

# Disclosing Protected Health Information (PHI) to Law Enforcement: Guidelines for N.C. Local Health Departments

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## Part 1. Introduction

It is not uncommon for law enforcement officials to have an interest in confidential patient information. Law enforcement may seek the information in order to further an investigation, to locate a missing person, or for a number of other legitimate law enforcement purposes. Local health departments typically want to cooperate with law enforcement officials but are sometimes constrained by federal or state confidentiality laws, which may prohibit a disclosure altogether, or may allow it but only if certain conditions are met.

### Key Principles

*Disclosures must comply with all applicable confidentiality laws*

Local health departments may disclose protected health information (PHI) to law enforcement officials *only if* the disclosure is specifically allowed by *all* confidentiality laws that apply to the information, which may include any or all of the following:

- The HIPAA Privacy Rule. The rule allows a number of disclosures to law enforcement, most of which are listed in 45 CFR 164.512(f). Disclosures to law enforcement are subject to HIPAA's minimum necessary standard, except for those that are required by law or made pursuant to a written authorization.<sup>1</sup> Before PHI may be disclosed to a law enforcement official, the official's identity and authority must be verified in accordance with the HIPAA verification rules.<sup>2</sup>
- North Carolina confidentiality laws. There are a number of state laws that may apply to PHI maintained by a local health department. One in particular to keep in mind is a state statute that limits the disclosure of information that identifies a person who has or may have a reportable communicable disease. Under this law, disclosures of individually identifiable information about reportable communicable disease may be made to law enforcement only in very narrow circumstances, and redisclosure of the information by law enforcement is constrained.<sup>3</sup>

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<sup>1</sup> 45 CFR 164.502(b) and 164.514(d). See the handout, "The HIPAA Privacy Rule's Minimum Necessary Standard."

<sup>2</sup> 45 CFR 514(h). See the handout, "Verifying the Identity and Authority of a Person to Whom PHI is Disclosed."

<sup>3</sup> G.S. 130A-143(7).

- Federal laws other than HIPAA that make information confidential. One that is likely to apply to most health departments is the federal rule restricting the disclosure of information about Title X family planning clients.<sup>4</sup>

### *Categories of disclosures to law enforcement*

There are three categories of disclosures to law enforcement that are generally allowed under HIPAA and state laws (though there may be some constraints on disclosure from state laws):

- Disclosures made with the written authorization of the individual who is the subject of the PHI. Obtaining written authorization for a disclosure to law enforcement may be undesirable or unrealistic in many cases, but it could be an option in some circumstances. The authorization must be on a proper form and signed by the appropriate person.<sup>5</sup>
- Disclosures that are required by law. In some circumstances a law or legal process requires the disclosure of patient information to law enforcement and the patient's authorization is not required. See part 2 of this handout.
- Disclosures that are expressly allowed by law. Disclosure of PHI without written authorization is allowed (but not required) in several circumstances that are discussed in part 3 of this document. In some of the circumstances the information may be disclosed only if a law enforcement official specifically requests it; in other circumstances the health department may initiate a disclosure that has not been specifically requested.

Part 4 summarizes disclosures to law enforcement that might be allowed by law. This is an unfortunate category, but it is included because the law is unfortunately unclear. HIPAA expressly allows some disclosures that might not be allowed under state law. A health department that wishes to make one of the disclosures should consult its attorney.

## **Part 2. Disclosures to law enforcement that are required by law**

### Summary

A local health department must disclose information to law enforcement:

- When a law (usually a statute or regulation) requires the disclosure.
- When a law enforcement officer presents a court order requiring a disclosure.
- When a law enforcement official presents a search warrant demanding disclosure.

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<sup>4</sup> 42 CFR 59.11. The Title X regulations prohibit the disclosure of client information to law enforcement without client consent, except when the disclosure is required by law.

<sup>5</sup> 45 CFR 164.508. Authorization is discussed further in Part 3 of this handout.

### Statutes or regulations requiring disclosure

A local health department must disclose PHI to a law enforcement official if a federal or state statute or regulation requires the disclosure. The following two requirements are imposed by a North Carolina statute and trigger a duty to initiate a report to local law enforcement.<sup>6</sup>

#### *Gunshot wounds and other illnesses and injuries caused by criminal acts (GS 90-21.20(a) & (b))*

The treating physician or administrator of a health care facility must report the following types of wounds or injuries to local law enforcement authorities:

- Gunshot wounds and other injuries caused by firearms.
- Illnesses caused by poisoning.
- Wounds and injuries caused by knives or other sharp instruments, if it appears to the treating physician that a criminal act was involved.
- Any other wound, injury, or illness involving grave bodily harm if it appears to the treating physician that criminal violence was involved.

#### *Non-accidental recurrent illness or serious physical injury to a minor child (GS 90-21.20(c))*

The treating physician or administrator of a health care facility must make a report to law enforcement when a child under the age of 18 is treated for a recurrent illness or serious physical injury that appears to the treating physician to have been caused by non-accidental trauma.

### Court orders

Law enforcement officials sometimes obtain court orders for confidential patient information. When a law enforcement official presents a court order requiring disclosure, the local health department must disclose the information specified in the order. If the information to be disclosed identifies someone who has or may have a reportable communicable disease, the health department staff should inform the law enforcement official that the subject of the information should be given the opportunity to request an *in camera* (private) review of the information by a judge.<sup>7</sup>

### Search warrant

Law enforcement officials sometimes obtain search warrants allowing them to search patient records or other documents that may contain confidential patient information. When a law

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<sup>6</sup> This list may not be complete. Other federal or state laws—currently in existence or enacted in the future—may require disclosure to law enforcement. These two are highlighted because they involve situations that local health departments plausibly may encounter, and because they trigger a duty to *initiate* a report (in other words, the health department should not wait for a law enforcement official to come and ask for the information).

<sup>7</sup> G.S. 130A-143(6) permits the release of communicable disease information pursuant to a court order, but it also provides: “Upon request of the person identified in the record, the record should be reviewed *in camera*.”

enforcement official presents a search warrant, the local health department must permit the search described in the warrant. If the search yields information that identifies someone who has or may have a reportable communicable disease, the health department staff should inform the law enforcement official that the subject of the information should be given the opportunity to request an *in camera* (private) review of the information by a judge.<sup>8</sup>

### **Part 3. Disclosures to law enforcement that are allowed by law**

#### Summary

A local health department is allowed to disclose information to law enforcement:

- Pursuant to a proper written authorization.
- Usually, a health department may disclose information to law enforcement in the following circumstances that are addressed in HIPAA (sometimes the disclosure is limited or prohibited by another state or federal law):
  - When limited information is requested by law enforcement for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person.
  - To provide information about a crime victim in response to a law enforcement query (the victim's permission is required in most cases).
  - To notify law enforcement of a death that may have been caused by criminal conduct.
  - When there has been a crime on the health department's premises, and the PHI that is disclosed constitutes evidence of the crime.
  - A health care provider who responds to an emergency that occurs somewhere other than the provider's premises may disclose PHI in order to alert law enforcement to a crime.
- A health department may disclose reportable communicable disease information to a law enforcement officer for the purpose of enforcing the North Carolina communicable disease laws or the North Carolina public health bioterrorism laws.

#### Written authorization

A local health department may disclose information to a law enforcement official who presents a proper written authorization. The authorization must include all of the elements described in HIPAA's authorization rule.<sup>9</sup> If it lacks any of the elements, it is not a valid authorization and information may not be disclosed pursuant to it. The form must be signed by the appropriate

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<sup>8</sup> G.S. 130A-143(6) permits the release of communicable disease information pursuant to a court order, but it also provides: "Upon request of the person identified in the record, the record should be reviewed *in camera*."

<sup>9</sup>45 CFR 164.508. Some of the elements required by HIPAA are not intuitive. Health department staff should check the form to ensure it includes all of the required elements. Alternatively, the department could ask law enforcement to use the health department's own HIPAA-compliant authorization form whenever feasible.

person, which may be the patient himself, or may be the patient's personal representative (if, for example, the patient is a child<sup>10</sup> or an incapacitated adult). The health department may disclose only the information specified in the authorization form.

#### Suspect, fugitive, material witness, or missing person

A local health department may disclose limited information to a law enforcement official who (i) requests the information, and (ii) states that the purpose of the request for information is to identify or locate a suspect, fugitive, material witness, or missing person.<sup>11</sup>

The officer must initiate the request for information. Only the following information may be disclosed: name, address, date and place of birth, social security number, ABO blood type and rh factor, type of injury (if applicable), date and time of treatment, date and time of death (if applicable), and distinguishing physical characteristics, including height, weight, sex, race, hair color, eye color, and the presence or absence of facial hair, scars, and tattoos. The health department must not disclose any of the following information in response to this type of request: DNA analyses; dental records; typing, samples, or analysis of body fluids or tissues; or information that may reveal that the person has or may have a reportable communicable disease.

If the health department does not have any or all of the information requested, staff may tell the officer that the department lacks the information.

#### Crime victim

A local health department may disclose information about an individual who is (or is suspected of being) a crime victim, if the following conditions are met:<sup>12</sup>

- A law enforcement official requests the information, and
- The individual agrees to the disclosure. The agreement does not have to be in writing, but if it is given orally a health department staff member should document the agreement.

Alternatively, if the victim is unable to agree to the disclosure because of incapacity or an emergency circumstance, the health department may still make the disclosure if all three of the following conditions are met:

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<sup>10</sup> The question of who should sign an authorization form for a minor under the age of 18 can become complicated. For further information, see the handout "Responding to Requests for Minors' Protected Health Information: Guidelines for North Carolina Local Health Departments."

<sup>11</sup> 45 CFR 164.512(f)(2).

<sup>12</sup> 45 CFR 164.512(f)(3).

- The law enforcement official represents that the information is needed to determine whether there has been a violation of law by someone *other than* the victim, and the information is not intended to be used against the victim;
- The law enforcement official represents that the immediate law enforcement activity that depends on the disclosure would be materially and adversely affected by waiting until the individual is available to agree to the disclosure, and
- The health department concludes, in the exercise of professional judgment, that disclosure is in the best interest of the individual.

Note that these conditions do not apply to a crime victim who must be reported to law enforcement under another law, such as GS 90-21.10 (described in Part 2 of this document). Although those reports may also involve crime victims, they fall under a different section of HIPAA that does not impose these conditions. When a disclosure of PHI about a crime victim is made under this provision, health department should not disclose information indicating that the individual has or may have a reportable communicable disease, unless the individual consents in writing to the disclosure of that information.

#### Notification of death

If a local health department has knowledge of a death that it suspects resulted from criminal conduct, the department may disclose information to law enforcement.<sup>13</sup> The health department should limit the information that is disclosed to the minimum that is necessary to alert law enforcement officials of the death and the department's suspicions about criminal conduct. Note that this provision *allows* but does not require a report to law enforcement. However, the health department should consider whether a report is *required* under G.S. 90-21.20, described in part 2 of this document.

#### Crime on premises

If a crime is committed on the local health department's premises, the department may disclose to law enforcement any PHI that the department in good faith believes constitutes evidence of a crime.<sup>14</sup> This provision does not require health department staff to be experts in criminal law; it requires only that they act in good faith. In some circumstances, it may be wise to consult with an attorney about whether a situation constitutes a crime on the premises, and if so, which PHI constitutes evidence of the crime.

Crimes related to emergencies that are *not* on health department premises: A health care provider who provides care in response to a medical emergency that occurs somewhere *other*

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<sup>13</sup> 45 CFR 164.512(f)(4).

<sup>14</sup> 45 CFR 164.512(f)(5).

*than* the health care provider's premises may disclose PHI to law enforcement if the disclosure is necessary to alert law enforcement to the commission of a crime, its nature, its location, the victim(s), and the identity, description and location of the perpetrator.<sup>15</sup> Note carefully the two conditions that must be satisfied for this provision to apply: (1) a health care provider must be providing care in response to a medical *emergency*, and (2) the emergency must occur somewhere *other* than the health care provider's premises. This provision probably is of greater importance to EMS agencies than health departments. However, it is possible that a health department employee who provides health care off-site could encounter a situation that falls under this provision.

#### Disclosing communicable disease information for the purpose of enforcing North Carolina public health laws

A local health department may disclose information identifying a person who has or may have a reportable communicable disease to a law enforcement official for the purpose of enforcing North Carolina's communicable disease or public health bioterrorism laws.<sup>16</sup> The law enforcement official who receives the information may not disclose it further, except when necessary to enforce the NC public health laws, or when a state or local public health official seeks the law enforcement official's assistance in preventing or controlling the spread of disease, and expressly authorizes the law enforcement official to disclose information for that purpose.

#### **Part 4. Disclosures to law enforcement that might be allowed by law**

##### Summary

The following disclosures to law enforcement are expressly permitted by HIPAA, but may not be allowed by state law, which is regrettably unclear. A health department that wishes to make one of these types of disclosures should consult its attorney.

- Disclosures to avert a serious and imminent threat to health or safety
- Disclosures to permit law enforcement to identify or apprehend certain individuals
- Disclosures about inmates to law enforcement officials or correctional institutions

##### Serious and imminent threat

If a covered entity believes, in good faith, that disclosure of PHI is necessary to lessen a serious and imminent threat to the health or safety of a person or the public, HIPAA permits the covered entity to disclose PHI to a person (including a law enforcement official) who may

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<sup>15</sup> 45 CFR 164.512(f)(6).

<sup>16</sup> GS 130A-143(7). HIPAA's public health provisions permit this state-authorized disclosure. 45 CFR 164.512(b).

“reasonably be able to prevent or lessen the threat.”<sup>17</sup> This disclosure may be initiated by a covered entity; it is not contingent upon an officer requesting the information.

#### Identify or apprehend an individual

HIPAA permits disclosure of PHI to law enforcement by a covered entity that believes, in good faith, that the disclosure is necessary for law enforcement authorities to identify or apprehend certain individuals.<sup>18</sup> This provision permits disclosures when:

- An individual has made a statement admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim, or
- It appears from all the circumstances that the individual has escaped from a correctional institution or other lawful custody.

This disclosure is not contingent upon a law enforcement official requesting the information; the covered entity may initiate the disclosure.

#### Inmates

A covered entity may provide PHI about an inmate to a correctional institution or law enforcement official with lawful custody in certain circumstances. HIPAA permits the disclosure if the law enforcement official or correctional institution represents that the information is necessary for any of the following:

- Provision of care,
- Health or safety of the inmate, other inmates, officers, persons responsible for transporting inmates, and other correctional institution employees,
- Law enforcement activities on the premises of the correctional institution, or
- Administration of the correctional institution.

If a health department decides to make a disclosure pursuant to this provision, it should not include information about reportable communicable diseases, unless the disclosure is specifically allowed by GS 130A-143.

**Note:** Both HIPAA and state law are clear that a local health department may disclose information about an inmate directly to a correctional institution’s *health care staff* if the disclosure is for treatment purposes. This includes communicable disease information. The inmate’s consent is not required for such disclosures.

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<sup>17</sup> 45 CFR 164.512(j)(1).

<sup>18</sup> 45 CFR 164.512(j)(2).