



## Overdose Fatality Review Teams: Veterans Health Administration Records

# How can an OFR team obtain medical and behavioral health records from the Veterans Health Administration (VHA) after a person dies?

## Medical Records

Medical records held by the VHA containing protected health information (PHI) are safeguarded by the Health Insurance Portability and Accountability Act (HIPAA) for 50 years after an individual dies. As such, medical records that do not contain substance use disorder (SUD) treatment information may be obtained the same as from private medical providers. See [OFR Review Medical Records.pdf \(cossup.org\)](#) for more information.

Should an overdose fatality review (OFR) team choose to use an authorization form signed by the decedent's authorized personal representative, as referenced above, the decedent's records may be held by the VHA and/or the National Archives. For records held by the VHA, requestors should submit this form, which must be signed by an authorized individual, such as the patient's next of kin: [VA Form 10-5345a](#). For records located at the National Archives, requestors should use this form to request non-SUD treatment records: [NA Form 13042 - Request for Information Needed to Locate Medical Records \(archives.gov\)](#). Requestors can submit an online request for records held by the National Archives here: [NARA | e-Vetrecs . \(archives.gov\)](#).

## Behavioral Health Records

Behavioral health records held by the VHA fall into one of two categories:

1. Behavioral health records that do not contain SUD treatment records, such as records related to treatment for depression or anxiety
2. Behavioral health records that do include SUD treatment records

Behavioral health records held by the VHA that DO include SUD treatment records are governed not by 42 Code of Federal Regulations (CFR) Part 2, as non-VHA SUD treatment records are, but by 38 CFR Part 1. Pursuant to this rule, records that would identify a patient as an "alcohol or drug user," either directly or indirectly, and are provided or obtained for the purpose of treating SUD, making a diagnosis for that treatment, or making a referral for that treatment are restricted from disclosure.<sup>1</sup>

Within 38 CFR Part 1, Section 1.465 governs the release of such records for deceased patients. Pursuant to this rule, records relating to treatment for SUD, including alcohol use disorder, may be released after the death of an individual pursuant to laws requiring the "collection of death or other vital statistics or permitting inquiry into the cause of death." If such provision is not available in state law, and release of the records under 38 CFR Part 1 requires patient consent, the OFR team may not obtain such records. The reason is that the rule provides that if written consent of the patient is required for the release of the records, the patient's personal representative may only receive such records if a determination is made that the disclosure is necessary to obtain certain benefits for the deceased patient's survivor, such as Social Security or life insurance benefits.<sup>2</sup> A death review by an OFR team does not meet this requirement.

### Additional Information

The U.S. Department of Veterans Affairs (VA) is a Cabinet-level department of the executive branch whose duties include providing health care services to eligible military personnel. Within the VA, the VHA is “the largest integrated health care network in the United States . . . serving 9 million enrolled Veterans each year.”<sup>3</sup> Part of their remit is treating SUD among military veterans and the creation and retention of records related to the diagnosis, treatment, and referral for treatment of individuals with SUD. Therefore, as part of an OFR team’s investigation into an individual’s overdose death, the OFR team may want to obtain VHA SUD treatment or other medical records for the individual.

As mentioned above, medical records held by the VHA may be obtained in the same way as medical records maintained by any other health care provider. However, unlike with non-VHA SUD treatment records, the process to obtain records related to the diagnosis, treatment, and referral for treatment of SUD from the VHA is covered by 38 CFR Part 1 rather than 42 CFR Part 2.

Pursuant to 38 CFR § 1.461, the restrictions on disclosure of SUD treatment records held by the VHA apply to any information, whether recorded or not, that would identify a patient as having SUD, “either directly, by reference to other publicly available information, or through verification of such an identification by another person,” and that is provided or obtained for the purpose of diagnosis, treatment, or referral for treatment.<sup>4</sup> Included in this rule are a list of exceptions to the restrictions on disclosure, including communications between treating providers within the VHA and information directly related to the patient’s commission of a crime on VHA property.<sup>5</sup>

Section 1.462 of 38 CFR prohibits the disclosure of SUD treatment records unless permitted by 38 CFR Part 1, and 38 CFR § 1.465 sets forth the permitted disclosures of records for deceased patients. Pursuant to the provisions of 38 CFR § 1.465, the SUD treatment records of a deceased patient may only be released by the VHA in two limited circumstances:

1. Patient identifying information may be disclosed pursuant to a law requiring the collection of death or other vital statistics or permitting inquiry into the cause of death.
2. Consent by personal representative. If patient consent to release records is required by this rule, the Under Secretary for Health or designee may, upon the written consent of the personal representative, disclose the contents of the patient’s records, “*only if* the Under Secretary for Health or designee determines that such disclosure is necessary to obtain survivorship benefits for the deceased patient’s survivor” (emphasis added).<sup>6</sup>

Given the restriction on release of records pursuant to the consent of the patient’s personal representative, it appears that the only way for an OFR team to obtain SUD treatment records from the VHA is if there is a federal, state, or local law requiring the collection of death or other vital statistics or permitting inquiry into the cause of death and the release of the records to an OFR team falls under this scope. In the absence of such a law, the OFR team will be unable to obtain the records.

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## Definitions

**Behavioral health records:** Medical records that address mental health and/or SUD.

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

**Patient identifying information [38 CFR § 1.460]:** The name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed, either directly or by reference to other publicly available information.

**PHI [45 CFR § 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.

## Endnotes

1. See 38 CFR Part 1.
2. 38 CFR § 1.465 (2023).
3. [About the Department - U.S. Department of Veterans Affairs \(va.gov\)](https://www.va.gov).
4. 38 CFR § 1.461 (2023).
5. Ibid.
6. 38 CFR § 1.465 (2023).

