

Overdose Fatality Review Teams: Behavioral Health Records

How can we obtain behavioral health records after a person dies?

Response

Behavioral health records fall into one of two categories:

1. Behavioral health records that do not contain Part 2 records, such as records about treatment for depression or anxiety.
2. Behavioral health records that do include Part 2 records.

Behavioral health records that DO NOT contain Part 2 records are treated the same as other medical records. Medical records containing protected health information (PHI) are safeguarded by the Health Insurance Portability and Accountability Act (HIPAA). Therefore, in order to obtain a decedent's behavioral health records from a HIPAA-covered entity when such records do not contain Part 2 records but do contain PHI, an OFR team must rely on one of the following options:

- State statute, state regulation, or local ordinance that specifically allows an OFR team to receive the information.
- State statute, state regulation, or local ordinance that allows a public health authority to access the records for certain purposes (such as health surveillance or death investigations).
- Authorization form signed by the decedent's authorized personal representative.

The disclosure of behavioral health records that DO contain Part 2 records is covered by 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2. Under these laws and regulations, OFR teams have only two options to attempt to obtain these records. These options are:

- Relying on a state law requiring the collection of death or other vital statistics or permitting inquiry into the cause of death that allows Part 2 records to be shared with an OFR team.
- Obtaining consent from the decedent's executor or personal representative, or where no such person is appointed, his or her next of kin.

PRACTICE TIP

For a discussion of how an OFR team can determine the best option for obtaining medical records that do not contain Part 2 records, please refer to the Overdose Fatality Review: Medical Records fact sheet.

Additional Discussion

Behavioral health treatment providers—whether they provide mental health treatment, substance use disorder (SUD) treatment, or both—are HIPAA-covered entities. Accordingly, the disclosure of behavioral health records that do not contain Part 2 records is covered by HIPAA, while the disclosure of behavioral health records that do contain Part 2 records is covered by 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2.¹ In both cases, the confidentiality provisions remain in place after a person dies. In the case of HIPAA, the protections remain in place for 50 years. Under 42 C.F.R. Part 2, the protections do not expire.²

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In the case of a deceased patient, OFR teams are limited in their access to patient information by 42 C.F.R. § 2.15. This regulation provides that patient identifying information can only be released: (1) pursuant to a state law “requiring the collection of death or other vital statistics or permitting inquiry into the cause of death;” or (2) with the consent of (a) the decedent’s executor, administrator, or other personal representative appointed under applicable state law; (b) the patient’s spouse, if there is no state law appointment of (a); or (c) any responsible member of the patient’s family, if there is no spouse.³ As a result of those limitations, the most expedient way for an OFR team to obtain this information is for the team to reach out to the family of the decedent and obtain a signed consent form (subject to 42 C.F.R. § 2.31) from the person who meets the requirement of (2) above.

Finally, it should be noted that, in a few very limited circumstances, 42 C.F.R. Part 2 allows for the disclosure of Part 2 records without patient consent. These avenues are unlikely to apply in the case of OFR teams, however.⁴

Definitions

Behavioral health records: Medical records that address mental health and/or SUD.

HIPAA-covered entity [45 C.F.R. § 160.103]: Health plan, health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

Part 2 program [42 C.F.R. §§ 2.11 and 2.12(b)]: Individual or entity that holds itself out as providing, and actually provides, assessment, treatment, or referral to treatment for SUD and receives federal assistance (as defined by regulation). Most SUD treatment providers qualify as Part 2 programs.

Part 2 records: Behavioral health records that include information about SUD treatment provided by a Part 2 program, in particular, records that identify a person as having, having had, or having been referred for treatment of an SUD.

PHI [45 C.F.R. § 160.103]: Subject to a few exceptions, PHI is individually identifiable health information that is maintained or transmitted in any form or media. In the context of HIPAA-protected information, PHI does not include information about a person deceased for more than 50 years.

¹ There is currently a disparity between 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2 concerning the ways in which patient identifying information may be accessed and shared, with 42 U.S.C. § 290dd-2 being more in line with HIPAA. This disparity results from changes made to 42 U.S.C. § 290dd-2 by the Coronavirus Aid, Relief, and Economic Security (CARES) Act enacted on March 27, 2020. However, those differences are not at issue in this scenario as 42 U.S.C. § 290dd-2 still requires initial patient consent for the release of information.

² Under HIPAA, the term “protected health information” excludes personally identifiable information about a person deceased for more than 50 years. (45 C.F.R. 160.103). There is no similar limitation in 42 C.F.R. Part 2.

³ 42 C.F.R. § 2.15(b)(2) (West 2020).

⁴ These three instances are medical emergencies, research, and audit/evaluation. (42 C.F.R. §§ 2.51 to 2.53). The medical emergency exception only allows disclosure of patient identifying information to medical personnel during the course of a bona fide medical emergency where a patient cannot give consent to the release of information (see 42 C.F.R. § 2.51). Patient identifying information can be released for the purposes of scientific research if, and only if, the individual or entity conducting the research meets certain specific requirements, which an OFR team would most likely be unable to meet (see 42 C.F.R. § 2.52 for more information on those requirements). Finally, SUD treatment records may be disclosed during the course of an audit or evaluation of the Part 2 program that provided the treatment (see 42 C.F.R. § 2.53). An OFR team would not qualify as an auditor or evaluator under this rule.