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**Department of Health, Housing & Human Services (H3S) Policy**

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|-----------------------|--|------------------|-----------|
| Name of Policy        | Individuals Right to Access Protected Health Information Held in the Designated Record Set | Policy #         | HP-05     |
| Policy Owner Name     | Ed Johnson   | Effective Date   | 10/1/2021 |
| Policy Owner Position | Admin Services Manager, Sr. and H3S Privacy Coordinator (H3S Director’s Office)            | Approved Date    | 9/29/2021 |
| Approved By           | Rodney Cook, H3S Director  | Last Review Date | 4/09/2018 |
| Signature             | <i>(Approved within PowerDMS)</i>  | Next Review Date | 9/30/2023 |

**I. PURPOSE**

The purpose of this policy is to ensure that an individual’s request to access their own protected health information (PHI) is processed according to requirements outlined in HIPAA, the Cures Act, 42 C.F.R. Part 2 and Oregon law. For purposes of this policy PHI includes Electronic Health Information (EHI).

**II. AUTHORITY**

- 45 C.F.R. § 164.524
- 45 C.F.R. 170, 45 C.F.R. 171,
- 45 C.F.R. §§ 171.200-205, 45 C.F.R. §§ 171.300-303
- 42 C.F.R. § 493.3
- ORS 179.505, ORS 192.576

**III. GENERAL POLICY**

It is the policy of Clackamas County’s Department of H3S to set standards regarding requests for the access, exchange or use of an individual’s protected health information.

**IV. DEFINITIONS**

*Authorized person* means a person or entity who is authorized to request the access, use, or exchange of PHI, such as a patient, healthcare provider, health information network or exchange (HIN/HIE), health IT developer or certified health IT.

*Designated Record Set* means:

- 1) A group of records maintained by or for a covered entity that is:

- a. The medical records and billing records about individuals maintained by or for a covered health provider;
  - b. The enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or
  - c. Used, in whole or in part, by or for the covered entity to make decisions about individuals.
- 2) For purposes of this paragraph, the term record means any item, collection, or grouping of information that includes protected health information and is maintained, collected, used, or disseminated by or for a covered health entity.

*Electronic health information (EHI)* is the electronic PHI in a designated record set (as defined by HIPAA 45 CFR § 160.103) regardless of whether the records are used or maintained by or for a covered entity. EHI includes electronic records consulted by any covered healthcare provider or workforce member of such a covered healthcare provider so long as the provider has a direct treatment relationship with the individual.

EHI **does not** include:

- a) de-identified information as defined by HIPAA,
- b) information used to make internal quality improvements or analytics, or
- c) paper records.

*Exchange* means the ability for EHI to be transmitted between and among different technologies, systems, platforms, or networks.

*Information Blocking:* A practice that is likely to interfere with, prevent or materially discourage access, exchange or use of EHI, except as required by law or covered by an exception.

*Interfere* means to prevent, materially discourage or otherwise inhibit the access, use or exchange of EHI.

*Personal Representative* means a person authorized under State or other applicable law to act on behalf of the individual in making healthcare related decisions.

*Psychotherapy Notes* means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual's medical record.

Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

For definitions set forth by HIPAA and 45 CFR 160 and 164, see the Clackamas County HIPAA Privacy Policy.

## V. POLICY GUIDELINES

- a. Clackamas County recognizes the right of an of an individual, their personal representative or other authorized persons to have access to (i.e., inspect, exchange and/or obtain a copy of) a client's protected health information that is maintained in

the Designated Record Set for as long as the information is maintained in the Designated Record Set.

- b. Any individual receiving services from Clackamas County has the right to request access to inspect and obtain a copy of their information in the Division's Designated Record Set. All requests for access to PHI shall be forwarded to the HIM team at the appropriate email address: [HC-PCRecords@clackamas.us](mailto:HC-PCRecords@clackamas.us) for primary care and dental records, and [HC-BHRecords@clackamas.us](mailto:HC-BHRecords@clackamas.us) for behavioral health records.
- c. An individual's right to inspect PHI about the individual in a designated record set includes the right to view, take notes, take photographs, and use other personal resources to caption the information, except the County is not required to allow an individual to connect a personal device to the County's information systems, and may impose requirements to ensure that an individual records only PHI to which the individual has a right of access.
- d. An individual's right to access includes the right to direct the covered health care provider to transmit an electronic copy of their PHI to a third party. The request can be written or oral, and must be clear, conspicuous and specific. This right does not apply to psychotherapy notes and information compiled in reasonable anticipation of, or for use in, a civil, criminal or administrative action or proceeding. This right can also be denied for the reasons for denial of an individual's right to access set out below. A summary can be provided in lieu of the EHI per the conditions for summaries outlined below.
- e. Permissible uses and disclosures of PHI include disclosures to or requests by a health care provider for treatment, including for care coordination and case management activities, with respect to an individual.
- f. An individual has a right to access to inspect and obtain a copy of one's protected health information in the Designated Record Set **unless** disclosure is prohibited by law or the request falls within the following exceptions:
  - i. Psychotherapy notes.
  - ii. PHI or EHI compiled in anticipation of or for use in criminal, civil, or administrative proceeding.
  - iii. An inmate's right to copy PHI (but not the right to inspect) may be denied if copying would jeopardize the health, safety, security, custody, or rehabilitation of the inmate or others in the facility or those responsible for transporting the inmate.
  - iv. If the PHI were permissibly obtained in confidence from someone other than a healthcare provider and disclosure would be reasonably likely to reveal the source of the information.
  - v. Per 45 CFR 164.524 "An individual's access to protected health information that is contained in records that are subject to the Privacy Act, 5 U.S.C. 552a, may be denied, if the denial of access under the Privacy Act would meet the requirements of that law."
  - vi. To Prevent Harm to a Patient or Another Person.  
For this exemption to apply the provider must:

- a) hold a “reasonable belief” that providing access is reasonably likely to endanger the life or physical safety of the client or another person;
- b) The practice must be no broader than necessary; and
- c) The risk of harm must:
  - 1) Be determined on an individualized basis in the exercise of professional judgment by a licensed healthcare professional who has a current or prior clinician-patient relationship with the patient whose EHI is affected by the determination; or
  - 2) Arise from data that is known or reasonably suspected to be misidentified or mismatched, corrupt due to technical failure, or erroneous for another reason.
- d) Type of Harm.

The type of harm must be one that could serve as grounds for a covered entity to deny access to an individual’s PHI under:

- (1) The practice is implemented pursuant to a determination of risk of harm consistent with paragraph (c)(1) of this section, and a determination is made that access is reasonably likely to endanger the life or physical safety of the individual or another person. See 45 CFR § 164.524(3)(i);
  - (2) The practice is implemented pursuant to an individualized determination of risk of harm consistent with paragraph (c)(1) of this section, and a determination is made that the PHI makes reference to another person and access is reasonably likely to endanger the life or physical safety of that person. See 45 CFR § 164.524(a)(3)(ii); or
  - (3) The practice is implemented pursuant to an individualized determination of risk of harm consistent with paragraph (c)(1) of this section, and a determination is made that where a request is made by the individual’s personal representative is reasonably likely to cause a risk of harm to the individual or another person. See 45 CFR § 164.524(a)(3)(iii).
- e) Harm determination and patient right to request review.
    - 1) Where the risk of harm is consistent with paragraph (c)(1) of this section, the provider must implement the practice in a manner consistent with any rights the individual patient whose EHI is affected may have under 45 § 164.524(a)(4), or any Federal, State, or tribal law, to have the determination reviewed and potentially reversed.
    - 2) The healthcare provider making the determination of harm must document their decision based on the facts and circumstances

known or reasonably believed at the time the determination is made, and the provider shall notify the individual of the provider's decision.

- 3) Review of a request for reversal shall be done by a healthcare provider holding the appropriate license for the subject matter of the care. The decision to reverse or uphold the determination of harm shall be documented in the patient's electronic health record, and communicated to the requestor.

vii. To Protect an Individual's Privacy

A provider's practice of not fulfilling a request to access, exchange or use EHI in order to protect an individual's privacy will not be considered information blocking if the practice meets all of the requirements of at least one of the sub-exceptions below.

1. State or Federal law requires one or more preconditions for providing access, exchange or use of EHI that have not been satisfied, such as a lack of consent, inability to verify the identity or authority of the person requesting access to EHI; and
  - A. The provider must make reasonable efforts to present a Right of Access form or assist the person in completing the form to aid disclosure;
  - B. The provider cannot improperly encourage or induce patient to withhold the ROI;
  - C. The provider should document the criteria used to determine when a precondition is satisfied or not met and the reason why the criteria were not met.
2. The patient requests nondisclosure (see 45 CFR § 171.202 for elements);
3. Privacy law requires nondisclosure (e.g. 42 CFR Part 2 or state law);
4. Denial of a patient's request for their EHI in the circumstances in HIPAA, 45 CFR § 164.524(a)(1) and (2); or
5. If you are an Health IT developer not covered by HIPAA

See 45 CFR § 171.202

viii. To Protect the Security of EHI.

It is not information blocking to interfere with the access, exchange or use of EHI to protect the security of EHI, provided these conditions are met:

- A. The practice is directly related to safeguarding the confidentiality, integrity and availability of EHI;
- B. The practice is tailored to specific security risks and implemented in a consistent and non-discriminatory manner; and
- C. The practice implements a qualifying organizational security policy or security determination.

See 45 CFR § 171.203.

ix. Infeasibility.

The provider must document in writing when it is infeasible to fulfill a request because:

- A. There are uncontrollable events, including natural or human-made disaster, public health emergency, public safety incident, war, terrorist attack, civil insurrection, strike or other labor unrest, telecommunication or internet service interruption, or act of military, civil or regulatory authority.
- B. The EHI cannot be unambiguously segmented due to an individual's preference or because the EHI cannot be made available by law (e.g. under Part 2); or
- C. The EHI may be withheld under 45 CFR Section 171.201.
- D. A written response to the requestor must be sent within ten (10) business days of the request stating why the request is infeasible.

x. Where Health IT is made temporarily unavailable.

- A. It is not information blocking if EHI is temporarily unavailable:
  - 1) To do maintenance and improvements;
  - 2) To assure a level of performance;
  - 3) In response to a risk of harm to a patient or another person (you must comply with the requirements of 45 CFR § 171.201); or
  - 4) In response to a security risk to EHI (you must comply with the requirements of 45 CFR 171.203.)
- B. If an exception to a request for access, use or exchange is based on the Security or Health IT exception contact Technology Services for further guidance. See 45 CFR § 171.205.

xi. The provider limits the content of their response or the manner in which they fulfill a request if certain conditions are met.

A. Content.

- 1. Up to October 6, 2022, the EHI identified by the data elements represented in the USCDI Standard adopted in § 170.213.
- 2. On and after October 6, 2022, all EHI as defined in § 171.102.

B. Manner.

- 1. The provider must fulfill a request in any manner requested unless technically unable to fulfill the request or the provider cannot reach agreeable terms with the requestor to fulfill the request. If the request is fulfilled in any manner requested, the fees charged are not subject to the restrictions in § 171.302.
- 2. If the provider cannot fulfill a request in any manner requested as set out in paragraph 1, the actor must fulfill the request as follows:

- A. The provider must fulfill the request without unnecessary delay in the following order of priority:
  - i. Using technology certified to standards adopted in Part 170 that is specified by the requestor;

- ii. Using content and transport standards specified by the requestor and published by:
  - 1) The Federal Government; or
  - 2) A standards developing organization accredited by the American National Standards Institute.
- iii. Using an alternative machine-readable format, including the means to interpret the EHI, agreed upon with the requestor.
  - B. Any fees charged by the provider to fulfill the request must satisfy the exception in § 171.302.
- 3. Any fees charged for fulfilling a request in a different manner than requested must satisfy 45 CFR § 171.302.

See 45 CFR § 171.301.

## VI. PROCESS AND PROCEDURES

- a. Verify the authority of the requestor. Unreasonable verification measures shall not be imposed. An unreasonable measure is one that causes an individual to expend unnecessary effort or resources when a less burdensome verification measure is practicable for the covered entity, e.g. requiring proof of identity in person, requiring notarization of the individual's signature on a written request to exercise the individual's right to access their records.
- b. Access Request Form: Each Division may provide clients with an Access Request Form notifying clients that except in certain circumstances (see sections IV & V) they have the right to access their PHI maintained in the Division's Designated Record Set. A client must designate third party recipients in writing.
- c. Requests for Access in Writing: A request from a client or their representative to inspect or to obtain a copy of their Protected Health Information (a "Request") may be oral or in writing. If a client makes an oral Request, the Division workforce shall document the request and response in the client's record. Division workforce can offer use of the request form and offer to help the client complete the form.
- d. Assistance with MyChart: Clients may be offered or provided with information and instruction on how to sign up for OCHIN Epic MyChart. No client will be refused access to their own PHI if they refuse to sign up for MyChart (except in the circumstances discussed in sections IV and V.)
- e. PHI held by Business Associates: A business associate is required to disclose PHI to the covered entity so the covered entity can meet its access obligations. However, the business associate must provide access directly to the individual or their designee if it is required by the Business Associate Agreement with the County.
- f. Social Security Benefits: In the case of an individual appealing the denial of Social Security disability benefits, the County shall upon request provide one copy of individually identifiable health information free of charge to the individual or the individual's personal representative. At the election of the individual or representative, the individually identifiable health information shall be provided in paper or electronic format. (ORS 192.576)

g. Review Procedures:

- i. Appointment of Reviewing Official: The H3S Privacy Coordinator shall be responsible for assuring a representative of the Division is appointed to serve as the Reviewing Official for Denials of Access Requests. The Reviewing Official shall be a licensed health care professional and shall not have participated in the original decision to deny access.
- ii. Referral to Reviewing Official: The H3S Privacy Coordinator shall promptly refer a Request for review to the Reviewing Official.
- iii. Determination by the Reviewing Official: Within a reasonable time of receiving the Request for review, the Reviewing Official must determine whether or not to uphold the previous decision to deny based on these procedures and provide the client with written notice of the Reviewing Official's decision, which shall be final.
- iv. If the denial is based on an infeasibility to provide EHI, as defined in 45 CFR § 171.204, the healthcare provider must respond to the request for information within five business days of receipt of the request explaining why it is infeasible to provide the EHI.

h. Action on a Request:

- i. Access must be provided as soon as practicable, but in no case later than 5 working day after receipt of the request. Divisions will prioritize urgent or other high priority requests, e.g. requests relating to the health and safety of the individual or another person.
- ii. The individual, personal representative or authorized person shall have the right to timely access to any written accounts. A public provider as defined in ORS 179.505(1)(g), shall upon written request disclose to the individual or the personal representative PHI within a reasonable time but not to exceed (5) working days.
- iii. Types of Action on a Request: The Division may take one of the following actions on a request.
  1. Determine that the client has no right to access as set forth in Section V(d). "Policy Guidelines" above.
  2. Provide access as described in Section VI(e)(iv). "Access Procedures" below.
  3. Deny the Request in writing without an opportunity for review as set forth in Section VI (d)(v). "Denial of Access Without Opportunity for Review" below (unless denial is based on infeasibility, see below), or
  4. Deny the Request in writing and give the client an opportunity to obtain a review of the denial as set forth in Section VI (e)(vi), "Denial of Access With Opportunity for Review" below.
- iv. Access Procedures: If the Division provides access to the client (in whole or in part).



1. Division workforce will discuss with the client the scope, format and other aspects of the Request as necessary to facilitate timely access, but this discussion does not extend the time allowed to provide access;
2. Inspection Request. If the client requests to inspect their record without copies made, the Division workforce shall notify the client of the decision and offer a date and location to provide the access requested. The client maintains their right to request a copy of the information after inspection.
3. H3S' responsibility to provide access extends not only to PHI in its own possession, but also to PHI that is a Designated Record Set of its business associate. However, if the Business Associate Agreement with the County requires it, the business associate must provide access to the client directly.
4. Summary Request. If the client requests a summary of the PHI requested, in lieu of providing an opportunity to inspect or obtain a copy of the full Designated Record Set, the client must agree in advance to any provisions of the summary, any fees imposed by the Division for such summary and to any extended time needed by the Division to produce the summary. See Section VI. e below. The Division must inform an individual to whom it offers to provide a summary of the individual's right to obtain a copy of the requested PHI if the individual does not agree to a summary, unless the Division is denying the individual's request for a copy, but the Division must follow the denial procedures.
5. If the Division approves the Request and would like to provide an explanation to accompany the information being released to the client, the Division may do so, but only if the client agrees in advance to any provisions of the explanation and to any fees imposed by the Division for such documents. See Section VI. e. below.
6. If the same PHI is maintained in more than one Designated Record Set or at more than one location, the Division need only produce the information once per Request and only from the Division's own Designated Record Set. Division workforce shall assist the client in information/direction to any Division and/or Department for additional Requests for Access.
7. Format. The Division shall provide the requested PHI in the electronic or paper form or format requested, provided that the information is readily producible in such form or format. Whether a request is readily producible depends on cost, volume and time. If unavailable, the Division shall produce a copy of the information or other form that is mutually agreed upon.
8. If the client requests that a copy of the Designated Record Set be mailed, the Division shall do so. If the client requests to inspect information that is maintained electronically, the Division shall provide a copy in the format requested or mutually agreed.

9. Copies of records may be provided to a client or a third party that the client identifies in an electronic or paper format depending on the request and the technology in which the records are maintained.
- v. Denial of Access Without Opportunity for Review: The Division may deny a Request without providing the client or requestor a right to have the denial reviewed under the following circumstances:
1. If the requested information falls under one of the exceptions to the right of access listed in Section V.C. "Policy Guidelines" above.
  2. If an inmate of a Correctional Institution makes a Request, the Division is acting under the direction of a Correctional Institution, and the inmate's Request would jeopardize the health, safety, security, custody, or rehabilitation of the inmates or the safety of any official, employee or other person at the institution;
  3. If the requested information has been obtained by the Division in the course of research that includes treatment of the research participants, the client's right to access this information may be temporarily suspended for as long as the research is in progress; provided that: 1) the client has agreed to the denial of access when consenting to participate in the research that includes treatment; and 2) the Division has informed the client that their right to access the information will be reinstated once the research is completed.
  4. If the requested information is subject to the Privacy Act (5 USC § 552a) and denial to access is permitted under the Privacy Act;
  5. If the Division obtained the requested information from someone other than a health care provider under a promise of confidentiality and such access would be reasonably likely to reveal the source of the information.
- vi. Denial of Access with Opportunity for Review:
- a. The Division may deny a Request in any of the following circumstances provided the Division affords the client a right to have the denial reviewed by a designated licensed health care professional who has not participated in the original decision to deny access:
    1. A licensed health care professional has determined, in the exercise of professional judgment, that the access is reasonably likely to endanger the life or physical safety of the client or another person;
    2. The requested information contains a reference to another person (who is not a health care provider) and a licensed health care professional has determined, in the exercise of professional judgment, that the access is reasonably likely to cause substantial harm to such other person.
    3. The Request is made by the client's Personal Representative and a licensed health care professional has determined that providing the requested access is reasonably likely to cause substantial harm to the client or another person.

4. The denial is based on the infeasibility of producing EHI under the circumstances set out above and in 45 CFR § 171.204.
- b. The reviewing official must determine, within 5 business days, whether or not to deny the access. The Division must promptly provide written notice to the individual of the reviewing official's determination.
  - vii. Procedure in Case of Denial: If the Division denies access in whole or in part as outlined above, the Division shall, to the extent possible, give the client access to any other information requested after excluding the PHI to which the Division had grounds to deny access.
  - viii. Notice of Denial: The licensed health care professional shall prepare a Denial of Access Form with the reason for denial of access to the client's record containing PHI and include:
    1. Complaint procedures for the Division,
    2. Complaint procedures for the Office for Civil Rights of the U. S. Department of Health and Human Services,
    3. Information describing the client's right to a review of the denial and how the client may exercise this right; and
    4. Contact information for the Reviewing Official (see below) for Denials of Access. If the Division denies a Request in whole or in part, the Privacy Official for the Division or designee shall furnish the client with the completed Denial of Access form.
  - ix. Protected Health Information Not Maintained by the Division: If the Division does not maintain the PHI requested by the client, but the Division knows where the information is maintained, the Privacy Official for the Division or designee must inform the client where to direct a Request for Access.
- i. Fees:
    - i. Notice of Fees: If fees are imposed the Division must provide advance notice of such fees on its website and make the fee schedule available to individuals at the point of service, and upon request.
    - a. The fee schedule must specify:
      - (1) all types of access to PHI available free of charge; and
      - (2) standard fees for:
        - a. Copies of PHI provided to individuals under Section 164.524(a), with respect to all readily producible electronic and non-electronic forms and formats for such copies;
        - b. Copies of PHI in an electronic health record and directed to third parties designated by the individual under Section 164.524(d), with respect to any available electronic forms and formats for such copies;

- c. Copies of PHI sent to third parties with the individual's valid authorization under Section 164.508, with respect to any available form and formats for such copies.
  - b. Upon request, the Division must provide an individualized estimate of the approximate fee that may be imposed for providing a copy of the requested PHI for any type of request covered by the fee schedule.
  - c. Upon request, the Division must provide an individual with an itemized list of the specific charges for labor, supplies, and postage that constitute the total fee charged for any type of request covered by the fee schedule.
  - d. A request for an estimate or list of charges shall not automatically extend the time allowed for the Division to provide copies of PHI.
  - e. If the information is being provided in a format different from the requested format, the fees are limited under 45 C.F.R. § 171.302.
- ii. Categories of Fees: A Division may charge a client or requesting individual the following reasonable, cost-based fees associated with obtaining access to their PHI, but may not deny access due to inability to pay fees associated with access. Any fees collected by the Division shall be recorded as revenue to that Division.
  - a. Copying: Fees may include the labor and supply costs (for electronic or paper form), paper costs;
  - b. Mailing: Fees may include copying costs and the cost of postage;
  - c. Electronic: Fees may include cost of computer disc. Fees for electronic transmission of ePHI may not be charged.
  - d. Summary or explanation: Fees may include the costs of preparing a summary or explanation if the individual agrees to a summary or explanation.
  - e. No Handling Fees: The Division shall not charge any fees for retrieving or handling information, an inspection of records, or for processing the Request.
  - f. Preparation of Summary or Explanation: The Division shall charge by the hour for the preparation of an explanation or summary of the information requested by the client, if
    - 1. The client requests such explanation and,
    - 2. The client agrees to the fees in advance of the preparation.
- j. Documentation:
  - i. Communication with Clients: The Divisions shall maintain Access Request Forms, Denial of Access Forms and any other written communications to or from a client or requestor regarding their right to access PHI in the medical record for the client. All documentation associated with Requests shall be

retained for at least ten (10) years from the last date of service, the termination of any litigation, or audit involving the record.

- ii. Designations: The Division shall document, in written or electronic form, the Designated Record Sets (HP-18 Designated Record Set) that are subject to access. The H3S Privacy Coordinator shall retain such documentation for ten (10) years from the date of its creation, or the date when it was last in effect whichever is later.

## **VII. ACCESS TO POLICY**

This policy will be available in Clackamas County's policy management system (PowerDMS).

## **VIII. ADDENDA**

### References:

- HP-18 Designated Record Set
- HP-20 Documentation and Retention of PHI
- Clackamas County HIPAA Privacy Policy

Links (Title & URL): [County HIPAA Policy](#)

### Attachments:

- Request for Access Form

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