



Center for Medicaid, CHIP, and Survey & Certification/Survey & Certification Group

Ref: S&C-11-39-ALL

DATE: September 16, 2011

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

Director
Division of Freedom of Information

SUBJECT: Guidance for State Survey Agencies Responding to Requests for Survey Documents

Memorandum Summary

- **Updated Guidance:** This memorandum provides updated guidance for the handling of subpoenas duces tecum and other written requests that seek disclosure of records in the possession of the State Survey Agency (SA) as a result of the SA's implementation of its Agreement with the Secretary, Health and Human Services under §1864 of the Social Security Act (§ 1864 Agreement).
- **New instructions to State Agencies:** In addition to previous guidance regarding information SAs may release, we are adding two CMS forms and other facility documents with no privacy concerns (policy memos, staffing schedules) without additional review by CMS.
- **Release of survey information to Medicaid Fraud Control Units:** State Survey Agencies are reminded of the regulatory requirement to share survey information with state MFCUs.

Background

Policy memorandum S&C-10-01, released October 2, 2009, established the process for States and CMS regional offices to follow when an employee or former employee of the Department of Health and Human Services (DHHS) is requested or subpoenaed to provide certain documents in the possession of DHHS (other than the Food and Drug Administration), and for the processing of requests for certification of copies of documents.

This new guidance is intended to facilitate prompt release of documents that CMS has determined should be made available to requesters.

Federal Documents Maintained by the SA

Section 3304 of the State Operations Manual (SOM) instructs that the SA should distinguish between information and documents obtained while performing functions under the SA's 1864 Agreement with the Secretary and those documents the State independently acquires through a State program.

Information and documents that the State independently acquires through a State program must be handled under State law because the documents are State, not Federal, records. For example, requests for survey or certification documents for **Medicaid**-only providers would fall under applicable State open records laws because such records are State, not Federal, records.

However, information and documents the SA acquires while performing functions under the SA's 1864 Agreement with the Secretary are subject to CMS disclosure rules. This means that the SA must comply with 42 CFR Part 401, SOM §§ 3300 through 3320, and SOM §§ 7900 through 7907 in responding to requests for such documents. S&C-10-01 established specific procedures for the processing of such records.

Survey Documents the SA May Release (Summary of Previous Guidance)

To summarize, S&C-10-01 emphasized that the SA may release, upon request and without further review, the Form CMS-2567 (statement of deficiencies) consistent with the provisions below:

1. Prior to release, the provider must have had an opportunity to review the report (not exceeding 60 days) and offer comments within the overall time frames cited below.
2. There is specific guidance for disclosure of Skilled Nursing Facility and Nursing Facility results. These reports may be disclosed within 14 calendar days after such information is made available to those facilities. Plans of correction are made available when approved.
3. Prior to release, the report must have been provided to CMS (through ASPEN), and the disclosure made within 30 days of CMS's receipt of the report.
4. The disclosure must be made within 90 days following completion of the survey by the SA.
5. Pertinent written comments, if received from the surveyed provider within the time frames above, must be disclosed with the report. (For SNF/NFs, follow Item 2 above.)
6. Individual identifiers within the report (of patients, health care practitioners, or others) must be deleted (this does not include identifiers used by surveyors to protect patient/resident safety or privacy or staff privacy).

Other Releasable Records on Surveyed Providers and Suppliers that States are authorized to disclose directly to the public, upon request, include:

1. Whether a facility does or does not participate in the Medicare/Medicaid/CLIA program

2. The Official Medicare/Medicaid/CLIA Statement of Deficiencies **except** to the extent that it contains:

- The name of any patient;
- Medical information about any identifiable patient;
- The identity of a complainant;
- The address of anyone other than an owner of the facility; or
- Information which could be defamatory toward any identifiable person.

NOTE: The SA reviews the Statement of Deficiencies (CMS Form-2567), and if it contains any of the above elements, it deletes the information from the report by blocking it out fully prior to release of the report. (See 42 CFR 401.118)

3. Citations of deficiencies that have been conveyed to the provider following a survey, except to the extent the report contains any of the identifiable information listed above. The SA blocks this information out prior to release of the statement of deficiencies;
4. Plan of Correction (PoC) and pertinent comments submitted by the provider relating to Medicare/Medicaid/CLIA deficiencies cited following a survey, except to the extent the PoC or comments contain any of the identifiable information listed above. The SA blocks this information out prior to release of the PoC;
5. Official notices of involuntary provider termination (including alternative remedies);
6. Reports and information about a laboratory's performance in proficiency testing programs (Note: information about any individual person's performance may not be released);
7. Information contained within the CMS manuals distributed to the SAs, intermediaries, carriers, providers, or suppliers; and
8. Statistical data on provider characteristics that do not identify any specific provider or individual.
9. CMS-116, CLIA Application for Certification; however, the name of the laboratory director must be blocked prior to the release of the application. CMS-209, Laboratory Personnel Report (CLIA), may not be released.

Paper or electronic copies of these Federal electronic documents may be released by the SA. Again, any individual identifiers (other than patient/resident or staff alphanumeric identifiers) must be deleted from the information prior to release.

Note: Standard and User-Defined OSCAR and CASPER reports also may be released by the SA.

Other Survey Documents the SA May Release (New Guidance)

Today, we are providing that SAs may also release additional documents, without additional review by CMS, in addition to the information specified above. Resident names and room numbers must be removed before this information is released, unless the requestor has furnished a Health Insurance Portability and Accountability Act (HIPAA) compliant authorization signed by the resident or his/her legal representative.

- CMS-671, Long Term Care Facility Application for Medicare and Medicaid
- CMS-672, Resident Census and Conditions of Residents.
- Facility documents with no privacy concerns (policy memos, staffing schedules) or where such concerns are addressed by blocking the specific information. Information that must be blocked from these documents includes names, social security numbers, health insurance claim numbers (HICNs), Medicaid numbers and room numbers. Names, phone numbers and addresses for family members and guardians should be removed, and names of staff members should also be removed.

Reminder about Requirement for State Survey Agencies to Share Survey and Certification Information with the State's Medicaid Fraud Control Unit (MFCU)

The regulation at 42 CFR 455.21(a)(2)(i) requires State Medicaid agencies to refer all cases of suspected provider fraud to the State's Medicaid fraud control unit (MFCU). If the MFCU determines that it may be useful in carrying out the unit's responsibilities, promptly comply with a request from the unit for "(i) Access to, and free copies of, any records or information kept by the agency or its contractors." If the State Medicaid Agency contracts with the State Survey Agency to perform surveys of Medicaid providers or suppliers, this regulation requires the SA to share survey information for Medicaid providers with the MFCU.

Effective Date: Immediately. This policy should be communicated with all survey and certification staff and their managers within 30 days of this memorandum.

Training: This clarification should be shared with all survey and certification staff, surveyors, their managers.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management