



Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 15-42-ALL

REVISED 08.28.15

DATE: June 19, 2015

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Guidance to State Survey Agencies (SA) Regarding Release of Information and Data to State Medicaid Fraud Control Units (MFCU)

“This guidance supersedes the previous guidance issued on June 19, 2015 and new to the memo is a Sample Request Letter attachment.”

Memorandum Summary

- **Revision to Guidance** – The Centers for Medicare & Medicaid Services (CMS) has revised this guidance to further clarify policies regarding SA release of data and documents to MFCUs.
- **Release of Information and Data to State MFCU:** State Survey Agencies are reminded of the regulatory requirement to share Automated Survey Processing Environment (ASPEN) Complaint Tracking System (ACTS) data, Long-Term Care Minimum Data Set (MDS) data, and survey documents with their State MFCU upon receipt of a written request.

Background

Policy memorandum S&C-11-39, released on September 16, 2011, provided guidance regarding the release of Survey and Certification information to MFCUs. The current memorandum is intended to further clarify that SAs are expected to provide ACTS data, MDS data, and survey documents to their State MFCU upon receipt of a valid written request from their MFCU in accordance with 42 C.F.R. §455.21(a). The written request must include enough information to make the requested documents or data easily identifiable and not be overly broad or unduly burdensome to retrieve.

A core element of the CMS mission is to protect those living in healthcare and residential care facilities from fraud, abuse, neglect, and misappropriation of funds. CMS expects SAs to provide effective support and assistance to State MFCUs in their work to investigate and prosecute these crimes, and as we wish to improve collaboration, communication, and

information sharing, SAs are expected to provide ACTS data, MDS data, and survey documents when requested appropriately by their state MFCU. Data and documents responsive to such requests should be provided directly to the MFCU without being routed through the Regional Office or CMS Central Office.

Medicaid Fraud Control Units

MFCUs are State agencies whose health oversight functions include investigation and prosecution of Medicaid provider fraud. MFCUs may also investigate fraud (with HHS Office of Inspector General approval) in any Federally funded health care program, such as Medicare, and investigate complaints of abuse or neglect and misappropriation of funds of those living in Medicaid-funded healthcare facilities as well as residential care facilities, regardless of payment source (see Social Security Act § 1903(q), 42 USC § 1396b(q) and 42 CFR § 1007.11). The MFCUs are generally located within offices of State Attorneys General. All of the existing MFCUs are funded by the Federal government on a 75 percent matching basis, with the States contributing the remaining 25 percent. In Fiscal Year 2014, MFCUs performed over sixteen thousand fraud, abuse, or neglect investigations and recovered over \$2 billion.

CMS Data Bases

Automated Survey Processing Environment Complaint Tracking System (ACTS)

One important source of data for MFCUs is the complaint information contained in ACTS. ACTS is a computer program whose primary purpose is to track and process complaints and incidents reported against healthcare facilities regulated by CMS and SAs. ACTS maintains Federal complaint information, as well as State licensure complaint information. It permits collection of Federal and State information so that states may maintain one database, instead of multiple systems. ACTS contains personally identifiable information on individuals who are complainants, residents, patients, clients, contacts, alleged perpetrators, or witnesses.

Long Term Care Minimum Data Set (MDS)

The MDS is a standardized, primary screening and assessment tool of health status that forms the foundation of the comprehensive assessment for all residents in a Medicare and/or Medicaid-certified long-term care facility. The MDS contains items that measure physical, psychological and psychosocial functioning. The items in the MDS give a multidimensional view of the resident's functional capacities and health conditions and helps staff to identify care needs. It also contains personally identifiable information of residents that is protected by the Privacy Act.

Disclosure Pursuant to the Privacy Act

The ACTS and MDS are CMS data collections that contain individually identifiable information, and, as such, are maintained within Privacy Act systems of records (SOR). Information in these systems can be retrieved using an individual's name or by some other unique identifier (e.g., Social Security number). Individually identifiable information contained in a Privacy Act SOR is only disclosed in accordance with the Privacy Act's disclosure provisions, which include the publication of "routine uses" in the Federal Register for each SOR.

The routine uses that were published under the Privacy Act for the ACTS and MDS SORs authorize disclosure to MFCUs because MFCUs are State agencies that investigate fraud and

abuse in healthcare programs and allegations of fraud and abuse in nursing facilities (and, potentially, skilled nursing facilities).

CMS issued a notice of SOR governing ACTS information (72 Fed. Reg. 29646, May 23, 2006). An SOR is a group of any records under the control of a Federal agency from which information is retrieved by the name of the individual or by a particular identifier. The SOR includes routine use 2, allowing the disclosure of information:

To another Federal and/or state agency, an agency established by state law, or its fiscal agent to . . . Enable such agency to administer a Federal health benefits program, or as necessary to enable such agency to fulfill a requirement of a Federal statute or regulation that implements a health benefits program funded in whole or in part with Federal funds.

Additionally, routine use 9 permits disclosure:

To another Federal agency and/or to any instrumentality of any governmental jurisdiction within or under the control of the United States (including any State or local governmental agency), that administers, or that has the authority to investigate potential fraud or abuse in a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud or abuse in such programs.

CMS issued a notice of SOR governing MDS information (72 Fed. Reg. 12801, March 19, 2007) that allows disclosure of MDS under routine uses 2 and 9, which are essentially the same as those delineated in the ACTS SOR discussed above.

Disclosure Pursuant to the HIPAA Privacy Rule

The HIPAA Privacy Rule permits appropriate disclosure of ACTS or MDS information to MFCUs because they are considered health oversight agencies under 45 CFR § 164.501. Covered entities are permitted under 45 CFR § 164.512(d) to disclose protected health information to health oversight agencies for the purposes of carrying out oversight activities authorized by law. When requesting ACTS or MDS information, a MFCU should provide sufficient information to meet the requirements of the health oversight agency disclosure (45 CFR § 164.512(d)(1)), the minimum necessary requirement (45 CFR § 164.514(d)(4)), and the verification requirements (45 CFR § 164.514(h)(2)(ii) and (iii)).

Request Process

A request for data must be on agency letterhead and signed by the MFCU director. The request must be maintained as confidential by the SA and must include, in addition to the HIPAA Privacy Rule information mentioned in the previous paragraph, the following:

- The source of data requested (ACTS or MDS);

- The specific case or law enforcement matter clearly identified;
- Identification of the provider or facility being investigated;
- Time frame;
- A statement that the information is being sought consistent with the MFCU's responsibilities under section 1903(q) of the Social Security Act and is being requested under the authority of [STATE LAW]. Identification of the custodian of the data who will be responsible for establishment and maintenance of security arrangements to prevent unauthorized use. If custodianship is transferred, the SA will be notified;
- A statement that the MFCU will seek a protective order if the data is to be used in court or other open forum; and,
- Acknowledgement that the data will be destroyed after the required record retention period as established by State law or regulation.

A sample request letter is attached.

SA Consultation with MFCU

When the SA itself wants to consult with the State's MFCU about ACTS complaint information in order to determine whether to make a referral, it may share appropriately de-identified beneficiary information (note that there are HIPAA Privacy Rule standards for de-identification) with the MFCU without going through the formal letter request described above.

Survey Documents the State Survey Agency May Release

For guidance regarding survey documents that SAs may release, please refer to policy memorandum S&C-11-39, available at: http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/SCLetter11_39.pdf

Contact: For questions regarding this memorandum, please contact Rebecca Ward at rebecca.ward@cms.hhs.gov.

Effective Date: Immediately. This information should be communicated with all survey and certification staff, their managers and the State/Regional Office training coordinators within 30 days of this memorandum.

/s/

Thomas E. Hamilton

Attachment: Sample Request Letter

cc: Survey and Certification Regional Office Management

MFCU Letterhead

CONFIDENTIAL; DO NOT RELEASE

[Name of individual]

[Date]

Director,

State Medicaid Survey Agency

[Street]

[City, State Zip Code]

Dear [Mr./Ms./Dr.] [Individual's last name]:

As director of the [NAME OF STATE] Medicaid Fraud Control Unit (MFCU or Unit), I am requesting [CHOOSE APPLICABLE DATABASE(S): Automated Survey Processing Environment Complaint Tracking System (ACTS)/ Long Term Care Minimum Data Set (MDS)] data for a health oversight investigation my Unit is conducting. The MFCU's authority to conduct this investigation is found at Social Security Act § 1903(q), 42 USC § 1396b(q) and 42 CFR § 1007.11 and section [FILL IN SECTION NUMBER] of [NAME OF STATE'S] code.

The subject of the investigation is [NAME]. The allegations relate to [GIVE A GENERAL DESCRIPTION]; examples: "abuse of a Medicaid patient," "Medicaid patient neglect," "theft of a Medicaid patient's funds at nursing home,]" during [TIMEFRAME]. A description of the information or data contained in ACTS/MDS that is requested by the MFCU is enclosed.

This request for [ACTS/MDS] data is consistent with the Privacy Act routine uses 2 and 9 for this system of records [FOR ACTS REQUEST INSERT: (72 Fed. Reg. 29646 (May 23, 2006)); FOR MDS REQUEST INSERT: (72 Fed. Reg. 12801 (Mar. 19, 2007))]. Additionally, for purposes of Health Insurance Portability and Accountability Act (HIPAA) Privacy, I am providing the following information. The MFCU is a health oversight agency under 45 CFR § 164.501. The data sought is necessary to further the health oversight activities of the health care system, (Medicaid) that the MFCU is authorized to perform under the statute and regulations cited above and is a permitted disclosure under 45 CFR § 164.512(d). The data described in the enclosure is the minimum necessary to achieve the purpose of the MFCU's investigation (45 CFR § 164.514(d)(3)(iii)(A)). My signature and the official MFCU letterhead satisfies the verification requirements of 45 CFR § 164.514(h).

[NAME OF INDIVIDUAL] is designated the custodian of the requested data and will be responsible for the establishment and maintenance of security arrangements to prevent unauthorized use or disclosure. If the custodianship is transferred, the State Medicaid Survey Agency will be notified.

The MFCU will seek a protective order if the requested data is to be used in court or in another open forum.

The data will be destroyed after the required record retention period, as established by State law or regulation, has passed.

MFCU Letterhead

If you need additional information please contact me at [PHONE NUMBER] or [EMAIL ADDRESS]

Sincerely,

[FULL NAME]
Director

Enclosure