

POLICIES OF THE DEPARTMENT OF HUMAN SERVICES
CONFIDENTIALITY

North Dakota Department
of Human Services Manual

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01. Confidentiality (Revised 3/03 ML #2859)

This service chapter is the "confidentiality manual" of the North Dakota Department of Human Services.

01-01. Definitions (Revised 3/03 ML #2859)

As used in this chapter:

1. "Administration of the program" means those activities and responsibilities, which the Department may appropriately engage in to ensure effective program operation, including the delivery of services, assistance to clients, treatment, and payment.
2. "Business Associate" means a person or organization that performs a function or activity on behalf of the department, or provides certain legal, financial or management services and the activities involve the use or disclosure of protected health information.
3. "Client" means an individual who may receive, is receiving, or has received benefits or services under a program administered by or under the supervision and direction of the Department, and with respect to whom the Department has received identifying information or individual protected health information.
4. "Department" means the North Dakota Department of Human Services and all of its constituent units, including its attorneys.
5. "Designated record set" means a group of records maintained by or for the Department that is:
 - a. The medical records and billing records about individuals maintained by or for the Department;
 - b. The enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or

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- c. Used, in whole or in part, by or for the covered entity to make decisions about individuals.
- 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 the Department, but does not include psychotherapy notes.
6. "Disclosure" means a communication of client identifying information, the affirmative verification of another individual's communication of client identifying information, or the communication of any information from the record of a client who has been identified, to anyone other than the subject client. It does not include the use or exchange of information between or among units of the Department for purposes of administering a program. See section [01-20-01](#) regarding use of confidential information within the Department.
7. "Health Care Operations" means any of the following activities of the Department:
- a. Conducting quality assessment and improvement activities.
 - b. Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance, conducting training programs in which students, trainees or practitioners learn under supervision.
 - c. Underwriting, premium rating and other activities relating to creation, renewal or replacement of health insurance or health benefits.
 - d. Conducting or arranging for medical review, legal services, auditing functions.
 - e. Business planning and development, business management and general administrative activities.
8. "Health Plan" means a group that provides, or pays the cost of, medical care. Included in this definition for the Department of Human Services is the Medicaid program, Children's Special Health Services, Healthy Steps, Personal Care Program, Home Safety Program, and Developmental Disabilities Administration.

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9. "Need to know" means the situation that arises when information requested is necessary to the administration of a program, and when authorized by this manual chapter.
10. "Protected Health Information" (PHI) means individually identifiable health information including demographic information that relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care; and identifies the person or there is a reasonable basis to believe the information can be used to identify the person.
11. "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 counseling session and are separated from the rest of the client's medical record. They are not considered part of the designated record set.
12. "Qualified Protective Order" means an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that prohibits the parties from using or disclosing protected health information for any purpose other than the litigation or proceeding for which that information was requested; and requires the return or destruction of the protected health information (including all copies) at the end of the litigation or proceeding.
13. "Record" or "records" means any recorded information relating to a client, which has been received, acquired, or created by the Department. It includes files, interoffice memoranda, medical records, untranscribed tapes, computer files, e-mails, and staff notes.
14. "Unit" means any division, program, agency, or other functioning entity, which is part of the Department. It does not include service providers under contract with the Department.
15. "Workforce" means employees, volunteers, trainees, and other persons whose conduct, in the performance of work for the Department, is under the direct control of the Department, whether or not they are paid by the Department.

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01-05. Basic Concepts of Confidentiality (Revised 3/03 ML #2859)

01-05-01. The Origins of Confidentiality (Revised 3/03 ML #2859)

The right of privacy is recognized as one of the rights protected by the federal Constitution under the Fourth and Fourteenth Amendments. Federal and state statutes also recognize the privacy rights of individuals who receive services and assistance under programs administered by the Department. These statutes include, most notably for purposes of this manual, the Social Security Act; Health Insurance and Portability and Accountability Act of 1996, 42 U.S.C. 1320d-2 and 1320d-4; 45 CFR, parts 160 and 164; Confidentiality of Substance Abuse Records 42 CFR Part 2; and N.D.C.C. § 50-06-15, (the state statute creating confidentiality safeguards binding on the Department). There are also federal regulations that interpret and amplify the requirements of federal statutes, and a limited number of state rules.

01-05-05. Sources of Confidential Client Information (Revised 3/03 ML #2859)

The Department obtains information about clients from the clients themselves and from collateral sources, such as doctors, medical facilities, friends, and informants. All information received by the Department concerning a specific client is subject to confidentiality safeguards, and some information is subject to additional safeguards due to its highly sensitive nature, such as information regarding substance abuse treatment (see section [01-25-100](#)).

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01-05-10. Freedom of Information Act and Privacy Act (Revised 3/03 ML #2859)

The Freedom of Information Act (FOIA) as amended in 1974 by Pub.L. 93-502 and the Privacy Act of 1974 (P.L. 93-579) pertain exclusively to federal agencies and contractors performing a federal function required by statute or executive order. Neither Act applies to the operations of the Department, with the exception of Disability Determination Services, even though the Department administers federally funded programs.

01-05-15. Information to be Safeguarded (Revised 3/03 ML #2859)

“Client specific” information and “PROTECTED HEALTH INFORMATION” are confidential and not subject to the open records law. “Client specific” information is that which specifically identifies a client through, for example, name, address, or social security number. Often a document will be subject to the open records law, but will have both “client-specific”/identifying information as well as information of a non-identifying nature. In such a case, the identifying information must be excised (blacked out) before releasing the documents. The non-identifying information on the document is still subject to the open records law.

01-05-20. When Confidentiality Safeguards are Effective (Revised 3/03 ML #2859)

Confidentiality safeguards go into effect from the initial contact between the client and the Department. Initial contact may be as early as an inquiry about the application process or availability of services, depending on what personally identifying information was obtained. The safeguards apply to any personally identifying information, whether written or oral, and whether or not it is incorporated into the client’s records. Safeguards continue to be in effect as long as services or assistance are provided and continue afterwards indefinitely. They are not terminated by the cessation of services or assistance, or by the client’s death (see section [01-25-75](#) regarding disclosure of deceased client records). Safeguards continue to be in effect indefinitely even for applicants who do not become recipients.

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01-05-20-01. Safeguards (Revised 3/03 ML #2859)

An individual record is created for each client by the unit providing services. The records are maintained as part of the designated record set and kept in paper or electronic format in accordance with applicable Federal laws, State laws, and retention guidelines and requirements.

The security and protection of client records are addressed in the Department's Information Technology Service Chapter, 230-01. Safeguards addressed include electronic and physical security, access and audit controls, and employee role functions limited to the information necessary for job performance.

Administrative safeguards include the provision of workforce training on the Department's confidentiality manual and policies and procedures, adherence to the confidentiality manual and practices, and imposing sanctions for breaches of confidentiality.

The Department identifies persons in its workforce who need access to protected health information to carry out their duties as well as the category or categories of information to which access is needed and any conditions appropriate to such access.

01-05-25. Changes in Policies and Procedures (Revised 3/03 ML #2859)

Revisions to this manual will be made promptly as there are changes in law that necessitates changes to the policies and procedures. The Department's Privacy Official along with the Legal Advisory Unit will maintain this manual and revise as necessary.

Any changes in the Department's privacy practices that are revised will be addressed in the Notice. The revised Notice will be made available to all clients.

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01-05-30. Confidentiality/Privacy Workforce Training (Revised 3/03 ML
#2859)

All members of the Department's workforce must receive training on the confidentiality manual and privacy practices in relationship to client's protected health information. When changes are made to the policies or procedures, members of the workforce affected by those changes will receive updated training. Each new member of the workforce must receive training as part of the overall Department orientation program.

Training includes Department confidentiality policies, procedures, information security measures, and consequences of wrongful disclosure of protected health information.

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01-10. General Policy and Rules (Revised 3/03 ML #2859)

01-10-01. Statement of Policy (Revised 3/03 ML #2859)

It is the policy of the Department to protect the privacy of individuals to the fullest extent possible while nonetheless permitting the use and disclosure of information required to fulfill: 1) client treatment; 2) payment for client services; 3) the administrative and the program responsibilities of the Department; and 4) responsibilities of the Department to disclose records to which the general public is entitled to have under the Constitution and laws of the State of North Dakota. Confidentiality restrictions preserve the dignity and self-respect of clients and assure the integrity and efficiency of departmental programs.

An ever-present trust and condition of employment within the Department is the safeguarding of client-related information. All employees are expected to be extremely circumspect in their daily handling of client information so that unwarranted and potentially illegal disclosures are scrupulously avoided. It is improper to unnecessarily divulge client information to co-workers or to discuss any such information unless in the context of fulfilling one's responsibilities.

The advent and use of automated systems within the Department has added another dimension in the safeguarding of confidential material. Information generated by the computer should receive no less consideration than traditionally stored information.

01-10-05. Relationship to Department of Human Services Manual Service Chapter 449- (Revised 1/06 ML #3016)

North Dakota Department of Human Services Manual Service Chapter 449, Administration, and in particular, part 449-05-30, Confidentiality and Safeguarding of Information, remains in effect. It applies to the following programs: Basic Care Assistance, Child Care Assistance, Food Stamps, Low Income Home Energy Assistance, Medical Assistance, and Temporary Assistance for Needy Families. For matters not covered by part 449-05-30 of Service Chapter 449, refer to this service chapter.

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01-15. Violations of Confidentiality (Revised 3/03 ML #2859)

01-15-01. Wrongful Disclosure of Confidential Information is a Crime
(Revised 3/03 ML #2859)

There are several statutes establishing penalties for the unauthorized disclosure of confidential information. Different penalties apply depending on the nature of the information or record that is disclosed.

For example, N.D.C.C. § 50-06-15 provides that unauthorized disclosure of confidential information derived from Department records regarding individuals applying for or receiving assistance under the Department's programs is a class A misdemeanor, which is punishable by a maximum of one year imprisonment, a fine of \$2,000, or both. It applies to any individual, making all employees of the Department, and even non-employees, subject to the penalty.

An employee of the Department who knowingly discloses confidential information from records other than those specifically enumerated in N.D.C.C. § 50-06-15 may violate N.D.C.C. § 12.1-13-01 which is punishable as a class C felony. A class C felony carries a maximum of five years' imprisonment, a fine of \$5,000, or both.

Any person who violates the federal law regarding confidentiality of substance abuse treatment records may be fined not more than \$500 for the first offense and not more than \$5,000 in the case of each subsequent offense. 42 U.S.C. §§ 290ee-3(f) and 290dd-3(f), 42 C.F.R. § 2.4.

HIPAA Privacy rules specify federal penalties that will be imposed on persons if a patient's right to privacy is violated. For non-criminal violations of the privacy standards by the persons subject to the standards, there are civil monetary penalties of \$100 per violation up to \$25,000 per year, per standard. In addition, criminal penalties are provided in HIPAA for certain types of violations of the statute that are done knowingly: up to \$50,000 and one year in prison for obtaining or disclosing protected health information; up to \$100,000 and up to five years in prison for obtaining or disclosing protected health information under "false pretenses;" and up to \$250,000 and up to 10 years in prison for obtaining protected health information with the intent to sell, transfer or use it for commercial advantage, personal gain or malicious harm.

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01-15-05. Civil Liability for Wrongful Disclosures or Withholding of Confidential Information (Revised 3/03 ML #2859)

The Department and its employees may be exposed to civil liability for wrongful disclosure of confidential information whenever confidential information is collected, used, stored, or disclosed. This exposure cannot be entirely eliminated, but can be minimized by careful adherence to the policies of this manual, as well as relevant confidentiality statutes and regulations. The issue is not whether the Department and its employees can be sued, but whether they have a good defense in case they are sued. Adherence to the requirements of the law and this manual, along with documentation of that adherence, is the key to a successful defense.

01-15-10. Alleged Violations (Revised 3/03 ML #2859)

Any alleged violation of confidentiality will be investigated, and, if the facts warrant, appropriate disciplinary action will follow. Workforce discipline may include written warnings, suspension without pay, or termination of employment, depending on the scope and severity of the outcome, pattern of violations, whether there was an intentional breach of confidentiality or breach with malicious intent. Corrective and disciplinary actions are addressed in the DHS HR Manual chapter 315-01.

All sanctions and disciplinary actions imposed on workforce members who violate the confidentiality policies and practices of the Department must be documented in personnel records. A supervisor will notify the Privacy Official who shall consult with the DHS Risk Manager about the need to complete an incident report.

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01-15-15. Mitigation of Violations (Revised 3/03 ML #2859)

The Privacy Official will review any loss, destruction, or compromise of protected health information, or violation of the confidentiality policies, procedures, or privacy practices by workforce members or business associates. The Privacy Official will consult with the DHS Risk Manager as necessary.

The Department will mitigate, to the extent practicable, any known harmful effect resulting from the violation.

01-15-20. Whistleblower Protection (Revised 3/03 ML #2859)

The Department will not intimidate, threaten, coerce, discriminate against, or take other retaliatory action against a client or workforce member who files a complaint, testifies or participates in an investigation, or opposes any act or practice that violates confidentiality or privacy practices and who has acted in good faith that the practice is unlawful.

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01-20. Disclosure of Client Information (Revised 3/03 ML #2859)

01-20-01. Use Within the Department (Revised 3/03 ML #2859)

A unit of the Department may exchange information regarding a client to another unit of the Department upon a showing that the requesting unit has a need to know the information in order to perform its duties, to provide client treatment, for payment purposes, for healthcare operations, or to administer its program. In most situations, no written authorization by the client shall be required prior to exchange of the requested information. However, the following records are subject to additional requirements before they may be exchanged within the Department:

- Medicaid records (for administration of the Medicaid program - see section [01-25-45-20](#) for more information).
- Vocational Rehabilitation records (for administration of the VR program - see section [01-25-45-20](#) for more information).
- Substance abuse treatment records (see section [01-25-100](#) for more information).
- Adoption records (see section [01-25-45-20](#) for more information).
- Child abuse and neglect records (see section [01-25-85](#) for more information).

Additionally, Department units may disclosure protected health information to County Social Service Agencies for purposes of treatment, payment, healthcare operations, or for activities related to determination of eligibility for benefits or enrollment in a health plan or other benefits eligibility determination.

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01-20-05. Client Right to Restrict Uses and Disclosures of Protected Health Information (Revised 3/03 ML #2859)

01-20-05-01. Request for Restriction (Revised 3/03 ML #2859)

Clients may request that the Department restrict uses and disclosures of their protected health information to carry out treatment, payment, or health care operations. However, the Department is not required to agree to such a restriction. If agreed to, the restriction will be documented in the medical record and retained as part of the record set. If a restriction is agreed to, the Department will use or disclose protected health information only as agreed to in the restriction request, except in the case of an emergency treatment situation if the information is necessary to provide treatment.

Termination of an agreement to a restriction may be made in the following ways:

1. The client agrees to or requests the termination in writing,
2. The client orally agrees to the termination and the oral agreement is documented; or
3. The provider informs the client that it is terminating its agreement to a restriction. It will become effective after informing the client.

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01-20-05-05. Confidential Communications (Revised 3/03 ML #2859)

Clients may request to receive communications of protected health information by alternative means or at alternative locations. The Department will accommodate reasonable requests. The client may make the request in writing or if orally, the provider will document the request in the client's record. The client need not provide an explanation for the request.

The Department may condition the request for information as to how payment will be handled, if applicable, and specification of an alternative address or other method of contact.

Department health plans must accommodate all reasonable requests for confidential information if the client clearly states that the disclosure of all or part of the protected health information could endanger the client.

01-20-10. Disclosure Outside the Department (Revised 3/03 ML #2859)

Any disclosure to an individual or entity outside the Department, except as described in section [01-25-45-20](#), Disclosure of Information to Law Enforcement Officials or Disclosure of Information for Purposes of Debt Collection; section [01-25-45-15](#), Disclosure of Information Pursuant to Mandatory Reporting of Child Abuse or Neglect; section [01-25-85](#), Implied Disclosures; section [01-25-45](#), Permitted Disclosures; or unless the information is disclosed to another covered entity for the purpose of treatment, payment, or healthcare operations shall be made only pursuant to a written authorization signed by the client or client's legal representative, appropriate subpoena, or appropriate court order. Please contact the Legal Advisory Unit if questions arise regarding whether a subpoena, court order, or authorization, is appropriate.

Protected health information subject to 42 C.F.R. Part 2 can only be disclosed with a signed authorization (see section [01-25-100](#)).

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01-20-15. Accounting of Disclosures (Revised 3/03 ML #2859)

The Department will provide, upon client request, a six-year accounting of disclosures made of the client's protected health information. The accounting does not need to include the following disclosures:

1. To carry out treatment, payment or health-care operations;
2. To the client;
3. As authorized by the client;
4. For the directory or to persons involved in the client's care and notification purposes;
5. For National security or intelligence purposes;
6. To corrections officials or law enforcement personnel when the client is in custody;
7. Those disclosures made prior to the implementation of HIPAA Privacy Rules (April 14, 2003); or
8. Those disclosures made as part of a limited data set.

The accounting must include the date of the disclosure, name of the entity or person who received the information, and if known, the address, a brief description of the information disclosed, and a brief statement of the purpose of the disclosure that reasonably informs the client of the basis for the disclosure or a copy of a written request for the disclosure.

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01-20-15-01. Procedure for Providing the Accounting of Disclosures
(Revised 3/03 ML #2859)

Each unit of the Department must identify, in writing, a person or office that is responsible for receiving and processing requests for an accounting of disclosures.

The unit will provide the client with the accounting as requested no later than 60 days after receipt of the request. If the unit is unable to provide the accounting within 60 days, the unit may have a 30-day extension by providing a written statement to the client. The statement will include the reasons for the delay and the date by which the unit will provide the accounting to the client. One extension is allowed per request.

The first accounting to a client in any 12-month period of time will be without charge. If the client requests another accounting within that time period, a reasonable cost-based fee may be required, provided that the client has been informed in advance of the fee and the client is given an opportunity to withdraw or modify the request.

01-20-15-05. Denying a Client's Request for Accounting of Disclosure
(Revised 3/03 ML #2859)

The Department may temporarily suspend a client's right to receive an accounting of disclosures if notified by a health oversight agency or law enforcement official that such an accounting to the client would impede their activities. The request must be in writing and identify a period of time for such suspension.

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01-25. Disclosures of Information (Revised 3/03 ML #2859)

01-25-01. What is an "Authorization to Disclose Information"? (Revised 3/03 ML #2859)

An authorization to disclose information is a client's authorization to the Department to disclose information from the client's records to an individual or entity other than the client. In most cases, a written authorization signed by the client or the client's legal representative is required before identifying information or protected health information will be disclosed. The written authorization serves as proof of the consent for disclosure to a particular individual or entity. A copy of the signed authorization must be kept in the client's record and a copy given to the client.

An authorization for protected health information cannot be combined with any other document.

A separate authorization for the use or disclosure of psychotherapy notes is required.

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01-25-05. Implied Disclosures (Revised 3/03 ML #2859)

Units of the Department occasionally receive telephone calls or letters from the Governor's Office, United States Congressmen or Senators, or their aides, inquiring about client's dealings with the Department in response to the client's request for assistance. Virtually all such calls are bona fide efforts undertaken with the client's approval. The Department considers that an implied authorization has been made in these cases. Protected health information disclosed must be limited to information directly related to the person's involvement in the current health care of the client or payment related to the client's health care and limited by exceptions identified in item 2.

NOTE: For inquirers who identify themselves as a client's legal representative, parent, or guardian, see section [01-35](#), Client Access to Case Records.

The Department will not require a written authorization from the client before disclosing information and discussing it with representative of the Governor's Office, U.S. Congressmen, or Senator's, provided the following procedures are followed:

1. Information will be disclosed to and discussed with only the following public officials and their staff:
 - a. United States Senators;
 - b. United States Congressmen;
 - c. North Dakota legislators;
 - d. The Governor of North Dakota; or
 - e. The Attorney General of North Dakota.

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2. The following types of information **shall not be** disclosed or discussed:
 - a. Information covered by 42 C.F.R. Part 2, regarding confidentiality of substance abuse treatment records;
 - b. Information identifying an adoptive parent, relinquishing parent, adopted person, genetic parent, or genetic sibling in an adoption; and
 - c. The identity of a reporter of suspected child abuse or neglect.
3. Employees may decline to disclose information pursuant to an implied authorization where, in the exercise of the employee's professional judgment, such authorization is not justified.
4. The name, title, and telephone number of the individual inquiring on behalf of the client should be obtained. If the circumstances lead you to question the authenticity of the call, you may inform the caller that you will call back when the appropriate records have been obtained. This allows you to verify that the caller is located at the purported office, to attempt to contact the client, and to locate the relevant information.
5. Reasonable care must be taken to verify the identity of the client.
6. Before disclosing or discussing the information, reasonable attempts should be made to verify the client's request for inquiry. Sometimes concerned relatives, friends, or neighbors will initiate the inquiry, but these requests do not give rise to an implied authorization. Only a request by the client creates an implied authorization, unless the client has a legal guardian or personal representative. If the inquiry is initiated by someone else, ask to speak to the client directly if the client is available. Otherwise, explain that you can only talk to the client.
7. Care should be taken to disclose only information necessary to make a meaningful response to the inquiry. Do not volunteer information, which is not relevant to the question asked. If you are unclear about exactly what the problem is or the question presented, ask for clarification. Do not disclose information about a client other than the client who initiated the inquiry.
8. All disclosures made under this section shall be documented in the client's permanent records. The record shall include the identity of the inquirer, attempts to contact the client, and information disclosed.

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01-25-10. Expired, Deficient, or False Authorizations (Revised 3/03 ML #2859)

A disclosure must not be made on the basis of an invalid authorization. An invalid authorization is one which:

1. Has expired (The expiration date has passed or the expiration event has occurred);
2. Is known to be revoked;
3. Is known, or through a reasonable effort could be known to be materially false;
4. Is not complete as required in section [01-25-15](#);
5. Violates the compound authorization rule of the HIPAA Privacy Rules (cannot be combined with any other document);
6. Violates HIPAA Privacy Rules by conditioning the provision of treatment, payment, or enrollment in a health plan based on a signed authorization.

01-25-15. Contents of an Authorization (Revised 6/03 ML #2876)

A written and signed authorization that contains all of the following elements is sufficient for all programs administered by the Department.

1. The name and date of birth or social security number of the client;
2. The name or other specific identification of the person, or class of persons, authorized to make the requested use or disclosure;
3. The name or other specific identification of the person, or class of persons, to whom the Department may make the requested use or disclosure;
4. A description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion;
5. A description of each purpose of the requested use or disclosure;

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6. The time limit on effectiveness, a specific date, or an expiration event that relates to the client or the purpose of the use or disclosure or “none” for disclosure to a long-term research database;
7. A statement that the client has the right to revoke the authorization in writing, but not as to disclosures already made in good faith reliance; and a description of how the client may revoke the authorization;
8. A statement that a copy has the same effect as the original;
9. The date of signature;
10. Signature by:
 - a. The client if the client is eighteen years of age or older;
 - b. The legal guardian if an adult client has been declared legally incompetent, and a description of the legal representative’s authority to act for the client;
 - c. The client if he or she is fourteen years of age or older and is receiving substance abuse treatment. See also section [01-35-30](#), Minors who are Receiving Substance Abuse Treatment;
 - d. The parent or legal guardian if the client is under fourteen and receiving substance abuse treatment, or if the client is under age eighteen and is not receiving substance abuse treatment.

(Include a description of legal representative’s authority to act for the client); or
 - e. The minor client in other situations where state law permits minors to obtain treatment for a specific condition without the consent of a parent or guardian;

NOTE: This section does not apply to a situation where the information may be “disclosed” to the parent or legal guardian or the minor client. The rights of a parent or legal guardian to information in a minor client’s file are discussed in section [01-35-25](#), Access by Minor Clients.

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11. A statement that treatment, payment, enrollment, or eligibility for benefits may not be conditioned on obtaining an authorization except for research-related treatment or eligibility for benefits under a health plan; and
12. A statement that information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer protected by federal privacy rules (45 C.F.R. Parts 160 and 164). However, substance abuse records are subject to 42 C.F.R. Part 2 and may not be redisclosed without client authorization.

If applicable, the following notice regarding disclosure of addiction records:

This information has been disclosed to you from records protected by Federal confidentiality rules (42 C.F.R. Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written authorization of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2. A general authorization for the disclosure of medical or other information is **NOT** sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any substance abuse treatment patient.

Units may use departmental form 1059, which contains all of the required elements of an authorization. Units may accept any other authorization form for the disclosure or use of protected health information; which includes all information required by law as enumerated in section [01-25-15](#).

The Department must document and retain any signed authorization in the medical record. A copy must be provided to the client or legal representative.

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01-25-20. Minimum Necessary Use, Request, and Disclosure of Protected Health Information (Revised 3/03 ML #2859)

When using, requesting, or disclosing protected health information from another covered entity, the Department will make reasonable efforts to limit information to the minimum necessary to accomplish the intended purpose of the use, request, or disclosure.

The entire designated record set may not be used, requested or disclosed except when the entire record is specifically justified as the amount of information that is reasonably necessary to accomplish the purpose or if authorized by the client.

01-25-25. Routine Disclosures and Requests for Protected Health Information (Revised 3/03 ML #2859)

Information necessary for routine and recurring disclosures and requests for protected health information must be identified in the completed authorization form.

01-25-30. Non-Routine Disclosures and Requests for Protected Health Information (Revised 3/03 ML #2859)

Information to be disclosed or requested that is not a routine or recurring request will be evaluated on an individual basis in accordance with the following criteria to determine what is minimally necessary to accomplish the intended purpose of the disclosure or request for information:

1. Purpose of disclosure or request;
2. If the request is general, narrow down the disclosure to specific documents for a certain period of time that would fit the purpose;
3. If the purpose could be achieved with de-identified information;
4. Impact to the patient in terms of privacy and needs for patient care;
5. Impact to the Department;

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6. Likelihood of re-disclosure;
7. Technology available to limit disclosure; and
8. Cost of limiting disclosure.

Consult with appropriate unit staff or with the Legal Advisory Unit for assistance with non-routine requests or disclosures if there is doubt as to the appropriate response or what information may be necessary to meet the purpose of disclosure or request.

01-25-35. Transfer or Disclosure of Information Obtained from Sources
Outside the Department (Revised 3/03 ML #2859)

Information obtained from sources outside the Department, also known as "third party information" or "collateral source information," does not enjoy any special status with regard to its use or transfer within the Department or disclosure outside the Department unless different treatment is specifically required by federal or state law or regulations. Information, which does enjoy special status, includes Social Security records, Vocational Rehabilitation records, Substance Abuse treatment records, and the identity of a reporter of suspected child abuse or neglect. The employee responsible for responding to requests for information (e.g., counselor, case worker, records custodian) has the duty to be aware of statutes and regulations mandating different treatment, and to seek assistance if he or she has questions.

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01-25-40. Mandatory Cautions for Disclosures Without Client Authorization
(Revised 3/03 ML #2859)

Where information is disclosed outside the Department without the client's written authorization (e.g., pursuant to appropriate subpoena and court order, emergency situation, or mandatory child abuse or neglect reporting), the disclosure of records other than substance abuse treatment records shall be accompanied by the following statement or words to this effect: "Confidentiality of this information is provided under N.D.C.C. § 50-06-15, which provides for penalties for violations. This material may not be transmitted to anyone without consent or other authorization by the agency furnishing it." This statement is not required if protected health information is disclosed for treatment, payment, or health care operations.

The disclosure of substance abuse treatment records shall be accompanied by the following statement: This notice accompanies a disclosure of information concerning a client in substance abuse treatment, made to you with the consent of such client. This information has been disclosed to you from records protected by federal confidentiality rules (42 C.F.R. Part 2). The federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2. A general authorization or the disclosure of medical or other information is **NOT** sufficient for this purpose. The federal rules restrict any use of the information to criminally investigate or prosecute any substance abuse treatment patient.

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01-25-45. Permitted Disclosures of Protected Health Information Without
Client Authorization (Revised 3/03 ML #2859)

Protected health information may be disclosed without client authorization in the following situations, to the extent that the use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of the law. Protected health information may be disclosed, without client authorization to another covered entity for the purpose of treatment, payment, or healthcare operations except for information subject to 42 C.F.R. Part 2.

01-25-45-01. Emergencies (Revised 3/03 ML #2859)

In an emergency situation involving a serious threat to human life or health, when the client's authorization for the disclosure of information cannot be obtained, information necessary to prevent or minimize harm may be disclosed from the record of a client, providing the client is notified as soon as possible of the disclosure. If substance abuse records are involved, see section [01-25-100](#).

01-25-45-05. Duty to Warn (Tarasoff Warning) (Revised 3/03 ML 2859)

The Tarasoff decision (the landmark case of *Tarasoff v. Regents of the University of California*, 131 Cal. Rptr. 14, 551 P.2nd 334 (Cal. 1976)) deals with responsibility of a psychotherapist to warn victims of potential violence by clients. Simply stated, this means that the psychotherapist-patient privilege is overshadowed by the therapist's responsibility to take reasonable precautions, including a warning to an intended victim.

In general, a duty to warn arises because there is a special relationship between the mental health professional (the therapist) and the client (by virtue of the therapy setting), or a special relationship exists between the mental health professional and the potential victim.

A Tarasoff warning inherently requires the exercise of professional judgment by a therapist. Thus, a therapist may, consistent with applicable standards of ethical conduct, use or disclose protected health information, if the therapist, in good faith, believes the use or disclose:

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- Is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and
 - Is to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat.
1. The general legal requirements for DHS staff in regard to Tarasoff warnings follow:
 - a. The psychotherapist's duty arises not only when the psychotherapist has actual knowledge of danger. It also arises if the therapist determines, or pursuant to standards of the profession should determine, that the patient presents a serious danger to another. If a patient threatens physical violence against someone, the threat must be a serious one and the victim or victims must be reasonable identifiable. Some examples of when a victim is "reasonable identifiable" include:
 - (1) The victim is specifically named by patient (e.g., Bob Smith of 123 Main Street);
 - (2) The victim is easily identifiable by their relationship to the patient (e.g., my mother, brother, employer, colleague, competitor, etc.);
 - (3) Other easily recognizable trait (e.g., the Mayor of Minot, my congressman, the male host of the morning radio talk show; or
 - (4) Some other identifiable class of persons, e.g., students at my school.

In order to discharge the duty to warn, the psychotherapist must make reasonable efforts to communicate the threat to the victim or victims AND must notify a law enforcement agency.

Prior to providing any warning, a therapist should seek, when possible, an authorization from the client to disclose information to the intended victim, law enforcement, or other appropriate people.

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- b. Persons to be notified in a Tarasoff situation must include the intended victim, and the police. The therapist must take all practical steps that are reasonable and necessary to warn the victim of the circumstances such as attempting to contact the potential victim by telephone, or letter. This may include telling other persons who are in a position to warn the victim. It is reasonable to provide the name and address of the client making the threats and the nature of the violence that the client has threatened. It is not permissible, however, to provide the police or the victim access to confidential patient records without a valid court order.
2. If a Tarasoff warning is issued, the therapist should consider whether the patient should be evaluated, and give serious consideration as to whether initiating detention or hospitalization under the emergency procedures set forth in NDCC section 25-03.1-25 is appropriate.
3. Once a decision has been made as to how the situation will be handled clinically, the actions taken should be carefully charted. The therapist needs to chart: (1) what information was disclosed, (2) to whom, (3) when, (4) why, and (5) whether consent to disclose was requested and the response (and, if not requested, why not). The name and location of the law enforcement agency contacted and the name of the officer must also be included in the chart. (The officer's badge number should also be included in the chart.)
4. A written incident report (which may incorporate information from the patient's chart) must always be completed by the clinical staff, signed by the supervisor, and submitted to the DHS Risk Manager when a Tarasoff warning has taken place.

This report must include the name of the staff member issuing the warning, the name of the supervisor and any other persons involved in the decision, as well as the circumstances surrounding the warning.

The report must be completed within 48 hours and submitted.

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NOTE: if you have any doubt about whether a Tarasoff warning should be issued, or what information should be disclosed and who should receive this information, contact your supervisor immediately. If a supervisor has any doubt about how to handle a Tarasoff situation, the supervisor (or the therapist) should immediately contact the DHS Legal Advisory Unit at 701.328.2311.

01-25-45-10. Exceptions to Patient Notice (Revised 3/03 ML #2859)

If a Tarasoff warning is given in a situation involving a serious threat to human life or health, and the client has refused to consent to a warning disclosure, or consent otherwise cannot be obtained, then, except as provided under 45 C.F.R. § 164.524 (a)(3) (which defines the circumstances under which a health care provider may withhold the disclosure to an individual of their own health care information), the client should be notified as soon as possible that a warning disclosure has occurred.

01-25-45-15. Debt Collection (Revised 3/03 ML #2859)

N.D.C.C. § 44-04-18.10, governs disclosure of records of a public entity. Section 4 of the provision states in relevant part:

Unless otherwise prohibited by federal law, records of a public entity which are otherwise closed or confidential **may** be disclosed to any public entity for the purpose of law enforcement or collection of debts owed to a public entity, provided that the records are not used for other purposes and the closed or confidential nature of the records is otherwise maintained

The Department is a "public entity" for purposes of this statute. There are two things to note about disclosures under section 44-04-18.10(4). First, the disclosure is only authorized if disclosing will not violate federal law or regulations. Second, disclosure under this section is not absolutely required, but instead is left to the discretion of the Department. Please contact the Legal Advisory Unit for assistance if needed.

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When material is disclosed, it is to be for law enforcement or collection of debts owed to a public agency only. It is the responsibility of the Department to inform the law enforcement agency or debt collection agency of the confidential nature of the requested information. Thereafter, the law enforcement agency or debt collection agency will be responsible for maintaining necessary confidentiality and assuring the information is used only for law enforcement or debt collection purposes.

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01-25-45-20. Law Enforcement (Revised 3/03 ML #2859)

As already noted, N.D.C.C. § 44-04-18.10(4) allows the disclosure of otherwise closed or confidential records of a public entity for the purpose of law enforcement.

The HIPAA Privacy Rules (45 CFR 164) allow for the disclosure of protected health information to law enforcement officials only for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. Only the following information may be disclosed for the above stated reasons without client authorization:

1. Name and address;
2. Date and place of birth;
3. Social security number;
4. ABO blood type and rh factor;
5. Type of injury;
6. Date and time of treatment;
7. Date and time of death, if applicable; and
8. A description of distinguishing physical characteristics, including height, weight, gender, race, hair and eye color, presence or absence of facial hair (beard or moustache), scars, and tattoos.

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The HIPAA Privacy Rules specify that the following information may not be disclosed to law enforcement officials without client authorization or appropriate court order:

1. DNA or DNA analysis;
2. Dental records;
3. Typing, samples or analysis of body fluids or tissue; and
4. Substance abuse records.

N.D.C.C. § 25-03.1-43 authorizes, in certain cases, the disclosure of information from records of an individual who is or has been a patient in a mental health facility. N.D.C.C. § 25-03.1-43(7) provides that all records may be disclosed to governmental or law enforcement agencies when necessary to secure the return of a patient who is absent without authorization from the facility or when necessary to report a crime committed on facility premises or against facility staff or patients, or threats to commit such a crime.

There is no specific requirement in the State statute that the focus of the law enforcement investigation be on a violation of a program, but federal regulations specific to a program may limit the purposes for which program records may be used. Frequently, federal regulations will place limits on the types of information, which can be disclosed, and the purposes for which program records may be disclosed, including limits on the types of criminal investigations or prosecutions for which the records may be disclosed. Below are a few examples:

1. Adoption and Foster Care

Federal law requires that the State Plan provide safeguards which restrict the use of disclosure of information concerning individuals assisted under the State Plan to purposes directly connected with: 1) the administration of the State Plan; 2) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of the State Plan; 3) the administration of any federal or federally assisted program which provides assistance directly to individuals on the basis of need; 4) any audit or similar activity conducted in connection with the administration of the plan; and 5) the reporting and provision of information to appropriate

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authorities regarding known or suspected child abuse or neglect. (42 U.S.C. § 671(a)(8)).

2. Food Stamps

Federal law and regulations provide that disclosure of information obtained from a food stamp applicant or recipient household are generally restricted to individuals directly connected with: 1) the administration or enforcement of the provisions of the Food Stamp Act or other programs which receive federal assistance; 2) programs required to participate in IEVS, (to the extent the food stamp information is useful in establishing or verifying eligibility or benefit amounts); 3) verification of immigration status of aliens applying for food stamp benefits; 4) administration of the Child Support Program under Title IV-D in order to assist in the administration of that program; 5) employees of the Comptroller General's Office of the United States for audit examination; and 6) local, state, or federal law enforcement officials who request the information in writing and include certain information in their request, as detailed below. (7 U.S.C. § 2020(e); 7 C.F.R. § 272.1(c)).

The Department may respond to a written request for information by law enforcement officials who are investigating an alleged violation of the Food Stamp Program, provided that such requests are in writing and have four distinct pieces of information contained within:

- a. The identity of the requesting individual;
- b. The authority of that individual to make the request;
- c. The violation being investigated; and
- d. The identity of the client about whom the request concerns.

Federal, state, or local law enforcement officials may also have access to the address, social security number, and (if available) a photo of a food stamp household member if the officer provides the Department with the name of the member and notifies the agency that:

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- a. The member is a "fleeing felon," has violated a condition of parole or probation under state or federal law, or has information necessary for an officer to conduct an official duty relating to such conduct;
- b. Locating or apprehending the member is an official duty of the law enforcement officer; and
- c. The request is being made in the proper exercise of an official duty.

3. Medicaid

Federal law and regulations require that the State Plan have protections in place to ensure that the use or disclosure of information concerning applicants and recipients be limited to purposes directly connected with the administration of the plan. Those purposes include establishing eligibility, determining the amount of medical assistance, providing services, and conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan. (42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.300-306).

4. TANF

Federal regulations authorize the Department to disclose the current address of a TANF recipient to state or local law enforcement officials at their request, and without written recipient consent. The law enforcement officer must provide the name and social security number of the recipient, and must demonstrate all of the following:

- a. The recipient is a fugitive felon, as defined by state law;
- b. The officer's duties include the location or apprehension of the felon; and
- c. The request is made pursuant to proper exercise of the officer's duties. (45 C.F.R. § 205.50)

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5. Vocational Rehabilitation

Federal regulations allow the VR program to disclose personal information in connection with law enforcement, fraud, or abuse, unless expressly prohibited by Federal or State laws or regulations, and in response to an order issued by a judge, magistrate, or other authorized judicial officer. (29 U.S.C. §§ 711(c), 721 (a)(6)(A); 34 C.F.R. § 361.38(c)(4)).

6. Substance Abuse

Substance abuse records governed under 42 C.F.R. Part 2 are often relevant to law enforcement investigations. The highly restrictive regulations do not apply to communications from program personnel to law enforcement officers where:

- a. The disclosure is directly related to a patient's commission of a crime or threat to commit a crime on the premises of the program or against program personnel;

and

- b. The information disclosed is limited to the circumstances of the criminal incident. See section [01-25-100](#) for more information.

01-25-50. Unlawful Conduct (Revised 3/03 ML #2859)

Protected health information may be disclosed if a workforce member or business associate believes in good faith that the Department has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided potentially endanger one or more clients, workers, or the public and the disclosure is to a health oversight agency or public health authority authorized by law to investigate or oversee the relevant conduct or conditions of the Department or to an appropriate health care accreditation organization, or to an attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options in relationship to the conduct in question. This does not apply to substance abuse records, adoption records, and foster care records.

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01-25-55. Secretary of Health and Human Services and Other Regulatory
Agencies (Revised 3/03 ML #2859)

Protected health information may be disclosed to the Secretary of the Health and Human Services to investigate compliance with HIPAA Privacy Rules; to health oversight agency, a public health authority, or accreditation or licensing authorities. This exception does not apply to adoption records, and foster care records, and does not apply to the disclosure of substance abuse records to a public health authority.

01-25-60. Business Associates (Revised 3/03 ML #2859)

Protected health information may be disclosed to Business Associates with whom the Department has HIPAA compliant written contracts. This does not apply to substance abuse records, adoption records, and foster care records.

01-25-65. Public Health Activities (Revised 3/03 ML #2859)

Protected health information may be disclosed to a public health authority authorized by law to collect or receive information for the purpose of preventing or controlling disease, injury, or disability. This does not apply to substance abuse records, adoption records, foster care records, food stamp records, Medicaid records, TANF records, and vocational rehabilitation records.

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01-25-70. Disclosure to Avert a Serious Threat to Health or Safety (Revised 3/03 ML #2859)

Protected health information may be disclosed, consistent with applicable law and standards of ethical conduct, if the employee, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and the information is given to a person reasonably able to prevent or lessen the threat, including the target of the threat; or is necessary for law enforcement authorities to identify or apprehend an individual (reference section [01-25-45-20](#) on law enforcement). This does not apply to substance abuse records and adoption records.

01-25-75. Disclosure of Deceased Client Records (Revised 3/03 ML #2859)

The disclosure of information from a deceased client's records may be authorized by the personal representative of the deceased client. The next of kin may authorize disclosure of information but not protected health information. This does not apply to adoption records (see section [01-25-90](#)) and substance abuse treatment records (see section [01-25-100](#)). A personal representative who is not also next of kin shall provide documentation indicating his or her unrevoked appointment as personal representative. In the absence of a personal representative, a surviving spouse may authorize the disclosure of information.

In the absence of a personal representative or surviving spouse, authorization to disclosure information can be given by any responsible member of the client's family, in the following fashion and order:

1. A living child of the decedent who can demonstrate agreement by all living children of the deceased that the information should be disclosed;
2. A surviving parent of the decedent;
3. A surviving sibling who can demonstrate agreement by all surviving siblings of the decedent that the information should be disclosed; or
4. A living grandchild who can demonstrate agreement by all living grandchildren of the decedent that the information should be disclosed.

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01-25-80. Information that Need not be Safeguarded (Revised 3/03 ML
#2859)

Information of a general nature concerning caseloads, number of recipients by program, social and statistical data resulting from studies, surveys, reports, and expenditures for programs and administration, etc., that cannot identify or reasonably lead to the identification of specific individuals or families is public information and must be disclosed upon request to the news media or members of the public.

01-25-80-01. De-identified Health Information (Revised 3/03 ML #2859)

De-identified Health Information is information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual. Health information is not individually identifiable health information if one of the following applies:

1. A person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable:
 - a. Applying such principles and methods, determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual who is a subject of the information; and
 - b. Documents the methods and results of the analysis that justify such determination; or
2. The following identifiers of the individual or of relatives, employers, or household members of the individual, are removed:
 - a. Names;

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- b. All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census;
- c. The unit has more than 20,000 people;
- d. The zip code is changed to 000 for units with 20,000 or fewer people;
- e. All elements of dates (except year) directly related to an individual, including birth date, admission date, discharge date, date of death, and all ages over 89 and all elements of dates indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
- f. Telephone numbers;
- g. Fax numbers;
- h. Electronic mail addresses;
- i. Social security numbers;
- j. Medical Records numbers;
- k. Health plan beneficiary numbers;
- l. Account numbers;
- m. Certificate/license numbers;
- n. Vehicle identifiers and serial numbers, including license plate numbers;
- o. Device identifiers and serial numbers;
- p. Web Universal Resource Locators;
- q. Internet Protocol address numbers;

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- r. Biometric identifiers, including finger and voice prints;
- s. Full face photographic images and any comparable images;
and
- t. Any other unique identifying number, characteristic or code;
and there is no actual knowledge that the information could be
used alone or in combination with other information to identify
an individual who is a subject of the information.

De-identified information may be re-identified by the Department if the code or other means of record identification is not derived from or related to information about the individual and is not otherwise capable of being transferred to identify the client, and the code is not disclosed for any other purposes, and the Department does not disclose the mechanism for re-identification.

01-25-80-05. Limited Data Set (Revised 3/03 ML #2859)

A limited data set is protected health information that excludes the following direct identifiers of clients or relatives, employers, or household members of the client:

- 1. Name;
- 2. Postal address information, other than town or city, State, and zip code;
- 3. Telephone number;
- 4. Fax numbers;
- 5. Electronic mail addresses;
- 6. Social security numbers;
- 7. Medical record numbers;
- 8. Health plan beneficiary number;
- 9. Account numbers;

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10. Certificate/license numbers;
11. Vehicle identifiers and serial numbers, including license plate numbers;
12. Device identifiers and serial numbers;
13. Web Universal Resource Locators (URLs);
14. Internet Protocol (IP) address numbers;
15. Biometric identifiers, including finger and voice prints; and
16. Full-face photographic images and any comparable images.

A limited data set can only be used or disclosed for the purposes of research, public health, or health care operations and the Department must have an agreement with the recipient of the information that contains an assurance that the limited data set will only be used or disclosed by the recipient for limited purposes. Contact the Privacy Officer for specific content requirements for a limited data set agreement.

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01-25-85. Authorization to Disclose Information Pursuant to Mandatory
Reporting of Child Abuse or Neglect (Revised 3/03 ML #2859)

An employee of the Department who is a mandatory reporter of suspected child abuse or neglect under North Dakota law may disclose information from client records as part of a mandatory report of suspected child abuse or neglect. If such a reporting involves the disclosure of substance abuse records however, special consideration must be given.

42 C.F.R. Part 2 prohibits the disclosure of substance abuse records in all but certain select situations. 42 U.S.C. § 290dd-2 and 42 C.F.R. § 2.12(c)(6) provide that the prohibitions do not apply to the reporting, under state law, of incidents of suspected child abuse and neglect to the appropriate state or local authorities. Specifically, 42 C.F.R. § 2.12(c)(6) states:

The restrictions on disclosure and use in these regulations do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities. However, the restrictions continue to apply to the original substance abuse treatment patient records maintained by the program including their disclosure and use for civil or criminal proceedings that may arise out of the report of suspected child abuse and neglect.

The exception to the federal substance abuse confidentiality law and regulations allowing programs to comply with mandatory child abuse reporting requirements applies only to initial reports of child abuse or neglect, and to a written confirmation of the initial report. The exemption does not apply to requests or even subpoenas for additional information or records, even if the records are sought for use in civil or criminal investigations or proceedings resulting from the program's initial report.

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01-25-90. Adoption Information Not to be Disclosed Except in Case of a
Court Order or Special Circumstances (Revised 3/03 ML #2859)

Certain information is subject by law to heightened confidentiality protection. The following information shall not be disclosed under any circumstances to any client or individual or entity outside of the Department, except in special circumstances or under court order:

1. Information identifying an adoptive parent, adopted individual, genetic parent, or genetic sibling in an adoption.

N.D.C.C. § 14-15-16(4) states the general rule that all papers, records, and information pertaining to an adoption are confidential and may be disclosed only in accordance with the provisions of N.D.C.C. § 14-15-16. In some cases, a client involved in an adoption or an individual or entity outside the Department will request information, which identifies an adopted individual, genetic parents, or genetic siblings in an adoption.

N.D.C.C. § 14-15-16 outlines the specific procedural requirements that must be followed when an adopted individual, genetic parent, or genetic sibling of an adopted individual requests the Department to initiate disclosure of identifying information about one another. The individual with respect to whom a disclosure of identifying information has been requested may do one of three things in response:

- a. Authorize disclosure;
- b. Refuse to authorize disclosure; or
- c. Nothing at all.

If the individual does nothing at all, that must be treated as a refusal to authorize disclosure except that it does not preclude disclosure after the individual's death.

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No individual may be required to disclose the name or identity of either an adoptive parent or adopted individual except as:

- a. Expressly authorized by N.D.C.C. § 14-15-16;
 - b. Authorized in writing by the adoptive parent or adopted person; or
 - c. Upon order of the court. If identifying information concerning an individual is sought, and the individual has objected, the court may not order the disclosure of identifying information concerning the objecting person.
2. The identity of a reporter of suspected child abuse or neglect.

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01-25-95. Authorization for Disclosure of Information for Research (Revised
3/03 ML #2859)

The disclosure of information for purposes of research projects is covered by N.D. Admin. Code § 75-01-02-02, Confidentiality in Research Projects, and the North Dakota Department of Human Services Manual Chapter [400-32](#), DHS Institutional Review Board. Questions on this topic should be addressed to those sources.

Research projects involving information from State Hospital records are further subject to the requirements of N.D.C.C. § 25-03.1-43, which includes the obtaining of a patient's authorization.

01-25-100. Confidentiality of Substance Abuse Treatment Records (Revised
3/03 ML #2859)

There are very stringent laws that govern the disclosure of substance abuse treatment records. These laws are stricter than the confidentiality provisions that govern disclosure of other kinds of records kept by the Department. If you are dealing with a request for disclosure of substance abuse treatment records, use caution and remember that you must use a different set of criteria for authorizing disclosure than you would with other kinds of records. **Please note that even a court order does not necessarily allow you to disclose addiction records!** As discussed below, when a court order is necessary for disclosure of such records, a certain process must be followed by the court and only when the court enters an appropriate kind of order will such a disclosure be allowed.

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01-25-100-01. Overview of Federal Law Regarding Disclosure of
Substance Abuse Treatment Records (Revised 3/03 ML
#2859)

The general rule is that, except under certain specified conditions, the federal law prohibits the disclosure of records or other information concerning any patient in a federally assisted substance abuse treatment program. 42 U.S.C. 290dd-2 and 42 C.F.R. Part 2. The Department receives federal funding and is thus subject to the law. The purpose of the law is to afford people seeking substance abuse treatment the greatest possible privacy. Protecting confidentiality encourages people to seek, and remain in, substance abuse treatment.

If a program receives a request for a disclosure of an individual's records that is not permitted by the law, it must refuse to make the disclosure, and must be sure to do so in a way that does not even reveal that the individual has ever been diagnosed or treated for substance abuse.

01-25-100-05. Exceptions to the General Prohibition on Disclosure of
Substance Abuse Treatment Records (Revised 3/03 ML
#2859)

The exceptions described below will allow you to disclose substance abuse treatment records.

1. Written authorization from the patient

Most disclosures of records are permissible if the patient has signed a valid authorization form which has not expired or been revoked. 42 C.F.R. § 2.31. **IMPORTANT RESTRICTION:** no information that is obtained from a program (even if the patient consents) may be used in a criminal investigation or prosecution of the patient unless a court order has been issued under the special circumstances set forth in 42 C.F.R. § 2.65.

Please note that a proper authorization form must be in writing and must contain the required information enumerated in section [01-25-15](#).

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2. Disclosure for internal program communications

Program staff may disclose information to other staff within the program or to an entity having direct administrative control over that program if the recipient needs the information in connection with duties that arise out of the provision of substance abuse diagnosis, treatment or referral.

3. The disclosure protects the patient's identity

Communications that neither identify an individual as a substance abuser or patient nor verify someone else's identification of the patient are permitted (i.e., reporting aggregate data about a program's population or information about an individual in a manner that does not disclose that the individual is someone with a substance abuse problem or in receipt of treatment services).

4. Medical emergency

The law permits programs to disclosure information to private or public medical personnel to the extent necessary to meet a bona fide medical emergency of the patient or any other individual (i.e., dangerous drug overdose or attempted suicide would be medical emergencies).

5. The patient committed a crime on the program premises or against program personnel

When a patient has committed, or threatened to commit, a crime on program premises or against program personnel, the regulations permit the program to report the crime or threatened crime to a law enforcement agency.

6. The disclosure relates to research, audit or evaluation

The regulations permit a program to disclose patient-identifying information to researchers without patient consent provided certain safeguards are met. 42 C.F.R. § 2.52. Contact the legal advisory unit for assistance in determining if these safeguards have been met.

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7. Reporting of child abuse or neglect

The confidentiality laws do not prohibit the reporting under state law of incidents of suspected child abuse and neglect to the appropriate state or local authorities. However, the exception only applies to the initial report of child abuse or neglect and not to requests or even subpoenas for additional information or records even if the records are sought for use in civil or criminal investigations resulting from the program's initial report.

8. Qualified service organization agreement

Programs may disclose information to a qualified service organization which is a person or agency that provides services to the program such as data processing, data preparation, laboratory analysis, vocational counseling or legal, medical, accounting or other professional services. There must be a special written agreement between the organization and the program in order to qualify for this exception. Please call the legal advisory unit for assistance.

9. Court orders allowing disclosure

Civil Cases

In civil matters, a court may issue an order authorizing a program to make a disclosure of patient-identifying information that would otherwise be prohibited only after it follows certain procedures and makes particular determinations specified by the law. *Jane H. V. Rothe*, 488 N.W.2d 879 (1992) is a North Dakota supreme court case which addresses what a court must do to properly order disclosure of addiction records. Our Supreme Court held that a court must make an *in camera* (in chambers) review of the records first before ordering disclosure.

A subpoena, search warrant or arrest warrant, even when signed by a judge, is not sufficient alone to permit a program to disclose addiction records. The court must first make a good cause determination as specified by law before a court order will allow a program to disclose any such records which entails:

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- a. Notice to both the program and the patient of the request for the order and some opportunity to make an oral or written statement to the court;
- b. The court finding “good cause” for the disclosure. Good cause can only be found if the court determines that the public interest and need for disclosure outweigh any adverse effect that the disclosure will have on the patient and the information is not available elsewhere;
- c. North Dakota law specifically requires the court to review the records *in camera* before making a good cause determination;
- d. If the court authorizes the disclosure, it must also limit the scope of the disclosure.

Please call the legal advisory unit for assistance in determining whether there is a proper court order authorizing the release of substance abuse treatment records. You may be referred to the Attorney General’s office if there is the potential for litigation.

Criminal Cases

An investigative, law enforcement or prosecutorial agency seeking an order authorizing disclosure of addiction records for purposes of investigating or prosecuting a patient for a crime must meet five stringent standards:

- a. A court must find that the crime involved is extremely serious, such as an act causing or threatening to cause death or serious injury;
- b. The records sought are likely to contain information of significance to the investigation or prosecution;
- c. There is no other practical way to obtain the information;
- d. The public interest in disclosure outweighs any actual or potential harm to the patient, the doctor-patient relationship and the ability of the program to provide services to other patients; and

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- e. The program has had notice of the order sought and an opportunity to be represented by independent counsel.

Responding To Requests For Disclosure Of Confidential Information

If Disclosure Is Allowed

If you have determined that disclosure of the requested information is allowed because the client gave written authorization or because one of the exceptions above is met, you must include with the disclosed information the following notice:

This notice accompanies a disclosure of information concerning a client in substance abuse treatment, made to you with the authorization of such client or as otherwise allowed by law. This information has been disclosed to you from records protected by federal confidentiality rules (42 C.F.R. Part 2). The federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written authorization of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2. A general authorization for the disclosure of medical or other information is not sufficient for this purpose. The federal rules restrict any use of the information to criminally investigate or prosecute any substance abuse patient.

If Disclosure Is Prohibited

If a program receives a request for a disclosure of an individual's records that is not permitted by law, it must refuse to make the disclosure and must be sure to do so in a way that does not reveal the individual has ever been diagnosed or treated for substance abuse. If you are responding to a request for disclosure of addiction records including a request issued via subpoena, search or arrest warrant and you are unsure if the law allows such a disclosure, call the legal advisory unit immediately for assistance at (701) 328-2311. The legal unit or the Attorney General's office will prepare a written response as necessary to inform the requestor that the disclosure cannot be made.

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01-25-105. Individuals Who are Clients Because of a Referral (Revised 3/03
ML #2859)

Some individuals who meet the definition of "client" in this manual are clients because they have been referred to the Department by another agency without having gone through the application process. Such referrals may be involuntary, such as by a court, or may be voluntary in nature. Employees may, in the exercise of professional discretion, disclose information of a non-clinical nature, (such as whether the individual kept an appointment), to the referring agency without a signed authorization from the client.

If the circumstances of a referral for services are such that employees may reasonably anticipate making a report to the referring agency or furnishing information to the agency in some form, the unit may refuse to provide services unless the client signs an authorization permitting the unit furnishing the report or information to give the information to the referring agency. See section [01-25-100](#).

01-25-110. Treatment of HIV Test Results (Revised 3/03 ML #2859)

In general, the disclosure of HIV "test results" is governed by N.D.C.C. Ch. 23-07.5. The Department does not do tests for the presence of HIV, and will not create "test results." If the Department possesses "test results" it is because the test subject has authorized disclosure to the Department.

Where one unit of the Department possesses HIV test results, and another unit of the Department requests those results, the information may be exchanged between units for the purpose of administering a program or providing a service.

Where an individual or entity outside the Department requests the Department or a unit thereof to disclose HIV test results, the disclosure depends on whether or not the test subject authorizes the disclosure.

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01-25-115. Disclosure of Information Contained in Family Files (Revised
3/03 ML #2859)

Due to the uniqueness of each family unit, it is impossible to set clear standards as to what information can be disclosed from children or family files. Each case must be reviewed individually. The following is a set of guidelines regarding situations in which material should not be disclosed:

1. Cases where a court has entered an order specifically limiting the availability of information.
2. Cases where the parental rights have been terminated by action of the court or where the parent has relinquished all parental rights.
3. Information regarding sexually transmitted diseases or addiction treatment where the child is 14 years of age or older and has sought treatment without permission, authority, or consent of a parent.
4. If a child is a married minor or is a member of the Armed Forces, he or she should be treated as an adult.
5. If it is determined that a disclosure of information to the parent would not be in the child's best interest, it may be appropriate to attempt to secure a Court Order prohibiting the information requested from being disclosed to the parent requesting the information.
6. After a client turns 18, the parents do not have access to records of the client generated before the client turned 18 years of age.
7. A client who is a minor may have access to the client's own records in the same manner as an adult, unless the individual primarily responsible for providing services to the minor determines that the minor client lacks sufficient capacity to understand the information to which access is sought.

An employee shall be present while the client reviews the file and shall answer questions the client may have to the extent the employee has the knowledge to do so.

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Where the individual primarily responsible for providing services to the client determines that a client's file contains information that requires interpretation in order to be properly understood, the employee designated to be present shall be someone capable of providing the interpretation.

01-25-120. Child Support Enforcement (Revised 3/03 ML #2859)

01-25-120-01. Service Recipient Access to Case Records (Revised 3/03 ML #2859)

The general statement of policy in section [01-05](#) has unique significance and application for child support case records. Any child support case has multiple service recipients, including the State as a third party. In addition, there are special considerations given the manner in which some of the information is stored, the quantity of the information, and the number of federal and state restrictions on disclosure of the information.

Development of written policy governing service recipients' access to child support case records to which he or she is a party is the responsibility of the Child Support Enforcement program. Employees should refer directly to the Child Support Enforcement policy or contact the state Child Support Enforcement office for assistance on issues regarding service recipients' access to case records.

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01-25-125. Uses and Disclosures for Involvement in the Individual's Care

Client Present

If the client is available or present and capable to make health care decisions, the client must agree with the use or disclosure of information and be provided with an opportunity to object; or the unit must reasonably infer from the circumstances that the client does not object based on the exercise of professional judgment.

Client Absent/Incapacitated

Information may be disclosed if, in the exercise of professional judgment, the unit determines the disclosure is in the best interests of the client and discloses only the information directly relevant to the person's involvement with the client's health care.

The unit may use professional judgment to make reasonable inferences of the client's best interest in allowing a person to act on behalf of the client to pick up filled prescriptions, medical supplies, x-rays, or other similar forms of protected health information.

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01-30. Notifying Applicants of Confidentiality Rights and Privacy Practices
(Revised 3/03 ML #2859)

01-30-01. Statement of Policy (Revised 3/03 ML #2859)

It is the policy of the Department that all applicants, clients, or their representatives be informed of the program's need to collect personal information, policies governing the use of personal information, the existence of confidentiality safeguards, and client rights with respect to their protected health information.

01-30-01-01. Notice to Clients of Privacy Practices (Revised 3/03 ML
#2859)

All clients, applicants, or personal representatives will be given a copy of the Department's notice which describes the uses and disclosures of protected health information that may be made by the Department, and individual's rights regarding their protected health information, and the Department's legal duties with respect to protected health information. The Notice will also identify the complaint process if a client feels that his or her privacy rights have been violated.

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01-30-01-05. Notice Distribution (Revised 3/03 ML #2859)

01-30-01-05-01. Client Notice Distribution (Revised 3/03 ML #2859)

The notice will be provided to the clients no later than the date of the first service delivery, including service delivered electronically. If initial contact is electronic, a copy of the notice will be mailed to the client.

In the case of emergency treatment, the notice will be given to the client as soon as reasonably practicable.

01-30-01-05-05. Health Plan Enrollee Distribution (Revised 3/03 ML #2859)

Individuals enrolled in a health plan will be given the notice upon enrollment.

Once every three years the Department will notify enrollees of the availability of the notice and how to obtain the notice.

01-30-01-10. Acknowledgment of receipt of Notice (Revised 3/03 ML #2859)

A Client is required to sign a written acknowledgment that he or she has received a copy of the Notice and such copy will be retained in the medical record. If the provider has made a good faith effort but was unable to obtain a signed acknowledgment, that effort will be documented along with the reason why the acknowledgment was not obtained. Documentation may be made in the medical record.

Individuals enrolled in a Department health plan are not required to sign an acknowledgment form.

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01-30-01-15. Notice Revision (Revised 3/03 ML #2859)

Changes in privacy practices must be incorporated in the notice and the revised notice made available for clients on or after the effective date of the revision.

Revised notices must be sent to enrollees of health plans within 60 days of the revisions.

01-30-01-20. Posting the Notice (Revised 3/03 ML #2859)

The Notice will be displayed at provider locations in a clear and prominent location for client review.

The Notice will also be displayed on the Department's web site and will be available electronically.

01-30-01-25. Notice to Applicant of Need for Information and Right to Withhold Information (Revised 3/03 ML #2859)

An applicant for services or assistance shall be informed at the time of application of the authority under which personal information is collected. The applicant shall be informed that he or she has the right to withhold information and to refuse to sign authorization forms, which would allow the Department's staff to obtain information from other sources. If the applicant refuses to provide information necessary to provide assistance requested, the applicant shall be informed that refusal may result in ineligibility for the program, if that is the case.

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01-35. Client Access to Case Records (Revised 3/03 ML #2859)

01-35-01. Statement of Policy (Revised 3/03 ML #2859)

It is the policy of the Department that a client has access to his or her designated record set, subject to limitations and exceptions outlined in section [01-25-40](#) to protect the confidentiality of information regarding individuals other than the client.

01-35-05. Access to Own File Not a Disclosure (Revised 3/03 ML #2859)

Prohibited disclosures do not include making available the entire contents of a client's records available to the client. The client or his or her representative shall be given access to the client's records in accordance with the procedures of this service chapter. No authorization is required if the client seeks access to his or her own records in person, except Food Stamp clients, but the client may be asked to present reasonable proof of identification. The designation of records as "protected health information" does not create any special status with regard to client access. A client has access to his or her own "protected health information" under this service chapter in the same manner as all other records.

01-35-10. Deletion of Information About Other Clients (Revised 3/03 ML #2859)

All references to and information about other clients shall be deleted from records made available to the client.

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01-35-15. Disclosures to or by a Client's Legal Representative (Revised 3/03
ML #2859)

Access shall be granted to a client's legal representative only upon receipt of a written authorization signed by the client or upon the receipt of written proof establishing the representative capacity, unless such authorization or written proof is already part of the client's file. Any authorization or written proof not already a part of the client's file shall be added to in the client's file.

Authorizations signed by a client's legal representative shall include a photocopy of the court order or other document establishing the representative capacity unless such a copy is already contained in the client's file. Authorizations signed by a representative shall include, above the signature, the statement, "My representative capacity has not been revoked" or words to that effect.

For contents of an authorization, see section [01-25-15](#).

Disclosure may be denied if, in the exercise of professional judgment, the provider decides that it is not in the best interest of the client to treat the person as the legal representative. In such a case, advice from the Department legal services or Privacy Official should be requested.

Clients occasionally authorize the disclosure of all information in their records to their attorneys. This commonly occurs in the setting of a court appointed attorney defending a client who is the object of a mental health commitment petition and in disputes over benefits, although it may arise in other settings. The purpose of such disclosure is to facilitate preparation of a client's claim or defense. Such authorizations are to be honored even though it does not enumerate or specifically describe the nature or amount of information to be disclosed, except for substance abuse treatment records.

Employees may require proper identification of attorneys and substantiation of the existence of the attorney-client relationship, such as a copy of the court appointment, before giving access to the client's records.

The Department may charge the attorney for copying records.

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01-35-20. Disclosure to or by a Client's Step-Parent (Revised 3/03 ML
#2859)

In some cases, a stepparent of a child client will seek access to client records or will be looked to for purposes of authorizing the disclosure of records. Disclosures in such a case must be addressed on a case-by-case basis. However, there are some general principles that can be followed in determining if disclosure to or by the step-parent is appropriate:

1. A disclosure to or by a step-parent who lives with the child is more appropriate than such a disclosure if the step-parent does not live with the child;
2. A disclosure to or by a step-parent who has a long-standing relationship with the child is more appropriate than such a disclosure when the relationship is of short duration;
3. If the child's parents dispute custody or visitation rights, disclosure to or by a step-parent is inappropriate;
4. With respect to a step-parent authorizing a disclosure, the urgency and ease of securing a parent's signature must always be considered. If getting a parent's signature will be unduly time-consuming or difficult, use of the step-parent's signature may be appropriate; and
5. The substance abuse treatment exception applies with respect to minor clients age fourteen or older (see section [01-35-30](#)).

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01-35-25. Access by Minor Clients (Revised 3/03 ML #2859)

A client who is a minor or an emancipated minor may have access to his or her own records in the same manner as an adult, unless the individual primarily responsible for providing services to the minor determines that the minor lacks sufficient capacity to understand the information to which access is sought. A parent or legal representative of a minor client shall have access to the minor client's records except records of a minor client age fourteen or older who receives services for substance abuse treatment or treatment for a sexually transmitted disease. For such a minor client, see section [01-35-30](#). Access shall be given to a minor client's legal representative in the same manner as discussed in section [01-35-15](#).

01-35-30. Minors Who Receive Substance Abuse Treatment (Revised 3/03 ML #2859)

There are special rules governing the disclosure of the substance abuse treatment records of minors. Refer to 42 C.F.R. § 2.14. N.D.C.C. § 14-10-17 provides in relevant part that any individual fourteen years of age or older may contract for and receive examination, care, or treatment for alcoholism or drug abuse without permission, authority, or consent of a parent or guardian. Written authorization for disclosure may only be given by the minor when he or she is age fourteen or older.

Facts relevant to reducing a threat to the life or physical well-being of a minor applicant or any other individual may be disclosed to the applicant's parent, guardian, or other person authorized under state law to act on the minor's behalf if the program director judges both of the following to be true:

1. The minor lacks capacity because of extreme youth or mental condition to make rational decisions on whether to consent to a disclosure to his or her parent, guardian, or other person authorized under state law to act in his or her behalf; and
2. The applicant's situation poses a substantial threat to the life or physical well-being of the applicant or any other individual, which may be reduced by the disclosure.

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01-35-35. Access in Fair Hearing Context (Revised 3/03 ML #2859)

In all cases in which a client has requested a fair hearing, the client shall have access to the entire case record.

01-35-40. Access Limitations and Exceptions Without Client Opportunity to Request Review (Revised 3/03 ML #2859)

1. The client shall be allowed to see the entire contents of his or her record except:
 - a. Information identifying an adoptive parent, adopted individual, genetic parent, or genetic sibling in an adoption;
 - b. The identity of a report of suspected child abuse or neglect;
 - c. Information compiled or prepared in anticipation of a civil, criminal or administrative action or proceeding;
 - d. Information about another client;
 - e. Information obtained from a third party (or outside source) under guarantees or assurances of confidentiality and the disclosure would be reasonably likely to reveal the source of that information;
 - f. Psychotherapy notes;

For the above exceptions, a client does not have the right to a review of the denial of access.

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01-35-45. Access Limitations and Exceptions With Client Opportunity to Request Review (Revised 3/03 ML #2859)

Access to a client's record by the client or legal representative may be denied if a licensed healthcare provider determines any one of the following:

- a. Access to the record is likely to endanger the life or safety of the individual or another person; or
- b. Access is likely to cause substantial harm to the individual or another person.

A client may request a review of a denial based on the above according to the process outlined in section [01-35-55](#).

01-35-50. Procedure for Giving Client Access (Revised 3/03 ML #2859)

A client's request to review or obtain a copy of his or her record will be acted upon within 30 days of the request, or within 60 days if the information is not maintained on-site.

1. Each unit of the Department must identify a person who is responsible for receiving and processing requests for access.
2. An employee of the Department shall be present while the client reviews the file and shall answer questions the client may have to the extent the employee has the knowledge to do so.
3. If the individual primarily responsible for providing services to the client determines that a client's file contains information that requires interpretation in order to be properly understood, the departmental employee designated to be present shall be someone capable of providing the interpretation.

If a client insists on reviewing the records without the explanation by a staff member, the client shall be asked to sign and date a statement essentially in the following form:

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"I, _____, a client of the ___(unit)___, have requested an opportunity to view the contents of my case records. I have been advised by agents of the ___(unit)___ of their belief that it would not be in my best interest to view certain contents of my file without the explanation of a staff member. I have rejected that advice and I continue to assert my request to see the entire case records unassisted. I agree to hold the ___(unit)___, as well as all other contributors to the case records which I have requested, harmless as to any damages I might incur or suffer due to my requested disclosure of information contained in my case records.

Date

Signature

Witness

This statement shall be witnessed by a Department employee and included with the client's records.

If the client refuses to sign such a statement, the Department employee shall make a record of the refusal.

4. A client will be permitted to examine his or her case records during normal working hours at the departmental facility. No material may be removed from the record; however, material may be copied for the client. Clients may be charged for copies in accordance with Service Chapter [248-02](#). The fees are limited to the cost of copying which may include the cost of supplies and labor of copying, postage, and the cost of preparing a summary or explanation of the protected health information, if requested by the client.
5. A record shall be kept of all instances of client access in the designated record set, including the date and Department employee present. Documentation will be retained for at least 6 years.

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01-35-55. Procedure for Denial of Client Access Client's Own Records
(Revised 3/03 ML #2859)

1. To the extent possible, access may be allowed to the client after excluding the protected health information to which the unit has a ground to deny access.
2. If access to a client's record which contains protected health information is denied, the unit will provide a written denial to the client within 30 days of the request. The written denial must contain the following:
 - a. Basis for denial;
 - b. If applicable, the client's review rights, including a description of how the client may exercise the rights; and
 - c. Description of how the client may complain to the Department or to the Secretary of Health and Human Services.

If the client requests a review of the denial, the unit will designate a licensed health care professional to review the decision to deny access. The reviewing official must not have been directly involved in the decision to deny access.

The reviewing official will provide a written notice to the client within a reasonable period of time of the determination. A copy will be retained in the client's record and retained for at least 6 years.

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05-35-60. Information Notes by Staff (Revised 3/03 ML #2859)

The Department recognizes that staff frequently keep informal or temporary notes containing client information. These notes, with the exception of psychotherapy notes, are the property of the Department and constitute a part of the client's records. They are subject to the confidentiality safeguards of this manual with the following exceptions:

1. Temporary notes which have been incorporated into the client's permanent written record may be destroyed. If not destroyed, they maintain their identity as Department records.
2. Informal or temporary notes may be changed or modified informally, without following procedures for a formal correction to the permanent written record.
3. Notes kept exclusively for the convenience of staff, such as appointment times, call-back messages, etc., may be destroyed without incorporation into the permanent written record of the client.

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01-40. Client Request to Correct or Amend Records (Revised 3/03 ML #2859)

A client may request that the unit correct or delete any portion of the client's records, which the client believes to be inaccurate, irrelevant, or incomplete. The client's request shall be considered by the unit that created the record. Only records created by the Department may be considered for amendment.

Each Department unit must identify a person who is responsible for receiving and processing requests for record amendments.

The unit must act on the request within 60 days after receiving it. If unable to act on the amendment request within that time frame, the unit may make an extension for up to 30 days provided that the client is given a written statement of the reasons for delay and date by which action will be completed. Only one such extension per situation is allowed.

01-40-01. Procedure for Accepting the Amendment (Revised 3/03 ML #2859)

If the unit agrees that the records are inaccurate, irrelevant, or incomplete, the unit shall promptly make the requested correction. In making such a correction, the following procedure is to be used:

1. Make the appropriate correction(s) to the appropriate record(s). Do not discard the old, incorrect version of the record(s). It is important to retain the record(s) to establish a paper trail documenting the correction(s) made. This allows, if necessary, an actual physical comparison between the old and corrected records.

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2. Prepare a statement documenting the circumstances surrounding the correction and notify the client. A suggested format for the statement is as follows:

I (name of employee), on (date), made the following changes to the following records in the file maintained by (facility) concerning (name of client):

[IDENTIFY THE DOCUMENT(S) CHANGED AND THE ACTUAL CHANGE(S) MADE]

The reason(s) for the above-described change(s) is/are:

[IDENTIFY THE REASON(S) THAT THE CHANGE(S) BECAME NECESSARY]

(Signature of employee and date signed)

I (name of client or client's legal representative) have read this statement and reviewed the change(s) described above. I agree that these changes have been made at my direction or otherwise with my permission. I understand that the incorrect version of the changed record(s) will be maintained along with the corrected version, for comparative and documentary purposes only. I understand that this statement will be included as a part of the file.

(Signature of client or client's legal representative and date signed)

3. If the relevant record(s) are maintained by more than one unit of the Department, communicate the nature of the change(s) to all locations in possession of a copy of the record(s). The client or the client's legal representative should be advised to verify, with each such location, that the appropriate change(s) have been made.
4. Communicate the amendment to persons identified by the client as having received protected health information about the client or persons, including business associates known by the provider to have the information that is the subject of the amendment and may have relied or could foreseeably rely on the information to the detriment of the client.

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01-40-05. Procedure for Denying the Amendment Request (Revised 3/03
ML #2859)

A client's amendment request may be denied according to the following criteria:

1. The information was not created by the Department,
2. The information is not part of the designated record set,
3. The information is not accessible to the client as enumerated in [01-25-50](#) or by federal or state law, or
4. The unit determines that the information is complete and accurate.

The unit will provide a written denial to the client or the client's legal representative, which contains the following:

1. The basis for the denial,
2. The client's right to submit a written statement disagreeing with the denial and how the client may file such a statement,
3. A statement that, if the client does not submit a statement of disagreement, the client may request that the unit provide the client's request for amendment and denial with any future disclosures of the protected health information that is the subject of the amendment, and
4. A description of how the individual may complain to the unit, Department, or the Secretary of Health and Human Services. The description must include the name or title, and telephone number of the contact person or office designation.

The client must be permitted to submit a written statement disagreeing with the denial of amendment and the basis of such disagreement. The unit may reasonably limit the length of the statement. Such a statement must be made a part of the designated record set and will be retained according with record retention guidelines but for a period of at least six years.

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The unit may prepare a written rebuttal to the client's statement. A copy must be provided to the client. The document must be retained according to record retention guidelines, but for a period of at least six years.

The unit must identify the record or information in the designated record set that is the subject of the disputed amendment and append or link the request, denial, statement of disagreement, and rebuttal to the designated record set.

01-40-10. Future Disclosures when There is a Disputed Amendment
(Revised 3/03 ML #2859)

The following procedure must be followed when there is a disputed amendment:

1. The statement of disagreement or an accurate summary of any such information must be included with any subsequent disclosure.
2. If the client has not submitted a written statement of disagreement, the unit must include the request for amendment and its denial or an accurate summary of any such information if the client has so requested.
3. If disclosing information using a standard transaction that does not permit the additional material to be included, the unit must separately transmit the amendment material.

01-40-15. Amendment Notice from Another Provider (Revised 3/03 ML
#2859)

If the Department is informed by another provider of an amendment to a client's information that has been disclosed to the Department, the amendment must be made in the record.

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01-45. Legal Proceedings (Revised 12/05 ML #3008)

01-45-01. Protected Health Information Disclosures (Revised 12/05 ML #3008)

Without a valid Authorization to Disclose Information form from a client, protected health information may only be disclosed in the course of any judicial or administrative proceeding, in response to an order from a court or administrative hearing order, or in response to a subpoena, discovery request, or other lawful process if accompanied by a Court Order. Additional restrictions apply to substance abuse records, see section [01-25-100](#).

North Dakota law provides that all records of individuals who have applied for or are receiving services from the Department are considered confidential (N.D.C.C. § 50-06-15). N.D.C.C. § 44-04-18.11(2) provides that unless disclosure under a court order is otherwise prohibited or limited by law, confidential records must be disclosed pursuant to a court order. The subsection also states that upon request of the public entity ordered to make the disclosure, the court ordering the disclosure shall issue a protective order to protect the confidential nature of the records.

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01-45-05. What the Subpoena Compels (Revised 3/03 ML #2859)

When it is not defective, a subpoena compels the presence of the witness or document at the appointed time and place. Failure to obey a subpoena may result in the witness being found in contempt of court.

An individual commanded by a subpoena to produce and permit inspection and copying of designated books, papers, documents, or tangible things or inspection of premises need not appear in person at the place of production, inspection, or copying unless commanded to appear for a deposition, hearing, trial, or other proceeding.

The subpoena alone does not compel the witness to allow inspection of records, books, etc., nor does it compel the witness to testify, where the records or information sought are protected by federal or state confidentiality laws. A copy of a court order must be attached to the subpoena in order for the subpoena to be effective against the party receiving it.

N.D.C.C. § 44-04-18.11(2) specifically provides that confidential records must only be disclosed pursuant to a court order unless disclosure under a court order is otherwise prohibited or limited by law. N.D.C.C. § 44-04-18.11(2). If a public entity is ordered to disclose, the court which orders disclosure shall issue a protective order to protect the confidential nature of the records upon the request of that entity. Such a request could be made a couple of ways. First, in cases where the Attorney General's Office is representing the Department in a hearing or other proceeding, the attorney would make the request on behalf of the Department. Second, in cases where an employee provides the records at a hearing, trial, or other court proceeding, the employee could make the request by saying, "Your honor, I respectfully request you issue a protective order against further disclosure pursuant to section 44-04-18.11 of the Century Code." The employee should also have a copy of the section to give the judge if the judge is unaware of its language.

Any person who discloses confidential records of a public entity under N.D.C.C. § 44-04-18.11 is immune from criminal prosecution. N.D.C.C. § 44-04-18.11(3).

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01-45-10. Licensing Board Requests (Revised 3/03 ML #2859)

Licensing boards are authorized to subpoena or request client records in their investigations or for purposes of a hearing. Protected health information may be disclosed to a health oversight agency authorized by law for oversight activities including civil, administrative or criminal investigations; inspections; or licensure or disciplinary actions. This does not apply to substance abuse records, adoption records, foster care records, food stamp records, Medicaid records, TANF records, and vocational rehabilitation records.

01-45-10-01. Board of Social Work Examiners (Revised 3/03 ML #2859)

The statute providing grounds for disciplinary proceedings gives the Board investigatory authority of licensees, including subpoena power. N.D.C.C. § 43-41-10(6). The statute specifically includes “client records,” and provides that a “written request [which would include a subpoena] from the board constitutes authorization to release information.” The Board’s subpoena or demand is as effective as the client’s authorization and a DHS employee can disclose the client records without further action by the client or court.

The statute provides for continued confidentiality of the client records if they are disclosed without a client authorization during any investigation and hearing.

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01-45-10-05. Board of Addiction Counseling Examiners (Revised 3/03
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The statute provides similar subpoena authority to this Board and also provides that the Board's written request, whether in subpoena or otherwise, "constitutes authorization to disclose information." Again, the statute provides the Board's subpoena or demand has the same effect as though it were a client authorization. The statute does not take into consideration the supremacy of the confidentiality requirements in 42 C.F.R. Part. 2. Any subpoena or request issued by a Board should be directed to the Legal Advisory Unit for action to ensure the Board follows the federal requirements to obtain disclosure of the information.

01-45-10-10. Board of Psychologist Examiners (Revised 3/03 ML
#2859)

While this Board has similar investigatory subpoena power for client records, there is no statutory authority that the Board's request constitutes authorization to disclose client information. See N.D.C.C. § 43-32-27.1(5). To disclose these records, the Board or the person holding the client record must have a client authorization to disclose to the Board or a court order providing for disclosure. N.D.C.C. § 44-04-18.11.

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01-45-10-15. Board of Medical Examiners (Revised 3/03 ML #2859)

The statute providing for Medical Examiners Investigative Panels provides authority to the panel to subpoena physician and hospital records relating to the practice of any physician and specifically provides the “confidentiality of the records by any other statute or law does not affect the validity of the investigative panel’s subpoena power.” N.D.C.C. § 43-17.1-06(1). This gives the Board the authority to override the requirement for client authorization for disclosure of records.

01-45-10-20. Board of Counselors Examiners (Revised 3/03 ML #2859)

The statute provides the Board authority to subpoena patient records; a “written request [or subpoena] from the Board constitutes authorization to disclose information.” N.D.C.C. § 43-47-08(3). Again this permits the disclosure of information as though a client authorization exists.

Note: The authority to disclose is provided only to the Boards. Absent such a request, there does not appear to be authority for a DHS employee under investigation to disclose client files in defense of a complaint.

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01-45-15. Depositions (Revised 3/03 ML #2859)

A deposition is a means of taking testimony from a witness other than in court. The witness is ordinarily served with a subpoena to appear and testify, and, in some cases, to bring records. It often takes place in an attorney's office. There is no judge present. Attorneys ask questions and make objections, and the proceedings are recorded by a court reporter.

For confidentiality purposes, a deposition is equivalent to appearing as a witness in court. All statutes and rules creating confidentiality standards apply to a deposition. Since there is no judge present to issue a court order compelling testimony or disclosure, the witness must state on the record that he or she refuses to answer questions or disclose records because the information sought is confidential. The following statement can be used: "I refuse to answer for the reason that the law and state and federal regulations provide that any such information obtained by me either from the files or in connection with my employment is confidential, and by disclosing this information, I will be violating the law." The witness must then refuse to testify or disclose any information, unless the client waives the confidentiality safeguards on the record or in the case of addiction records, the client has signed an appropriate authorization or there is a valid court order.

01-45-20. Procedure for Responding to a Subpoena (Revised 3/03 ML #2859)

The following procedure shall be followed for responding to all subpoenas:

1. Notify your supervisor immediately that you have been served with a subpoena. If the subpoena was issued on behalf of the client whose records or information are the subjects of the subpoena, treat the subpoena as an authorization to disclose information, unless it pertains to substance abuse treatment records, which require a written authorization or court order.

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2. If the subpoena is issued by a third party, attempt to secure a written authorization from the client for the disclosure of information indicated in the subpoena. The client is not required to give such an authorization, although this is the quickest and easiest way to allow the staff member to testify or disclose records. You may ask the client to consult an attorney about the subpoena before signing an authorization. It is especially important to do this where it is apparent that the client is represented by an attorney in the matter which gives rise to the subpoena. By calling the matter to the attention of legal counsel, the Department may avoid involvement in disputes over the subpoena to which it is not properly a party.
3. If you were not able to obtain a written release from the client, fax a copy of the subpoena to the Legal Advisory Unit.
4. Appear at the time and place indicated in the subpoena. If the subpoena requires that you bring records, bring a copy of them, but do not allow access by anyone unless ordered to do so by a judge.
5. State on the record that you appear in response to the subpoena, and that state law prohibits the disclosure of confidential information. See the sample statement at section [01-45-20](#), in #7. If the information is subject to additional regulations restricting disclosure, contact the Legal Advisory Unit. Federal HIPAA Privacy Rules also prohibit the disclosure of protected health information in response to a subpoena without the requirements listed in section [01-45-01](#).
6. If there is no judge present, such as at a deposition, and no court order has been issued, do not disclose any information about the client unless the client or client's attorney authorizes you to do so on the record. However, for addiction records, see section [01-25-100](#).
7. If you are in a court proceeding, state that you must refuse to answer for the reason "I refuse to answer for the reason that the law and state and federal regulations provide that any such information obtained by me either from the files or in connection with my employment is confidential, and by disclosing such information, I will be violating the law." If the court orders you to disclose the information, you must do so. However, for substance abuse treatment records, you must follow a different procedure, which is detailed in section [01-25-100](#).

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NOTE: See section [01-45-35](#), Court Orders, for additional policies on response to court orders.

8. If a court orders the disclosure of information, ask for a protective order under N.D.C.C. § 44-04-18.11. When the order is issued, disclose the information. Disclose only the specific information ordered to be disclosed. Do not volunteer any additional information. Again, for addiction records, see section [01-25-100](#).
9. If the court does not order the disclosure of the information, do not disclose any information. If necessary, direct the questioner's attention back to state law and state and federal regulations.
10. Make an entry in the client's records indicating what, if any, testimony or disclosure was provided. Indicate if a court order was issued compelling the testimony.

01-45-25. Changes to Records After Subpoena (Revised 3/03 ML #2859)

No altering of or additions to existing entries in the records may be made after the receipt of a subpoena. It must be clear exactly how the records appeared at the time the subpoena was served. This is an essential part of complying with a subpoena. Any documentation to be done to existing records after receipt of a subpoena must be made on separate sheets exclusively for that purpose. For example, an error in the original record, which is discovered after service of a subpoena, must be corrected on a separate sheet and not on the original record.

In a case where there are no ongoing services, it is a relatively simple task to preserve the records as they existed when the subpoena was served. Where the case records are part of an active file requiring ongoing documentation, employees can comply with the subpoena and still continue documentation in the usual course of business as long as it is clear from the record at what point the subpoena was served. This could involve stamping the record, underlining in red, or other means of clear demarcation. For example, a record may contain a form, which is partially completed when the subpoena is served. Proper practice would be to copy the form as it exists at the time of service and make any notations necessary to complete the form on the copy, rather than on the original. In this way, the original is preserved unaltered, while at the same time necessary paperwork can be processed.

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Similar precautions should be observed for documentation of records after response to the subpoena is complete. Case records involving ongoing services may be subject to ongoing documentation long after the subpoena has been responded to. In these cases, normal documentation can continue, as long as any alterations to entries existing before the subpoena are not made on the original document.

Additionally, an individual responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business, or shall organize and label them to correspond to categories specified in the subpoena, if any such categories are specified.

01-45-30. Disclosure of Copies of Records (Revised 3/03 ML #2859)

An employee ordered to disclose records shall do so by giving copies of the records to the court. Original records are not to be left with the court or with attorneys. Copies of official documents are universally accepted in place of the original records. An employee who anticipates that the court may order disclosure of the records should prepare copies, rather than originals, to bring to court.

01-45-35. Information Not to be Disclosed Without an Appropriate Court Order (Revised 3/03 ML #2859)

The following items are to be deleted from the materials disclosed in response to a court order, unless the court makes an appropriate order for their disclosure:

1. The identity of reporters of child abuse or neglect;
2. Information identifying an adoptive parent, relinquishing parent, adopted individual, genetic parent, or genetic sibling in an adoption.

NOTE: When adoption records are at issue, N.D.C.C. § 14-15-16(22) provides that a court may not order the disclosure of identifying information on a party to an adoption where that party objects to the disclosure.

3. Information regarding substance abuse treatment (this information is subject to stringent federal safeguards found at 42 C.F.R. Part 2). See also section [01-25-100](#).

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01-50. Privacy Rights Complaint Procedures (Revised 3/03 ML #2859)

01-50-05. Authority (Revised 3/03 ML #2859)

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 (45 CFR Parts 160 and 164) provides for the privacy of individualized health information. Under HIPAA, a notice of privacy rights and explanation of how protected health information (PHI) is used or disclosed must be distributed.

01-50-10. Purpose of Policy (Revised 3/03 ML #2859)

The purpose of this policy issuance is to establish a procedure for the resolution of client complaints regarding privacy rights and the use or disclosure of protected health information under HIPAA.

01-50-15. Informal Conference Procedures (Revised 3/03 ML #2859)

1. An aggrieved party may request an informal conference with the Department's applicable division director or the director's designee. The aggrieved individual may be represented by an individual or individuals of the aggrieved individual's choice.
2. The director shall, within five working days of an oral or written request for informal conference, convene a conference with the aggrieved party to resolve the matter. The director may request involvement of appropriate staff.
3. Within five working days following the informal conference, the aggrieved party shall receive a written decision together with the reasons for reaching this decision. The director shall file a copy of the decision and request for informal conference with the Privacy Officer.

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4. In the event the decision is contrary to the request of the aggrieved party, the aggrieved party shall be informed of the right to file a request for review to the Department's Privacy Officer. Appropriate forms and assistance must be provided by the Department's staff to the aggrieved individual in order to assist the individual in submitting a request for review to the Department's Privacy Officer.

01-50-20. Procedure for Review (Revised 3/03 ML #2859)

1. A request for review must be received by the Privacy Officer within thirty days of mailing of the informal conference.
2. The Privacy Officer will process the request if timely filed and, if so, shall secure relevant information regarding the complaint and render a decision with thirty days.

01-50-25. Address of the Privacy Officer (Revised 3/03 ML #2859)

The mailing address of the Privacy Officer is: Privacy Officer, North Dakota Department of Human Services, State Capitol, 600 E. Boulevard Dept. 325, Bismarck, North Dakota 58505.

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01-53. Interim Policy and Procedure for Reporting a Breach of Protected Health Information (Revised 7/10 ML #3230)

Any employee of the Department of Human Services who has reason to believe that a breach of protected health information has occurred must report the incident promptly to the employee's immediate supervisor and the DHS privacy officer. The reporting must occur prior to the end of the employee's work day. The report must be emailed to the DHS privacy officer at dhsbreach@nd.gov. The DHS employee also must complete and file a risk management incident report in accordance with the division's or unit's policies and procedures. Employees must continue to follow current policies and procedures regarding the reporting of non-protected health information breaches.

If you have any questions regarding the privacy of protected health information, please contact Kristin Buckmier, privacy officer, at 701-665-2271. If you have any questions regarding the security of electronic protected health information, please contact Kelly Klein, security officer, at 701-328-1017.

In reporting the circumstances of a breach, a DHS employee needs to provide specific detail regarding the following:

1. Name of the client(s) affected;
2. Date of the breach;
3. Date the breach was discovered;
4. Name of the person who discovered the breach;
5. Contact information for the person who discovered the breach;
6. The approximate number of people affected by the breach;
7. Location of the breached information (e.g., laptop, flash drive, network, portable devices, paper record, or email);
8. Type of protected health information involved in the breach; and
9. Brief, but detailed, description of the breach and safeguards in place prior to breach.

Definitions:

Breach: A breach is, generally, an impermissible use or disclosure under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule that compromises the security or privacy of the protected health information, such that the use or disclosure poses a significant risk of financial, reputational, or other harm to the affected individual.

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There are three exceptions to the definition of “breach”. The first exception applies to the unintentional acquisition, access, or use of protected health information by a workforce member [an employee of DHS or a volunteer assisting DHS] acting under the authority of a covered entity [DHS] or business associate. The second exception applies to the inadvertent disclosure of protected health information from a person authorized to access protected health information at a covered entity or business associate to another person authorized to access protected health information at the covered entity or business associate. In the first two exceptions, the information cannot be used further or disclosed further in a manner not permitted by the Privacy Rule. The final exception to breach applies if the covered entity or business associate has a good faith belief that the unauthorized individual, to whom the impermissible disclosure was made, would not have been able to retain the information. (United States Department of Health and Human Services Web site)

Business Associate: Is a person or entity that performs, in accordance with a written business associate agreement between the business associate and the covered entity, certain functions or activities that involve the use or disclosure of protected health information on behalf of, or provides services to, a covered entity. A member of the covered entity’s workforce is not a business associate. A covered health care provider, health plan, or health care clearinghouse can be a business associate of another covered entity. The Privacy Rule lists some of the functions or activities, as well as the particular services, that make a person or entity a business associate, if the activity or service involves the use or disclosure of protected health information. The types of functions or activities that may make a person or entity a business associate include payment or health care operations activities. Business associate functions and activities include: claims processing or administration; data analysis, processing or administration; utilization review; quality assurance; billing; benefit management; practice management; and repricing. Business associate services are: legal; actuarial; accounting; consulting; data aggregation; management; administrative; accreditation; and financial. See the definition of “business associate” at 45 CFR § 160.103. (United States Department of Health and Human Services Web site)

Covered Entity: A Covered Entity is a health plan, health care clearinghouse, or a health care provider who transmits any health information in electronic form. (45 C.F.R. § 160.103)

Health Information: Information, whether oral or recorded in any form or medium, that: is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse;

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and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual. (45 C.F.R. § 160.103)

Individually Identifiable Health Information: Information that is a subset of health information, including demographic information collected from an individual, and is created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and identifies the individual; or with respect to which there is a reasonable basis to believe the information can be used to identify the individual. (45 C.F.R. §§160.103 and 164-514)

Health information is individually identifiable if you can tell or could figure out to whom it refers by looking at it. Common identifiers include:

1. Names;
2. Geographic subdivisions smaller than a state;
3. All elements of dates (except year) related to an individual (including dates of admission, discharge, birth, death and, for individuals over 89 years old, the year of birth must not be used);
4. Telephone numbers;
5. FAX numbers;
6. Electronic mail addresses;
7. Social Security numbers;
8. Medical record numbers;
9. Health plan beneficiary numbers;
10. Account numbers;
11. Certificate/license numbers;
12. Vehicle identifiers and serial numbers including license plates;
13. Device identifiers and serial numbers;
14. Web URLs;
15. Internet protocol addresses;
16. Biometric identifiers (including finger and voice prints);
17. Full face photos and comparable images; and
18. Any unique identifying number, characteristic, or code.

Protected Health Information: The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy

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Rule calls this information "protected health information" (PHI). (United States Department of Health and Human Services Web site)

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01-55-05. SFN 394, Assignment of Health Insurance Benefits (Revised 3/03 ML #2859)

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