



**MONTANA STATE HOSPITAL
POLICY AND PROCEDURE**

**ACCESS TO PATIENT RECORDS
BY PROTECTION AND ADVOCACY SYSTEM**

Effective Date: April 21, 2016

Policy: HI-10

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- I. PURPOSE:** To establish procedures for providing access to patient records by employees and authorized agents of a designated protection and advocacy system as required under state and federal law.
- II. POLICY:**
- A. Montana State Hospital (MSH) will meet requirements of state and federal statutes permitting the protection and advocacy system for Montana under 42 USC 10805, 42 CFR § 51.41, and § 53-21-169 (2)(d), MCA, to have access to all records of:
1. An individual who is a client of the protection and advocacy system, if authorized by that individual or the legal guardian, conservator or other legal representative of the individual.
 2. An individual, including an individual who has died or whose whereabouts is unknown, to whom all of the following conditions apply:
 - a) The individual, due to his or her mental or physical condition, is unable to authorize the protection and advocacy system to have access.
 - b) The individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State or one of its political subdivisions; and
 - c) A complaint or report has been received and the protection and advocacy system has determined that there is probable cause to believe that the individual has been or may be subject to abuse or neglect.
 3. An individual who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint or report has been received by the protection and advocacy system and with respect to whom the system has determined that there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, whenever all of the following conditions exists:
 - a) The system has made a good faith effort to contact the representative upon prompt receipt of the legal guardian, conservator, or other legal representative's name and address;
 - b) The system has made a good faith effort to offer assistance to the legal guardian, conservator, or other legal representative to resolve the situation; and
 - c) The legal guardian, conservator, or other legal representative has failed or refused to act on behalf of the individual.

- B. MSH will permit the protection and advocacy system for Montana to have access to Quality Assurance Data which are also “records of an individual” under the same circumstances.

III. DEFINITIONS:

- A. Protection and advocacy system or “system”: The agency designated by the Governor to provide mental health protection and advocacy under provisions of 42 U.S.C. 10801 through 10851, and § 53-21-169, MCA.
- B. Staff and authorized agents: Protection and advocacy system employees with appropriate agency-issued identification and any other person for whom the protection and advocacy system has provided written designation as an authorized agent of the system.
- C. Abuse: For the purposes of this policy, “abuse” has the meaning given to it in 42 CFR 52.10, which is, “any act or failure to act by an employee of a facility rendering care or treatment which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with mental illness, and includes but is not limited to acts such as: rape or sexual assault; striking; the use of excessive force when placing an individual with mental illness in bodily restraints; the use of bodily or chemical restraints which is not in compliance with Federal and State laws and regulations; verbal, nonverbal, mental and emotional harassment; and any other practice which is likely to cause immediate physical or psychological harm or result in long-term harm if such practices continue.”
- D. Neglect: For the purposes of this policy, “neglect” has the meaning assigned to it by 42 CFR 52.10, which is “a negligent act or omission by an individual responsible for providing services in a facility rendering care or treatment which caused or may have caused injury or death to an individual with mental illness or which placed an individual with mental illness at risk of injury or death, and includes, but is not limited to, acts or omissions such as failure to: establish or carry out an appropriate individual program or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care; and the failure to provide a safe environment which also includes failure to maintain adequate numbers of appropriately trained staff.”
- E. Access: The opportunity for employees and authorized agents of the protection and advocacy system to personally inspect and copy records while physically present at MSH.
- F. HIPAA: Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d, et seq. U.S. Department of Health and Human Services privacy regulations under HIPAA regarding health information are published at 45 CFR Part 164.
- G. SAMHSA: Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. SAMHSA’s privacy regulations under the Drug Abuse Prevention, Treatment, and Rehabilitation Act are published under CFR Part 2.

- H. Patient Records: Information and individual records maintained by MSH, whether written or in another medium, draft or final, including handwritten notes, electronic files, and photographs or video or audio tape records.

The term includes information and individual records obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, financial records, and reports prepared or received by a member of the staff of a facility or program rendering care or treatment, discharge planning records, and incident reports or occurrences reports, and health care information that is used in whole or in part to make decisions about an individual who is the subject of the health care information. It does not include Quality Assurance Data.

- I. Quality Assurance Data: Written reports, notes, or records created by or at the request of a utilization review, peer review, medical ethics review, quality assurance, or quality improvement committee of MSH that are used exclusively in connection with quality assessment or improvement activities, including the professional training, supervision, or discipline of a medical practitioner by MSH.

The term includes reports, notes or records created pursuant to MSH Policy TX-17, "Allegations of Abuse or Neglect," including supporting information that was relied upon in creating a report, information and records used or reviewed in preparing reports of abuse, neglect or injury such as records which describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings. It does not include incident reports or health care information that is used in whole or in part to make decisions about an individual who is the subject of the health care information.

IV. RESPONSIBILITIES:

- A. Protection and advocacy system: Provide MSH Health Information Department with a signed authorization and supporting documents as described below.
- B. Health Information Department: Verify the protection and advocacy system authorization meets requirements below. Document the disclosure as required by MSH policy HI-18, "HIPAA Documentation and Record Retention".

V. PROCEDURE:*

- A. The Director of the Health Information Department or designee will authorize protection and advocacy system to access patient records or Quality Assurance Data upon receipt of appropriate documentation, as follows:
1. In the circumstances described above in Part II.A.1, a valid written authorization signed by the patient or legal guardian, conservator, or other legal representative which complies with applicable HIPAA and/or SAMHSA regulations.

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2. In the circumstances described above in Part II.A.2, a valid written authorization signed by an employee or authorized agent of the protection and advocacy system which complies with applicable HIPAA and/or SAMHSA regulations, with attached documentation that must include either:
 - a) A copy of the complaint or report alleging that such individual has been subjected to abuse or neglect; or
 - b) A written statement from an employee or authorized agent of a protection and advocacy system describing, with sufficient facts so the MSH may conduct its own investigation if needed, the system's probable cause to believe that such individual has been subject to abuse or neglect.

3. In the circumstances described above in Part II.A.3, a valid written authorization signed by an employee or authorized agent of a protection and advocacy system which complies with applicable HIPAA and/or SAMHSA regulations, with attached documentation that must include:
 - a) A copy of the complaint or report alleging that the health or safety of the individual is in serious and immediate jeopardy, or
 - b) A written statement from an employee or authorized agent of the protection and advocacy system describing, with sufficient facts so MSH may conduct its own investigation if needed, the system's probable cause to believe that health or safety of the individual is in serious and immediate jeopardy; and
 - c) In addition to a) or b), a written statement from an employee or authorized agent of a protection and advocacy system describing the system's good faith efforts to contact the patient's legal guardian, conservator, or other legal representative and offer assistance to resolve the situation, and the results of that contact indicating the failure or refusal of the legal guardian, conservator, or other legal representative to act on behalf of the individual, including a copy of any written communication from the guardian, conservator, or other legal representative indicating failure or refusal to act on behalf of the patient.

* This procedure is MSH's preferred method of implementing this policy.

- B. Health Information Department staff will identify and provide contact information of the legal guardian, conservator, or other legal representative of a patient upon written request of an employee or authorized agent of the protection and advocacy system when the request is accompanied by either:
 1. A copy of the complaint or report alleging that the individual has been subjected to abuse or neglect, or that the health or safety of the individual is in serious and immediate jeopardy, or
 2. A written statement from an employee or authorized agent of the protection and advocacy system describing the probable cause to believe that the individual has been subjected to abuse or neglect or the health or safety of the individual is in serious and immediate jeopardy.

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- C. When MSH staff receive a written request for access to patient records or Quality Assurance Data, Health Information Department staff will promptly:
1. Acknowledge receipt of the request by e-mail no later than one working day after request is received. (If the protection and advocacy system does not timely receive the acknowledgement, it is strongly urged that the protection and advocacy system contact the Health Information Department to confirm receipt of the request);
 2. Review the request and confirm that the requirements of Part II are met;
 3. Review the records or data to determine whether they are complete and accurate, and whether they contain Protected Health Information of another patient, or information which is otherwise subject to a right of privacy;
 4. Inform the protection and advocacy system in writing if access will be denied, providing the reason for denial, and in the case of a denial for alleged lack of authorization, provide the name, address and telephone number of the legal guardian, conservator, or other legal representative of the individual; and
 5. Inform the protection and advocacy system in writing if access will be delayed, providing the reason for delay and identify a date at which the records or data will be available for inspection and copying.
- D. If the requirements of Part II are met, Health Information Department staff will promptly, or by the date identified as the date at which the records or data will be available, ensure that the requested records are available for inspection and copying by the protection and advocacy system in the Health Information Department on the specified date.
- E. Copying of records by protection and advocacy system. Upon inspection of patient records or Quality Assurance Data, the protection and advocacy system may copy the records using their own equipment. Hospital documents may not be removed from the location at which they are inspected.

OR

Upon inspection of clinical records or Quality Assurance Data, the protection and advocacy system may indicate which records it wants copied. MSH staff will make copies of the requested documents as time and staffing resources reasonably permit.

OR

The protection and advocacy staff may submit a written request for MSH staff to make copies apart from their statutory right to access the records.

In all cases where MSH staff makes copies of records, MSH staff will calculate the cost of duplication and postage that are associated with the request, and inform the protection and advocacy system in writing the amount, pursuant to Policy HI-02, "Billing Charges for Copies of Health Information". MSH staff may estimate the time for duplication, and if it cannot be completed immediately, arrange for mailing or pickup of copies by protection and advocacy system staff. MSH will bill the protection and advocacy system on a monthly basis.

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- F. Quality Assurance Data is confidential and may be used only for the purposes described in §§ 50-16-203, -204, and -205, MCA. It is not discoverable or admissible in evidence in any judicial proceeding. A protection and advocacy system is required by federal law to maintain the same confidentiality of records as the facility that provides access to facility records or data. Each page of Quality Assurance Data will be clearly marked as such.
- G. Except as otherwise specifically provided in this policy, all MSH policies regarding patient records apply to requests for access by a protection and advocacy system. These include but are not limited to MSH Policy HI-02, "Billing Charges for Photocopies of Health Information," MSH Policy HI-06, "Guidelines for Release of Information," and MSH Policy HI-07, "Medical Records: Access and Security".
- H. Questions or problems regarding access to patient records are to be referred to MSH's administrative staff.
- VI. REFERENCES:** Sections 50-16-201 through 205, 53-21-142, 53-21-166, and 53-21-169, Montana Code Annotated; 42 USC § 10805; 42 CFR § 51.41.
- VII. COLLABORATED WITH:** Hospital Administrator, Director of Nursing, Director of Health Information, DPHHS Office of Legal Affairs.
- VIII. RESCISSIONS:** HI-10, *Montana Advocacy Program Access to Patient Records* dated November 16, 2012; HI-10, *Montana Advocacy Program Access to Patient Records* dated October 26, 2009; HI-10, *Montana Advocacy Program Access to Patient Records* dated September 30, 2006; HI-10, *Montana Advocacy Program Access to Patient Records* dated September 1, 2002; HI-10, *Montana Advocacy Program Access to Patient Records* dated February 14, 2000; HOPP HI-03-96-N, *Montana Advocacy Program – Access to Patient Records* dated 1966.
- IX. DISTRIBUTION:** All hospital policy manuals.
- X. ANNUAL REVIEW AND AUTHORIZATION:** This policy is subject to annual review and authorization for use by either the Administrator or the Medical Director with written documentation of the review per ARM § 37-106-330.
- XI. FOLLOW-UP RESPONSIBILITY:** Director of Health Information.
- XII. ATTACHMENTS:** None

Signature:

John W. Glueckert
Hospital Administrator