

Human Rights Regulations Confidentiality

12 VAC 35-115-80

12 VAC 35-115-90



Confidentiality. 12 VAC 35-115-80

- Each individual is entitled to have all identifying information that a provider maintains or knows about him remain confidential.
- Each individual has a right to give his authorization before the provider shares identifying information about him or his care unless another state law or regulation or these regulations specifically require or permit the provider to disclose certain specific information.

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Provider's Duties:

- Providers must maintain the confidentiality of any information that identifies an individual.
 - If an individual's services record pertains in whole or in part to referral, diagnosis or treatment of substance use disorders, providers shall disclose information only according to the federal SA confidentiality regulations (this includes a substance abuse label)

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- Providers shall obtain and document in the individual's services record the individual's authorization or that of the authorized representative prior to disclosing any identifying information about him. The authorization must contain the following elements:
 - a. The name of the organization and the name or other specific identification of the person or persons or class of persons to whom the disclosure is made;

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- b. A description of the nature of the information to be disclosed, the purpose of the disclosure, and an indication whether the authorization extends to the information placed in the individual's record after the authorization was given but before it expires;
- c. An indication of the effective date of the authorization and the date the authorization will expire, or the event or condition upon which it will expire; and
- d. The signature of the individual and the date. If the authorization is signed by an authorized representative, a description of the authorized representative's authority to act.

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- Providers are obligated to tell each individual and his authorized representative about the individual's confidentiality rights.
 - This shall include how information can be disclosed and how others might get information about the individual without authorization.
 - If a disclosure is not required by law, provider shall give strong consideration to any objection by individual or his authorized representative

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- Providers shall prevent unauthorized disclosures of information from services records and shall maintain and disclose information in a secure manner.

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Minors:

- Authorization of custodial parent or other person authorized to consent to the minor's treatment under § 54.1-2969 is required to disclose.
- **Exceptions:**
 - A minor is permitted to authorize the disclosure of information related to medical or health services for sexually transmitted or contagious disease, family planning or pregnancy (see Virginia Code §54.1-2969 (E))

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- A minor may also authorize disclosure of information related to **outpatient** care, treatment or rehabilitation for substance use disorders, mental illness, or emotional disturbance (see Virginia Code §54.1-2969 (E))

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- The concurrent authorization of the minor and custodial parent is required to disclose **inpatient** substance abuse records.
- The minor and the custodial parent shall authorize the disclosure of identifying information related to the minor's **inpatient** psychiatric hospitalization when the minor is **14 years of age and older and has consented to the admission.**

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Redisclosure:

- When providers disclose identifying information, they must attach a statement that informs the person receiving the information that it must not be disclosed to anyone else unless the individual authorizes the disclosure or unless state law or regulation allows or requires further disclosure without authorization.

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- Providers may encourage individuals to name family members, friends, and others who may be told of their presence in the program and general condition or well-being.
- Except for information governed by 42 CFR Part 2, providers may disclose to a family member, other relative, a close personal friend, or any other person identified by the individual, information that is directly relevant to that person's involvement with the individual's care or payment for his health care, if:

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- (i) the provider obtains the individual's agreement
- (ii) the provider provides the individual with the opportunity to object to the disclosure, and
- (iii) the individual does not object or the provider reasonably infers from the circumstances, based on the exercise of professional judgment, that the individual does not object to the disclosure.

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- If the opportunity to agree or object cannot be provided because of the individual's incapacity or an emergency circumstance, the provider may, in the exercise of professional judgment, determine whether the disclosure is in the best interest of the individual and, if so, disclose only the information that is directly relevant to the person's involvement with the individual's health care.

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- **Exceptions:**

In some limited circumstances (listed in the regulations) providers may disclose certain identifying information without authorization or violation of the individual's confidentiality, but only according to the following....

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What are the exceptions?

- A) **Emergencies:** Providers may disclose information in an emergency to any person who needs that particular information for the purpose of preventing injury to or death of an individual or other person
- The provider shall not disclose any information that is not needed for this specific purpose.
 - *NOTE: Substantial property damage deleted!!

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What are the exceptions?, con't:

B) Providers or health plans:

Providers may permit any full or part-time employee, consultant, agent, or contractor of the provider to use identifying information or disclose to another provider, a health plan, the department or a CSB, information required to give services to the individual or to get payment for services.

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What are the exceptions?, con't:

C) Court proceedings:

- If the individual, or someone acting for him, introduces any aspect of his mental condition or services as an issue before a court, administrative agency, or medical malpractice review panel, the provider may disclose any information relevant to that issue.
- The provider may also disclose any records if they are properly subpoenaed, if a court orders them to be produced, or if involuntary admission or certification is being proposed.

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What are the exceptions?, con't:

D) Legal Counsel:

Providers may disclose information to their own legal counsel, or to anyone working on behalf of their legal counsel, in providing representation to the provider.

- State providers may disclose to the OAG or anyone appointed by or working on its behalf for representation purposes

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What are the exceptions?, con't:

E) Human Rights Committees:

Providers may disclose to the LHRC and the SHRC any information necessary for the conduct of their responsibilities under these regulations.

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What are the exceptions?, con't:

F) Others authorized or required by the Commissioner, CSB or private program director:

Providers may disclose information to other persons if authorized or required by one of the above, for the following activities:

- 1) Licensing, human rights, or certification or accreditation reviews;
- 2) Hearings, reviews, appeal or investigation under these regulations;

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What are the exceptions?, con't:

- 3) Evaluation of provider performance and individual outcomes (see § 37.2-508 and 37.2-608 of the Code of Virginia);
- 4) Statistical reporting;
- 5) Preauthorization, utilization reviews, financial and related administrative services reviews and audits; or
- 6) Similar oversight and review activities.

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What are the exceptions?, con't:

G) Preadmission screening, services and discharge planning:

Providers may disclose to the department, the CSB or to other providers information necessary to screen individuals for admission or to prepare and carry out a comprehensive individualized services or discharge plan (see §37.2-505 of the Code of Virginia).

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What are the exceptions?, con't:

H) Protection and Advocacy Agency:

Providers may disclose information to the P & A in accordance with that agency's legal authority under federal and state law.

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What are the exceptions?, con't:

I) Historical Research:

Providers may disclose information to persons engaging in bona fide historical research if all of the following conditions are met:

- 1) The Commissioner, or CSB/Program director has authorized the research;
- 2) The individual(s) who are the subject of the disclosure are deceased;

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What are the exceptions?, con't:

- 3) There are no known living persons permitted by law to authorize the disclosure; and
- 4) The disclosure would in no way reveal the identity of any person who is not the subject of the historical research.
- The regulations also lay out the requirements for a request for human research.

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What are the exceptions?, con't:

J) Protection of the public safety:

If an individual receiving services makes a specific threat to cause serious bodily injury or death to an identified or readily identifiable person and the provider reasonably believes the individual has the intent and ability to carry out the threat immediately or imminently, provider may disclose facts necessary to alleviate potential threat.

- “Duty to Warn”

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What are the exceptions?, con't:

K) Inspector General:

Providers may disclose to the Inspector General any individual services records and other information relevant to the provider's delivery of services.

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What are the exceptions?, con't:

L) Virginia Patient Level Data System:

Providers may disclose financial and services information to Virginia Health Information as required by law (see § 32.1-276.2 *et seq.*)

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What are the exceptions?, con't:

M) Psychotherapy notes: Providers shall obtain an individual's authorization for any disclosure of psychotherapy notes, except when disclosure is made:

1) For the provider's own training programs in which students, trainees, or practitioners in mental health are being taught under supervision to practice or improve their skills in group, joint, family, or individual counseling;

2) To defend the provider or its employees or staff against any accusation of wrongful conduct;

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What are the exceptions?, con't:

3) In discharge of the provider's duty, in accordance with § 54.1-2400.1 B of the Code of Virginia, to take precautions to protect third parties from violent behavior or other serious harm;

4) As required in the course of an investigation, audit, review, or proceeding regarding a provider's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity;
or

5) When otherwise required by law.

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What are the exceptions?, con't:

N) To a law enforcement official:

1) Pursuant to a search warrant or grand jury subpoena;

2) In response to their request, for the purpose of identifying or locating a suspect, fugitive, individual required to register pursuant to §9.1-901 of the Sex Offender and Crimes Against Minors Registry Act, material witness, or missing person, provided that only the following information is disclosed:

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What are the exceptions?, con't:

- (a) Name and address of the individual;
- (b) Date and place of birth of the individual;
- (c) Social security number of the individual;
- (d) Blood type of the individual;
- (e) Date and time of treatment received by the individual;
- (f) Date and time of death of the individual;
- (g) Description of distinguishing physical characteristics of the individual; and
- (h) Type of injury sustained by the individual;

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What are the exceptions?, con't:

- 3) Regarding the death of an individual for the purpose of alerting law enforcement of the death if the health care entity has a suspicion that such death may have resulted from criminal conduct; or
- 4) If the health care entity believes in good faith that the information disclosed constitutes evidence of a crime that occurred on its premises.

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What are the exceptions?, con't:

O) Other statutes or regulations:

Providers may disclose information to the extent required or permitted by any other state law or regulation.

- See also Va. Code 32.1-127.1:03 for a list of circumstances where records may be disclosed without authorization

Other Confidentiality Laws

- The Patient Health Records Privacy Act (Va. Code § 32.1-127.1:03)
- Federal Law on the Confidentiality of Substance Abuse Records (42 U.S.C. §290dd-2 and 42 C.F.R., Part 2)
- Numerous other scattered laws

Federal Substance Abuse Confidentiality Law

- Very restrictive
- Applies to all programs receiving federal assistance and that relate to substance abuse “education, prevention, training, treatment, rehabilitation, or research”
- Release only allowed with the patient’s prior *written* consent, unless one of the few listed exceptions apply

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- Upon request, the provider shall tell the individual or his authorized representative the sources of information contained in his services records and provide a **written listing of disclosures** of information made without authorization, except for disclosures:
 - a. To employees of the department, CSB, the provider, or other providers;
 - b. To carry out treatment, payment, or health care operations;
 - c. That are incidental or unintentional disclosures that occur as a by-product of engaging in health care communications and practices that are already permitted or required;

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- d. To an individual or his authorized representative;
- e. Pursuant to an authorization;
- f. For national security or intelligence purposes;
- g. To correctional institutions or law-enforcement officials or;
- h. That were made more than six years prior to the request.

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- The provider shall include the following information in the listing of disclosures of information provided to the individual or his authorized representative under subdivision 9 of this subsection:
 - a. The name of the person or organization that received the information and the address, if known;
 - b. A brief description of the information disclosed; and
 - c. A brief statement of the purpose for the disclosure or, in lieu of such a statement, a copy of the written request for disclosure.

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- If the provider makes multiple disclosures of information to the same person or entity for a single purpose, the provider shall include the following:
 - a. The information required in subdivision 10 of this subsection for the first disclosure made during the requested period;
 - b. The frequency, periodicity, or number of disclosures made during the period for which the individual is requesting information; and
 - c. The date of the last disclosure during that time period.

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- If the provider makes a disclosure to a social service or protective services agency about an individual whom the provider reasonably believes to be a victim of abuse or neglect, the provider is not required to inform the individual or his authorized representative of the disclosure if:
 - a. The provider, in the exercise of professional judgment, believes that informing the individual would place the individual at risk of serious harm; or
 - b. The provider would be informing the authorized representative, and the provider reasonably believes that the authorized representative is responsible for the abuse or neglect, and that informing such person would not be in the best interests of the individual.

Access to and amendment of services records. 12 VAC 35-115-90

- With respect to his own services record, each individual and his authorized representative has the right to:
 1. See, read, and get a copy of his own services record, except information that is privileged pursuant to § 8.01-581.17 of the Code of Virginia, and information compiled by the provider in reasonable anticipation of or for use in a civil, criminal, or administrative action or proceeding;
 2. Let certain other people see, read, or get a copy of his own services record if the individual is restricted by law from seeing, reading, or receiving a copy;

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3. Challenge, request to amend, or receive an explanation of anything in his services record; and
4. Let anyone who sees his record, regardless of whether amendments to the record have been made, know that the individual has tried to amend the record or explain his position and what happened as a result.

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- Except in the following circumstances, **minors** must have their parent's or guardian's permission before they can access their services record:
 1. A minor may access his services record without the permission of a parent only if the records pertain to treatment for sexually transmitted or contagious diseases, family planning or pregnancy, outpatient care, treatment or rehabilitation for substance use disorders, mental illness or emotional disturbance, or inpatient psychiatric hospitalization when a minor is 14 years of age or older and has consented to the admission.

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2. A parent may access his minor child's services record unless parental rights have been terminated, a court order provides otherwise, or the minor's treating physician or clinical psychologist has determined, in the exercise of professional judgment, that the disclosure to the parent would be reasonably likely to cause substantial harm to the minor or another person.

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- Providers shall tell each individual, and his authorized representative, how he can access and request amendment of his own services record.
- Providers shall permit each individual to see his services record when he requests it and to request amendments if necessary.

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- Access to all or a part of an individual's services record may be denied or limited only if a physician or a clinical psychologist involved in providing services to the individual:
 - talks to the individual,
 - examines the services record as a result of the individual's request for access, and

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- signs and puts in the services record permanently a written statement that he thinks access to the services record by the individual at this time would be reasonably likely to endanger the life or physical safety of the individual or another person or that the services record makes reference to a person other than a health care provider and the access requested would be reasonably likely to cause substantial harm to the referenced person.
- The physician or clinical psychologist must also tell the individual as much about his services record as he can without risking harm to the individual.

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- **If access is denied in whole or in part**, provider shall give the individual or his authorized representative a written statement that explains the basis for the denial, the individual's review rights, how he may exercise them, and how the individual may file a complaint with the provider or the United States DHHS, if applicable.
- If restrictions or time limits are placed on access, the individual shall be notified of the restrictions and time limits and conditions for their removal. These time limits and conditions also shall be specified in the services record.

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- If the individual requests a **review of denial of access**, the provider shall designate a physician or clinical psychologist who was not directly involved in the denial to review the decision to deny access.
- The physician or clinical psychologist must determine within a reasonable period of time whether or not to deny the access requested in accordance with the standard in subdivision 2 a of this subsection. The provider must promptly provide the individual notice of the physician's or psychologist's determination and provide or deny access in accordance with that determination.

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- At the individual's option, the individual may designate at his own expense a reviewing physician or clinical psychologist who was not directly involved in the denial to review the decision to deny access in accordance with the standard in subdivision 2 a of this subsection. If the individual chooses this option, the provider is not required to designate a physician or clinical psychologist to review the decision.

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- If the provider limits or refuses to let an individual see his services record, the provider shall also notify the advocate and tell the individual that he can ask to have a lawyer of his choice see his record. If the individual makes this request, the provider shall disclose the record to that lawyer (§ 8.01-413 of the Code of Virginia).

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- Providers shall, without charge, give individuals any help they may need to read and understand their services record and request amendments to it.

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- If an individual asks to challenge, amend, or explain any information contained in his services record, the provider shall investigate and file in the services record a written report concerning the individual's request.
 - a. If the report finds that the services record is incomplete, inaccurate, not pertinent, not timely, or not necessary, the provider shall:

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- 1) Either mark that part of the services record clearly to say so, or else remove that part of the services record and file it separately with an appropriate cross reference to indicate that the information was removed.;
- 2) Not disclose the original services record without separate specific authorization or legal authority (e.g., if compelled by subpoena or other court order).;
- 3) Obtain the individual's identification of and agreement to have the provider notify the relevant persons of the amendment; and
- 4) Promptly notify in writing all persons who have received the incorrect information and all persons identified by the individual that the services record has been corrected

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- If a request to amend the services record is denied, the provider shall give the individual a written statement containing the basis for the denial and notify the individual of his right to submit a statement of disagreement and how to submit such a statement.
- The provider shall also give the individual
 - (i) a statement that if a statement of disagreement is not submitted that the individual may request the provider to disclose the request for amendment and the denial with future disclosures of information and

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- (ii) a description of how the individual may complain to the provider or the Secretary of Health and Human Services, if applicable.

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- Upon request, the provider shall file in the services record the individual's statement explaining his position. If needed, the provider shall help the individual to write this statement. If a statement is filed, the provider shall:
 - 1) Give all persons who have copies of the record a copy of the individual's statement.
 - 2) Clearly note in any later disclosure of the record that it is disputed and include a copy of the statement with the disputed record.