

# Disclosing PHI to Law Enforcement Officials: Overview for NC Local Health Departments

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## Introduction

It is not uncommon for law enforcement officials (LEOs) to have an interest in confidential patient information. They may seek patient 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 (LHDs) typically want to cooperate with law enforcement officials carrying out these duties. However, LHDs also have a legal and ethical duty to protect their patients' confidentiality, and must not disclose patient information unless the confidentiality laws that apply to the information allow the disclosure.

The main HIPAA rules for disclosure to law enforcement are 45 C.F.R. 164.512(f) (disclosures for law enforcement purposes), 164.512(j) (disclosures to avert a serious and imminent threat to a person or the public), and 164.512(k)(5) (limited disclosures about individuals who are inmates of a correctional institution or otherwise in law enforcement custody). A North Carolina law, G.S. 90-21.20B, aligns state law with HIPAA by establishing the general rule that disclosures of confidential medical information may be made to law enforcement if the disclosure is allowed by HIPAA. However, other state and federal laws limit disclosures of some categories of information to law enforcement.

### **Disclosures to law enforcement that are allowed vs. required**

The HIPAA Privacy Rule addresses circumstances under which disclosures to law enforcement are *allowed* without the individual's written authorization. The HIPAA provisions allowing disclosures to law enforcement are very prescriptive. All of them specify the purposes for which PHI may be disclosed. Some of them set conditions on particular disclosures. For example, there is a rule regarding disclosures about missing persons that specifies exactly which PHI may be disclosed. A LHD should determine the purpose of the disclosure to law enforcement, identify the disclosure rule that addresses that purpose, and then adhere to the rule closely when making a disclosure.

There is nothing in the HIPAA rules that *requires* any disclosures to law enforcement. However, sometimes other laws require such disclosures. When a disclosure to law enforcement is required by another law, HIPAA allows the disclosure to be made. A disclosure is required by law if a law (such as a statute or regulation) or legal process (such as a court order or a search warrant) compels the LHD to make the disclosure.

If a disclosure to law enforcement is not specifically allowed by the HIPAA use and disclosure rules, then a LHD should obtain the individual's written authorization before making the disclosure.

## Effect of other laws on disclosures

HIPAA provides the baseline for determining whether a particular disclosure to law enforcement is allowed. Additional confidentiality laws may apply to particular programs, services, or types of information. Before making a disclosure to law enforcement, a LHD should determine which laws apply to the information to be disclosed, and ensure that the disclosure is allowed by all of them. Three categories of information that LHDs may have in their records, and that are affected by laws limiting disclosures, are individually identifiable communicable disease information, family planning information, and behavioral health information.

*Communicable disease:* Information that identifies a person who has or may have a reportable communicable disease is subject to a North Carolina law that limits disclosures to law enforcement. G.S. 130A-43. Such information may be disclosed:

- **When required by law.** However, if the disclosure is for a court proceeding and is compelled by a court order or other legal process, the person is entitled to have a judge review the information *in camera* before the information is used in the proceeding. *In camera* means a private review by the judge.
- **In order to enforce the North Carolina communicable disease control laws and public health bioterrorism laws.** However, if individually identifiable communicable disease information is disclosed to law enforcement for this purpose, the LEO who receives the information must not disclose it further, except when necessary to enforce the laws, to investigate terrorism, or when state or local public health officials expressly authorize the LEO to disclose the information so that the LEO can assist public health in preventing or controlling the spread of disease.

*Family planning:* Information about a person who is a client of a Title X-funded family planning program is subject to a federal regulation that requires documented consent for most disclosures. Such information may be disclosed to a law enforcement official if the disclosure is required by law. Disclosures that are not required by law require the client's documented consent. 42 C.F.R. 59.11.

*Behavioral health:* Disclosure of information from these programs may be limited by state mental health confidentiality laws (G.S. Chapter 122C) or federal substance abuse program confidentiality regulations (42 C.F.R. Part 2) as well as HIPAA. A local health department that provides behavioral health services should determine whether it is subject to those laws. If it is, the LHD's policies and procedures regarding disclosures to law enforcement should specifically address disclosures involving behavioral health information. Review of the specific requirements of those laws is beyond the scope of this document. LHDs should seek advice from an attorney if a LEO seeks information pertaining to behavioral health services provided to a client.

*Laws affecting other programs, services, or information:* A local health department may have other services or programs that are subject to additional confidentiality laws as well. Each local health department should ensure that its policies and procedures for disclosing patient information to law enforcement take all applicable laws into account.

## Contents of this document

The remainder of this document is organized into the following sections:

- **Basic Practices for Disclosures to Law Enforcement.** This section addresses practices that address the requirements of HIPAA's minimum necessary and verification standards.
- **Disclosures to Law Enforcement that are Required by Law.** This section summarizes three North Carolina laws that require disclosures to law enforcement. It also addresses disclosures pursuant to court orders or search warrants.
- **Other Disclosures to Law Enforcement that are Allowed by HIPAA.** This section addresses all of the disclosures to law enforcement that HIPAA allows. Although these disclosures are allowed by HIPAA, they are not required and sometimes other confidentiality laws will prohibit the LHD from making them.

## Basic Practices for Disclosures to Law Enforcement

When disclosing protected health information (PHI) to a law enforcement official, a local health department must:

- Verify the law enforcement official's identity;
- Verify the law enforcement official's legal authority to obtain the PHI, which includes identifying the specific provision(s) of HIPAA and any other laws that apply to the particular disclosure;
- Assure that any conditions that HIPAA or another law places on the particular disclosure are satisfied;
- Disclose only the PHI that is necessary to accomplish the purpose of the disclosure; and
- Document that the disclosure has been made.

These practices will help assure:

- That a health department's disclosures to law enforcement comply with HIPAA's Verification Standard and Minimum Necessary Standard;
- That any conditions imposed by HIPAA's disclosure provisions are satisfied; and
- That the department maintains documentation of the disclosure.

### Complying with the Verification Standard

The HIPAA Privacy Rule requires covered entities to verify the identity of a person to whom protected health information is to be disclosed, as well as the person's legal authority to receive the PHI, if the identity and authority are not already known to the entity. 45 C.F.R. 164.514(h). The HIPAA Privacy Rule specifies methods a covered entity may use to verify the identity and authority of public officials who request PHI. These may be applied to LEOs, who are public officials.

#### *Verifying the Law Enforcement Official's Identity*

A covered entity may rely on either of the following to verify the identity of a law enforcement official:

- If the request for PHI is made in person, identity may be verified by the LEO presenting an agency identification badge, other official credentials, or other proof of government status.
- If the request for PHI is made in writing, the request should be on the appropriate letterhead for the LEO's government agency.

#### *Verifying the Law Enforcement Official's Legal Authority to Obtain PHI*

A public official's legal authority may be verified by either of two things:

- A subpoena, warrant, order, or other legal process that has been issued by a grand jury or a judicial or administrative tribunal;
- A written statement of the legal authority under which the information is requested. An oral statement may be accepted if a written statement is impracticable.

The documents described above are sufficient to verify a LEO's identity and legal authority, but they do not in themselves authorize the LHD to give PHI to the LEO. Before disclosing PHI to the LEO, the LHD

must still ensure that the disclosure is allowed by the HIPAA Privacy Rule and any other laws that apply to the information, and that any additional requirements that are imposed on the disclosure by HIPAA or another law are satisfied.

### **Assuring additional requirements or conditions are satisfied**

The HIPAA provisions that allow disclosures to law enforcement sometimes impose particular conditions that must be met before a disclosure is made. For example, the provision that allows disclosures in response to a LEO's inquiry about a crime victim usually requires the victim to agree to the disclosure. Other HIPAA provisions contain different conditions. Any conditions imposed on a disclosure of PHI must be affirmatively addressed by the LHD before the disclosure is made, and documentation of the disclosure should be clear that the conditions were satisfied.

Other laws sometimes impose additional requirements or conditions on disclosures to law enforcement as well. This is discussed further in the Introduction section of this document.

### **Complying with the Minimum Necessary Standard**

Disclosures to LEOs are subject to HIPAA's minimum necessary standard. 45 C.F.R. 164.514(d). LHDs must limit the amount of PHI that is disclosed to a LEO to the minimum that is necessary to achieve the purpose of the disclosure.

The minimum necessary standard does not apply to disclosures that are required by law. However, required by law disclosures also have a limit: the LHD may disclose only the information that it is compelled to disclose by the law requiring disclosure (statute or regulation), or the legal process the LEO presents (court order, warrant, or subpoena).

## Disclosures to Law Enforcement that are Required by Law

A local health department must disclose information to a law enforcement official (LEO):

- When a law, such as a statute or regulation, requires the disclosure.
- When a law enforcement official presents a court order, a search warrant, or a subpoena, and the LHD must disclose PHI to comply with the terms of the court order, warrant, or subpoena.

45 C.F.R. 164.512(f)(1).

### Laws requiring disclosure

This section summarizes three North Carolina laws that require LHDs to make a report to local law enforcement. Please note that this list may not be complete. Other federal or state laws requiring disclosures to law enforcement may exist now, or may be enacted in the future. These three laws are highlighted 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).

*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, if it appears to the treating physician that a criminal act was involved.
- 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.

In a LHD, if the treating health care provider is not a physician, the provider should alert the supervising physician or the health director that the report must be made.

Reports under this law must be made to the local law enforcement agency responsible for the location where the health care provider is located. The law doesn't specify how the report should be made, but it does require that it be made as soon as practicable before, during, or after the treatment. That suggests that an oral report by phone would be appropriate.

This law limits the information that may be disclosed to the following:

- Information about the person: name, age, sex, race, and residence or present location.
- Information about the character and extent of the person's reportable injury or illness.

If a LHD makes a report under this law, it would be wise to anticipate that law enforcement might want additional information, but disclosure of additional information is not authorized by the statute. To receive additional information, the LEO will need some other legal authority.

*Non-accidental recurrent illness or serious physical injury to a minor child* (GS 90-21.20(a) & (c1)): 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.

In a LHD, if the treating health care provider is not a physician, the provider should alert the supervising physician or the health director that the report must be made.

Reports under this law must be made to the local law enforcement agency responsible for the location where the health care provider is located. The law doesn't specify how the report should be made, but it does require that it be made as soon as practicable before, during, or after the treatment. That suggests that an oral report by phone would be appropriate.

The PHI that may be disclosed under this law appears to be limited to:

- Information about the child: name, age, sex, race, and residence or present location.
- Information about the character and extent of the child's reportable injury or illness.

If a LHD makes a report under this law, it would be wise to anticipate that law enforcement might want additional information, but disclosure of additional information is not clearly authorized. To receive additional information, the LEO will need some other legal authority.

*Child under age 16 has disappeared and may be in danger* (G.S. 14-318.5). This law, which is also known as Caylee's Law, requires reports to law enforcement when the parent of a child under age 16 does not know where the child is and has not had contact with the child for 24 hours. Caylee's law was enacted in response to a case in which a child disappeared and the child's mother did not notify law enforcement for an extended period of time. One part of the law is directed specifically to the parents of children who disappear, and requires them to report the disappearance of their child within 24 hours. This provision will not apply to LHD staff members unless the staff member is the parent of a child under age 16 who disappears.

However, the law also requires any other person "who reasonably suspects the disappearance of a child [under age 16] and who reasonably suspects the child may be in danger" to report those suspicions to law enforcement. This provision would require a LHD staff member to make a report to law enforcement if the staff member reasonably suspects that a child under age 16 has disappeared and may be in danger. A child is considered to have "disappeared" if the parent or other person responsible for supervising the child does not know the child's location and has not had contact with the child for a 24-hour period.

### **Court orders**

Law enforcement officials sometimes obtain court orders for confidential patient information. When a LEO presents a court order requiring disclosure, the local health department usually must disclose the information specified in the order. It is wise to consult the LHD's attorney before disclosing PHI pursuant

to a court order. The attorney can evaluate the court order and determine whether any issues should be raised with the court before proceeding with disclosure.

If a court order requires disclosure of information that identifies someone who has or may have a reportable communicable disease, the LHD staff should inform the LEO that the person who is the subject of the information is entitled to request an *in camera* (private) review of the information by a judge. See G.S. 130A-143 and the discussion in the Introduction Section of this document.

If the LHD has programs or services that are subject to behavioral health confidentiality laws, the LHD's policies and procedures for disclosing behavioral health information should address how to respond to a court order in a manner that is consistent with applicable laws. This document does not address the requirements of behavioral health laws.

### **Search warrants**

Law enforcement officials sometimes obtain search warrants allowing them to search patient records or other documents that may contain confidential patient information. When a LEO presents a search warrant, the LHD must permit the search described in the warrant. A LHD staff member should make and retain a copy of the warrant and the LEO's identification. The LHD should notify its attorney about the warrant as soon as practicable.

LHD staff should advise the LEO that if the search yields information that identifies someone who has or may have a reportable communicable disease, the person who is the subject of the information is entitled to request an *in camera* (private) review of the information by a judge. See G.S. 130A-143 and the discussion in the Introduction Section of this document.

If the LHD has programs or services that are subject to behavioral health confidentiality laws, the LHD's policies and procedures should address how to respond to a search warrant that may involve behavioral health records or information. This document does not address the requirements of behavioral health confidentiality laws.

### **Subpoenas presented by law enforcement officials**

It is possible that a law enforcement official would present a subpoena for confidential medical information. If this occurs, the LHD should notify its attorney and follow its policies for responding to subpoenas.



## Other Disclosures to Law Enforcement that HIPAA Allows

HIPAA allows a local health department to disclose PHI to law enforcement in the following circumstances:

- 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.
- When a health care professional determines in good faith that disclosure is necessary to avert a serious and imminent threat to the health or safety of a person or the public.
- To assist law enforcement in identifying or apprehending certain individuals.
- To disclose PHI about inmates and others in lawful custody in limited circumstances.

The remainder of this section addresses each of these more fully. Remember that even though HIPAA allows these disclosures, if another confidentiality law applies to the PHI, the disclosure may be limited or prohibited by the other law.

### **Limited information to identify a suspect, fugitive, material witness, or missing person**

A local health department may disclose limited information to a law enforcement official who requests the information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. 45 C.F.R. 164.512(f)(2). The rule limits the PHI that may be disclosed to the following:

- 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)
- Distinguishing physical characteristics, including height, weight, sex, race, hair color, eye color, the presence or absence of facial hair, scars, and tattoos

The rule specifies that the following information does not fall into any of these categories and must not be disclosed: DNA analyses; dental records; or typing, samples, or analysis of body fluids or tissues.

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

### **Disclosing information about crime victims in response to LEO queries**

A local health department may disclose information about an individual who is (or is suspected of being) a crime victim, if a LEO requests the information and the individual agrees to the disclosure. 45 C.F.R. 164.512(f)(3). The agreement does not have to be in writing, but if it is given orally the LHD should clearly document that the individual agreed, noting the time and date and names of the staff member(s) who witnessed the individual's agreement.

If the victim is unable to agree to the disclosure because of incapacity or an emergency circumstance, the LHD may make the disclosure only if all three of the following conditions are met:

- 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.

These rules do not apply to a crime victim who must be reported to law enforcement under another law, such as those discussed in the section of this document titled Disclosures to Law Enforcement that are Required by Law. Although those mandatory reports may also involve crime victims, they fall under a different provision of HIPAA—the one that allows disclosures to LEOs when the disclosure is required by law.

### **Notifying law enforcement of a death that may have been caused by criminal conduct**

If a local health department has knowledge of a death that it suspects resulted from criminal conduct, the department may disclose PHI to law enforcement. 45 C.F.R. 164.512(f)(4). The LHD 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.

### **Notifying law enforcement of a crime on LHD 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. 45 C.F.R. 164.512(f)(5). This provision does not require health department staff to be experts in criminal law; it requires only that they act in good faith. However, it would be wise to consult with an attorney if there is a question about whether a situation constitutes a crime on the premises, and if so, which PHI constitutes evidence of the crime.

## **Notifying law enforcement of crimes related to emergencies that are *not* on LHD premises**

A health care provider who provides care in response to a medical emergency that occurs somewhere *other 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. 45 C.F.R. 164.512(f)(6).

Note carefully the two conditions that must be satisfied for this provision to apply:

- A health care provider must be providing care in response to a medical *emergency*, and
- The emergency must occur somewhere *other* than the health care provider's premises.

Because of these conditions, this provision probably is of greater importance to EMS agencies than health departments. However, it is possible that a LHD employee who provides health care off-site (such as a nurse who makes home visits) could encounter an emergency medical situation that falls under this provision.

## **Disclosure that is necessary to lessen a 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 entity to disclose PHI to a person who may “reasonably be able to prevent or lessen the threat,” if the disclosure is consistent with other applicable laws and standards of ethical conduct. 45 C.F.R. 164.512(j)(1). The entity's good faith will be presumed if the belief that the disclosure is necessary to lessen a serious or imminent threat is based on the entity's actual knowledge, or if the entity is relying on a credible representation by a person with apparent knowledge or authority.

This provision requires an “entity” to have a good faith belief that the threat is serious and imminent, and that disclosure of PHI is necessary to avert it. Of course, it will be one or more members of the LHD's workforce who have the belief. In addition to having information that constitutes a good faith belief, a LHD must not make a disclosure unless it is consistent with other applicable laws and standards of ethical conduct. For these reasons, it would be wise for a LHD to consider having a procedure for how decisions about whether to disclose PHI under this provision will be made.

This rule does not specify that a disclosure must be made to a LEO, but it is certainly possible that a LEO would be the recipient of a disclosure.

## **Disclosure to assist law enforcement in identifying or apprehending 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 an individual who:

- Appears to have escaped from a correctional institution or other lawful custody, or
- 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 (except this disclosure may not be made if the covered entity learns this information as part of treating the individual

for the propensity to commit the criminal conduct the individual has admitted to, or responding to a request by the individual for a referral for treatment for the propensity to commit such criminal conduct).

45 C.F.R. 164.512(j)(2).

A covered entity that makes a disclosure under this provision may disclose only the following PHI: 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, the presence or absence of facial hair, scars, and tattoos. The rule specifies that the following information does not fall into any of these categories and must not be disclosed: DNA analyses; dental records; or typing, samples, or analysis of body fluids or tissues.

#### **Disclosures about inmates of correctional institutions and others in LEO custody**

A HIPAA-covered entity may provide PHI about an inmate to a correctional institution or law enforcement official with lawful custody in certain circumstances. 45 C.F.R. 164.512(k)(5). HIPAA permits the disclosure if the LEO or the correctional institution represents that the information is necessary for any of the following:

- Provision of health 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.

This provision addresses disclosures that are made to LEOs or correctional institutions, and it requires the LEO or institution to state that the disclosure is necessary to one of the listed purposes. It does not apply to a LHD's disclosure of information about an inmate directly to a correctional institution's health care provider(s). A disclosure from a LHD to a correctional institution's health care provider for treatment, payment, or health care operations would fall under HIPAA's rules for disclosures for those purposes, 45 C.F.R. 164.506.