

NEW YORK STATE OFFICE FOR THE AGING

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Andrew M. Cuomo, Governor

An Equal Opportunity Employer

Greg Olsen, Acting Director

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| PROGRAM INSTRUCTION | Number: | 17-PI-03 |
| | Supersedes: | N/A |
| | Expiration Date: | N/A |

DATE: January 17, 2017

TO: Area Agencies on Aging Directors, PeerPlace Champions, NY Connects Local Administrative Agencies, NY Connects Coordinators, and Regional NY Connects Grantees

SUBJECT: Disclosures of Personal Information Involving Health and Safety of an Individual

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ACTION REQUESTED:

Effective immediately.

PURPOSE:

The following guidance is being provided to supplement the instructions contained in a previous Program Instruction, 16-PI-16, "Statewide Client Data System: Informed Consent: Written and Verbal Consent Requirements, and How to Meet Them Beginning in the Go-Dark Period," issued by the New York State Office for the Aging (NYSOFA) on August 5, 2016. 16-PI-16 communicates the requirement that no disclosures of an individual's personal information be made without that person's informed consent. The purpose of this Program Instruction is to explain the implications of this requirement on the ability of Area Agencies on Aging (AAA), NY Connects Partners, service providers, and others providing services under the auspices of NYSOFA to contact Adult Protective Services, law enforcement, or other agencies when there is a concern regarding the safety or wellbeing of an individual. These guidelines describe how these situations should be approached, and identify the limited circumstances in which these disclosures may be made. For purposes of this Program Instruction, the term "NY Connects Partners" shall refer to the Local Administrative Agency and any subcontractors, NY Connects Coordinators, and other NYSOFA NY Connects grantees

and their subcontractors.

BACKGROUND:

The informed consent requirement outlined in 16-PI-16 is based on various laws aimed at privacy and confidentiality, including federal regulations promulgated under the Older Americans Act (OAA) (45 C.F.R. § 1321.51(a)), New York’s Personal Privacy Protection Law (Article 6-a of the Public Officers Law), and the Health Insurance Portability and Accountability Act (HIPAA) (all references to HIPAA refer also to its implementing regulations at 45 CFR parts 160–164 and to the Health Information Technology for Economic and Clinical Health Act (HITECH)). While each of these laws or regulations stress confidentiality and the protection of personal information, they also contemplate the need for disclosures of information in certain compelling circumstances. Both HIPAA and the PPPL expressly provide for disclosures to be allowable in limited circumstances involving threats to health and safety (45 C.F.R. § 164.512(c), (j); Public Officers Law § 96(1)(i)). The OAA, while placing importance on confidentiality, also recognizes an objective of protecting older adults. This objective has also been recognized in state regulation, which allows for disclosures where there is an “actual and immediate danger to the health or welfare of the individual” (9 N.Y.C.R.R. § 6663.3(q)). NYSOFA has operationalized these objectives by providing the instructions below.

Step-by-Step Guidance

- (a) If a worker is concerned about the health, safety, or welfare of an individual, the worker must attempt to obtain the informed consent of the individual or the individual’s legal representative to make a referral to the appropriate agency or agencies.
- (b) If an individual is unable to communicate informed consent, the worker may refer the matter and disclose identifying information to the appropriate entity or entities with statutory or regulatory authority to act for the welfare of the individual, including for adult or child protective services and/or law enforcement action, if all of the following circumstances are met:
 - (i)
 - (A) The referral is necessary to avoid or respond to an immediate danger to health, safety, or welfare of the individual; Or
 - (B) There is reasonable cause to believe that an action, inaction, or decision may pose an immediate danger to the health, safety, welfare, or rights of the individual;

- (ii) The individual has no legal representative or there is reason to believe that the individual's legal representative has taken an action, inaction, or decision that may pose an immediate danger the health, safety, welfare, or rights of the individual;
 - (iii) There is no evidence indicating that the individual would not wish a referral to be made; and
 - (iv) The referral is in the best interest of the individual;
- (c) If a worker becomes aware of circumstances that the worker believes constitute an immediate emergency such that it poses an extreme risk to the life or safety of an older adult or of another individual, the worker must attempt, where practicable, to obtain the informed consent of the individual to make a referral to the appropriate entity or entities.
- (d) If the individual refuses to consent to such disclosure, or if section (b) is otherwise inapplicable, the worker may refer the matter and disclose identifying information to the appropriate entity or entities with statutory or regulatory authority to act for the welfare of the individual, including for adult or child protective services and/or law enforcement action if all of the following circumstances are met:
- (i) The worker is aware of circumstances that the worker believes constitute an immediate emergency such that it creates an extreme risk to the life or safety of an individual or of others; and
 - (ii) The worker believes that the referral is necessary to avoid the risk of serious harm or death of an individual or others. A determination of necessity includes having considered and/or attempted alternative responses which do not involve the disclosure of identifying information without informed consent.
- (e) If a referral is permitted as described in sections (b) or (d), any referral made should be limited to the minimum disclosure of personal information necessary to allow for an investigation. In many instances, this will be limited to the individual's name, address, and telephone number, along with a basic description of the concern. *For referrals to APS, an individual must be described as: 1) being in need of protection from actual or threatened harm, neglect, or hazardous conditions caused by action or inaction of either themselves or other individuals;*

2) having a mental or physical impairment, and; 3) having no one who is willing or able to assist them responsibly.

- (f) Any referrals made pursuant to this Program Instruction must be documented by the worker. For referrals made pursuant to sections (b) or (d), this documentation must also include an explanation of the circumstances involved and the justification for the referral, applying and discussing the requirements of sections (b) or (d).
- (g) If a referral is not permitted pursuant to sections (b) or (d), the individual, the individual's legal representative, and/or the individual's caregiver should be encouraged to contact the appropriate entity or entities and should be provided with the necessary contact information for such agency or agencies.
- (h) If circumstances which may create a danger to the health, safety, or welfare of an individual are reported to the AAA, NY Connects Partner, or service provider by any person, such person should be encouraged to contact the appropriate authorities and/or agencies.
- (i) If an AAA, NY Connects Partner, or service provider receives reports of or otherwise becomes aware of circumstances which adversely affect the health, safety, or welfare of an individual, and if informed consent has previously been obtained from that individual to capture their information, information may be entered into the individual's client profile to track such reports or circumstances. If the individual has not provided informed consent to capture his or her information, no such record or client profile shall be created except to the extent necessary to comply with section (f) above.

PROGRAMS AFFECTED: Title III-B Title III-C-1 Title III-C-2
 Title III-D Title III-E CSE WIN Energy
 EISEP NSIP Title V HIICAP LTCOP
 NY Connects:
Choices for Long
Term Care Other

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