

## Overdose Fatality Review Teams: Medical Records

# How can I obtain medical records after a person dies?

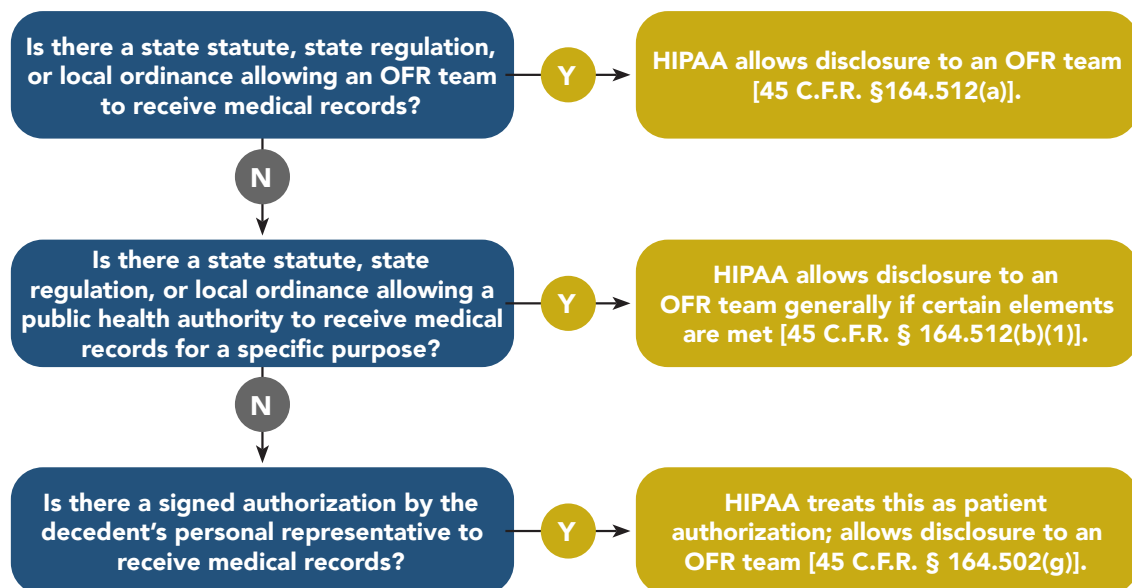
### Response

Medical records containing protected health information (PHI) are safeguarded by the Health Insurance Portability and Accountability Act (HIPAA) for 50 years after an individual dies. Therefore, to obtain medical records of a decedent that contain PHI from a HIPAA-covered entity, an OFR team must rely on one of the following options:

- State statute, state regulation, or local ordinance that specifically allows an OFR team to receive the information.
- State statute, state regulation, or local ordinance that allows a public health authority to access medical records for certain purposes (such as health surveillance or death investigations).
- Authorization form signed by the decedent’s authorized personal representative.

Determining the best option for an OFR team is dependent upon the team’s situation as outlined below:

### Options for Obtaining Medical Records



### Additional Discussion

#### OFR state statute, state regulation, or local ordinance

OFR teams can obtain PHI about an individual from a covered entity medical provider through some type of legal authority, whether a state statute, state regulation, or local ordinance, in one of two ways. First, HIPAA provides that patient authorization to use or disclose PHI is not required if such use or disclosure is required

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by law.<sup>1</sup> Therefore, if there is legal authority in force that requires medical providers to provide OFR teams with a decedent's medical records upon request, the OFR team can use that legal authority to acquire the needed records. As of December 2020, the laws or regulations of at least eight states provide state-level and/or local OFR teams with the authority to receive a decedent's medical records.<sup>2</sup>

### Public health authority to receive medical records

#### PRACTICE TIP

HIPAA allows the disclosure of PHI for certain public health activities. Housing an OFR team within a state or local public health authority makes it easier to apply this provision.

Alternatively, if there is no OFR-specific legal authority in place, OFR teams may consider other types of legal authority to obtain the information. HIPAA provides that a covered entity may disclose PHI to a public health authority that is authorized by law to collect or receive such information for certain purposes without patient authorization.<sup>3</sup> If an OFR team is based out of a public health authority, such as a state or local health department, there might be one or more ways to obtain the information, depending on state or local law. A non-exhaustive list of examples includes a state or local regulation that authorizes the department of health to request health records to investigate deaths or other public health threats or to receive information from a medical examiner or coroner for the purpose of reducing morbidity and mortality rates. In each case, the OFR team could potentially use

the statute or regulation as the basis for getting the information transmitted to the OFR team lead within the public health authority. Once the public health authority is in possession of the records, however, the authority may still be limited in its use by HIPAA and may need to deidentify the information before sharing it with the other members of the OFR team.<sup>4</sup>

### Consent from personal representative

Health information known firsthand by family and friends is not covered by HIPAA. OFR teams can conduct interviews with the decedent's family and friends and ask questions regarding any prior nonfatal overdoses. In addition, for purposes of disclosing PHI, covered entities must treat a decedent's "personal representative" as if he or she is the individual.<sup>5</sup> Thus, a decedent's personal representative may sign a form authorizing the OFR team to request and receive medical records directly from a hospital or other medical provider who treated the decedent prior to the fatal overdose. A personal representative is a person with legal authority to act on behalf of the decedent or the decedent's estate. This includes the executor of the decedent's estate and may include the decedent's next of kin.<sup>6</sup> The individual or individuals who qualify as a decedent's personal representative is a question of state law.<sup>7</sup> OFR teams should verify that the individual who signs this authorization form is the decedent's personal representative under state law to avoid questions about the validity of the authorization.

#### PRACTICE TIP

States with laws granting some or all OFR teams with the authority to receive medical records (as of December 2020):

- Arizona
- Delaware
- Indiana
- Maryland
- New Hampshire
- Oklahoma
- Utah
- West Virginia

#### PRACTICE TIP

OFR teams can always ask a decedent's personal representative (as defined by state law) to sign an authorization form for the disclosure of the decedent's medical records.

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### Definitions

**PHI [45 C.F.R. § 160.103]:** Subject to a few exceptions, PHI is individually identifiable health information that is maintained or transmitted in any form or media. In the context of HIPAA-protected information, PHI does not include information about a person deceased for more than 50 years.

**Individually identifiable health information [45 C.F.R. § 160.103]:** Health information that:

- Identifies the individual or provides a reasonable basis to identify the individual.
- Relates to the individual's past, present, or future physical health or condition; the provision of health care to the individual; or the individual's past, present, or future payment for health care.

**HIPAA-covered entity [45 C.F.R. § 160.103]:** A health plan, health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA.

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<sup>1</sup> 45 C.F.R. § 164.512(a) (2020).

<sup>2</sup> Ariz. Rev. Stat. Ann. § 36-198.01(A) (applies to statewide and local teams); Del. Code Ann. tit. 16, § 4799C(b), (c) (applies to statewide and regional review teams); Ind. Code Ann. §§ 16-49.5-2-6(b) and 16-49.5-2-8 (apply to county and regional teams); Md. Code Ann., Health – Gen. § 5-904 (applies to local teams); N.H. Rev. Stat. Ann. § 126-DD:1(III)(b) (applies to a statewide commission); Okla. Stat. Ann. 63, § 2-1001 (applies to statewide board); Utah Code Ann. § 26-7-13(5) (applies to statewide committee); W. Va. Code R. § 64-29-7(7.7) (applies to statewide panel). Pennsylvania's state law (71 P.S. § 1691.7(b)) applies only to deaths caused in whole or in part by methadone. An additional three states (North Dakota, Rhode Island, and Virginia) have OFR legislation in place but do not specifically authorize the OFR team to receive or request medical records of the decedent.

<sup>3</sup> 45 C.F.R. § 164.512(b)(1). These purposes include “the conduct of public health surveillance, public health investigations, and public health interventions.”

<sup>4</sup> Whether the OFR team, as a whole, is a “covered entity” for purposes of redisclosure under HIPAA is a question for officials within the public health authority where the team is housed. In most jurisdictions, however, all members of the OFR team will be fine to operate under 45 C.F.R. § 164.512(b)(1).

<sup>5</sup> 45 C.F.R. § 164.502(g) (applies to a person with legal authority to act on behalf of the decedent or the decedent's estate, which can include next of kin or other family member if relevant law provides authority).

<sup>6</sup> <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/personal-representatives/index.html>.

<sup>7</sup> See *id.*, noting that examples include the “executor or administrator of the estate [and] next of kin or other family member (if relevant law provides authority).”