

COVID-19 (Coronavirus) Guidance

FAQ #5: Confidentiality, HIPAA, and Privacy Rights

As COVID-19 continues to spread, county board staff must continue to comply with all state privacy laws—even (and, as OACB would advise, especially) in circumstances involving the illness or death of a person served resulting from complications of COVID-19 transmission. This FAQ has been assembled to address questions related to HIPAA compliance and confidentiality requirements during the COVID-19 response. For questions about this guidance, please email covid19@oacbdd.org.

1. What is protected health information (PHI)?

- Protected health information (PHI) is any individually identifiable information related to the past, present, or future of a person’s physical or mental health that is collected, stored, transmitted, or maintained by a HIPAA-covered entity such as a county board of DD. This includes diagnoses, prognoses, prescriptions, test results, treatment records, medical/personal histories, causes of death, and any identifying factors stored in these records (such as names, addresses, Social Security numbers, etc.).
- **Whether or not someone receives or has received support from a county board of DD is confidential under Ohio Law.** As such, sharing or confirming that a person (living or dead) is, was, or will be on a county board’s caseload is a violation state confidentiality law unless specific releases have been granted by the person served and/or their legal guardian/personal representative. This does not change in light of ongoing efforts to respond to COVID-19.

2. Who is permitted to access the PHI of a person (living or deceased) who receives services and supports from a county board of DD?

- PHI is disclosable to the person the information belongs to, the person’s “personal representative” (i.e. a person or entity that has legal authority to act on behalf of an individual), and anyone else they have formally designated (often a spouse or other relative).
- If a person is deceased, PHI can be shared only with someone who has legal authority to act on behalf of the deceased person or their estate. This is typically a relative specified in a will, an estate executor, or a legally appointed custodian. It is important to remember that Powers of Attorney expire upon a person’s death, however, and may not be relied upon for this purpose. We encourage boards to engage with legal counsel prior to making a disclosure.
- Under HIPAA and Ohio law, nothing that counts as PHI is considered a public record.
- The PHI of a person is protected under HIPAA for a period of 50 years after death.

3. Can a person's PHI be shared with their permission or that of their parent/guardian or personal representative?

Yes. A person's PHI can be shared with proper authorization. A release prepared by OACB legal counsel has been included as an appendix to this FAQ. However, boards should carefully consider whether it is necessary or wise to do so given the many extenuating circumstances surrounding the current crisis. Boards should also ask whether the intended goal of sharing this information can be achieved without doing so. See Questions 10 and 11.

4. Are boards permitted to share PHI—such as a COVID-19 diagnosis—with third parties that provide services and supports to a person (such as DD providers, medical staff, etc.)?

- Yes. County boards are permitted to share PHI with companies with which they have a business associate agreement (BAA), and those business associates are also permitted to make disclosures to public health authorities if the agreement specifically permits this.
- It should be noted that the U.S. Department of Health and Human Services has stated that it plans to relax certain aspects of BAA limitations to help third parties better combat COVID-19. HHS will not enforce any penalties or sanctions on covered entities or business associates for sharing PHI with health authorities during the pandemic crisis, provided the disclosure is made in good faith and the associate informs the covered entity within 10 days of the disclosure.

5. Are boards permitted or required to share PHI—such as a COVID-19 diagnosis—with public health officials?

- Yes. It is the opinion of OACB legal counsel that county boards and providers can and must share relevant PHI to local and/or state health authorities if a person contracts a disease that the state has said poses a threat to public health (such as COVID-19) or if the board believes a person has passed away from complications due to that illness.
- Health authorities are the **only** entities with which the PHI of people served can be shared without authorization or a BAA, and only when it is shared to inform those authorities about a disease that is a threat to public health. Additionally, the Ohio Administrative Code requires a release to the Director of Health if that person requests it.
- HIPAA allows for this disclosure as an exception to the law, and the Ohio Revised Code goes further by mandating it in order to protect public health during a public health emergency (which has been declared by Governor Mike DeWine). Those local health authorities have their own restrictions on how that data can be used or shared, but those restrictions are outside the scope of this document.
- Once local health boards have PHI, they have the additional authority to make further disclosures as part of their efforts to combat infectious diseases. This might include sharing or transmitting PHI as part of contact tracing and quarantine procedures.

6. Can a board tell providers about a person's COVID-19 diagnosis?

- Provided a board has a business associate agreement (BAA) on file with a provider, the board can share with a provider that a person has been diagnosed with COVID-19 in order to prevent further spread by those who may have been in contact with the person.
- As discussed above, business associates may share PHI with public health authorities to the same extent as county boards of DD.
- Business associates are also bound by HIPAA requirements and must not share a person's PHI outside of permitted contexts.

7. If a person is confirmed to have COVID-19, can county boards inform other people served or employees that they might have been exposed?

- Boards and providers are permitted to inform employees and people served/families that they might have been exposed to a dangerous and communicable disease.
- The disease can be specified, but boards cannot share the identity of a person confirmed or suspected to have the disease. This would constitute a violation under HIPAA.

8. Do HIPAA protections still apply even if a person has passed away?

- Yes. A deceased person's PHI is protected to the same extent as when the person was alive, and that protection does not expire until 50 years after their death.
- Except in specific circumstances required by law (see question 9), county boards cannot disclose any information about a deceased person with developmental disabilities who was served by the board without a proper release or authorization to do so.

9. Can a board of DD disclose any information about a person served after the person's death without receiving authorization?

- Not to a significant extent. State law prohibits the board from disclosing the identity of an eligible person or releasing records related to that person except in certain circumstances. This does not change after the person dies.
- If a person passes away, PHI can be disclosed without authorization only to coroners or medical examiners (to determine the identity of a person or their cause of death) and funeral directors.
- When an eligible person dies, upon receipt of a written request, a board must provide any reports and records in the board's possession concerning the eligible person to the person's executor, guardian, or family members in the order listed in the statute.

10. Can a county board share non-specific information about a person, such as their general geographic location, gender, age range, etc.?

- Maybe, but this is not recommended. While disclosing vague information about a person served who has or is suspected to have an illness may not *technically* violate state and federal confidentiality laws, OACB recommends that county boards of DD refrain from doing so, as this information could still be used to identify a person and, therefore, violate their privacy rights under state and federal law.
- County boards concerned about the public health impacts of failing to make vague disclosures should consult with local health authorities, who are specifically empowered to act upon this kind of information.

11. Should a county board of DD seek authorization to talk publicly about a person who is believed to have passed away due to COVID-19?

- It is natural for county board staff to want to celebrate the life of a person served, especially at a difficult time for the community. However, OACB recommends that boards carefully consider whether doing this would benefit their mission or their local COVID-19 response. Even if a board of DD *can* get permission to tell the wider community about a person's death due to COVID-19, that does not necessarily mean the board *should*.
- OACB recommends that boards with protocols in place for communicating about the deaths of people served under normal circumstances continue to use those protocols.
- If the board is committed to writing a public obituary, OACB advises following standard obituary-writing etiquette and that boards refrain from discussing cause of death

12. If a news reporter contacts the board seeking information about whether a person served by the board has contracted COVID-19 or passed away due to complications from the virus, how should the county board respond?

- County boards are prohibited from providing any information about a person served by the board to any member of the news media without that person's explicit written consent. This does not change due to the public health emergency.
- Similarly, the board may neither confirm nor deny any details about a person's PHI to a reporter regardless of how the reporter learned that information.
- Some news reporters may insist that the public has the right to know about any local COVID-19 transmissions and that the board is obligated as a public/government body to confirm whether a person served has tested positive for the virus (or passed away from it). This is inaccurate, and the board should handle such an inquiry as they would handle a media inquiry concerning the PHI of a person served by the board during non-pandemic situations.
- In an attempt to circumvent a board's refusal to identify whether a person is served by the board or has tested positive for the virus (or passed away from it), a reporter may bring up other ways that they believe they have verified the identity of a person served and ask the board to confirm their conclusions. County boards should resist engaging in these conversations as they may inadvertently result in the disclosure of PHI.
- A blanket refusal to discuss any matters pertaining to COVID-19 transmission at the board due to prohibitions in state and federal law is sufficient to answer these questions. If a reporter persists, the county board is encouraged to refer the reporter to the local health authority with jurisdiction over your county's response to COVID-19.
- As always, county board employees who are responsible for media relations can contact OACB's communications team for guidance on interacting with reporters during the COVID-19 response period.

Updates and Additional Information

This document will be updated as necessary to reflect the latest information available. **Additional questions and concerns should be emailed to covid19@oacbdds.org for possible inclusion in this FAQ document.** Thank you for your continued support and collaboration during this public health response.

AUTHORIZATION FOR THE RELEASE OF MEDICAL INFORMATION
For Purposes of and in accordance with HIPAA, 42 C.F.R. 2.31, and R.C. §5126.044
and other Applicable Federal and State Confidentiality Laws

Patient/Client Name: _____

Date of Birth: _____

Address: _____

I, _____, _____, authorize the _____ County Board of Developmental Disabilities and its staff to communicate with and release my identity and any and all records, including medical records that address diagnosis or medical condition and individual plans, maintained or possessed by them, as necessary, to the Ohio Department of Health, to the local Board of Health, to any provider and/or its employees who deliver services to me, and to family members of mine who do not otherwise participate in my health services treatment or payment, but with whom I have had close contact, for the purposes of disclosing that I may have contracted COVID-19. I also hereby consent for the _____ County Board of Developmental Disabilities and its staff to share any and all of the above identified information with its legal counsel.

I understand that the _____ County Board of Developmental Disabilities is not conditioning receipt of services upon my execution of this authorization.

If any of the information to be released relates to treatment for alcohol use or abuse or drug use or abuse, I understand that such information is subject to the requirements of Part 2 of Title 42 of the Code of Federal Regulations, which prohibits the further release of such information without my consent, as referenced in the federal regulations, or as otherwise permitted by law. If any of the information to be released constitutes a psychiatric communication or a communication with a psychologist, or any other mental health worker, this release will serve as my written release of that information.

This authorization will be in effect for one (1) year or until the aforementioned proceedings have concluded, whichever is longer. Notwithstanding the foregoing, this authorization may be revoked by me, at any time, in writing, except to the extent that action has been taken in reliance thereon. This authorization is valid unless and until it is revoked and properly presented to the Superintendent of the _____ County Board of Developmental Disabilities. I acknowledge I have been advised to review the Notice of Privacy Rights issued to me by the _____ County Board of Developmental Disabilities.

I understand that, if the person or entity that receives the information is not a health care provider or health care plan covered by the federal privacy regulations, the information described above may be redisclosed and no longer protected by those regulations.

I may inspect or copy any information used/disclosed under this authorization.

Individual/Guardian/Personal Representative if individual cannot sign

Print Name

(signature)

Date _____

Minor's signature (needed only if drug/alcohol treatment information is being disclosed)

Print Name

(signature)

Date _____

If this authorization has been signed by a personal representative on behalf of an individual, his/her authority to act on behalf of the individual must be set forth here:

For Board Use Only:

Board Employee releasing information: _____
(signature)

Print Name

Date information released: _____