than criminal investigation may be entered only if the court determines that a good cause exists. To make this determination, the court must find that:
 - i. Other ways of obtaining the information are not available or would not be effective
 - ii. The public interest and need for the disclosure outweigh the potential injury to the recipient, the therapeutic relationship, and the treatment services.
- e. A Court Order authorizing a disclosure must:
 - i. Limit disclosure to those parts of the recipient's record, which are essential to fulfill the objective of the order.
 - ii. Limit disclosure to those persons whose need for information is the basis for the Court Order.

- iii. Include such other measures as are necessary to limit disclosure for the protection of the recipient, the therapeutic relationship, and the treatment services.
- f. The court may authorize the disclosure and use of recipient records for the purpose of conducting a criminal investigation or prosecution of a recipient only if the court finds that all of the following criteria are met:
 - i. The crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury.
 - ii. There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.
 - iii. Other ways of obtaining the information are not available or would not be effective.
 - iv. The potential injury to the recipient, to the physician-recipient relationship, and to the ability of the program to provide services to other recipients is outweighed by the public interest and the need for the disclosure.
- g. The legal effect of a Court Order is a unique kind that does not require that information be released. Instead, it merely lifts any Federal prohibitions against release of the records. A subpoena or similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompanying an authorizing Court Order entered under the Federal regulations.

T. The record is the property of the Board of HealthWest.

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1. The information contained therein, however, belongs to the recipient. The recipient, therefore, has a right to examine, in most circumstances, the record and/or obtain a copy, or to direct HealthWest programs to permit a third party to examine and/or obtain a copy. A reasonable fee may be charged for this service. The recipient may refuse to consent to the release of his/her records to persons outside of HealthWest, except as required by law.
2. In order to facilitate family involvement and enhance treatment, recipients may be requested to authorize disclosure of information by the program to family members, significant others, and/or other agencies providing services to that recipient.
3. The Federal regulations on confidentiality of alcohol and drug abuse records do not prohibit a program from giving a recipient of substance abuse services in a covered program access to his/her own record, including the opportunity to inspect and copy any records that the program maintains about the recipient, provided the Executive Director or his/her designee judges that such actions will not be detrimental to the recipient or to others [R325.14304 (4)(a)(b)].

- V. Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings or in proceedings preliminary to these unless the recipient has waived the privilege.
1. Privileged communication is a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of the recipient, or to another person while the other is participating in the examination, diagnosis, or treatment (M.C.L. 330.1750).
 2. Independent privileges exist which protect confidential communications made by a recipient to a licensed masters social worker, licensed bachelors social worker, social services technician or agency employing them. Communications by the recipient and advice given are both protected (M.C.L. 339.1610).
 3. In the following circumstances, the privileged communications shall be disclosed upon request:
 - a. When the privileged communication is relevant to a physical or mental condition of the recipient which the recipient has introduced as an element of his/her claim or defense in a civil or administrative case or proceeding, or which, after the recipient's death, has been introduced as an element of his/her claim or defense by a party to a civil or administrative case or proceeding.
 - b. When the communication is relevant to a matter under consideration in a proceeding governed by the Mental Health Code, but only if the recipient was informed that any communications could be used in the proceeding.
 - c. When the communication is relevant to a matter under consideration in a proceeding to determine legal competence of a recipient or the recipient's need for a guardian, but only if the recipient is informed that any communications made could be used in such a proceeding.
 - d. In civil or criminal actions against a psychiatrist or psychologist for malpractice.
 - e. When the privileged communication was made during an examination ordered by a court, prior to which the recipient was informed that the communication would not be privileged, but only with respect to the particular purpose for which the examination was ordered.
 - f. When the communication was made during treatment, the recipient was ordered to undergo an evaluation to render him/her competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with competence of the recipient to stand trial.
 4. In instances where disclosure of privileged communications is prohibited, the fact that the recipient has been examined or treated or undergone a diagnosis shall also not be disclosed, unless relevant to a determination by a health care insurer of its rights under a policy, contract, or certificate of insurance or health care benefits.

W. A recipient whose privacy/confidentiality has been breached by a staff person may bring a civil suit for damages.

1. The court may consider unauthorized disclosure of recipient information about substance abuse a Federal criminal offense. Such an offense is punishable by the court with a fine of \$500.00 for a first offense and up to \$5,000.00 for each additional offense.
2. An employee, volunteer, or intern who violates the confidentiality of a recipient with a serious communicable disease, including HIV, AIDS, or ARC, may have the court find him/her guilty of a misdemeanor. Such an offense is punishable by imprisonment of up to one (1) year or a fine up to \$5,000.00, or both. Additionally, the court may find the individual liable for civil action for actual damages or \$1,000.00, whichever is greater, plus cost and reasonable attorney fees.
3. In addition to the above civil and criminal penalties, staff violating the recipient's rights to the confidentiality provisions contained in this policy may also have such action subject to disciplinary proceedings.

V. REFERENCES

M.C.L. 330.1748, 330.1749, 330.1750, 330.1752
Administrative Rule R 330.7051