

SafetyNetWorks

*Information for Elder Adults-at-Risk and Adults-at-Risk Agencies
AAR Information Memo #3, October 2007*

IN THIS ISSUE

Release or exchange of Confidential Treatment Information (CTI), Protected Health Information (PHI), and Reports and Records of Abuse, Neglect, Self-Neglect, Financial Exploitation of Adults at Risk, including Elder Adults (AAR).

BACKGROUND

Various federal and State statutes and regulations provide requirements related to CTI, PHI, and AAR Reports. Health care providers, treatment providers, insurers, county departments, and others must comply with the requirements that provide the greatest protection for the CTI and PHI. This issue of the SafetyNetWorks will identify the applicable statutes and regulations and note to whom a holder of CTI, PHI or an AAR Report is permitted to release information without prior written informed consent of the person or the person's legal representative (e.g., parent with legal custody, legal guardian, and health care agent).

GENERAL GUIDELINES

The legality of releasing CTI, PHI or an AAR Report depends upon which entity is the creator/initial holder of the information and to whom the information will be released. All applicable statutes and regulations permit use of CTI, PHI or AAR Reports within a treatment facility, health care provider, or other entity. Also, all applicable statutes and regulations permit release of CTI or PHI, but not AAR Reports, if necessary to address a medical emergency. If the information contains CTI, then the information must be limited to include only the information necessary to fulfill the request. While this "minimum necessary" standard does not apply to all entities and all information, it is recommended, as a "best practice standard," that a holder of any personally identifiable information, including CTI, PHI, and AAR Reports, release only the specific pieces of information necessary to accomplish a task, and only to those persons who have a legitimate need to know the information.

As a reminder, ss. 46.90 (4) (ab) 1. and 55.043 (1m), Stats., and DHFS policy requires an employee of any entity that is licensed, certified, or approved by or registered with the department; a health care provider, as defined in s. 155.01 (7); and a social worker, professional counselor, or marriage and family therapist certified under ch. 457 to file a report to the Division of Quality Assurance if the employee has reasonable cause to believe that an elder adult/adult at risk is at imminent risk of serious bodily harm, death, sexual assault, or significant property loss (see OQA Memo 06-028 issued on November 15, 2006 at http://dhfs.wisconsin.gov/rl_DSL/Publications/06-028.htm). This statement is a general summary of the requirements in the statutes and the memo; please refer to the statutes and the memo for the precise language and details.

WITH WHOM CAN INFORMATION BE RELEASED WITHOUT PRIOR WRITTEN INFORMED CONSENT?

The answer to this question is rather complex. The table below provides the answers to the question based on the type of protected information (e.g., information related to alcohol or other drug abuse treatment versus general health care information); the entity that currently holds the CTI or PHI; and the entity that is the intended recipient of the information.

Note: This memo does not address access to records by the individual or his/her legal representative or the release or sharing of information to child protective services, law enforcement, the Department of Health and Family Services, family members, or to a representative of the Board on Aging and Long Term Care Ombudsman program or the State's protection and advocacy agency, Disability Rights Wisconsin.

Key for the table below:

AODA = treatment information related to alcohol or other drug abuse

MI/DD = treatment information related to a mental illness or a developmental disability

CTI = the term used in State statutes for treatment information related to AODA or MI/DD; because of the more stringent federal requirements related to AODA treatment information, this term is not used in the table below and the information for ADOA and MI/DD is dealt with separately

PHI = protected health information

AAR = information related to a response and report of abuse, neglect, self-neglect or financial exploitation of an elder adult/adult at risk conducted by a county agency; also used to refer to the unit within the county agency that responds to a report

TF = treatment facility/program for persons who have an AODA disorder, MI or DD

HCP = health care provider, as defined in s. 146.81, Stats., including but not limited to a physician, nurse, dentist, pharmacist, psychologist, and professional licensed under ch. 457

HMO = health maintenance organization

County Agency = a county department of human services, social services, community programs or aging

ADRC = aging and disability resource center

CMO = care management organization (related to Family Care)

Individual at risk = an adult at risk, including elder adults at risk

The CTI or PHI involves	Record Holder	The CTI or PHI will be released to	Is it OK to release the CTI or PHI without prior written consent?	Issues/Comments. The most stringent requirements related to confidentiality are mentioned.
AODA	TF	TF, HCP, HMO, County Agency, AAR, ADRC, CMO	No	42 CFR Part 2 provides the most stringent of all confidentiality requirements. A TF is permitted to release CTI/PHI without prior written consent only to a qualified service organization (e.g., a contracted provider that handles data processing, billing, lab analysis, etc.), to an entity that has direct administrative control over the TF, to report suspected child abuse or neglect, to report a crime on the premises of the TF or against the TF staff, and to report to medical personnel who have a need for information about an individual for the purpose of treating a condition that poses an immediate threat to the health of any individual and which requires immediate medical intervention. There is no mention in the federal regulations regarding release of CTI/PHI related to abuse, neglect, self-neglect or financial exploitation of an elder adult/adult at risk.
	County Agency, AAR, ADRC, CMO	ADRC, CMO, County Agency, AAR	Yes	State law permits a subunit of a County Agency to exchange CTI/PHI with other subunits of the County Agency.
		TF, HCP, HMO, AAR	No	42 CFR Part 2 prohibits redisclosure of CTI/PHI related to AODA treatment except to medical personnel to address a medical emergency as noted above.
	HCP, HMO	TF, HCP, HMO, County Agency, AAR, ADRC, CMO	No	42 CFR Part 2 prohibits redisclosure of CTI/PHI related to AODA treatment except to medical personnel to address a medical emergency as noted above.

The CTI or PHI involves	Record Holder	The CTI or PHI will be released to	Is it OK to release the CTI or PHI without prior written consent?	Issues/Comments. The most stringent requirements related to confidentiality are mentioned.
MI/DD	TF	HCP, HMO, County Agency, AAR, CMO	Yes, but limited	<p><u>The release of CTI/PHI is limited</u> to particular circumstances and particular pieces of CTI/PHI:</p> <p><u>To a HMO or CMO</u>---CTI/PHI may be released to a HMO or CMO, but only if the HMO or CMO is paying for the services. Only the minimum amount of information necessary to accomplish the task should be released.</p> <p><u>To the County Agency</u>---§ 51.30 (4) (b) 5., Stats., permits the release of CTI/PHI to the director of the county department that is responsible for serving a person or to qualified staff members designated by the director as is necessary to determine progress and adequacy of treatment, to determine whether the person should be transferred to a less restrictive or more appropriate treatment modality or facility or for the purposes of s. 51.14.</p> <p><u>To a HCP</u>---§ 51.30 (4) (b) 8., Stats. permits the release of CTI/PHI for treatment of the individual in a medical emergency, to a health care provider who is otherwise unable to obtain the individual's informed consent because of the individual's condition or the nature of the medical emergency.</p> <p><u>To a HCP</u>---§ 51.30 (4) (b) 8g., Stats., permits the release of CTI/PHI to health care providers in a related health care entity, or to any person acting under the supervision of such a health care provider who is involved with a person's care, if necessary for the current treatment of the individual. Information that may be released under this subdivision is limited to the name of the individual's mental health treatment provider; the date of mental health service provided; the individual's medications, allergies, and diagnosis; and other demographic information necessary for the current treatment of the person.</p> <p><u>To the AAR</u>---§§ 46.90 (4) and 55.043, Stats., require an employee of a TF who has reasonable cause to believe that the individual at risk is at imminent risk of serious bodily harm or significant property loss and is unable to make an informed judgment about whether to report the risk, or an elder adult/adult at risk other than the subject of the report is at risk of serious bodily harm or significant property loss. An employee is not required to file a report if the employee believes that filing a report would not be in the best interest of the elder adult/adult at risk or if a health care provider provides treatment by spiritual means in lieu of medical care in accordance with his or her religious tradition; with either of these exceptions the employee must document the reasons for not filing a report in the person's treatment record.</p>

The CTI or PHI involves	Record Holder	The CTI or PHI will be released to	Is it OK to release the CTI or PHI without prior written consent?	Issues/Comments. The most stringent requirements related to confidentiality are mentioned.
MI/DD, continued	TF, continued	TF, ADRC, CMO	No	
	County Agency, AAR, ADRC, CMO	County Agency, AAR, ADRC, CMO	Yes	State law permits a subunit of a County Agency to exchange CTI/PHI with other subunits of the County Agency and with the AAR, ADRC and CMO.
		TF, HCP, HMO	No	HFS 92.03 (1) (h), Wis. Admin. Code, prohibits redisclosure of CTI/PHI related to AODA, MI and DD treatment, unless otherwise permitted by law.
	HCP, HMO	TF, HCP, HMO, County Agency, AAR, ADRC, CMO	No	HFS 92.03 (1) (h), Wis. Admin. Code, prohibits redisclosure of CTI/PHI related to AODA, MI and DD treatment, unless otherwise permitted by law.
PHI				
	TF	TF, HCP, HMO, County Agency, AAR, ADRC, CMO	See the above information under the AODA and MI/DD sections	42 CFR Part 2 and s. 51.30, Stats., provide more stringent protections related to CTI/PHI and, therefore, supersede the requirements of the Health Insurance Portability and Accountability Act (HIPAA) statutes and regulations.
	HCP, HMO, CMO	TF, HCP, HMO, AAR, CMO	Yes	For a TF, HCP, HMO, and CMO---If the information does not involve CTI, then the federal HIPAA regulations at 45 CFR 164.506 permit disclosures to carry out treatment, payment, or health care operations. For an AAR---The HIPAA regulations, at 45 CFR 164.512, permit a disclosure of PHI without prior written consent when required by law (such as ss. 46.90 and 55.043, Stats.) or if there is reason to believe that a person is a victim of abuse, neglect, or domestic violence, then the information may be released to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence. Last, a HIPAA covered entity is permitted to release PHI to avert a serious threat to health or safety under 45 CFR 164.512 (j).
		County Agency, ADRC	No	Some counties are "covered entities" or "hybrid entities" as defined in the HIPAA regulations. In these cases, PHI can be disclosed to and from the County Agency to carry out treatment, payment, or health care operations. Otherwise, there is no provision that permits disclosure of PHI to the County Agency or ADRC without prior written consent.
	County Agency, AAR, ADRC, CMO	County Agency, AAR, ADRC, CMO	Yes	State law permits a subunit of a county to exchange CTI/PHI with other subunits of the County Agency and with the AAR, ADRC and CMO.

The CTI or PHI involves	Record Holder	The CTI or PHI will be released to	Is it OK to release the CTI or PHI without prior written consent?	Issues/Comments. The most stringent requirements related to confidentiality are mentioned.
PHI, continued	County Agency, AAR, ADRC, CMO, continued	TF, HCP, HMO	No	The County Agency, AAR, ADRC, and CMO may be viewed as a covered entity or hybrid entity, as defined in the HIPAA regulations. Many persons who are served by the County Agency, AAR, ADRC or CMO are receiving services to treat an AODA disorder, MI or DD or are receiving protective services, in which case s. 51.30, Stats., apply. See the above information under the MI/DD section.
AAR	AAR	TF, HCP, HMO, County Agency, ADRC, CMO	Yes/No	<p>Section 46.90 (6), Stats., permits the AAR unit to release information related to the AAR investigation and report only to certain parties. The following sections potentially are pertinent for a TF, HCP, HMO, County Agency, ADRC or CMO. If one of these provisions is not applicable, then the information should not be released:</p> <p>(b) 6. To any agency or individual that provides direct services under sub. (5m), including an attending physician for purposes of diagnosis and treatment, and within the department (i.e., Wisconsin Department of Health and Family Services) to coordinate treatment for mental illness, developmental disabilities, alcoholism, or drug abuse of individuals committed to or under the supervision of the department. Information obtained under this subdivision shall remain confidential.</p> <p>10. To the reporter who made a report in his or her professional capacity, regarding action to be taken to protect or provide services to the alleged victim of abuse, financial exploitation, neglect, or self-neglect.</p> <p>(bt) 5. To an employee of a county department under s. 51.42 or 51.437 that is providing services either to the elder adult at risk who is the alleged victim named in the record or to the alleged perpetrator of abuse, to determine whether the alleged victim should be transferred to a less restrictive or more appropriate treatment modality or facility.</p> <p>Identical provisions exist in s. 55.043 (6) (b) 6. and 10. and (bt) 5.</p>
	TF, HCP, HMO, County Agency, ADRC, CMO	TF, HCP, HMO, County Agency, ADRC, CMO	Yes	State statutes do explicitly indicate that information from AAR is confidential, but imply that this information should not be redisclosed. It is advised that a redisclosure only occur under the condition permitted for the AAR unit noted above.

The above information provides general responses. Readers should refer to Attachment 1, which provides the applicable portions of State statutes and regulations and the applicable portions of the federal Health Insurance Portability and Accountability Act (HIPAA) regulations to the issues discussed in this newsletter. Underlining was added to sentences and paragraphs that are very pertinent.

Also, note that s. 55.23 (1), Stats., states, "The rights and limitations upon rights, procedures for enforcement of rights, and penalties prescribed in s. 51.61 apply to individuals who receive services under this chapter, whether on a voluntary or involuntary basis." Among the rights under s. 51.61 is the right to confidentiality of all treatment records, as provided in s. 51.30.

QUESTIONS

If you have questions concerning this issue of SafetyNetWorks, please contact StopAbuse@dhfs.state.wi.us or 608-266-2568.

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