

(was MCCMH Policy 3-02-010)

Chapter: **DIRECTLY-OPERATED PROGRAM MANAGEMENT**
Title: **ACCESS TO ADMINISTRATIVE RECORDS / DOCUMENTS**

Prior Approval Date: 04/21/11
Current Approval Date: 09/21/16

Approved by: _____

Executive Director

Date

I. Abstract

This policy establishes the standards and procedures of the Macomb County Community Mental Health Board (MCCMH) compliance with the Freedom of Information Act (FOIA) and with applicable Macomb County policy and procedures regarding access to administrative records/documents.

II. Application

This policy shall apply to all administrative and directly operated network provider employees, volunteers, interns and independent contractors of the MCCMH Board.

III. Policy

It is the policy of the MCCMH Board, pursuant to Macomb County Board of Commissioners' approved policy dated November 21, 1983, that:

- A. Program records and administrative non-personnel records of the Board and its programs are public records and shall be made available to person(s) requesting such records,
- B. Consumer clinical/case records and other documents which may serve to identify consumers are specifically excluded from disclosure except as provided for in the Michigan Mental Health Code, and

- C. Records, data, and knowledge collected for or by individuals or committees assigned a quality assurance peer review function, including the review function under section 143a(1) of the Michigan Mental Health Code are confidential, are used only for the purpose of a quality assurance utilization peer review, are not public records, are not subject to court subpoena nor to FOIA and shall not be released.

IV. Definitions

- A. **Processing Fee**
The cost of photocopying materials, researching which materials to copy, the deletion and separation of exempt from nonexempt information, certifying the requested material for authenticity, if necessary, postage, and actual cost of documents and reports.
- B. **Public Record**
Writing prepared, owned, in the possession of, or retained by the public body in the performance of an official function, from the time it is created.
- C. **Writing**
Handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, electronic copies, or other means of recording or retaining meaningful content.

V. Standards

- A. MCCMH full-time, part-time employees, and independent contractors shall comply with applicable provisions of the following Michigan Compiled Laws including, but not limited to, the following:
 - 1. MCL 15.233
 - (1) Upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body. A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable. An employee of a public body who receives a request for a public record shall promptly forward that request to the freedom of information act coordinator.

- (3) A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body shall protect public records from loss, unauthorized alteration, mutilation, or destruction.
- (4) This act does not require a public body to make a compilation, summary, or report of information, except as required in section 11.
- (6) The custodian of a public record shall, upon written request, furnish a requesting person a certified copy of a public record.

2. MCL 15.243

- (1) A public body may exempt from disclosure as a public record under this act any of the following:
 - (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
 - (d) Records or information specifically described and exempted from disclosure by statute [including quality assurance, peer review documents].
 - (g) Information or records subject to the attorney-client privilege.
 - (h) Information or records subject to the physician-patient privilege, the psychologist-patient privilege, the minister, priest, or Christian Science practitioner privilege, or other privilege recognized by statute or court rule.
 - (i) A bid or proposal by a person to enter into a contract or agreement, until the time for the public opening of bids or proposals, or if a public opening is not to be conducted, until the deadline for submission of bids or proposals has expired.
- (3) This act does not authorize the withholding of information otherwise required by law to be made available to the public or to a party in a contested case under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

3. MCL 330.1748(1)
 - (1) Information in the record of a recipient, and other information acquired in the course of providing mental health services to a recipient, shall be kept confidential and shall not be open to public inspection. The information may be disclosed outside the department, community mental health services program, licensed facility, or contract provider, whichever is the holder of the record, only in the circumstances and under the conditions set forth in this section or section 748a.
- B. The MCCMH Deputy Director shall ensure that he/she or another individual is designated in writing to coordinate implementation of this policy.
- C. The MCCMH Deputy Director or designated staff member shall be responsible for:
 1. Determining, with regard to each request for information under the FOIA, whether:
 - a. The record, or part of the record, is exempt from disclosure and by what authority the exemption is to be made;
 - b. The record can be found; and
 - c. The record is available on the MCCMH website. If so, the FOIA Coordinator will tell the requestor that the information is available, at no charge, on the MCCMH website.
 2. Separating exempt material from non-exempt material as provided in:
 - a. The Mental Health Code; and
 - b. The Freedom of Information Act.
 3. Responding to all written requests for program records within five (5) business days of receipt of the request unless the requesting person agrees in writing to afford a longer period of time. The response shall also contain a best efforts estimate regarding the time frame it will take to comply with the law in providing the public records to the requestor. The response shall take one of the following forms:
 - a. Granting the request by furnishing all of the requested records.
 - b. Issuing a written notice (see Exhibit A) when the requested record is exempt from disclosure under the Mental Health Code.

- c. Issuing a written notice when the requested record is otherwise exempt from disclosure under the Mental Health Code or cannot be found.
 - d. Granting the request in part, and issuing a written notice denying the request in part. The written notice of denial shall include a brief description of the separated, deleted, or unavailable materials.
 - e. Issuing an extension notice for up to ten (10) additional business days which shall inform the requesting person of:
 - 1) The reason for the extension.
 - 2) The date by which the program/administrative office shall respond as provided in V.C.3.
4. Pursuant to MCL 15.234(1)(d), the fee per page shall not exceed 10 cents (\$0.10). Copies provided on non-paper physical media will be determined by the most reasonably economical cost of the non-paper physical media, such as computer discs, computer tapes, or other digital or similar media. In calculating the fee for search time of the records, MCCMH must round down to the nearest fifteen (15) minute increment. MCL 15.234(1)(b). Additionally, when calculating the cost of separating exempt from non-exempt information, MCCMH is limited to the rate of the lowest paid person capable of separating documents, limited to "6 times the state minimum hourly wage rate," plus up to 50% of the labor charge to cover the cost of fringe benefits. MCL 15.234(1)(b). MCL 15.234(2). If a lawyer is used to separate exempt from non-exempt information, the cost limitation stated above applies. If the FOIA Coordinator determines there is no employee capable of redacting the exempt information, the FOIA Coordinator may contract for the labor and treat the constructed labor costs in the same manner as employee labor costs, but the hourly rate charged may not exceed six times the State's minimum hourly wage.
5. Structuring program records so as to facilitate the separation of exempt information from non-exempt information.
6. Consulting with County Corporation Counsel when clarification is needed prior to responding to a request for information under the FOIA or when information sought under the FOIA relates to an existing lawsuit involving MCCMH.
- D. It is a FOIA request if, in writing, and within the first 250 words, states "freedom of information," "information," "FOIA," "copy," or some abbreviations or recognizable misspellings of such.
- E. A request for information under the FOIA shall not be denied because the requester previously requested the identical records.

- F. MCCMH may charge a good faith deposit if processing fees exceeds \$50.00, which shall be one-half of the projected processing fee, at the time the request is made. A request for information under the FOIA may be denied because the requestor refuses to pay a good faith deposit.
- G. MCCMH must provide a detailed itemization of all charges.
- H. A request for information under the FOIA shall not be denied because the requestor has failed to pay processing fees for a prior request.
- I. If MCCMH denies, in whole or in part, a FOIA request and the requester files a civil action, if the court determines that MCCMH arbitrarily and capriciously violated this act by refusal or delay, the court shall order MCCMH to pay a civil fine of \$1,000 into the general fund of the state treasury. The court can also award punitive damages to the requester of \$1,000. MCL 15.240(7).
- J. If MCCMH denies, in whole or in part, a FOIA request and the requester files a civil action, if the court determines that MCCMH arbitrarily and capriciously violated this act by charging an excessive fee, the court shall order MCCMH to pay a civil fine of \$500 into the general fund of the state treasury. The court can also award punitive damages to the requester of \$500. MCL 15.240a(7).
- K. If a court determines that MCCMH willfully and intentionally failed to comply with the Michigan FOIA, or otherwise acted in bad faith, the court shall order MCCMH to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500 or more than \$7,500 for each occurrence. This fine will be deposited in the general fund of the state treasury. MCL 15.240b.
- L. If MCCMH does not respond to a written request in a timely manner as required , MCCMH shall reduce the charges for labor costs otherwise permitted by 5% for each day MCCMH exceeds the time permitted for a response to the request, with a maximum 50% reduction of the late response if the late response was willful and intentional. MCL 15.234(8)(9).
- M. If a FOIA request is emailed and is delivered to the MCCMH spam or junk-mail folder, the request is not received until one day after MCCMH becomes aware of the written request. MCCMH shall note in its records both the time the written request was delivered to its spam/junk-mail folder and the time MCCMH became aware of the request.
- N. The MCCMH Deputy Director or his/her designee may, at his/her discretion, determine how long to wait before taking steps to collect fees charged for processing a FOIA request, but any legal action taken to collect FOIA fees must be commenced within 6 years after the initial refusal to pay the fees.
- O. The MCCMH Deputy Director or his/her designee may, at his/her discretion, deny a fee waiver to an indigent person who requests information under the FOIA which was previously provided under an FOIA fee waiver.

- P. If a FOIA requester believes the fee estimate violates either FOIA or the publicly available procedures and guidelines, the requester may appeal the fee estimate to the Deputy Director of MCCMH.
- Q. In response to the fee appeal, and within 10 days, MCCMH must do one of the following:
1. Waive the fee.
 2. Reduce the fee and issue a written determination of the specific basis for supporting the balance of the fee. Such determination must include certification from the Director of MCCMH indicating that the statements are accurate and comply with FOIA and the MCCMH procedures and guidelines.
 3. Uphold the fee estimate and provide a written determination with certification.
 4. Extend time to decide for up to 10 business days. MCCMH must include a detailed reason for the extension.
- R. Within 45 days after a determination of an appeal to the Director and no response has been received, the requestor may commence a civil action.
- S. The written notice denying any requested records, in whole or in part, shall contain the following:
1. When the record is exempt from disclosure, a brief explanation of the authority under the FOIA or other statute by which the exemption determination was made;
 2. When the record cannot be found, a certificate that the record does not exist under the name given by the requesting person or by another name reasonably known to the program;
 3. A full explanation of the requesting person's right under section 10 of the FOIA to seek judicial review including the right to seek damages, attorney's fees, and costs.
 4. When the record is exempt from disclosure under the Mental Health Code, the printed signature of the MCCMH Executive Director or his/her designee.
 5. When the record cannot be found or is otherwise exempt under the FOIA (except as provided in V.D.4.), the signature of the MCCMH Executive Director or his/her designee.
- T. The MCCMH Deputy Director or his/her designee shall provide FOIA records/documents in any of the formats used by MCCMH, e.g., computer tapes, hard copies, email messages which state facts and replace paper records. (Email which replaces telephone communications is informal, nonfactual, and not

intended to be kept as a record or response may not be available under the FOIA.)

- U. The requesting person may file an Information Request form asking for access to information which the program/administrative office believes to be exempted by the Mental Health Code after receiving the printed notice of denial for material exempted from public disclosure. Such a request shall receive a regular review (see V.C.1-2) and shall result in the issuance of a written, signed denial of access if the records requested are found to be exempt from disclosure.
- V. Common exemptions applicable to Board or program/administrative office activities include:

1. Information of a personal nature where public disclosure would constitute a clearly unwarranted invasion of an individual's privacy, i.e., some personnel records (other than name, job description, leave usage, performance of job duties) may meet this exemption.
2. Records of information specifically described as exempt from disclosure by statute.

The most commonly exempt records are quality assurance documents and clinical records. However, if the person requesting the clinical record is the consumer, the program/administrative office should respond within the time period by complying with Board policy (re client access) under the Mental Health Code, or by notifying the requestor of the inapplicability of the FOIA and including a copy of a valid release form pursuant to MCCMH MCO Policies 6-001, "Release of Confidential Information – General," and 6-006, "Consumer Access to Clinical Records." See V.L.10., below, regarding quality assurance documents.

3. Any information or records subject to the attorney-client privilege, physician-patient privilege, psychologist-patient privilege, minister-penitent privilege, or other privilege recognized by statute or court rule.
4. Medical, counseling or psychological facts or evaluations concerning individuals if their identity would be revealed by disclosure. This category could also involve research files and reports, which should be carefully edited prior to disclosure.
5. Communications and notes within the program/administrative office or with other public agencies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final determination of policy or action. Recipient rights fact-finding investigations come within this category until such time as a final report is prepared and the Board response is complete.
6. Any bids or proposals by persons to enter into a contract or agreement with the Board until the time for the public opening or bids or proposals, or if a public opening is not to be conducted, until the time for the receipt of

bids or proposals has expired. This may apply to materials involved in negotiation of purchase of service contracts.

7. Information requested by a party to a lawsuit or the party's counsel when such information relates to an existing lawsuit that involves MCCMH as a party.
8. The definition of a person who may utilize the FOIA procedure does not include a governmental body. Requests written on governmental stationery may be denied. However, the program/administrative office shall give consideration to releasing the material voluntarily if it would have been available to the general public under the FOIA. A reasonable fee to cover the cost of locating and duplicating the material may be requested.
9. The definition of a person who may utilize the FOIA procedure does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility. Requests for FOIA materials received from incarcerated individuals can be denied.
10. The records, data, and knowledge collected for or by individuals or committees assigned a quality assurance utilization peer review function, including the review function under section 143a(2) of the Mental Health Code are confidential, are used only for the purpose of peer review, are not public records, and are not subject to court subpoena.

VI. Procedures

- A. The requestor shall make a written request for information which describes the public record sufficiently to enable the program/administrative office to find the public record. Use of the Information Request form (Exhibit C) is optional. The request may include a Request for Waiver of Fees form (Exhibit D).
- B. The MCCMH staff member who receives the oral or written request shall estimate whether the projected processing fee exceeds \$50.00 and, if it does, shall immediately ask the requestor to pay one-half of the projected processing fees. If the request was made on the Information Request form (Exhibit C), the staff member shall check off whether or not a good faith deposit was paid.
- C. The MCCMH Deputy Director or designated staff member shall receive and review the request for information.
- D. If a FOIA request is delivered to the MCCMH spam or junk-mail folder, the request is not received until one day after MCCMH becomes aware of the written request. MCCMH shall note in its records both the time the written request was delivered to its spam/junk-mail folder and the time MCCMH became aware of the request.

- E. The MCCMH Deputy Director shall forward the request to County Corporation Counsel who shall respond to it, or he/she shall respond to the request, with review by and approval of County Corporation Counsel.
- F. If the request for information is exclusively for material exempted under the Mental Health Code including any information with regard to services to specific individuals who may be MCCMH consumers:
 1. The MCCMH Deputy Director or designated staff member shall explain to the requesting person that information regarding consumers or services to consumers is confidential under the provisions of the Mental Health Code and provide him/her with a written explanation (Exhibit A).
 2. The MCCMH Deputy Director or designated staff member shall explain to the requesting person that, as provided in the FOIA, the denial of access may be contested in Circuit Court, including recovery of fees and costs.
 3. The MCCMH Deputy Director or designated staff member shall explain to the requesting person information and data collected pursuant to a quality assurance utilization peer review function are confidential and not public records under the provisions of the Mental Health Code and provide him/her with a written explanation (Exhibit A).
- G. If the request is for information which includes material which is subject to disclosure, in whole or in part under the provisions of the FOIA:
 1. The MCCMH Deputy Director or designated staff member shall record the name and address of the person requesting the information on the Information Request Log, (Exhibit E).
 2. Within two (2) business days, the MCCMH Deputy Director or designated staff member shall:
 - a. Determine if the record requested exists;
 - b. Determine if any of the information requested is exempted from disclosure and by what authority the exemption is to be made;
 - c. Document his/her recommendation for exemption of the information and submit the recommendation to the MCCMH Executive Director (Exhibit C).
 3. Within two (2) business days, the MCCMH Executive Director shall:
 - a. Review the recommendation of the MCCMH Deputy Director or designated staff member as to information subject to withholding and the basis of the action, and concur with or modify the recommendation, in writing, authorizing specific action(s) with regard to the withholding/disclosure of the requested information (Exhibit C).

- b. As needed, the MCCMH Executive Director shall authorize or deny the Request for Waiver of Fees (Exhibit D).
- H. Within five (5) days of the request, the MCCMH Deputy Director or designated staff member shall respond to the requesting person by either:
 1. Granting the request by authorizing access to the requested information (payment in full may be requested prior to actual delivery of the copies;
 2. Issuing a signed, written notice denying all or part of the request if the requested material is exempt, cannot be found (see V.F.), or if the requestor refuses to pay a good faith deposit for processing fees at the time the request is made;
 3. If the request is granted in part, preparing a brief description of the materials deleted from those disclosed and basis for deletion. The description shall be included in the materials disclosed.
- I. If the request for FOIA information by a party (or an attorney for a party) to an existing lawsuit involving MCCMH is granted, the MCCMH Deputy Director shall forward a copy of the released materials to County Corporation Counsel.
- J. If the request for information is denied in whole or in part, the MCCMH Deputy Director or designated staff member shall explain to the requesting person that the decision may be appealed to the Office of the Chairperson of the Board of Commissioners of Macomb County, in writing, in reference to the decision to withhold any or all requested information.
- K. If the requestor would like to appeal the decision, the Deputy Director must respond in writing within ten (10) days with one of the following options:
 - a. Reverse the denial;
 - b. Issue a written notice upholding the denial;
 - c. Reverse the denial in part and issue a written notice to uphold the denial in part; or
 - d. Issue a notice extending the response period for up to 10 business days.
- L. The requestor may commence a civil action against MCCMH if there has been no response from MCCMH within 180 days.
- M. The MCCMH Deputy Director or designated staff member shall determine the charges for copies of material reproduced for release (Exhibit B), whether a good faith deposit shall be required, or determine that the charges for copies of material reproduced are waived (up to \$ 20.00 per request) in accordance with the approval of a Request for Waiver of Fees (Exhibit D) signed by the MCCMH Executive Director.

- N. The MCCMH Deputy Director or designated staff member shall schedule an appointment for the review of the requested information or for the release of copies of the requested information or, if no review is necessary, he/she may mail the requested information upon full payment of the processing fees.
- O. If a review is necessary, the MCCMH Deputy Director or designated staff shall sit with the requesting person during the review, providing any explanation as necessary, or providing copies as authorized and requesting full payment of the fees for reproduction costs as authorized by County policy.
- P. If the requested information is to be mailed without a review, MCCMH Deputy Director or designated staff may request that the processing fees be paid in full prior to the mailing.
- Q. The MCCMH Deputy Director or designated staff member shall record the disclosure of the requested information and the name and address of the individual to whom the information was released or by whom the information was reviewed (Exhibit E).
- R. MCCMH shall post the procedures, guidelines, and written public summary on its website. MCCMH shall make the procedures and guidelines publicly available by including either a website link to procedures or a written copy in each FOIA response. If a FOIA requestor stipulates, MCCMH must provide records in electronic form.
- S. Procedures and guidelines must include:
 - 1. "How to submit written requests to the public body"
 - 2. "Use of standard form for detailed itemization of any fee"
 - 3. "How to understand a public body's written response"
 - 4. "Deposit requirements"
 - 5. "Fee calculations"
 - 6. "Avenues for challenge and appeal"

VI. References / Legal Authority

- A. MCL 15.231 et seq.
- B. MCL 330.1748
- C. OAG, 1998, No 6,977 (April 1, 1998)
- D. Commission on Accreditation of Rehabilitation Facilities (CARF) Manual

VIII. Exhibits

- A. Notice of Denial of Request
- B. Fees for Requests of Copies of Public Documents under the Freedom of Information Act
- C. Information Request
- D. Request for Waiver of Fees
- E. Information Request Log