

CHAPTER 41

RECORD CONFIDENTIALITY AND ACCESS
TO CLIENT AND AGENCY RECORDS

Authority

N.J.S.A. 9:6-8.10a, 30:1-12, 30:4-24.3, 30:6D-4(f) and 47:1A-1 et seq.;
34 CFR 361.38, 42 CFR Part 2, and 45 CFR Parts 160 and 164;
and 42 U.S.C. §§ 3601 et seq. and 42 U.S.C. §§ 15001 et seq.

Source and Effective Date

R.2004 d.320, effective August 16, 2004.
See: 36 N.J.R. 1906(a), 36 N.J.R. 3920(a).

Chapter Expiration Date

Pursuant to Executive Order No. 1(2010), the chapter expiration date is extended from February 12, 2010 until the completion of the review of administrative regulations and rules by the Red Tape Review Group, and until such time as the extended regulation or rule is readopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

Chapter Historical Note

Chapter 41, Administration, was adopted as R.1989 d.134, effective March 20, 1989. See: 20 N.J.R. 2435(a), 21 N.J.R. 757(b).

Subchapter 4, Human Rights Committees, was adopted as R.1989 d.302, effective June 5, 1989. See: 20 N.J.R. 2552(a), 21 N.J.R. 1573(a).

Pursuant to Executive Order No. 66(1978), Chapter 41, Administration, expired on March 20, 1994.

Chapter 41, Administration, was adopted as new rules by R.1994 d.196, effective April 18, 1994. See: 26 N.J.R. 81(a), 26 N.J.R. 725(a), 26 N.J.R. 1655(a). Pursuant to Executive Order No. 66(1978), Chapter 41 expired on April 18, 1999.

Chapter 41, Administration, was adopted as new rules by R.1999 d.263, effective August 16, 1999. See: 31 N.J.R. 844(a), 31 N.J.R. 2396(a).

Chapter 41, Record Confidentiality and Access to Client and Agency Records, was adopted as new rules by R.2004 d.320, effective August 16, 2004. Subchapter 2, Access to Client Records and Record Confidentiality, was repealed by R.2004 d.320, effective August 16, 2004. See: Source and Effective Date.

Subchapter 4, Human Rights Committee, was repealed by R.2004 d.321, effective August 16, 2004. See: 36 N.J.R. 1910(a), 36 N.J.R. 3925(a).

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 41, Record Confidentiality and Access to Client and Agency Records, was scheduled to expire on February 12, 2010. See: 41 N.J.R. 2880(a).

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SUBCHAPTER 1. GENERAL PROVISIONS

10:41-1.1 Purpose

The purpose of this chapter is to provide a uniform approach to records management that safeguards the confidentiality of client records and agency records maintained by the Division.

10:41-1.2 Scope

This chapter applies to all service components of the Division and all providers under contract with or regulated by the Division.

10:41-1.3 Definitions

The words and terms in this chapter have the following meanings, unless the context clearly indicates otherwise.

“Agency records” means the organized compilation of documents, including electronic documents, that relate to the operation of a Division component or a provider agency under contract with or regulated by the Division.

“Authorization” means a valid, written authorization on a form that conforms to the Federal regulations, 45 C.F.R. Parts 160 and 164, for the release of protected health information. The authorization may only be signed by the individual, if a competent adult, or the legal guardian of a minor or incapacitated adult.

“Client records” means the organized compilation of documents, including copies of electronic documents, that relate to the provision of services to an individual.

“Department” means the Department of Human Services.

“Discharge” means the individual is no longer receiving functional services from the Division.

“Division” means the Division of Developmental Disabilities and its staff.

“Division circulars” means a sequentially numbered document issued by the Director, Division of Developmental Disabilities, to promulgate operational policies, standards and key procedures of the Division. The circulars convey policies that have broad applicability to major components of the Division and may have applicability to provider agencies under contract with or regulated by the Division. The Director may, however, limit the scope of a circular to a single component.

“Individual” means a person who is receiving or has applied for services from the Division. For the purpose of this chapter, this term also applies to those persons who are not eligible for services from the Division but reside in facilities regulated by the Division.

“MIS identification number” means the six-digit serial number assigned to all individuals served by the Division. This number is unique to each individual and does not provide any individually identifying information.

“Next of kin” means the spouse, mother and/or father, guardian, persons connected by birth or marriage, or other persons so indicated on official records.

“Office of the Regional Assistant Director” means a component of the Division that provides administrative oversight for the provision of services to individuals served by the Division. Counties of service and locations of such offices are as follows:

Sussex, Warren, Morris, Bergen, Passaic, Hudson, Essex, Somerset and Union Counties:

Office of the Regional Assistant Director
c/o Greenbrook Regional Center
275 Greenbrook Road
Green Brook, NJ 08812

Mercer, Middlesex, Ocean, Hunterdon, Monmouth, Camden, Atlantic, Salem, Cape May, Gloucester, Cumberland and Burlington Counties:

Office of the Regional Assistant Director
PO Box 726
Trenton, NJ 08625

“Protected health information (PHI)” means any information, including demographic information, whether oral or recorded in any form or medium, that is created or received by the Division and relates to the past, present, or future physical or mental health or condition of an individual served by the Division, and identifies the individual, or the information can be used to identify the individual. PHI also means individually identifiable health information created or received by the Division that is transmitted or maintained by the Division.

“Provider” means a person, agency or business that is under contract with or regulated by the Division.

“Secure environment” means data encryption, which is a process involving data coding to achieve data confidentiality, data integrity, end point authentication, and other security objections.

“Service component” means any developmental center, regional office or central office unit.

“Transfer” means movement of individual or record from one Division component or service provider to another.

SUBCHAPTER 2. DIVISION POLICY ON CONFIDENTIALITY OF RECORDS

10:41-2.1 Division policy on confidentiality of records

(a) The Division recognizes its responsibility to protect the confidentiality of the records of individuals in its care. Therefore, all client records, as defined in N.J.A.C. 10:41-1.3, shall be kept confidential in accordance with N.J.S.A. 30:4-24.3, which mandates that all certificates, applications, records and reports that directly or indirectly identify an individual currently or formerly receiving services from the Division be kept confidential and are not subject to public disclosure. In addition, the requirements of this chapter conform with the Federal Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. Parts 160 and 164 as it applies to the release of and access to protected health information; N.J.S.A. 30:6D-1 et seq., Developmentally Disabled Rights Act; 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records; 34 C.F.R. 361.38, Vocational Rehabilitation, Protection, Use and Release of Patient Information; and the Federal Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601 et seq.

(b) The protections in this chapter extend to all records of individuals held by the Division, including applications for services of persons determined ineligible for services and those applications that are initiated but not completed.

(c) Release of Division agency records, as defined in N.J.A.C. 10:41-1.3, shall be in accordance with N.J.S.A. 47:1A-1 et seq., the Open Public Records Act, and this chapter. All such records shall be redacted in accordance with N.J.A.C. 10:41-4.4.

(d) Records that are otherwise protected by law, for example, individual HIV/AIDS information as indicated in N.J.S.A. 26:5C-5 et seq., and individual drug and alcohol abuse information as indicated in 42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records, shall not be disclosed without a specific authorization for the release of such information or a judicial order.

(e) Records containing health information on family members of an individual are to be redacted to remove such information before disclosure to a third party. This information shall not be shared unless disclosure is required for treatment and/or services for the individual.

(f) Division employees who violate confidentiality shall be subject to corrective action.

(g) Where an individual is placed with a provider under contract with or regulated by the Division, all records specific to that individual, whether generated or obtained by the provider, shall be the Division's client record.

SUBCHAPTER 3. CLIENT AND AGENCY RECORDS

10:41-3.1 Client record

(a) Only court ordered civil commitments, including records of conviction, and payments of maintenance, shall be considered to be public information.

(b) Except as indicated in (a) above, the information in the client record is not public information. The client record is specific to one individual and includes, but is not limited to, the following records:

1. Eligibility determinations and supporting documents;
2. Applications for services;
3. Medical examinations and reports, medication administration records, and prescriptions;
4. Evaluation reports or Comprehensive Functional Assessment (CFA);
5. Individual Habilitation Plan (IHP), Individualized Family Service Plan (IFSP), and Individual Educational Plan (IEP);
6. Progress notes and internal communications relating directly to the individual's condition or service decisions;
7. Communications to or from parent or legal guardian;
8. Legal guardianship documents;
9. Individual financial records; and
10. Health information regarding family members.

10:41-3.2 Public and non-public agency records

(a) The following agency records are considered public when the documents are final. Redaction of information as defined in N.J.A.C. 10:41-4.3 must occur before release of these records. Agency records that are public include:

1. The standard contract documents, including appendices and supporting materials that are not specific to any individual;
2. Programmatic and financial reports;
3. Reports that monitor or evaluate the operations of the Division or of agencies under contract with the Division, including, but not limited to: accreditation report;
4. Fiscal auditing reports;
5. Provider agency policies and procedures that are required by State regulation and/or Division policy, and are not specific to any individual;
6. Licenses to operate;
7. Inspection reports for licensure;
8. Plan of Correction for Inspection Reports; and
9. Division procedures, including, but not limited to, Division Circulars, institutional and agency procedures.

(b) The following agency records are not public and can only be released upon judicial order or Grand Jury Subpoena. These agency records include:

1. Investigations of unusual incidents;
2. Initial Unusual Incident Reports and Unusual Incident Follow up Reports;
3. Any and all documents and materials related to a pending investigation of an unusual incident;
4. Addresses of community residences licensed or regulated by the Division;
5. Intra- and inter-agency communications and procedures that are considered by the Division to be Advisory, Consultative and Deliberative Material; Risk Management documents; and self-critical analyses;
6. Investigations conducted by Developmental Disabilities Licensing; and
7. Records that are otherwise protected by law as indicated in N.J.A.C. 10:41-2.1(d).

10:41-3.3 Photographing, audio and videotaping of individuals

(a) An individual may be photographed if the photograph is to be used by the Division or provider for internal identification purposes.

(b) Written authorization must be obtained from the individual or legal guardian before an individual may be photographed, if the photograph is to be used for display or public dissemination.

(c) Audio taping and videotaping of individuals is prohibited for other than treatment purposes or health care opera-

tions unless written authorization is obtained from the individual or legal guardian.

(d) All audiotapes and videotapes of individuals shall be considered confidential and not subject to public disclosure.

10:41-3.4 Electronic records

(a) Any client records that are maintained electronically shall be subject to the same requirements in this chapter as records that are maintained on paper.

(b) Electronic mail is part of the official record of the Division and its release shall conform to the requirements contained in this chapter.

(c) Client-identifying information shall not be transmitted to persons or agencies external to the Department by electronic mail unless the information is transmitted in a secure environment.

SUBCHAPTER 4. CONFIDENTIALITY OF RECORDS

10:41-4.1 Safeguarding records

(a) All service providers, including those under contract with the Division, shall secure records of individuals in their care against access, loss, defacement, use and copying by unauthorized persons.

(b) The Division's chief executive officer, regional administrator or unit director shall safeguard the records of individuals in his or her Division service component, and shall determine who may access, inspect or copy the records, how the records may be used, how long the records may be used, and other restrictions on access to the records, in accordance with this chapter and the HIPAA Privacy Rule, 41 C.F.R. Part 160 and 164.

(c) All requests for release of records shall be directed to the administrative head of the Division component, or the administrative head's designee.

(d) All requests for release of client records shall be made in writing and identify the specific information requested as well as the intended uses of the information, except for those exceptions indicated in N.J.A.C. 10:41-5.2(d). The requests for release of client records shall be accompanied by a valid written authorization.

(e) An accounting record shall be maintained of every person or entity that accesses, inspects or obtains copies of a client record, the stated use to be made of the information, and the staff person authorizing the release of the record. This information is to be maintained in accordance with the Federal HIPAA Privacy Rule, and 45 C.F.R. 164.528.

(f) Retention and destruction of client and agency records shall be in accordance with the State of New Jersey, Division of Archives and Records Management records retention schedule and the Federal HIPAA privacy rule, 45 C.F.R. Parts 160 and 164.

(g) Records shall be released to entities outside the Department of Human Services such as the Centers for Medicare and Medicaid Services, New Jersey Department of Health and Human Services, New Jersey Protection and Advocacy Inc., if authorized by the Department to monitor the quality of services offered to the individual or as otherwise authorized by law. The persons identified in this subsection shall agree in writing to safeguard the confidentiality of records.

(h) Information may be released to program staff and associated professional personnel (including students completing professional internships or field placements) who provide habilitation to the individual. The persons identified in this subsection shall agree in writing to safeguard the confidentiality of records.

(i) Information may be released to persons authorized by the Division who serve as unpaid volunteers if necessary to further the habilitation of the individual. The persons identified in this subsection shall agree in writing to safeguard the confidentiality of records.

(j) Any questions concerning access to records shall be referred to the Division's Administrative Practice Officer.

10:41-4.2 Records held by agencies under contract with or regulated by the Division

(a) Where an individual is placed with a provider under contract with or regulated by the Division, all records specific to that individual, whether generated or obtained by the provider, shall be the Division's client record.

(b) Providers under contract with or regulated by the Division, who violate confidentiality, shall be subject to corrective action and/or sanctions by the Division and as prescribed by 45 C.F.R. Parts 160 and 164.

(c) Requests for copies of client records received by a provider under contract with or regulated by the Division shall be referred to the Regional Assistant Director. The Division will be responsible for forwarding the records to the requester.

(d) When an individual transfers from one provider to another, the client record shall be transferred between the providers on the day of transfer.

(e) Where a provider is assuming responsibility for an individual from another provider, the receiving provider will have access to the client record of that individual at the time of referral, including copies of the required records.

(f) When an individual is discharged from Division services or is deceased, all client records shall be returned to the Division. A provider agency may keep a discharge summary with an outline of the time the individual was with the agency and general services provided.

(g) Records created by a provider agency that are required by statute or rule are considered Division records. These records will be provided to the Division upon request.

10:41-4.3 Redaction of records

(a) When providing client records, all individual identifying information regarding individuals other than the individual who is the subject of the request, must be redacted, including, but not limited to, names, initials, and specific descriptions, from all client and agency records before they are disclosed. Redaction of individual identifying information shall be in accordance with 45 C.F.R. 164-514(b)(2)(i). The Division MIS identification number may be used to identify individuals other than the individual who is the subject of the request.

(b) In accordance with N.J.S.A. 30:4-24.3, 42 U.S.C. §§ 3601 et seq., and 45 C.F.R. Parts 160 and 164, addresses of community residences are confidential. Therefore, the address of any community residence must be redacted from agency records before the records are disclosed.

SUBCHAPTER 5. ACCESS AND RELEASE OF RECORDS

10:41-5.1 Access to client record

(a) An individual currently or formerly receiving services from the Division, or the legal guardian of a minor or incapacitated adult, is entitled to inspect or request a copy of the client record. The Division shall require that the request to inspect the client record be in writing. The Division, or agency, must provide access or deny the request for access to the client record as soon as possible but no later than 30 days of the receipt of the request, as described in 45 C.F.R. 164.524(b).

(b) Records of an individual shall be open to inspection by other persons upon receipt of a valid written authorization, as described in 45 C.F.R. 164.524(b).

(c) A staff person must be present, at all times, during the inspection of a client record or agency record. Staff knowledgeable about the contents of the record shall offer assistance in reviewing the record, and provide assistance, if requested.

10:41-5.2 Release of client records

(a) All elements of the client record shall be kept confidential and be released only upon receipt of a valid, written authorization or upon grand jury subpoena or judicial order.

(b) An individual currently or formerly receiving services from the Division, or the legal guardian of a minor or incapacitated adult, shall receive a copy of the client record within 30 days of receipt by the Division of a valid written authorization or shall be advised in writing of reason for denial, as described in 45 C.F.R. 164.524(b).

(c) Records of an individual shall be provided to other persons upon receipt of a valid written authorization by the individual, if the individual is a competent adult, or the legal guardian of an incapacitated adult or minor.

(d) Client records may be released without authorization if the request meets one of the exceptions set forth below:

1. As directed by the Office of the Attorney General (N.J.S.A. 59:8-4) in response to the plaintiff in a tort claim or civil action for damages to which the Commissioner, Department, Division or employee of the Division is named as a defendant;

2. To Department components, if directly related to the administration of its services;

3. Upon admission, the individual or legal guardian shall provide a list of individuals, including relatives, friends, personal physician or personal attorney, who may receive information regarding the individual's general medical condition over the telephone. This listing shall be updated annually;

4. When an individual is transferred from one component of the Department or Division to another;

5. Medical staff outside of the Department who have assumed temporary medical responsibility for the individual shall have access to information and records as necessary for the treatment of the individual;

6. If an individual is missing, or Division staff is assisting law enforcement in location of a suspect, fugitive, or material witness, the following information relating to the individual may be released to official agencies, if applicable:

- i. Name and address;
- ii. Date and place of birth;
- iii. Social security number;
- iv. ABO blood type and Rh factor;
- v. Type of injury;
- vi. Date and time of treatment;
- vii. Date and time of death;

viii. A physical description including a photograph, if available; and

ix. Other significant personal data, such as medical condition or dangerousness to self;

7. To an agency authorized to investigate allegations of abuse or neglect of an individual, for example, Division of Youth and Family Services in the case of children, the Ombudsman for the Institutionalized Elderly for individuals over 60 years of age; and Adult Protective Services in the case of an adult living in his or her own home;

8. Investigators or inspectors from the Department shall have access to client and agency records in the course of conducting an investigation or inspection for licensure; or

9. In the case of guardianship actions, the Public Defender shall be recognized as the attorney representing the individual, unless another attorney is noted in the client record and shall be permitted access.

10:41-5.3 Court orders and subpoenas

(a) If a valid written authorization is not provided, then a judicial order is required for the release of client records. A subpoena is not sufficient to release a client record. If staff of the Division or a provider receives a subpoena, the recipient of the subpoena shall immediately contact the Division's Administrative Practice Office.

(b) Client and agency records may be released in response to a subpoena issued by a Grand Jury. Such records will be limited to the subject of the Grand Jury investigation.

(c) The Division may release client and agency records to law enforcement officials when the Division initiates law enforcement action.

10:41-5.4 Records of deceased individuals

(a) The records of a deceased individual who has received services may be released to the administrator or executor.

(b) If there is no administrator or executor, records may be released to the next of kin indicated in the client record. A valid written authorization for the release of this information must be obtained from next of kin in the following order:

1. Natural or adoptive parents;
2. Siblings;
3. Grandparents; or
4. Family caregiver of record.

(c) If someone other than the next of kin requests the records, a release shall be obtained from the next of kin prior to the release of the records.

(d) Records shall be provided to New Jersey Protection and Advocacy, Inc. in accordance with 42 U.S.C. § 15043.

10:41-5.5 Records created or held by other entities

(a) In the instance of the Division of Youth and Family Services' (DYFS) reports involving the investigation of abuse and neglect of individuals served by the Division of Developmental Disabilities, the requests for copies of these reports shall be referred to DYFS.

(b) In the instance of the Division of Mental Health Services' (DMHS) reports of investigations involving individuals served by the Division of Developmental Disabilities, the requests for copies of these reports shall be referred to DMHS.

10:41-5.6 Copying fees

(a) Copies of records that may be released shall be provided in accordance with the provisions of this chapter and upon payment of the fees listed in N.J.S.A. 47:1A-2.

(b) Fees may be waived for an eligible individual or his or her family, if it is demonstrated that the payment is a financial hardship.