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**SUBJECT: ACCESS**

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**GENERAL STANDARD (PRIVACY RULE SECTION 164.524):**

AHS health care providers and health plans are generally required to permit individuals (and their personal representatives) to have access to inspect or obtain (or both) PHI maintained in designated record sets. There are exceptions to the access requirements of the Privacy Rule. For example, AHS health care providers and health plans are not required to provide access to PHI in psychotherapy notes.

In all cases, AHS may require that access requests be made in writing.

AHS may deny access to PHI to an individual (or his/her personal representative) in some cases, and some of those denials will be reviewable, and some non-reviewable. AHS must permit an individual (or his/her personal representative) to challenge a reviewable denial.

AHS will ensure it appropriately responds to all requests for access to PHI covered by the Privacy Rule, and will incorporate the requirements of any other law (e.g., Vermont statutes and AHS Rule 96-23) in its response.

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**PRIVACY RULE:**

**I. Rights of Access**

- A. An individual has a right of access to inspect and obtain a copy of his/her PHI within a designated record set, for as long as the PHI is maintained in the designated record set.
- B. However, a CE is not obligated to provide such access to:
  - 1. Psychotherapy notes;
  - 2. Information compiled in reasonable anticipation of, or for use in, a civil, criminal or administrative action or proceeding; or
  - 3. PHI maintained by a CE that is:
    - a. Subject to the Clinical Laboratory Improvements Amendments of 1988 (“CLIA”), to the extent the provision of access to the individual would be prohibited by law.
    - b. Exempt from CLIA, pursuant to 42 CFR 493.3(a)(2).

## **II. Individual's Request for Access and Timely Action**

- A. A CE must permit an individual to request access to inspect or obtain a copy of his/her PHI maintained in a designated record set.
- B. A CE may require individuals to make requests for access in writing, provided that it informs individuals of such a requirement.
- C. A CE must act on a request for access within 30 days after receipt of the request, as follows:
  - 1. If a CE grants the request, in whole or in part, it must inform the individual of such acceptance and provide the access requested, in accordance with Paragraph III below;
  - 2. If a CE denies the request, in whole or in part, it must provide the individual with a written denial, in accordance with Paragraph VI below.
- D. If the request for access is for PHI that is not maintained or accessible to the CE on-site, the CE must take an action required above (i.e., grant or deny the request, in whole or in part) within 60 days from receipt of the request.
- E. If a CE is unable to take any such action (i.e., grant or deny the request, in whole or in part) within the allotted time (i.e., either 30 or 60 days), then the CE may extend the time for such action by no more than 30 days, provided that:
  - 1. The CE, within the time limit set forth above (i.e., the original time limit), provides the individual with a written statement of the reasons for the delay and the date when the CE will complete its action on the request;
  - 2. A CE may have only one such extension of time for action on a request for access.

## **III. Providing the Access Requested**

- A. If a CE provides an individual with access, in whole or in part, to PHI, then the CE must comply with the following requirements:
  - 1. The CE must provide the access requested, including inspection or obtaining a copy, or both, of the PHI about the individual in a designated record set;
  - 2. If the same PHI that is the subject of a request for access is maintained in more than one designated record set or at more than one location, the CE need only produce the PHI once to the requesting individual;

3. A CE must provide the individual with access to the requested PHI in the requested form or format, if the PHI is:
  - a. Readily producible in such form or format, or if not;
  - b. In a readable hard copy form or in such other form or format as agreed to by both the CE and the requesting individual.
- B. A CE may provide the individual with a summary of the PHI requested, in lieu of providing access to the PHI or may provide an explanation of the PHI to which access has been provided, if the individual agrees in advance to:
  1. Such a summary or explanation; and
  2. To the fees imposed, if any, by the CE for such summary or explanation.
- C. A CE must provide the access as requested by the individual in a timely manner (as set forth above), including:
  1. Arranging with the individual for a convenient time and place to inspect or obtain a copy of the PHI; or
  2. Mailing the copy of the PHI, if requested by the individual.
- D. A CE may discuss the scope, format, and other aspects of the request for access with the individual, as necessary to facilitate the timely provision of access.
- E. If the individual requests a copy of the PHI or agrees to a summary or explanation of such information, then a CE may impose a reasonable, cost-based fee, provided that the fee includes only the cost of:
  1. Copying, including the cost of supplies for and labor of copying, the PHI requested by the individual;
  2. Postage, when the PHI, summary or explanation is mailed per the individual's request;
  3. Preparing an explanation or summary of the PHI, if agreed to by the individual as set forth above.

#### **IV. Unreviewable Grounds for Denial**

- A. A CE may deny an individual access without providing the individual an opportunity for review in the following circumstances:
  1. If the exceptions to access as outlined in I. B. above apply;

2. A CE that is a correctional institution, or a covered health care provider acting under the direction of a correctional institution may deny, in whole or in part, an inmate's request to obtain a copy of PHI, if it believes that such access would jeopardize:
  - a. The health, safety, security, custody or rehabilitation of the individual or of other inmates;
  - b. The safety of any officer, employee or other person at the correctional institution; or
  - c. The safety of a person responsible for transport of the inmate.
- B. An individual's access to PHI created or obtained by a covered health care provider in the course of research that includes treatment may be temporarily suspended for as long as the research is in progress, provided that:
  1. The individual has agreed to the denial of access when consenting to participate in the research that includes treatment; and
  2. The covered health care provider has informed the individual that the right of access will be reinstated upon completion of the research.
- C. An individual's access to PHI that is contained in records that are subject to the Privacy Act (5 U.S.C. 552a) may be denied, if such denial would meet the requirements of the Privacy Act.
- D. An individual's access may be denied if the PHI was obtained from someone other than a health care provider under a promise of confidentiality and the access requested would be reasonably likely to reveal the source of the information.

**V. Reviewable Grounds for Denial**

- A. A CE may deny an individual access, provided that the individual is given a right to have such denials reviewed, as set forth below, in the following circumstances:
  1. A licensed health care professional has determined, using his/her professional judgment, that the access requested by the individual is reasonably likely to endanger the life or physical safety of the individual or another person;
  2. The PHI makes reference to another person (unless such other person is a health care provider), and a licensed health care professional has determined, using his/her professional judgment, that the access requested is reasonably likely to cause substantial harm to such other person;

3. The request for access is made by the individual's personal representative, and a licensed health care professional has determined, based on his/her professional judgment, that the provision of access to such representative is reasonably likely to cause substantial harm to the individual or another person.

## **VI. Denial of Access**

- A. If a CE denies access, in whole or in part, to the PHI requested, then the CE must comply with the following requirements:
  1. The CE must, to the extent possible, give the individual access to any other PHI requested, after excluding the PHI as to which the CE has a ground to deny access;
  2. A CE must provide a timely (in accordance with the time limits set forth above), written denial to the individual. The denial must be in plain language and contain:
    - a. The basis for the denial;
    - b. If applicable, a statement of the individual's review rights (discussed below) including a description of how the individual may exercise such rights;
    - c. A description of how the individual may complain to the CE or to the Secretary of Health and Human Services, including:
      - i. The name or title of the contact person/office; and
      - ii. The telephone number of the contact person/office.
  3. If a CE does not maintain the PHI requested by the individual, and the CE knows where the PHI is maintained, then the CE must inform the individual where to direct the request for access.

## **VII. Review of a Denial of Access**

- A. If access is denied on a ground permitted under Paragraph V above, the individual has the right to have the denial reviewed by a licensed health care professional who is designated by the CE to act as a reviewing official and who did not participate in the original decision to deny. A CE must provide or deny access in accordance with the determination of the reviewing official.

- B. If the individual has requested a review of a denial of access, and such denial is reviewable, a CE must designate a licensed health care professional, who was not directly involved in the denial to review the decision to deny access. A CE must promptly refer a request for review to such designated reviewing official. The designated reviewing official must determine, within a reasonable period of time, whether or not to deny the access requested, based on the standards in Paragraph V. The CE must promptly provide written notice to the individual of the determination of the designated reviewing official and take other action as required to carry out the designated reviewing official's determination.

### **VIII. Documentation Requirements for Access of PHI**

- A. A CE must document in electronic or written format and retain, for a period of six years from the date of creation or the date when last in effect, whichever is later, the following:
  - 1. The designated record sets that are subject to access by individuals; and
  - 2. The titles of the persons or offices responsible for receiving and processing requests for access by individuals.

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### **GUIDELINES:**

- 1. There are a series of state laws that impact the rights of patients and beneficiaries to access PHI, and the amounts that can be charged for such access.
  - A. **AHS Rule 96-23, Section 4.4, Client Access to Records**, states (in pertinent part):

[u]nless prohibited by federal or state law or regulation, clients shall be permitted to view and obtain copies of their records. . . . Employees shall take reasonable steps to present records in a form accessible to the client, including but not limited to large type format or verbal review. A fee not to exceed the actual cost of copying may be charged for records exceeding 10 pages. This fee shall be waived if it would prohibit access.
  - B. **3 VSA 129a(a)(8), Licensee Misconduct**, states:
    - (a) In addition to any other provision of law, the following conduct by a licensee constitutes unprofessional conduct. When that conduct is by an applicant or person who later becomes an applicant, it may constitute grounds for denial of a license or other disciplinary action. Any one of the following items, or any combination of items, whether or not the conduct at issue was committed within or outside the state, shall constitute unprofessional conduct:

(8) Failing to make available promptly to a person using professional health care services, that person's representative, succeeding health care professionals or institutions, upon written request and direction of the person using professional health care services, copies of that person's records in the possession or under the control of the licensed practitioner.

The following are some of the licensees who are subject to the obligations created by 3 VSA 129a(a)(8): chiropractors; allied mental health practitioners; nurses; osteopathic physicians and surgeons; pharmacists; physical therapists; athletic trainers; and audiologists and speech language pathologists.

C. **26 VSA 1354(a)(10), Licensee Misconduct**, states:

(a) The board shall find that any one of the following, or any combination of the following, whether or not the conduct at issue was committed within or outside the state, constitutes unprofessional conduct:

(10) failure to make available promptly to a person using professional health care services, that person's representative, succeeding health care professionals or institutions, when given proper written request and direction of the person using professional health care services, copies of that person's records in the possession or under the control of the licensed practitioner.

The obligations of 26 VSA 1354(a)(10) apply to “licensed practitioners”, who include persons licensed to practice medicine and surgery in Vermont.

D. **18 VSA 9419, Copying Statute**, states:

(a) A custodian may impose a charge that is no more than a flat \$5.00 fee or no more than \$0.50 per page, whichever is greater, for providing copies of an individual's health care record. A custodian shall provide an individual or the authorized recipient with an itemized bill for the charges assessed. A custodian shall not charge for providing copies of any health care record requested to support a claim or an appeal under any provision of the Social Security Act or for any other federal or state needs-based benefit or program.

(b) A custodian may charge an individual a fee, reasonably related to the associated costs, for providing copies of x-rays, films, models, disks, tapes, or other health care record information maintained in other formats.

(c) As used in this section:

(1) “Custodian” means any person who maintains health care information for any lawful purpose, including a health care provider, a health care facility, or a health insurer.

(2) “Health care record” means all written and recorded health care information about an individual maintained by a custodian.

(3) “Individual” means a natural person, alive or dead, who is the subject of health care information and includes, when appropriate, the individual's attorney-in-fact, legal guardian, health care agent, as defined in [14 V.S.A. chapter 121](#), executor or administrator.

2. AHS will require that all requests for access to PHI by a patient, beneficiary or his/her personal representative be made in writing. AHS has created a form request letter, which it will make available to a patient, beneficiary or his/her personal representative seeking access to PHI. A copy of the form is attached to this Standard and Guidelines.
3. AHS will contact a patient, beneficiary or his/her personal representative in any situation where the specific information sought is not clear from the written request.
4. AHS will review each written request for access to determine whether an access request should be granted.
5. Vermont statutes, and AHS Rule 96-23, arguably provide broader rights of access to health information than the Privacy Rule. Consequently, all decisions to deny access, in whole or in part, must be reviewed with the Assistant Attorney General or other counsel providing services to the AHS health care provider or health plan that desires to deny access. The purposes of the review are to ensure that:
  - A. A denial of access would not violate Vermont law; and
  - B. AHS complies with any appeal rights available to a patient, beneficiary or his/her personal representative under the Privacy Rule.
6. AHS will attempt to respond to each request for access to PHI within ten (10) business days, though, if necessary, AHS may have more time to respond to the request, in accordance with the Privacy Rule (as set forth above).
7. AHS health care providers and health plans have documented their designated record sets, and the Privacy Official maintains such documentation. This documentation also identifies the titles of the persons/offices responsible for receiving and processing access requests.
8. If an access request is denied, in whole or in part, AHS will notify the patient, beneficiary, or his/her personal representative of the denial, in writing. A form denial letter is attached to this Standard and Guidelines. The letter has blanks that must be completed to tailor the letter to a specific situation.
9. If an access request is accepted, AHS will notify the patient, beneficiary or his/her personal representative of that fact, in writing. A form acceptance letter is attached to this Standard

and Guidelines. The letter has blanks that must be completed to tailor the letter to a specific situation.

10. AHS may charge the following fees when responding to access requests:
  - A. A reasonable cost based fee for copying, including labor and supplies (for instance, paper and computer disks); provided, however that:
    - (i) AHS will not so charge when a request is made by a patient, beneficiary or his/her personal representative to support a claim or an appeal under any provision of the Social Security Act or for any other federal or state needs-based benefit or program; and
    - (ii) AHS health care providers and health plans subject to AHS Rule 96-23 (all those who voluntarily serve clients, such as the Department of Prevention, Assistance, Transition and Health Access, the Department of Health, and the Department of Aging and Disabilities) will only charge a reasonable cost based fee for copying of records exceeding 10 pages, and will waive this fee if it would otherwise prohibit access.
  - B. The cost of postage when a patient or his/her personal representative requests that the information be mailed; provided, however, that AHS will not so charge when a request is made by a patient, beneficiary or his/her personal representative to support a claim or an appeal under any provision of the Social Security Act or for any other federal or state needs-based benefit or program.
  - C. A nominal fee for preparing an explanation or summary of the requested PHI if the patient, beneficiary or his/her personal representative is informed of and agrees to receive such summary or explanation and is willing to pay the fee.
11. AHS will look to the determinations of “actual cost” made by the Vermont Secretary of State in accordance with 1 VSA Section 316 (with respect to access to public records and documents) to help AHS determine a reasonable cost based fee, as set forth above.
12. In some situations, AHS health care providers and health plans may wish to be present when an individual inspects his/her PHI, whether to maintain the integrity of the information, or because there are concerns about individual reactions to the information. In these situations, AHS may be present, but will take every precaution necessary to ensure the individual is afforded the full and complete access the Privacy Rule and state laws would otherwise require.
13. AHS is aware of the Vermont laws that affect the right of a patient, beneficiary, or his/her personal representative to have access to health information, and that such laws do not directly address the situations where a health care provider may deny access to such information. See, 3 VSA 129a(a)(8), 26 VSA 1354(a)(1), and Section 4.4 of AHS Rule 96-23. As set forth above, any decision to deny access must be reviewed and approved by the

Assistant Attorney General or other counsel providing services to the AHS health care provider or health plan wishing to deny access to PHI.

14. AHS is also aware of the requirements of Vermont law on charges that may be assessed in responding to a request for medical records. See, 18 VSA 9419 and Section 4.4 of AHS Rule 96-23. This Standard and Guidelines incorporates the specific aspects of these Vermont laws that are more stringent in terms of privacy protection than the Privacy Rule. In addition, AHS is aware that the Privacy Rule will not allow AHS to utilize the .50c per page charge otherwise permitted by 18 VSA 9419 (rather, the Privacy Rule will only permit a cost-based fee).
  15. Section 4.4 of AHS Rule 96-23 permits access to PHI “in a form accessible to the client, including but not limited to large type format or verbal review”. This excerpt is potentially more stringent in terms of privacy protection than the HIPAA Privacy Rule, at least as it concerns large type format presentation. AHS will continue to comply with this obligation, for those AHS Departments, Divisions and Offices subject to AHS Rule 96-23.
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Form Access Request

I, \_\_\_\_\_ (name), \_\_\_\_\_ hereby request access to my health information from \_\_\_\_\_ for the following dates: \_\_\_\_\_ . I request the health information contained in the following records (please check one or more):

all of the above

other (please specify) \_\_\_\_\_

\_\_\_\_\_  
Signature of Requestor

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

If signed by personal representative:

Name of personal representative: \_\_\_\_\_

Relationship to individual or nature of authority: \_\_\_\_\_

\_\_\_\_\_  
Signature of Personal Representative

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_

Form Denial Letter

Date

Participant's Name

Address

City, State, Zip

Dear \_\_\_\_\_,

Thank you for your request to access your health information (information that constitutes protected health information as defined in the Privacy Rule of the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996), received by the \_\_\_\_\_ on \_\_\_\_\_. After careful review, we are not able to grant your request for the following reason(s): *[Make reference to the specific permissible ground(s) for denial; if the requested PHI is not maintained by you but its whereabouts is known, redirect the individual to where he/she might redirect the request.]*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*[Include if able to grant request in part*

While we are not able to grant your request in its entirety for the reason(s) stated above, you may have access to: \_\_\_\_\_. Please contact \_\_\_\_\_ at (telephone number) to discuss the details of your request.]

*[Include if request is appealable*

If you disagree with our decision regarding access to your health information, you have the right to request that we reconsider. We will appoint a licensed health care professional who was not involved in the original decision to reevaluate your request. You will receive a written response of the review official's determination. Please contact *(Insert title of contact person and telephone number for appeal)* if you want our determination reviewed.]

If you are dissatisfied with our decision and wish to lodge a formal complaint, you may contact: *[Insert title of contact person, address and telephone number of person designated to receive privacy complaints]* or, alternatively, you may make a complaint to the Secretary of the Department of Health and Human Services, at Office for Civil Rights U.S. Department of Health and Human Services, JFK Federal Building - Room 1875, Boston, MA 02203.

Please contact me if you have any questions or concerns.

Sincerely,

Form Acceptance Letter

Date

Participant's Name

Address

City, State, Zip

Dear \_\_\_\_\_,

Thank you for your request to access your health information, received by \_\_\_\_\_  
\_\_\_\_\_ on \_\_\_\_\_. Your request has been granted.

If you would prefer to receive a written summary of the requested information instead of a complete copy, we would be glad to prepare it for you for the fee of \$\_\_\_\_\_. Please contact me at *[Insert telephone number]* if you prefer this option.

The health information you requested is available to you for inspection, copying or both. If you prefer to receive a copy of the information by mail, we will prepare a paper copy [if applicable, or a computer disk] that contains the requested information. Please send a check payable to \_\_\_\_\_ in the amount of \$\_\_\_\_\_ to cover the costs of postage and labor and supplies for the copying.

If you would prefer to inspect and/or have copied the requested information in person, please contact me so we can arrange a mutually convenient time for you to come to \_\_\_\_\_. You will be charged a fee of \$\_\_\_\_\_ if you wish to have the requested information copied.

Please do not hesitate to contact me if you have any questions or require additional information.

Sincerely,