§ 33.16 Access to clinical records.

(a) Definitions. For the purposes of this section:

1. "Clinical record" means any information concerning or relating to the examination or treatment of an identifiable patient or client maintained or possessed by a facility which has treated or is treating such patient or client, except data disclosed to a practitioner in confidence by other persons on the basis of an express condition that such data would never be disclosed to the patient or client or other persons, provided that such data has never been disclosed by the practitioner or a facility to any other person. If at any time such data is disclosed, it shall be considered clinical records for the purposes of this section. For purposes of this subdivision, "disclosure to any other person" shall not include disclosures made pursuant to section 33.13 of this article, to practitioners as part of a consultation or referral during the treatment of the patient or client, to the statewide planning and research cooperative system, or to the committee or a court pursuant to the provisions of this section or to an insurance carrier insuring, or an attorney consulted by, a facility.

2. "Committee" means a clinical record access review committee appointed pursuant to this section.

3. "Facility" means a facility as defined in section 1.03 of this chapter, a program requiring approval for operation pursuant to article thirty-two of this chapter, institutions offering training in psychotherapy, psychoanalysis and related areas chartered pursuant to section two hundred sixteen of the education law, or, notwithstanding section 1.03 of this chapter, any provider of services for persons with mental illness or developmental disabilities which is operated by, under contract with, receives funding from, or is otherwise approved to render services by, a director of community services pursuant to article forty-one of this chapter or one or both of the offices, including any such provider which is exempt from the requirement for an operating certificate under article sixteen or article thirty-one of this chapter.

4. "Mental health practitioner" or "practitioner" means a person

employed by or rendering a service at a facility maintaining the clinical record licensed under article one hundred thirty-one of the education law who practices psychiatry or a person licensed under article one hundred thirty-nine, one hundred fifty-three or one hundred fifty-four of the education law or any other person not prohibited by law from providing mental health or developmental disabilities services.

5. "Patient or client" means an individual concerning whom a clinical record is maintained or possessed by a facility as defined in paragraph three of this subdivision.

6. "Qualified person" means any properly identified patient or client, guardian of a person with a developmental disability appointed pursuant to article seventeen-A of the surrogate's court procedure act, or committee for an incompetent appointed pursuant to this chapter or a parent of an infant, or a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph three of subdivision (b) of this section, or a parent, spouse, adult child, or adult sibling of an adult patient or client who may be entitled to request access to a clinical record pursuant to paragraph four of subdivision (b) of this section.

7. "Treating practitioner" means the practitioner, who has or had primary responsibility for the care of the patient or client within the facility or if such practitioner is unavailable, a practitioner designated by such facility.

(b) Access by qualified persons. 1. Subject to the provisions of subdivision (c) of this section, upon the written request of any patient or client, a facility shall provide an opportunity, within ten days, for such individual to inspect any clinical record concerning or relating to the examination or treatment of such individual in the possession of such facility.

2. Subject to the provisions of subdivision (c) of this section, upon the written request of a committee for an incompetent appointed pursuant

to this chapter or a guardian of the person of a person with a developmental disability appointed pursuant to article seventeen-A of the surrogate's court procedure act, a facility shall provide an opportunity, within ten days, for the committee or such guardian to inspect any clinical record concerning the patient or client in the possession of such facility. Provided, however, in the case of any such request by such a guardian to inspect the clinical record concerning a client eighteen years of age or older, the facility shall notify such client of such request.

3. Subject to the provisions of subdivision (c) of this section and except as otherwise provided by law, upon the written request of a parent of an infant or guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act, or any other legally appointed guardian of an infant, a facility shall provide an opportunity, within ten days, for such parent or guardian to inspect any clinical record maintained or possessed by such facility concerning care and treatment of the infant for which the consent of a parent or guardian was obtained or has been requested; provided, however, that such parent or guardian shall not be entitled to inspect or make copies of any clinical record concerning the care and treatment of an infant where the treating practitioner determines that access to the information requested by such parent or guardian would have a detrimental effect on the practitioner's professional relationship with the infant, or on the care and treatment of the infant or on the infant's relationship with his or her parents or guardians.

4. Subject to the provisions of subdivision (c) of this section and except as otherwise required by law, upon the written request of a parent of an adult patient or client, spouse, adult child, or adult sibling of a patient or client, a facility shall provide an opportunity, within ten days, for such parent, spouse, adult child or adult sibling to inspect any clinical record maintained or possessed by such facility concerning the care and treatment of such patient or client for which the parent, spouse, adult child or adult sibling is authorized pursuant to law, rule or regulation to provide consent and has consented or is being requested to provide such consent; provided, however, that such

parent, spouse, adult child or adult sibling shall not be entitled to inspect or make copies of any clinical record concerning the care and treatment of the patient or client where the treating practitioner determines that access to the information requested by such parent, spouse, adult child or adult sibling would have a detrimental effect on the practitioner's professional relationship with the patient or client, or on the care and treatment of the patient or client or on the relationship of the patient or client with his or her parents, spouse, adult child or adult sibling. Any inspection of a clinical record made pursuant to this paragraph shall be limited to that information which is relevant in light of the reason for such inspection.

5. Subject to the provisions of this subdivision and subdivision (c) of this section, upon the written request of any qualified person, a facility shall furnish to such person, within a reasonable time, a copy of any clinical record requested which the person is authorized to inspect pursuant to this subdivision.

6. The facility may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. However, the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person shall not be denied access to the clinical record solely because of inability to pay. No charge may be imposed under this section for providing, releasing, or delivering clinical records or copies of clinical records where requested for the purpose of supporting an application, claim or appeal for any government benefit or program, provided that, where a provider maintains clinical records in electronic form, it shall provide the copy in either electronic or paper form, as required by the government benefit or program, or at the patient's request.

7. A facility may place reasonable limitations on the time, place, and frequency of any inspection of clinical records.

8. A treating practitioner may request the opportunity to review the patient information with the qualified person requesting such information, but such review shall not be a prerequisite for furnishing

the record.

9. A facility may make available for inspection either the original or a copy of clinical records.

(c) Limitations on access. 1. Upon receipt of a written request by a qualified person to inspect or copy the clinical record maintained by a facility, the facility shall inform the treating practitioner of the request. The treating practitioner may review the information requested. Unless the treating practitioner determines pursuant to paragraph three of this subdivision that the requested review of the clinical record can reasonably be expected to cause substantial and identifiable harm to the patient or client or others which would outweigh the qualified person's right of access to the record, review of such record shall be permitted or copies provided.

2. A patient or client over the age of twelve may be notified of any request by a qualified person to review his/her record and if the patient or client objects to disclosure, the facility, in consultation with the treating practitioner may deny the request.

3. If, after consideration of all the attendant facts and circumstances, the practitioner or treating practitioner determines that the requested review of all or part of the clinical record can reasonably be expected to cause substantial and identifiable harm to the patient or client or others, or would have a detrimental effect as defined in subdivision (b) of this section, the facility may accordingly deny access to all or a part of the record and may grant access to a prepared summary of the record. In determining whether the review can reasonably be expected to cause substantial and identifiable harm to the patient or client or others which would outweigh the qualified person's right of access to the record or whether review of the record would have a detrimental effect as defined in subdivision (b) of this section, the practitioner or treating practitioner may consider, among other things, the following: (i) the need for, and the fact of, continuing care and treatment; (ii) the extent to which the knowledge of the information contained in the clinical record may be harmful to the health or safety of the patient or client or others; (iii) the extent to which the

clinical record contains sensitive information disclosed in confidence to the practitioner or treating practitioner by family members, friends and other persons; (iv) the extent to which the clinical record contains sensitive information disclosed to the practitioner or the treating practitioner by the patient or client which would be injurious to the patient's or client's relationships with other persons except where the patient or client is requesting information concerning himself or herself; and (v) in the case of a minor making a request for access pursuant to paragraph one of subdivision (b), the age of the patient or client.

4. In the event of a denial of access, the qualified person shall be informed by the facility of such denial, and of the qualified person's right to obtain, without cost, a review of the denial by the appropriate clinical record access review committee. If the qualified person requests such review, the facility shall, within ten days of receipt of such request, transmit the record to the chairman of the appropriate committee with a statement setting forth the specific reasons access was denied. After an in camera review of the materials provided and after providing all parties a reasonable opportunity to be heard, the committee shall promptly make a determination whether the requested reviews of the record can reasonably be expected to cause substantial and identifiable harm to the patient or client or others which outweighs the qualified person's right of access to the record pursuant to paragraph three of this subdivision or whether the requested review would have a detrimental effect as defined in subdivision (b) of this section, and shall accordingly determine whether access to all or part of such record shall be granted. In the event that the committee determines that the request for access shall be granted in whole or in part, the committee shall notify all parties and the facility shall grant access pursuant to such determination.

5. In the event that access is denied in whole or in part the committee shall notify the qualified person of his or her right to seek judicial review of the facility's determination pursuant to this section. Within thirty days of receiving notification of the decision, the qualified person may commence, upon notice, a special proceeding in

supreme court for a judgment requiring the provider to make available the record for inspection or copying. The court upon such application and after an in camera review of the materials provided, including the determination and record of the committee, and after providing all parties an opportunity to be heard, shall determine whether there exists a reasonable basis for the denial of access. The relief available pursuant to this section shall be limited to a judgment requiring the facility to make available to the qualified person the requested record for inspection or copying.

(d) Clinical records access review committees. The commissioner of mental health, the commissioner of developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committees shall be appointed by the respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision.

(f) Applicability of federal law. Whenever federal law or applicable federal regulations restrict, or as a condition for the receipt of federal aid require, that the release of clinical records or information be more restrictive than is provided under this section, the provisions of federal law or federal regulation shall be controlling.

(g) Challenges to accuracy. A qualified person may challenge the accuracy of information maintained in the clinical record and may require that a brief written statement prepared by him/her concerning the challenged information be inserted into the clinical record. This statement shall become a permanent part of the record and shall be released whenever the clinical record at issue is released. This subdivision shall apply only to factual statements and shall not include a provider's observations, inferences or conclusions. A facility may place reasonable restrictions on the time and frequency of any challenges to accuracy.

(h) Waivers void. Any agreement by an individual to waive any right to inspect, copy or seek correction of the clinical record as provided for in this section shall be deemed to be void as against public policy and

wholly unenforceable.

(i) Disclosure. Nothing contained in this section shall restrict, expand or in any way limit the disclosure of any information pursuant to articles twenty-three, thirty-one and forty-five of the civil practice law and rules or section six hundred seventy-seven of the county law.

(j) Proceedings. No proceeding shall be brought or penalty assessed, except as provided for in this section, against a facility, which in good faith, denies access to a clinical record.

(k) Immunity from liability. No facility, practitioner, treating practitioner, mental health practitioner or clinical records access review committee member shall be subjected to civil liability arising solely from granting or providing access to any clinical record in accordance with this section.