

Responding to Subpoenas for Confidential Medical Records or Information: Guidelines for North Carolina Local Health Departments

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Part 1. Introduction: Subpoenas for confidential medical information

A subpoena is a form of court order that directs the person named in the subpoena to appear at a designated time and place to testify, to produce documents, or both.

A health department that receives a subpoena for confidential medical information or records must not ignore the subpoena—a response is usually required.¹ *However, the appropriate response is not to immediately release records or otherwise disclose confidential information.* The HIPAA Privacy Rule imposes conditions that must be met before protected health information (PHI) may be disclosed in response to a subpoena. In addition, the information may be privileged under state law, in which case it may not be disclosed without either the patient's permission or a court order.

Part 2 of this document outlines the provisions of HIPAA and North Carolina law that restrict the disclosure of health information in response to a subpoena. Part 3 puts HIPAA and state law together to explain how a health department may respond to a subpoena for confidential health information in a manner that complies with both HIPAA and state law. Part 4 provides a link to a document that examines all of these issues in greater detail.

Part 2. Summary of relevant laws

HIPAA Privacy Rule

The HIPAA Privacy Rule governs when a local health department may disclose PHI. It allows disclosure of PHI in response to a subpoena in the following circumstances:

- The information may be disclosed if the subpoena is accompanied by a proper *written authorization*. The authorization form must include all of the elements described in

¹ Sometimes a response is not required because the subpoena was improperly served or was issued by a court that does not have jurisdiction over the health department. However, health department staff should assume a response *is* required unless they are advised otherwise by the department's attorney.

HIPAA's authorization rule.² The form must be signed by the appropriate person, which may be the patient himself, or may be the patient's personal representative (if, for example, the patient is a child or an incapacitated adult).

- **Practice tip:** If a subpoena is accompanied by an authorization or other document labeled "release" or "waiver" or something similar, the document should be examined carefully by a staff member who is familiar with HIPAA's authorization requirements before any PHI is disclosed. Some of the elements of an authorization form that is valid under HIPAA are not intuitive and may be left out of a form prepared by a person (even an attorney) who is unaccustomed to working with HIPAA.
- The information may be disclosed without the individual's authorization if it is accompanied by a *court order* for the information.³
- The information may be disclosed without the individual's authorization or a court order if either of the following two conditions is satisfied:
 - *Written notice that the information has been subpoenaed is given to the individual who is the subject of the PHI.* The covered entity may give notice to the individual itself, but it need not do so if it receives satisfactory assurance from the party requesting the PHI that notice has been given.⁴
 - *A qualified protective order is obtained from a court.*⁵ The health department may obtain a qualified protective order itself, but it need not do so if it receives satisfactory assurance from the party requesting the PHI that it has made reasonable efforts to obtain a qualified protective order.⁶

²45 CFR 164.508.

³ 45 CFR 164.512(e)(1)(i).

⁴ 45 CFR 164.512(e)(1)(ii)(A). To constitute "satisfactory assurance," the party requesting the information should give the health department a written statement and supporting documentation demonstrating: (1) that the party requesting the information has made a good faith effort to provide written notice to the individual; (2) that the notice included sufficient information about the litigation or proceeding to permit the individual to raise an objection with the court; and (3) that the time for the individual to raise objections has elapsed and either no objections were filed, or all objections that were filed have been resolved by the court and the disclosures sought are consistent with such resolution. 45 CFR 164.512(e)(iii).

⁵ 45 CFR 164.512(e)(1)(ii)(B). A "qualified protective order" is either a court order or a stipulation by the parties to the proceeding that: (1) prohibits the parties from using or disclosing the PHI for any purpose other than the proceeding for which it was requested, and (2) requires that the information and any copies made of it be returned to the covered entity that disclosed it or be destroyed at the end of the proceeding.

⁶ In this case, to constitute "satisfactory assurance," the party requesting the PHI must provide the health department with a written statement and supporting documentation demonstrating *either* of the following: (1) that the parties to the dispute have agreed to a qualified protective order and have presented it to the court, or (2) that the party seeking the PHI has requested a qualified protective order from the court. 45 CFR 164.512(e)(iv).

North Carolina law

Privilege laws. Information acquired by health care providers in the course of treating patients is usually privileged, which means that in most cases the health care provider may not testify in court proceedings or provide patient records for court proceedings, unless the patient authorizes the disclosure or a judge orders the disclosure. Privilege laws that may apply to health department information include:

- GS 8-53, the physician-patient privilege. This privilege applies not only to physicians, but also to others who work under their direction.
- G.S. 8-53.13, the nurse-patient privilege. A nurse working under the direction of a physician likely is covered by the physician-patient privilege. This law provides that nurses also have a privileged relationship with patients when they are working within their scope of practice but not under the direction of a physician.
- North Carolina also has privilege laws for psychologists, counselors, and certain other parties. See GS 8-53.2 through 8-53.12.

Health department confidentiality law. G.S. 130A-12 provides that health department records are confidential if they contain privileged medical information, information protected by the HIPAA Privacy Rule, or information collected pursuant to the childhood lead program. This law does not specifically address subpoenas but it allows disclosures of information that are authorized or required by other federal or state laws, which includes disclosures pursuant to subpoenas.

Communicable disease confidentiality law. A North Carolina law (G.S. 130A-143) provides heightened protection for information and records that identify an individual who has or may have a reportable communicable disease or condition. The law allows this information to be released pursuant to a subpoena or court order, but also requires that the individual who is the subject of the information be given the opportunity to request *in camera* review of the information (that is, private review of the information by the judge before it is released).

Part 3. Responding to subpoenas, taking HIPAA and state law into account

Summary of response options

When a health department receives a subpoena for confidential health information, it has three basic options for how to respond:

- Ask the department's attorney to formally challenge the subpoena. The attorney may file a motion to quash the subpoena, or to modify the subpoena.

- Ask the department's attorney to informally request that the party who issued the subpoena excuse the department from the subpoena's requirements.
- Comply with the subpoena by appearing at the place and time designated in the subpoena along with any records requested by the subpoena. However, the person who appears should not testify about confidential health information or release confidential records until the provisions of both HIPAA and state law have been satisfied. **Both HIPAA and state law are satisfied by either of the following:**
 - An order from a judge, directing the person to testify or release the records.
 - A written, HIPAA-compliant authorization for disclosure of the information.

Practice tips for complying with a subpoena

- *Know what a subpoena is.* A subpoena is a document that directs a person to appear at a particular place and time to testify, produce records, or both.
- *Know what it means to comply.* A person named in a subpoena complies by appearing at the designated place and time. If the subpoena was for testimony, the person should be prepared to testify. If the subpoena was for documents, the person should have the documents and be prepared to produce them.
- *Do not release confidential health information on the basis of the subpoena alone.* Because health information that is subpoenaed usually is both PHI under HIPAA and privileged under state law, a person should not give testimony about the information or release the records unless the judge orders disclosure or a proper written authorization for disclosure is provided.
- *Know what to say if the information requested identifies a person who has or may have a reportable communicable disease.* The individual who is the subject of this type of information should be given the opportunity to ask the judge to review the information *in camera* before it is released (GS 130A-143(6)). Do not assume the attorney who requests the information or the judge presiding in the proceeding knows this. Tell them.
- *Inform the attorney who issued the subpoena about the constraints on release of the information.* Although no law requires it, it is always a good idea to notify a party who subpoenas confidential health information that is protected by confidentiality laws that prohibit its release without a court order or the patient's authorization. No one likes to be surprised by this information during a proceeding. If the attorney is informed in advance, he or she can decide whether to seek a court order in advance, seek the individual's authorization for disclosure, withdraw the subpoena, or take other appropriate action.
- *If you use the "mail-in" procedure for records that are subpoenaed, follow the HIPAA procedures for notifying the individual, obtaining a qualified protective order for the information, or obtaining satisfactory assurance that the requesting party has taken one*

of those actions. Some courts permit health departments to respond to a subpoena that is for records only by submitting certified copies of the records to the clerk of court at any time before the date specified in the subpoena. The usual practice is to seal the documents in an envelope and attach a letter identifying the case for which the documents have been requested and noting that the documents are privileged and must not be disclosed without a court order. If the court permits this procedure and the health department wishes to use it, **the department must comply with HIPAA's requirements for giving notice, obtaining a qualified protective order, or obtaining satisfactory assurance that the requesting party has taken one of those actions.** See the summary of these requirements in Section II of this document.

- *Have a written policy for responding to subpoenas.* A health department should anticipate that it will receive subpoenas for confidential health department from time to time and should have a policy for responding to them in a manner that ensures compliance with both HIPAA and state law. Ideally, the department's attorney should review and approve the policy.

Part 4. Resource for additional information

The following document is available for free on the Internet and is highly recommended for health department employees who are responsible for responding to subpoenas (or simply want to know more about them):

John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, SOG Health Law Bulletin No. 82 (September 2005), available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/hlb82.pdf>.