



Privacy Protections for Deceased Patients



What You Need to Know

Federal privacy law strictly protects individuals’ substance use disorder treatment information, including after their death. For individuals in “Part 2 programs” (addiction treatment programs covered by 42 USC § 290dd-2 and 42 CFR Part 2), these protections last indefinitely. Knowing how to respond to inquiries from a patient’s family, public health officials, or other entities is essential for protecting patient privacy and also for following the law.

This resource describes the key privacy protections for deceased patients’ treatment records under 42 CFR Part 2 and the way these protections interact with similar provisions in the HIPAA Privacy Rule.¹

A CLOSER LOOK

- KEY POINT 1**

Both HIPAA and Part 2 generally protect the privacy of individuals after their death to the same extent as during their life.

- HIPAA protects the confidentiality of deceased patients for 50 years after the patient’s death (45 CFR §160.103), and Part 2 protects patients’ confidentiality indefinitely (42 CFR §2.15(b)(2)).

Example:

While in treatment at an Opioid Treatment Program (OTP)², Amina dies without signing a consent form permitting the OTP to disclose information to her boyfriend, Ben. After Amina’s funeral, Ben approaches the OTP and requests Amina’s treatment records. The OTP may not disclose Amina’s information to Ben without written consent from Amina’s state-appointed administrator, executor, or personal representative, because Amina’s records are still protected by Part 2.

- When a provider or entity such as an OTP is covered by both HIPAA and Part 2, it must apply the *more protective* privacy rule to determine whether a disclosure is permissible.³ For example, if HIPAA would permit a disclosure that Part 2 would prohibit, the provider should follow Part 2.

• **KEY POINT 2**

Part 2 permits disclosures of information identifying a deceased patient as seeking or receiving treatment for a substance use disorder with written consent, including with a special consent provision for deceased patients.

Disclosures may be authorized pursuant to a written consent signed by the patient before their death, if the consent form has not yet expired and the disclosure is otherwise consistent with the stated purpose of the consent form. 42 CFR §2.31.

Once the patient is deceased, the consent form may also be signed by the executor, administrator, or other personal representative appointed under applicable state law. If there is no such applicable state law appointment, the consent may be given by the patient’s spouse⁴ or, if none, by any responsible member of the patient’s family. See 42 CFR §2.15(b)(2).

Case Study Question

Callan dies in a hospital after a lengthy illness, having never been married. During his hospitalization, Callan signed a consent form permitting the hospital to share his Part 2-protected information with his sister, Stella. Now, Callan’s attorney has contacted the hospital and requested access to his medical records. May Stella sign a release of information on behalf of Callan that would permit disclosure of Callan’s records to his attorney?

Case Study Answer

No, unless Stella is also Callan’s executor (or another party identified under §2.15(b)). Just because Callan once authorized disclosure to his sister does not mean that she is now authorized to sign consent forms on behalf of her deceased brother. To validly sign a release form on Callan’s behalf, Stella must have been appointed as Callan’s executor, administrator, or other personal representative. If there is no personal representative, and because he had no spouse, she can sign the consent form if the program determines she is a responsible member of his family.

• **KEY POINT 3**

A deceased patient’s Part 2 records may be released without consent in limited circumstances.

- Part 2 permits the disclosure of patient identifying information relating to the cause of death of a patient under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death. 42 CFR §2.15(b)(1).

Example

Del dies after a suspected overdose. The state’s Medical Examiner is authorized by state law to request records from Del’s treatment provider in her investigation of Del’s death. Del’s treatment provider may disclose Del’s records to the Medical Examiner without violating the regulations in Part 2.

- In addition, a deceased patient’s information may be disclosed as otherwise permitted by Part 2 (e.g., pursuant to a Qualified Service Organization Agreement, §2.11, or during the course of an audit or evaluation, §2.53).



For More Information

Resources

This resource is one of many that are available within the Center of Excellence for Protected Health Information's resource library, which can be found at coephi.org.

Request Technical Assistance

You can request brief, individualized technical assistance and join our mailing list for updates, including news about the publication of new resources and training opportunities, [here](#).



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References

1. It is also important to understand state law when responding to requests regarding deceased patients. Part 2 programs should consult with local counsel regarding any and all applicable state laws.
2. An Opioid Treatment Program is both a HIPAA "covered entity" and a "Part 2 program." 45 CFR §160.103; 42 CFR §2.11. Please see our resource library for further information about when HIPAA and Part 2 may apply.
3. This long-standing interpretation continues to be true following the recent publication of the Information Blocking Rule. See 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 85 Fed. Reg. 25642 (June 30, 2020).
4. This includes same-sex spouses. Any same-sex marriage legally entered into in one of the 50 states, the District of Columbia, a U.S. territory, or foreign country will be recognized as valid, regardless of whether the couple now lives in a jurisdiction that does not recognize same-sex marriage. Substance Abuse Confidentiality Regulations: FAQ 17, SAMHSA (last updated June 17, 2022), <https://www.samhsa.gov/about-us/who-we-are/laws-regulations/confidentiality-regulations-faqs>.