

# Health Information Confidentiality: An Introduction to the Law for NC Local Health Departments<sup>1</sup>

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Medical confidentiality law is extraordinarily complex. One would think that the concepts and legal requirements would be fairly straightforward –information should be disclosed in some circumstances and not others. Unfortunately, the rocky evolution of this area of the law has generated quite a few inconsistencies and poorly drafted laws. Health care providers, including local health departments, are faced with the challenge of cobbling all of these laws together and deciphering what their practices should be with respect to the disclosure of health information.

This article will not provide a comprehensive review of all of the federal and state confidentiality laws that apply to North Carolina’s health departments.<sup>2</sup> Rather, it is intended to provide departments with a starting point as they consider the issue of confidentiality. It offers basic responses to confidentiality questions related to some of the departments’ core functions, but please remember that this resource is *not comprehensive*. When faced with a complex medical confidentiality question, health departments should consult with their privacy officers and, if necessary, an attorney.

- **What does it mean to say health information is “confidential”?**

The term “confidential” can mean different things to different people. In personal and professional relationships, it may simply refer to an understanding that the information is sensitive or personal and should not be shared. To lawyers, the term is generally invoked when referring to a law or other legally binding standard that requires someone to prevent information from being used or disclosed in certain ways or to certain people. Confidentiality laws and standards may be found in a variety of different legal and quasi-legal sources, including:

- State statutes and rules including those governing health departments, privileged communications, communicable diseases, mental health, and licensure of providers and facilities;
- Federal statutes and regulations governing the confidentiality of information including the HIPAA medical privacy regulations and the regulations governing substance abuse facilities;
- Common law remedies for the unwarranted disclosure of patient information by health care providers;
- Professional ethical standards; and
- Accreditation standards.

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<sup>1</sup> Special thanks to Professors John Saxon and Jill Moore for their assistance with these materials.

<sup>2</sup> In particular, readers should note that this resource does not address state or federal laws specifically governing mental health, substance abuse and developmental disabilities. Some of these questions would be answered differently for providers subject to those laws.

It is important to remember that laws and standards regarding confidentiality are seldom, if ever, absolute. When confronted with a confidentiality question, each law or standard must be examined individually to determine whether it applies to the situation at hand and, if so, whether there any exceptions or qualifications apply that might alter the conclusion that the information should not be disclosed.

- **Is the term “confidential” different from the term “privileged”?**

The term “privileged” generally refers to a subset of confidential information that is intended to protect communications in specific types of relationships, such the physician/patient and clergy/communicant relationships. If a communication is privileged, a court will generally not allow the information to be admitted into evidence. If the relationship is subject to a *qualified* privilege, the court may allow the information to be admitted into evidence in some circumstances.

In North Carolina, communications with both physicians and nurses are subject to a privilege (see G.S. § 8-53 [physicians and other health care professionals working under their supervision] and 8-53.13 [nurses]). Both of these privileges are *qualified*; a court may order disclosure of privileged information if the court concludes that “disclosure is necessary to a proper administration of justice.”

In North Carolina, the physician-patient privilege law (G.S. § 8-53) has been interpreted by some to establish confidentiality protections that extend beyond the courtroom setting. Some attorneys advise their clients to comply with the privilege statute with respect to virtually all disclosures of health information. These interpretations have generated some confusion in our state regarding our legal landscape for medical confidentiality.

- **May a health department disclose identifiable health information to other health care providers in the course of treating a common patient?**

In general, NC local health departments may disclose identifiable health information to another health care provider for treatment purposes *without obtaining the patient’s written permission*. Both state law and the HIPAA privacy rule specifically allow these treatment-related disclosures.<sup>3</sup> See G.S. § 130A-12 (state confidentiality law governing health departments); 45 C.F.R. § 164.506 (HIPAA provision related to treatment disclosures). Such disclosures are allowed regardless of whether it is the health department or the other provider is seeking the information.

If a health department is subject to another law that requires written permission for a treatment-related disclosure, the department must abide by that other law. There are two communicable disease regulations in North Carolina that require written permission before disclosing HIV information. Guidance regarding these laws is available on the web at <http://www.medicalprivacy.unc.edu/faqs/2004FAQs130A12v4.pdf> (see answers to questions 6 and 7).

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<sup>3</sup> The HIPAA Privacy Rule defines the term “treatment” to mean “the provision, coordination, or management of health care and related services by one or more health care providers.” The definition further explains that the term includes:

- The coordination and management of health care by a health care provider with a third party;
- Consultation between health care providers relating to a patient; and
- Referral of a patient for health care from one health care provider to another.

45 C.F.R. § 164.501.

Even if another law does not require the patient's written permission, a health department may still choose to seek permission before making such disclosures. It is important to remember, however, that if the patient refuses to grant his or her permission, the health department *must* abide by the patient's decision (unless another law *requires* disclosure).

- **May a health department disclose information to Medicaid, health insurance companies, and collection agencies for payment purposes?**

In general, NC local health departments may disclose identifiable health information when they are seeking payment for services rendered to a patient. Both state law and the HIPAA privacy rule specifically allow for these payment-related disclosures.<sup>4</sup> See G.S. § 130A-12 (state confidentiality law governing health departments); 45 C.F.R. § 164.506 (HIPAA provision related to payment disclosures).

If a health department is subject to another law that requires written permission for a payment-related disclosure, the department must abide by that other law. There are two communicable disease regulations in North Carolina that require written permission before disclosing HIV information. Guidance regarding these laws is available on the web at <http://www.medicalprivacy.unc.edu/faqs/2004FAQs130A12v4.pdf> (see answer to question 8).

Even if another law does not require the patient's written permission, a health department may still choose to seek permission before making such disclosures. It is important to remember, however, that if the health department asks for permission and the patient refuses to grant it, the health department *must* abide by the patient's decision (unless another law *requires* disclosure).

- **May a health department disclose health information when a statute or regulation requires the disclosure?**

Yes. Both state law and the HIPAA privacy rule allow a health department to disclose identifiable health information when required to do so by other law. For example, a health department must report child abuse or neglect, child dependency and child death due to maltreatment to the county department of social services. See G.S. § 7B-301. Note that the department must only disclose the information specifically required under the applicable law; the department must not disclose additional information without legal authority to do so. For information on some of the disclosures required by law in North Carolina, see <http://www.medicalprivacy.unc.edu/pdfs/Upreqbylw.pdf>.

- **May a health department disclose health information in response to a court order?**

Yes. Both state law and the HIPAA privacy rule allow disclosures in response to a court order. Such a disclosure would be considered "required by law." State law requires the judge issuing the order to find that "disclosure is necessary to the proper administration of justice." G.S. § 8-53. Ideally, any court order provided to the health department will include language to that effect. If it does not, the department should probably still turn over the information but should consult with its attorney before doing so.

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<sup>4</sup> The HIPAA Privacy Rule defines the term payment to include "activities undertaken by a health care provider...to obtain or provide reimbursement for the provision of health care" including eligibility determination, billing, collection, and medical necessity reviews. 45 C.F.R. § 164.501.

- **May a health department disclose health information in response to a subpoena?**

Health departments are often presented with subpoenas requesting copies of medical records or ordering an employee to appear to testify. Depending on the circumstances, the records or information may be considered confidential or privileged under state or federal law. Despite this legal protection, the health department may still need to turn over the records or testify in court or in a deposition about the confidential information.

If the patient (i.e., the subject of the records) gives the health department written permission to disclose the records, the health department should disclose them. For example, a health department may receive a subpoena from a district attorney prosecuting a domestic violence case. The subpoena may be accompanied by an authorization form signed by the patient. If the authorization is valid (e.g., it complies with the HIPAA authorization requirements, the signature appears to be that of the patient), the health department should disclose the records or testify.

When the patient has *not* authorized disclosure of confidential information, the health department should proceed with caution. The health department *must* respond to the subpoena, but the type of response may vary depending on the information being requested or the circumstances surrounding the request. The health department may respond in one of three ways: (1) contest the subpoena by having the department's attorney formally challenge it in court; (2) informally ask the person issuing the subpoena to excuse the department from compliance; or (3) comply with the subpoena. In most situations, a health department will comply with the subpoena – but “compliance” does not necessarily mean disclosing the information immediately. If the information is privileged or confidential, the department must follow certain procedures to ensure that it complies with the law.

*Testimony*

Some subpoenas request that an employee or former employee of the health department appear in court or in a deposition to give oral testimony. In order to comply with such a subpoena, the employee should appear at the designated time and place. Once the witness is being questioned, he should *not* reveal any privileged or confidential information until ordered to do so by the court. For example:

Attorney: What is your name?  
Witness: Sally Jones  
A: What do you do for a living?  
W: I am a nurse at the Local County Health Department.  
A: Were you working at LCHD on the morning April 15, 2003?  
W: Yes.  
A: On that day, did you see a patient name Jim Brown?  
W: I cannot answer that question. It is confidential.

At this point in the questioning, the judge has the authority to order Nurse Jones to answer the question. If the court orders it, she must respond. Disclosing information in this situation is acceptable under both state law and the HIPAA privacy rule. During a deposition, a judge will not be present to order the witness to disclose. In this case, it would be wise to contact the opposing party in advance to notify him that the employee will not be able to disclose any privileged information without a court order. This provides the opposing party with the opportunity to seek the court order before the deposition.

### *Records*

Some subpoenas request medical records in addition to or instead of oral testimony. The subpoena will specify a date and time for the department to appear and turn over the records. The department should not send the records (or a copy of the records) directly to the attorney issuing the subpoena *unless* the patient has signed a HIPAA-compliant authorization directing the department to do so. Rather, the department has two options:

- (1) The employee named in the subpoena may appear with the records in hand at the date and time designated in the subpoena. Before disclosing the records, she should explain to the judge that the records are privileged and that she cannot disclose them without a court order. If the judge orders her to disclose them, she must do so.
- (2) The department could (a) seal the records in an envelope, (b) include an affidavit stating that the copies are true and correct copies and that the records were made and kept in the regular course of business, and (c) include a letter or memo *outside the sealed envelope* indicating the case for which the documents have been requested, and stating clearly that the documents are privileged and should not be disclosed without a court order. The department could then deliver the records to the clerk of court or send them by registered mail. This procedure is problematic for two reasons. First, sending the records to the clerk of court *even in a sealed envelope* may be considered a disclosure under the HIPAA privacy rule. Second, North Carolina law allows the parties to the case to review the records sent to the clerk *before* the court has ordered disclosure. Because of these potential risks, the health department must also comply with the subpoena procedures in the HIPAA privacy rule before following this “mail-in” procedure. The HIPAA procedures, in short, require either (a) notification to the patient or (b) a qualified protective order. See 45 C.F.R. § 164.512(e) for details regarding those requirements (available at <http://www.hhs.gov/ocr/hipaa/finalreg.html>)

If the subpoena requests both testimony and records, the person named in the subpoena should follow the guidelines described above for testifying and only disclose the privileged paper records when ordered to do so by the judge.

For more information about subpoenas generally, see “Responding to Subpoenas: A Guide for Mental Health Facilities,” available at <http://ncinfo.iog.unc.edu/pubs/electronicversions/pg/botts.pdf>.

- **May a health department report a crime or other crime-related information to law enforcement if doing so would identify an individual who is a patient and the patient has not authorized the disclosure?**

Local health departments are required to report certain types of identifiable health information to law enforcement pursuant to G.S. § 90-21.20 (e.g., gunshot wounds and certain other illnesses and injuries caused by criminal acts of violence). The statute is available on the web at:

[http://www.ncleg.net/Statutes/GeneralStatutes/HTML/BySection/Chapter\\_90/GS\\_90-21.20.html](http://www.ncleg.net/Statutes/GeneralStatutes/HTML/BySection/Chapter_90/GS_90-21.20.html)

Note that the department may only disclose certain information under this law: the patient's name (if known), age, sex, race, residence or present location (if known), and the character and extent of his injuries. Disclosure of the limited information identified in the statute is required by state law and permitted by the HIPAA privacy rule (see 45 C.F.R. § 164.512(a)). A health department treating a person with any reportable injury or illness should contact law enforcement directly – it should *not* wait for law enforcement to initiate the contact.

If the health department is not otherwise *required* by law to disclose information to law enforcement, it may *wish* to do so. There are three provisions of the HIPAA privacy rule that would allow the department to initiate contact with law enforcement officials to disclose information:

- Crime on the health department's premises: The department may disclose identifiable health information it believes constitutes evidence of criminal conduct that occurred on its premises. 45 C.F.R. § 164.512(f)(5). For example, one patient may steal another patient's purse while in the waiting room.
- Emergency medical care: If the department is providing emergency health care in a medical emergency while *not on the department's premises*, the department may disclose certain information to law enforcement officials (commission/nature of crime, location of crime or victim, and identity, description and location of perpetrator). 45 C.F.R. § 164.512(f)(6). For example, health department employees may be staffing an emergency shelter where two residents get into a violent fight. The employee may need to provide emergency care to one of residents.
- Avert a serious threat to health or safety: The department may disclose to law enforcement information that is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. It may also disclose information to law enforcement to assist in apprehending suspects in some situations. 45 C.F.R. § 164.512(j). For example, a patient may make a credible statement indicating her plan to kill another person.

A department should *not* disclose information that identifies a person who has or may have a reportable communicable disease to law enforcement in the three scenarios described above. State law only authorizes disclosure of such information to law enforcement in certain narrow circumstances that relate to the control of communicable disease or responding to a bioterrorism-related incident. See G.S. § 130A-143.<sup>5</sup>

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<sup>5</sup> Recall that any state law that is contrary to and more stringent than the HIPAA privacy rule (i.e., more protective of privacy) remains enforceable. 45 C.F.R. § 160.103.

With respect to other categories of information (i.e., information not identifying a person with a communicable disease), it is not clear whether these disclosures authorized by the HIPAA privacy rule are permitted under state law. Despite the ambiguity in state law, a health department could be faced with a situation where it seems more appropriate to risk violating state confidentiality law rather than to risk potential harm to an individual or the public. Anticipating such a situation may be difficult, but health departments should consider consulting with their attorneys in advance to develop general policies governing these three categories of disclosures.

- **What if a law enforcement officer contacts the health department and asks for identifiable health information?**

If a law enforcement officer contacts a health department seeking information not required to be reported under state law, the department should *usually* request a court order (or the patient's authorization) before disclosing the information. Exceptions to this general rule include:

- Search warrants: While both subpoenas and search warrants are technically considered "court orders" under North Carolina law, the search warrant requires a judicial officer to make a finding of probable cause whereas a subpoena may be issued by a private attorney. Some believe that this finding elevates the search warrant to a slightly higher level than the subpoena and therefore should be treated like a court order. Health departments should consult with their attorneys and possibly their local law enforcement agencies to determine whether they will provide copies of records in response to search warrants. Ideally, the judicial officer issuing the warrant will be a district or superior court judge (rather than a magistrate) and will make a finding that disclosure is "necessary to the proper administration of justice," as required by G.S. § 8-53. Such a finding by a judge would alleviate the state law concerns of many cautious attorneys.
- Avert a serious threat to health or safety: As explained above, the HIPAA privacy rule allows disclosures necessary to prevent or lessen a serious and imminent threat to health or safety. 45 C.F.R. § 164.512(j). Although state law on this issue is not entirely clear, situations may arise where a health department wishes to make a disclosure to law enforcement under this provision.
- Identification/location: The HIPAA privacy rule permits disclosure of certain information to a law enforcement official when the official is requesting it for the purpose of identifying or locating a suspect, fugitive, material witness or missing person. See 45 C.F.R. § 164.512(f)(2). State law would likely permit disclosure of limited information in this situation, such as name and address. It may allow disclosure of the date and time of treatment or death. It is unclear whether state law would allow disclosure of the remaining categories of information (date and place of birth, social security number, blood type and rh factor, type of injury, and a description of distinguishing characteristics).
- Corrections: For those health departments providing care to inmates of county jails, there are special provisions in the HIPAA privacy rule and state law that allow disclosures of information to law enforcement officers having custody of those inmates and to other jails. See 45 C.F.R. § 164.512(k)(5); G.S. §153A-225.

- Directory information: Some providers maintain directories identifying patients who are currently in their facility, such a hospital's patient information system. The HIPAA privacy rule allows disclosure of *limited* directory information (name, location, condition) to anyone who asks for the patient by name – including law enforcement – as long as the patient has been provided with an opportunity to opt-out of the directory (with limited exceptions). 45 C.F.R. § 164.510(a). In the unlikely event a health department maintains such a directory, it may disclose the directory information to law enforcement officials upon request.

As stated above, health departments should not disclose information that identifies a person who has or may have a reportable communicable disease to law enforcement except as authorized in G.S. § 130A-143. With respect to other identifiable health information, however, there are some who argue that departments should follow the provisions in the HIPAA privacy rule for responding to requests for information from law enforcement and others who assert that state law (specifically the physician-patient privilege law in G.S. § 8-53) prohibit such disclosures. Health departments should consult with their attorneys to determine the best course for responding to requests in each of the situations described above.

- **When may other health care providers disclose health information to the health department for public health purposes?**

North Carolina has many state laws that require health care providers and others to disclose identifiable health information to public health officials, such as the communicable disease reporting and investigation laws. As explained above, if the disclosure is required by state law, it is allowed by the HIPAA privacy rule. Therefore, providers who are subject to the HIPAA privacy rule should continue to make those mandatory disclosures. Unfortunately, many are still struggling to understand the privacy rule. As a result, health departments may need to educate providers in their community who are refusing to disclose such information about the applicable law.

If state law *authorizes* (i.e., permits) a disclosure to public health officials but does not *mandate* it, providers are still allowed to make the disclosure under both state law and the HIPAA privacy rule. For example, state law permits providers to report certain outbreaks, illnesses and other information to the State or local health director if the provider believes that the situation may suggest a bioterrorism-related incident. G.S. §130A-476(a). Such a disclosure would be permitted under the HIPAA privacy rule because (a) it would be made to a public health authority (as that term is defined by the privacy rule), and (b) it relates to a public health activity authorized by law. See 45 C.F.R. § 164.512(b). Some providers may still hesitate to make such *optional* disclosures based on some ambiguities in North Carolina's state law. Specifically, some attorneys and providers believe that the restrictive language of the state's physician-patient privilege law (G.S. § 8-53) governs virtually all disclosures of health information.

For more information about disclosures for public health purposes, see the health law bulletin at: <http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/hlb80.pdf>