Chapter 1 Section 5

Compliance With Federal Statutes

1.0 GENERAL

Contractors shall comply with all federal laws which apply to the administration of TRICARE. In many situations where federal law is in conflict with the law in the state(s) in which the contractor is based or operating, Federal statute may have precedence. Coordination of benefits under TRICARE is a federal statutory requirement. Conversely, the contractor must apply state law in third party liability (subrogation) cases and in collection of overpayments. Below is information relating to federal statutes which have substantial significance in a contractor's operations. All contractor staff must be educated in matters relating to freedom of information and the privacy rights of the beneficiary.

2.0 FREEDOM OF INFORMATION ACT (FOIA)

2.1 Purpose

The Freedom of Information Act (FOIA) was enacted in 1967 as an amendment to the "Public Information" section of the Administrative Procedures Act. The purpose of the FOIA was to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence, to the extent necessary, without permitting indiscriminate secrecy.

2.2 Policy Of Department of Defense (DoD)

The policy of the DoD is to make available to the public the maximum amount of information concerning its operations and activities. Procedures by which information is made available to the public have been implemented by the DoD to ensure compliance with the 1974 Amendments to the FOIA. The TRICARE Management Activity (TMA) is subject to these provisions, including TRICARE contractors.

2.3 Procedures

TRICARE FOIA procedures require a written request under the Act to be addressed to the FOIA Officer, TMA, 16401 East Centretech Parkway, Aurora, Colorado 80011-9066. The request shall describe the desired record as completely as possible to facilitate its retrieval from files and to reduce search fees which may be borne by the requestor. Normally, no more than 10 working days shall elapse after a request has been received by the Freedom of Information Officer before notification is sent that the request has been granted or denied. The administrative time limit for responding to FOIA requests does not begin until the request is received by the TMA FOIA Officer.

2.4 Request For Release Of Information

In response to requests received by contractors for the release of information, unclassified

information, documents and forms which were previously provided to the public as part of routine services shall continue to be made available in accordance with previously established criteria. All other requests from the public for release of TRICARE records and, specifically, all requests that reference the FOIA shall be immediately forwarded to TMA, ATTENTION: FOIA Officer, for appropriate action. **Direct contact, including interim replies, between TRICARE contractors and such requestors is not authorized**. The contractor shall process requests by individuals for access to records about themselves under the Privacy Act procedures when those procedures are more advantageous to the requestor.

2.5 Requests From The General Accounting Office (GAO) and Other Governmental Agencies

The procedures above apply to the release of records to the general public and are not applicable to requests from the GAO and other federal, state, and local governmental organizations. Questions concerning such requests shall be coordinated with TMA. The procedures above, also apply to requests for records by individual Members of Congress who invoke the FOIA.

2.6 Records Forwarded To TMA

When a request for a TRICARE record is forwarded to TMA, a copy of the requested record, if in the contractor's custody, shall also be forwarded. The contractor shall provide a completed copy of DoD Document (DD) Form 2086, "Record of FOI Case Processing Costs," reporting the direct search and copying charges associated with each request. DD Form 2086, Addendum A, Figure 1.A-1, may be reproduced by the Managed Care Support Contractor (MCSC). SD Form 467 may be used in lieu of DD Form 2086.

2.7 Contractor Provided Assistance To TMA

The contractor shall provide assistance to TMA in resolving and pursuing FOIA requests involving the contractor's proposal submitted during solicitation of a Managed Care Support (MCS) contract or FOIA issues relative to the contract. The contractor shall provide representatives at the time and places as directed by the Procuring Contracting Officer (PCO) to complete actions under FOIA. The contractor's representative(s) should schedule 80 hours to review both the technical and business proposals.

3.0 THE ALCOHOL, DRUG ABUSE, AND MENTAL HEALTH REORGANIZATION ACT (ADAMHRA)

The ADAMHRA, Public Law (PL) 102-321 (enacted July 10, 1992, with an effective date of October 1, 1992) (42 United States Code (USC) 290dd-2) places specific requirements upon federal agencies (and their agents) for the confidentiality and disclosure of records of the identify, diagnosis, prognosis or treatment of any beneficiary in connection with a substance abuse, alcoholism or alcohol abuse program. The Health and Human Services (HHS) Privacy Regulation permits a health care provider to disclose information in a number of situations that are not permitted under the substance abuse regulation. For example, disclosures allowed without patient authorization under the HHS Privacy Regulation for law enforcement, judicial and administrative proceedings, public health, health oversight, directory assistance, and as required by other laws would generally be prohibited under the substance abuse statute and regulation. However, because these disclosures are discretionary and not mandatory, a covered entity would not be in violation of the HHS Privacy rules for not disclosing this information and for complying with

Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) requirements. **(The procedures established below supersede the requirements of the Privacy Act for these records.)**

3.1 General Rules Regarding Confidentiality

Records of the identity, diagnosis, prognosis or treatment of any beneficiary in connection with a substance abuse, alcoholism or alcohol abuse program shall be confidential and shall be disclosed only as authorized in the procedures found in 42 CFR Part 2 which is titled "Confidentiality of Alcohol and Drug Abuse Patient Records." Such written records and verbal information that would identify a person as a beneficiary receiving alcohol or drug treatment shall not otherwise be disclosed in any civil, criminal, administrative or legislative proceeding. This prohibition covers all information about the beneficiary. The criminal penalty for violation of the law is a fine of not more that $500 for the first offense and not more than $5,000 for each subsequent offense.

3.2 TRICARE Contractor Responsibility Regarding Confidentiality Of Alcohol And Substance Abuse Records

The contractor shall establish and maintain procedures and controls for the purpose of assuring the confidentiality of the records of beneficiaries in connection with alcohol and substance abuse programs and for the disclosure of information from the contractor records only as provided in the referenced statutes and regulations and in accordance with the following instructions:

3.2.1 Collection Of Information

When medical information is requested by a TRICARE contractor pertaining to identity, diagnosis, prognosis, or treatment of a TRICARE beneficiary in connection with a substance abuse, alcoholism, or alcohol abuse program, informed written consent shall be obtained from the beneficiary using the model consent form found in 42 CFR Part 2 Subpart C which is titled "Disclosures With Patient's Consent."

3.2.1.1 Minor Beneficiaries

The Federal rule relies on State laws to define minors, or if no age of majority is specified in the applicable State law, the age of eighteen years. When State law requires parental consent for treatment, then consent to disclose information must be obtained by both the minor beneficiary or person authorized to sign in lieu of the minor beneficiary and the custodial parent (or guardian). Regardless of the requirement for parental consent, the contractor must always obtain the minor's consent or person authorized to sign in lieu of the minor beneficiary, for disclosure the parent's signature alone is not sufficient. If a beneficiary has been legally declared an emancipated minor, they are to be considered as an adult. If the beneficiary is under 18 years of age and is or was a spouse of an Active Duty Service Member (ADSM) or retiree, they are considered to be an emancipated minor.

3.2.1.2 Incompetent Beneficiaries

For beneficiaries, other than minors, judged to be incompetent, the consent may be

given by the guardian or other person authorized under state law to act in the patient's behalf.

3.2.1.3 Deceased Beneficiaries

When consent is required for collection or disclosure of records of a deceased beneficiary, consent may be obtained from an executor, administrator, or other personal representative of the deceased beneficiary's estate. If such a representative has not been appointed, the spouse, or if none, other responsible family member may give consent.

3.2.2 Disclosure of Information

When covered information is requested by a person other than the TRICARE beneficiary to whom the records pertain, informed written consent shall be obtained from the beneficiary using the model consent form, found in 42 CFR Part 2 Subpart C subject to paragraphs 3.2.1.1, 3.2.1.2, 3.2.1.3, and the following instructions. The contractor shall maintain the original signed consent form with a copy of the documents disclosed.

3.2.2.1 Disclosure to Beneficiary or Family Members or Others

Disclosure to the beneficiary shall be determined in accordance with the procedures set forth in paragraph 4.7. When consent is given, disclosure to family members or any person with whom the beneficiary has a personal relationship may be made unless, in the judgment of the person responsible for the beneficiary's treatment, the disclosure would be harmful to the beneficiary.

3.2.2.2 Disclosure to Non-Custodial Parent

In paragraphs citing the ADAMHRA Act, the term "parent" refers to custodial parent. In general there is no absolute right of a non-custodial parent to have access to a record about a child absent a court order or consent notwithstanding that private information may be retrievable only by the sponsor's Social Security Number (SSN). A non-custodial parent may not generally have access to the minor child's medical information. In some cases involving separation or divorce, it may be necessary to review the court order to determine the specific intent of the court with relation to medical issues involving a minor. The privacy of persons receiving alcohol and substance abuse prevention and treatment services is protected by federal statute and regulations.

3.2.2.3 Disclosure Without Beneficiary Consent

Disclosure without beneficiary consent may be made in certain circumstances described in 42 CFR Part 2 Subpart D. These circumstances include the following:

- Medical emergencies when medical personnel have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention.

- Research, audit, management and evaluation activities (including disclosure of financial information) conducted within and between the DoD, TRICARE, TRICARE contractors, the Department of Veterans Affairs (DVA), and the Department of Health and Human Services (DHHS).

- In compliance with an appropriate order of a court of competent jurisdiction.

3.2.2.4 Prohibition On Redisclosure

Whenever a written disclosure is made, with proper written consent, the disclosure shall be accompanied by a written statement as follows:

> "Prohibition on redisclosure: This information has been disclosed to you from records whose confidentiality is protected by Federal Law. Federal Regulations (42 CFR Part 2) prohibit you from making any further disclosure of this information except with the specific written consent of the person to whom it pertains. A general authorization for the release of medical or other information, if held by another party, is **not** sufficient for this purpose. Federal regulations state that any person who violates any provision of this law shall be fined not more than $500 in the case of a first offense and not more than $5,000 in the case of each subsequent offense."

Note: This statement shall either appear on correspondence transmitting the documents or be stamped on the first page of the documents disclosed. (A program or person is subject to the confidentiality requirements of 42 CFR Part 2 if records are maintained for any alcohol abuse or substance abuse function which received federal funds or is conducted by a federal agency, requires a federal license or authorization or has a tax-exempt status.)

3.2.3 Other Disclosures

Requests for disclosures in situations not specified above shall be made only with the written authorization of TMA Office of General Counsel (OGC).

3.2.4 State Authorities/Program Directors

For information regarding state and territorial alcoholism authorities and program directors contact:

National Clearinghouse for Alcohol Information
P. O. Box 2345
Rockville, MD 20852
Telephone: (301) 468-2600

National Institute on Alcohol Abuse and Alcoholism
Division of Resource Development
State Assistance Branch
5600 Fishers Lane
Rockville, MD 20857

4.0 PRIVACY ACT

The Privacy Act imposes legal responsibility on the DoD and TRICARE contractors to assure that personal information about individuals collected in TRICARE records is limited to that which is legally authorized and necessary, and the personal information is maintained in a manner which

assures its confidentiality. This section sets forth the basic guidance concerning DoD implementation of the Privacy Act and contractor responsibility for compliance. However, in administration of a medical benefit program some common sense must be applied in responding to correspondence. Although the Privacy Act restricts disclosure of personal information outside the agency (DoD and contractors), such restrictions do not justify non-response to inquiries or other Program correspondence. Following are the relevant regulation and directive regarding contractor compliance with the Privacy Act (5 USC 552a), DoD Regulation 5400.11 and DoD Directive 5400.11. Pursuant to this law and regulation contractors will be required to operate a government system of records and perform activities associated with maintaining this system of records, including the collection, use, and dissemination of government records. Government records include records related to beneficiary health care services and/or claims and supporting documentation which are received or developed under this contract. These records are property of the United States Government. To the extent the following procedures conflict with the procedures set forth in paragraph 3.0, the procedures in paragraph 3.0 take precedence over the Privacy Act procedures. Questions concerning the release of information pertaining to deceased beneficiaries shall be referred to TMA OGC.

4.1 Privacy Act Requirements

The Privacy Act of 1974 requires agencies to:

- Publish in the **Federal Register** annual notice of the existence and character of any system of records from which information is retrieved by some personal identifier.

- Itemize in the public notice the "routine uses" of the records contained in a system of records, including the categories of users and the purpose of such use. No other use or disclosure of the information shall be made without the express written consent of the individual to whom the record pertains.

- Establish procedures for granting individuals access to records or information pertaining to them and for reviewing requests from individuals concerning the amendment of any records pertaining to them. A requester may ask the agency to review the agency's initial adverse determination. If the review is again adverse the agency then must advise the requester of his/her right to seek judicial review.

- Establish procedures governing the collection, safeguarding and maintenance of personal information.

4.2 Policy Of DoD

The policy of DoD is to preserve the personal privacy of individuals, permitting an individual to know what records pertaining to him or her are collected, maintained, used, or disseminated in the DoD, to other individuals or entities and to have access to and have a comprehensible copy made of all or any portion of such records, in accordance with applicable laws and regulations. Concomitantly, DoD activities shall collect, maintain, use or disseminate any record of an identifiable personal nature in a manner which assures that such action is necessary and lawful; that any information collected is accurate, relevant, timely, and complete as is reasonably necessary to assure fairness to the individual, and that adequate safeguards are provided to prevent misuse or unauthorized release of such information.

4.2.1 E-Government and Privacy Impact Assessment (PIA)

Contractors are responsible for the employment of practices that satisfy the requirements and regulations of the E-Government Act of 2002 (Public Law PL 107-347, 44 USC 3501 note); the E-Government Memorandum 03-22 (September 26, 2003) and current DoD PIA Guidance Memorandum at http://www.tricare.mil/TMAPrivacy/Info-Papers-PIAs.cfm.

4.2.2 PIA Submission

The requirements for submission of Privacy Impact Assessments are outlined in the TRICARE Systems Manual (TSM) Chapter 1, Section 1.1.

4.3 Definitions Of Key Terms

4.3.1 Individual

An individual is a citizen of the United States or an alien lawfully admitted for permanent residence. This status applies only to living persons. The Act does not cover entrepreneurs by the term "individual." Thus, physicians and other sources of care, when acting in their professional business capacity, are not "individuals" under the Privacy Act. To be subject to the Act, information maintained must in fact be **personal** in nature, and the individual must be dealt with in a personal, not an entrepreneurial role. Minors have independent and individual rights of privacy under the Privacy Act. A legal guardian or the parent of a minor, with some exceptions, may have the same rights as the individual minor and may act on behalf of the individual. Each request submitted by a minor or a legal guardian or custodial parent of a minor should be reviewed individually and case by case judgements made. A letter from an attorney stating that he/she represents a beneficiary or provider is sufficient to authorize the agency to release information under the Privacy Act. It would be a violation of professional ethics for an attorney to indicate that he/she represents an individual when in fact that is not true. Because of this standard of professional ethics, the agency can rely on the attorney's statement of representation.

4.3.2 Record

A record is any item, collection, or grouping of information about an individual which is maintained (collected, used or disseminated) by TMA or a TRICARE contractor, including, but not limited to, his or her education, financial transactions, medical history, and criminal or employment history, and which contains the individual's name or the identifying number, symbol, or other personal identifiers.

4.3.3 Beneficiary History And Deductible Files

This term includes, but is not limited to, any record of claims or billings for medical, hospital or related services, application or approval forms which reflect diagnoses, treatment or medical conditions, family history files, or any other correspondence, memorandum or report reflecting these data with respect to any individual which are acquired or used by the contractor in the development and processing of claims or in carrying out the other functions under the TRICARE contract.

Note: The term "TRICARE Contractor Claims Records" is used by the National Archives and Records Service (NARS). The terms "Beneficiary History and Deductible Files" and "TRICARE Contractor Claims Records" both apply to the same documents.

4.3.4 Routine Use

With respect to the disclosure of a record or the use of such record for a purpose which is compatible with the purpose for which it was collected, "routine use" of Beneficiary History and Deductible Files has been specified as follows:

> "The TMA and TRICARE contractors use the information to review for payment of medical care; for control and approval of medical treatments and interface with providers of health care; to respond to inquiries from Congressional offices made at the request of the individual covered by the system; to control and accomplish reviews of utilization; for review of claims related to possible third-party liability cases; for referral to Peer Review Committees or similar professional review organizations to control and review providers of health care; for disclosure to third-party contacts (without the consent of the individual to whom the information pertains) in situations where the party to be contacted has, or is expected to have, information necessary to establish the validity of evidence or to verify the accuracy of information presented by the individual concerning the individual's eligibility for benefits under TRICARE, the amount of benefit payments, any review of suspected abuse or fraud, or any concern for program integrity or quality appraisal; to respond to an individual's inquiry concerning TRICARE; for the issuance of deductible certificates; for referral to the Secretary of the Department of Health and Human Services or the Administrator of the Veterans Administration, consistent with their statutory administrative responsibilities under TRICARE; for referral to the Department of Justice, state law enforcement or regulatory agencies, or foreign law enforcement agencies for investigation and possible criminal prosecution; and, for referral to the Department of Justice for representation of the Secretary of Defense in civil actions." 65 **Federal Register** Number 94, page 30966, May 15, 2000.

4.4 Beneficiary History And Deductible Files

Operation of a TRICARE health care delivery and/or claims processing system includes maintenance of a decentralized segment of the TRICARE systems of records known as "Beneficiary History and Deductible Files." TRICARE contractors are obligated to comply with the requirements of the Privacy Act in the collection, use and dissemination of information contained in the systems of records.

4.5 Confidentiality Of Beneficiary History And Deductible Files

The contractor shall establish and maintain procedures and controls for the purpose of assuring that the confidentiality of the Beneficiary History and Deductible Files is maintained at all times and that information is disclosed solely and strictly in accordance with the provisions of the Privacy Act of 1974 and DoD Regulation 5400.11-R.

4.6 Collecting Information

4.6.1 The Privacy Act requires personal information to be collected, to the greatest extent practicable, directly from the individual when the information may result in adverse determinations about an individual's rights, benefits, or privileges under federal programs. The collection of information from third parties shall be minimized except where the nature of the information is such that there is a need to obtain it directly from a third party, or to obtain verification from a third party.

4.6.2 When obtaining information from an individual, a **Privacy Act Statement** shall be provided to the individual advising of the authority for soliciting the information, the principal purposes for which it will be used, the routine use to be made of it, whether furnishing the information is mandatory or voluntary and the effect on the individual for not providing the information. The appropriate Privacy Act Statement must be included in any distribution of TRICARE claim forms by the TRICARE contractor. TRICARE claim forms, incorporate the Privacy Act Statement.

4.6.3 Claims received by the contractor which do not contain an indication that the claimant was aware of the Privacy Act will, nevertheless, be processed for payment. However, if additional information concerning a claim is required, the request to the individual must include a copy of the appropriate Privacy Act Statement. When information is collected by telephone, a brief oral explanation of the Privacy Act shall be given to the individual.

4.7 Access To Contractor Records Under The Privacy Act

4.7.1 The contractor must devise and describe procedures by which an individual is permitted access to records pertaining to him or her. Upon request, an individual must be informed whether or not the Beneficiary History and Deductible Files contain a record pertaining to him or her. And, if the individual so desires, he or she shall be permitted to review such record and to be accompanied for the purpose of reviewing the record by a person of his or her choice. Further, an individual is permitted to obtain a copy of such record in a form which is comprehensible to him or her.

4.7.2 Granting individual access to a record containing his/her personal information shall not be conditioned upon any requirement that the individual state a reason or otherwise justify the need to gain access. However, the requester shall be required to provide such information as is necessary to determine generally where and how to look for their records. The individual shall also be required to provide reasonable verification of his or her identity prior to being granted access to personal information. Custodial parents or legal guardians shall be required to verify both their identity and their relationship to a minor or a legal incompetent. In addition, since most records in the Beneficiary History Files relate to medical information, an individual may be required to submit a written request for access to the file. This allows the contractor time to review the medical information in accordance with the following procedures to determine if direct access by the individual to the medical information would have an adverse effect on the individual.

4.7.3 In paragraphs citing the Privacy Act, the term "parent" refers to custodial parent. In general there is no absolute right of a non-custodial parent to have access to a record about a child absent a court order or consent notwithstanding that private information may be retrievable only by the sponsor's SSN. A non-custodial parent may not generally have access to the minor child's medical information. In some cases involving separation or divorce, it may be necessary to review

the court order to determine the specific intent of the court with relation to medical issues involving a minor. A custodial parent or guardian of a minor may request notification of, or access to, medical records of the minor on behalf of the minor. A custodial parent or guardian will be granted direct access to the minor's medical record unless it falls under the ADAMHRA. If the records relate to this Act then follow the instructions stated in paragraph 3.0.

4.7.4 Information from the Beneficiary History and Deductible File shall be released to authorized representatives of the individual concerned, upon written request of the individual (parent/guardian) as appropriate. If the individual concerned is mentally incompetent, insane, or deceased, the next of kin or legal representative must authorize, in writing, the release of the individual's records. Any written authorization to release records must be incorporated in the accounting for disclosures discussed below.

4.7.5 Requests for information or records must be **acknowledged** within 10 working days from the date of receipt. An individual's request for access to records pertaining to him or her shall receive concurrent consideration both under the Privacy Act and the FOIA, if appropriate. The requested information must be furnished within 30 working days unless good cause exists to delay furnishing the record, in which case the individual will be informed in writing within the 30 working days of the reason for delay and when it is anticipated that the information will be furnished.

4.8 Corrections To Records

4.8.1 An individual is permitted by the Privacy Act to request correction of any record pertaining to him or her. Requests should be in writing and contain, as a minimum, sufficient identifying information to enable location of the record, a description of the items to be amended and the reason amendment is being requested.

4.8.2 TRICARE contractors shall implement procedures for reviewing records at the request of individuals concerned and develop and implement procedures for making corrections, if appropriate. Whenever practicable, contractors shall complete the review and advise the individual of the decision to amend the record within 10 working days of receipt of the request. Otherwise, a written acknowledgment of receipt of a request for amendment must be provided within 10 working days after receipt, with notification of a decision to amend the record furnished within 30 working days of receipt of the request.

4.8.3 If a contractor agrees with allowing any portion of the individual's request to amend a record, it shall amend the record accordingly. In addition, all previous recipients of the uncorrected record, including those recipients identified by a disclosure accounting as required below, shall be advised of the amendment and of the substance of the correction.

4.8.4 If the TRICARE contractor does not agree to amend the record as requested, the individual shall not be advised of the decision. Rather the individual's request for amending the record, together with a copy of the record and the contractor's written explanation of the reason(s) for not amending the record, shall be sent to TMA, ATTENTION: OGC, within 10 working days of the decision as prescribed in paragraph 4.8.2. Written acknowledgment of receipt of the request for amendment will be provided to the individual.

4.9 Accounting For Disclosures

4.9.1 Except for routine disclosures, no record contained in the Beneficiary History and Deductible Files shall be disclosed to any person or to any agency outside DoD, without the prior written consent or request, of the individual to whom the record pertains. Contractors shall disclose records contained in the Beneficiary History and Deductible Files to officials and employees of DoD and to officials and employees of TRICARE contractors who have a need for the record in the performance of their duties, provided the use is compatible with the purpose for which the record is maintained. The routine use of information contained in the Beneficiary History and Deductible Files has been set forth in paragraph 4.3.3. Certain other routine uses have been authorized by the Privacy Act, which, in summary, include disclosures to the Bureau of the Census, disclosures for statistical research and reporting, disclosures to the Congress, disclosures to the GAO, and disclosures pursuant to court order. Disclosures to persons or agencies which would not amount to a routine use as set forth above will be made by the contractor only with the written authorization of TMA.

4.9.2 Except for disclosures made to officials and employees of DoD and TRICARE contractors as described above, the Privacy Act requires an accurate accounting for all other disclosures of personal data. Disclosures which must be accounted for under the Privacy Act are of two types, routine and nonroutine. Under either type, a record must be kept of the name and address of the person and, if appropriate, the agency to whom the disclosure is made, the date, nature, and purpose of each disclosure. In addition, accounting for nonroutine disclosures shall also contain the consent of the individual to whom the record pertains. Nonroutine disclosures include all disclosures made outside DoD and TRICARE contractors which are not otherwise identified as routine. The accounting need not include a notation on each separate document of every disclosure of a particular record, provided the contractor can construct from its system the required accounting information when required by the individual, when necessary to inform previous recipients of any amended records, or when providing the justification or basis upon which the disclosure was made (i.e., an individual to whom a record pertains is entitled, upon request, to all information on the accounting of disclosures, except disclosures made for law enforcement purposes). Accounting records for routine and nonroutine disclosures must be retained for at least five (5) years after the last disclosure or the life of the basic record, whichever is longer.

4.10 Employee Training

4.10.1 In the event of violations of the Privacy Act, a civil action may be brought against DoD when a violation concerns the design, development or operation of a system of records on individuals to accomplish an agency function. Criminal penalties may be imposed upon the officers and employees of DoD when the violation concerns the operation of a system of records on individuals to accomplish an agency function. For purposes of the Privacy Act, when a TRICARE contractor maintains the Beneficiary History Files to accomplish a TRICARE function, the contractor and any employee of the contractor will be viewed as employees of the DoD.

4.10.2 Administrative and physical safeguards to protect Beneficiary History and Deductible Files from unauthorized or unintentional access, disclosure, modification, or destruction, must be employed by contractors. All persons whose official duties require access to or processing and maintenance of personal information should be advised of the proper safeguarding and use of

such information. In addition, all employees should be aware of their responsibilities under the Privacy Act. Any officer or employee of the contractor who:

- Willfully discloses individually identifiable information from the Beneficiary History and Deductible Files, in violation of the Privacy Act, shall be guilty of a misdemeanor and fined not more than $5,000; or,

- Willfully maintains through performance of the TRICARE contract, a system of records not included in the Beneficiary History and Deductible Files shall be guilty of a misdemeanor and fined not more than $5,000.

4.11 General Correspondence

In responding to general correspondence, the reply should be sent to the beneficiary regardless of who made the inquiry. If a spouse or other family member makes an inquiry concerning a beneficiary's claim, etc., the inquiry should not be returned to the spouse or family member unanswered. Rather, a reply should be addressed to the beneficiary with an explanation that under the Privacy Act the reply could not be made to the spouse or family member who made the inquiry. Also, if an inquiry is made by the beneficiary, including an eligible family member regardless of age, the reply should be addressed to the beneficiary, not the beneficiary's spouse (service member) or parent. The only exceptions are when a parent writes on behalf of a minor child (under 18 years of age) or when a guardian writes on behalf of a physically or mentally incompetent beneficiary. However, in responding to a parent of a minor or guardian of an incompetent, the Privacy Act precludes disclosure of sensitive information (e.g., abortion, alcohol and substance abuse, venereal disease, etc.) or information which, if released, would have an adverse effect on the beneficiary. In such cases, the procedures outlined in paragraph 4.7 shall be followed. When a reply is made to the beneficiary, the reply should be fully responsive to the inquiry (reasonable charge, etc.) whether or not the query was originally made by the beneficiary. Copies of the response shall NOT be sent to any family member, spouse or other person who may have made the inquiry.

4.12 Release Of Information To Members Of Congress

4.12.1 In accordance with the DoD policy of making maximum information concerning its operations and activities available to both Government officials and to the public in general, TMA and TRICARE contractors will answer constituent's letters to members of Congress as fully as possible.

4.12.2 Information requested by members of the Congress for the constituents shall be handled in the same manner as if the beneficiary had written directly to TMA or the TRICARE contractor. If it develops that the information cannot be released, the Member of the Congress requesting the information shall be advised promptly of that fact and of the reasons for the determination.

4.12.3 Responding to a Congressional office from the record of an individual in response to an inquiry from the Congressional office at the request of that individual (beneficiary), has been established as a routine use of the Beneficiary History and Deductible Files. However, in those cases in which the Congressional inquiry indicates that the request is being made on behalf of a person other than the individual whose record is to be disclosed (e.g., a spouse or family member 18 years of age or older), the contractor shall advise the Congressional office that written consent of the

beneficiary is required. A verbal statement from a Congressional staff member that written consent was obtained from the individual to whom the record pertains or from the parent in the case of a beneficiary under age 18, is sufficient for the contractor to release the requested information. The contractor shall not contact the beneficiary unless the Congressional office requests that it be done. Similarly, a record of an individual which would not be releasable directly to the individual (e.g., a medical record which would have an adverse effect on the individual) cannot be released directly to the Congressional office making the inquiry on behalf of the individual. Instead, the Congressional office shall be advised of the procedure for release of such record. Of course, in those cases where a contractor can respond to a Congressional request for assistance on behalf of an individual, without disclosing personal information which would fall under the Privacy Act, the contractor shall comply.

4.12.4 Replies to all Congressional inquiries and requests shall be completely responsive and handled as expeditiously as possible. Should it become evident that a response to a request cannot be made within 15 working days, an interim reply will be sent. The interim reply will indicate the anticipated date of completion and the steps being taken to obtain the information requested.

4.13 Disclosure Within The Agency

4.13.1 The Privacy Act prohibits the disclosure from TRICARE records of information concerning a beneficiary without the beneficiary's written consent except for "routine uses" as directed by the agency or disclosures made to officials and employees of the DoD (including TRICARE contractors) who have a need for the record in the performance of their duties, provided the use is compatible with the purpose for which the record is maintained.

4.13.2 Paragraph 4.3.4, defines "routine uses" with respect to disclosure of TRICARE records. TRICARE contractors should be aware that TRICARE Health Benefit Advisors (HBAs) and Uniformed Services claims officers are employees of the DoD authorized to receive information from TRICARE records if they have a need for the information in the performance of their duties. A TRICARE HBA who is assisting a beneficiary may receive TRICARE information pertaining to that beneficiary. If there is some reason to question release of the information, a request can be made for the beneficiary's written consent. The restriction on disclosure of only that information directly releasable to the beneficiary also applies to the HBA.

4.14 Appeals

Guidance for handling general correspondence also applies to appeal cases, except that a designated "representative" (as defined in 32 CFR 199.10), may be communicated with on the same basis as the individual beneficiary. However, unless the representative is an attorney, a written statement from the beneficiary appointing the representative is required. (See Chapter 12, Section 2, for requirements.)

5.0 TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

5.1 Title VI of the Civil Rights Act of 1964 provides that no person shall, on the grounds of race, color or national origin, be excluded from participation under any program or activity receiving federal financial assistance. All federal departments and agencies extending such assistance are required to ensure that institutions or facilities participating in these federally-assisted programs do not discriminate against beneficiaries or employees on the grounds of race, color or national

origin. Hospitals, skilled nursing facilities, residential treatment centers and special treatment facilities determined to be authorized providers under TRICARE are subject to the provisions of Title VI.

5.2 Investigating complaints of noncompliance with Title VI is a function of the Office of Civil Rights of the DHHS. Any discrimination complaints involving Title VI that are received by contractors should be forwarded to the Office of Civil Rights, DHHS, North Building, 330 Independence Avenue, S.W., Washington, DC 20003. A copy of the material sent to the Office of Civil Rights must also be sent to TMA OGC, 16401 East Centretech Parkway, Aurora, Colorado 80011-9066.

6.0 SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 as amended, states that no otherwise qualified handicapped individual shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. All federal agencies extending such assistance are required to ensure that both individual professional providers and institutions participating in these federally-assisted programs do not discriminate against beneficiaries or employees on grounds of a handicapping condition. Any discrimination complaints involving Section 504 that are received by contractors shall be forwarded to TMA within two working days of receipt.

7.0 HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) AND DOD PRIVACY REGULATION

The contractor shall comply with the above Act and Regulation. TRICARE is a health plan and a covered entity. As business associates of the TRICARE Health Plan, the MCSC and its subcontractors shall comply with the HHS Privacy Regulation. Network providers are not considered business associates, but must comply with the provisions of the HHS Privacy Regulation as covered entities.

7.1 HHS Privacy Regulation Relationship To Existing Federal And State Laws And Federal Regulations

The Privacy Act of 1974 and the DoD Privacy Regulation will be interpreted in a manner that will make them compatible with the HHS Privacy Regulation and the DoD HIPAA Privacy Regulation. If a regulation or law mandates a particular action, that regulation or law will take precedence over a regulation that makes a particular action discretionary. Further, the more specific regulation or law will take precedence over the more general regulation or law. Where a determination must be made as to the applicability of a privacy requirement, the general rule is that the more restrictive requirement will be applied.

The preamble of the HHS Privacy Regulation states:

> "When a covered entity is faced with a question as to whether the privacy regulation would prohibit the disclosure of protected health information that it seeks to disclose pursuant to a federal law, the covered entity should determine if the disclosure is required by that law. In other words, it must determine if the disclosure is mandatory rather than merely permissible. If it is mandatory, a covered entity may disclose the

protected health information pursuant to §164.512(a), which permits covered entities to disclose protected health information without an authorization when the disclosure is required by law. If the disclosure is not required (but only permitted) by the federal law, the covered entity must determine if the disclosure comes within one of the other permissible disclosures. If the disclosure does not come within one of the provisions for permissible disclosures, the covered entity must obtain an authorization from the individual who is the subject of the information or de-identify the information before disclosing it. If another federal law prohibits a covered entity from using or disclosing information that is also protected health information, but the privacy regulation permits the use or disclosure, a covered entity will need to comply with the other federal law and not use or disclose the information."

7.1.1 The Privacy Act Of 1974 And The DoD HIPAA Privacy Regulation

The Military Health System (MHS), TRICARE, and its contractors are subject to the Privacy Act of 1974 and the DoD HIPAA Privacy Regulation. The Privacy Act and the DoD HIPAA Privacy Regulation permits the disclosure of information for reasons compatible with the purposes for which the information was collected. These uses and conditions or reasons for disclosures of information, otherwise referred to as "routine uses," must be identified and published in the **Federal Register**. Routine uses are defined by the agency and are, by definition, discretionary. Where a routine use conflicts with mandatory requirements under the HHS Privacy Regulation, the routine use must be interpreted or applied in a manner that complies with the HHS Privacy Regulation requirements.

7.1.2 FOIA

The FOIA, 5 USC 552, requires the federal Government to disclose several types of information upon the request of any person. Uses and disclosures required by FOIA fall under §164.512(a) of the HHS Privacy Regulation which allows for uses and disclosures required by law. The HHS Privacy Regulation does not change the established policies and procedures for the MCSC towards FOIA requests.

7.1.3 State Laws

The general rule set forth in the HHS Privacy Regulation states that any standard, requirement, or implementation guideline adopted in the privacy rule that is contrary to state law will preempt that state law unless one of the privacy rule exceptions apply. In other words, federal privacy regulations adopted pursuant to the HIPAA privacy rule set the floor of minimal privacy requirements that must be met by covered entities in all states. States are permitted to enforce requirements that exceed the federal minimum.

Generally, state laws pertaining to health care are not applicable to health care programs and activities of the DoD. However, there are circumstances when DoD procedures require DoD components (including contractors) to follow state law. In those cases DoD components will follow state law. For example, state law (where treatment is provided) will be applied to cases involving the disclosure of Protected Health Information (PHI) about a minor to authorized persons (i.e., parent, guardian, etc.)

Paragraph C2.4. of the DoD Health Information Privacy Regulation provides guidance regarding the preemption of state law.

> "In general, the HHS regulation (HHS Privacy Regulation) establishes rules, exceptions, and procedures governing the determination of the preemption of state law by the HHS regulation. As a general rule, a standard, requirement, or implementation specification adopted under the HHS regulation that is contrary to a provision of State law preempts the provision of State law. Exceptions to this general rule include the circumstance in which the provision of State law relates to the privacy of health information and is more stringent than a standard, requirement, or implementation specification adopted under the HHS regulation. Exceptions also include circumstances in which the provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child or domestic abuse or neglect, birth, or death, or for the conduct of public health surveillance, investigation, or intervention."

Paragraph C2.4.2. states:

> "As a general rule, State laws pertaining to health care are not applicable to health care programs and activities of the DoD. However, there are some matters concerning which DoD rules and procedures call for DoD components to follow State law."

For example:

> "In cases involving disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor, the State law of the state where the treatment is provided will be applied. In any other case, in which there is a conflict between this regulation [DoD Health Information Privacy Regulation] and State law, this regulation [DoD HIPAA Privacy Regulation] will apply, unless: DoD rules, procedures, or other applicable policy call for DoD components to follow State law with respect to the matter at issue."

- END -