

HIPPA

⊖ Note: The U.S. Probation Office is exempt from HIPPA regulations, however, the treatment vendor is not. Follow all requirements of confidentiality, including any e-mail communication which contains identified health care information.

⊖ The vendor shall disclose offender records only in accordance with 42 C.F.R. Part 2 and 45 C.F.R. 160.201 and 205, and Part 164. **The vendor shall disclose records only after advising the U.S. Probation Officer of the request** and any exceptions to the disclosure of, or an individual's right of access to, treatment or protected health information that might apply.

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The Privacy Rule specifies mandatory, permissible, and authorized disclosures of protected health information (PHI). The Privacy Rule sets forth required elements of an authorization and HIPAA imposes civil and criminal penalties on health providers who disclose PHI without receiving a valid authorization.

The Privacy Rule requires that a valid written authorization 1) describe the information to be used or disclosed; 2) identify the persons or class authorized to disclose or use the PHI; 3) identify the persons or class entitled to the disclosure; 4) set forth an expiration date or event; 5) advise the individual of the right to revoke the authorization in writing and identify the process for doing so; 6) inform the individual that the PHI to be released may be subject to redisclosure without the benefit of the Privacy Rule; and 7) contain the individual's signature and the date the form was signed.

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Vendors who have contracted with the judiciary to provide health care services are covered entities and are obliged to conform their procedures for handling PHI and providing individuals with access to this information to the HIPAA privacy rules' requirements.

The privacy rules define "individual" as "the person who is the subject of protected health information." 45 C.F.R. 164.501. **Defense counsel or others purporting to represent an offender receiving treatment have no right to review and copy an individual's PHI.** Of course, nothing precludes an individual from disseminating copies that he legally receives.

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The privacy rules give offenders a qualified right of access to their PHI. The privacy rules prohibit disclosure of an offender's PHI except as authorized by the offender or as required or permitted by the privacy rules. The privacy rules require that individuals have a right of access to inspect and to obtain a copy of his PHI, with a few exceptions. *Among the exceptions are psychotherapy notes, litigation work product, and information subject to, or exempted by, the Clinical Laboratory Improvements Act of 1988.*

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*The existing HHS regulation governing the confidentiality of drug treatment records of federally-assisted drug aftercare programs merely *permitted patient* access without prescribing standards for evaluating whether access was appropriate. 42 U.S.C. 2.23(a). By contrast, HIPAA gives an individual a qualified right of access to inspect and copy his own PHI. 45 C.F.R. 164.524. Because disclosures under the drug aftercare regulations are permissive and not mandatory, there is no conflict between the regulations.*

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Unreviewable exceptions to the right of access include psychotherapy notes; litigation work product; *and information "obtained from someone other than a health care provider under a promise of confidentiality and the access requested would be reasonably likely to reveal the source of the information."*

Reviewable grounds for denial of access include a licensed health care professional's decision that access is reasonably likely to endanger the life or physical safety of the individual receiving treatment or another person, *or a licensed health care professional's determination that the requested access is reasonably likely to cause substantial harm to a person referred to in the records.*

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In sum, unless one of the above exceptions to the right of access apply, a vendor must allow an individual to review his PHI. The determination of whether an individual is entitled to review his PHI must be made by the health care provider.

However, the vendor shall disclose records only after advising the USPO/USPSO of the request and any exceptions to the disclosure of, or an individual's right of access to, treatment or protected health information that might apply.

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If the Pretrial Services Office is piggybacking on your Agreement, **you must not disclose** “pretrial services information” concerning pretrial services clients. “Pretrial services information,” as defined by the “Pretrial Services Confidentiality Regulations,” is “any information, whether recorded or not, that is obtained or developed by a pretrial services officer (or a probation officer performing pretrial services duties) in the course of performing pretrial services.” Pretrial Services Confidentiality Regulations, 2.A.

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Generally, any information developed by an officer performing pretrial services that is shared with the vendor will be confidential pretrial services information. Only a judicial officer or a Chief USPO/USPSO may authorize disclosure of pretrial services information to a third party pursuant to the Pretrial Services Confidentiality Regulations. Any doubts about whether a potential disclosure concerns pretrial services information must be resolved by consultation with the USPO/USPSO.

Ensure that all persons having access to or custody of defendant/offender records follow the disclosure and confidentiality requirements of this agreement and federal law.