

SOCIAL SERVICES

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CONFIDENTIALITY AND SOCIAL SERVICES (PART II): WHERE DO CONFIDENTIALITY RULES COME FROM?

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It is common knowledge that much of the information contained in the records of state and county social services agencies is "confidential."

But what, exactly, does it mean to say that information is confidential?¹

- Does confidentiality mean that information² may *never* be disclosed to or shared with other agencies, the media, or the public?
- Are there exceptions to confidentiality that allow or require the disclosure of confidential information?
- When can social services agencies³ obtain confidential information from other agencies or individuals?
- What rules⁴ govern the acquisition, use, protection, and disclosure of confidential information by social services agencies?
- Where do these rules come from?

This is the second in a series of *Social Services Bulletins* that will attempt to answer these and other questions regarding confidentiality and social services in North Carolina. *Social Services Bulletin No. 30* (February, 2001) discussed the general meaning, purposes, nature, scope, and limits of confidentiality. This *Social Services Bulletin* examines the legal and quasi-legal sources of rules governing the acquisition, use, protection, and disclosure of confidential information. Subsequent *Social Services Bulletins* will—

1. list and summarize the state and federal laws that govern the use, protection, disclosure, and acquisition of confidential information by social services agencies;
2. provide an analytical framework that social services agencies can use to address and resolve problems involving confidentiality; and
3. answer some of the questions regarding confidentiality that social services employees, directors, and attorneys frequently ask.

Where Do Confidentiality Rules Come From?

Social Services Bulletin No. 30 concluded that the meaning and scope of confidentiality are determined by the particular provisions, requirements, and restrictions of specific *rules* that govern the acquisition, use, protection, and disclosure of information.⁵ This bulletin addresses the question: *Where do these confidentiality rules come from?*

The short answer to this question is that confidentiality rules come from several distinct legal or quasi-legal sources:

- the United States Constitution;
- state constitutions;
- federal statutes and regulations;
- state statutes and rules;
- common law principles and court decisions;
- contracts;
- professional ethical codes and standards.

The following sections of this bulletin examine each of these sources of confidentiality and briefly discuss the nature and scope of *some* of the confidentiality rules that originate from these sources.⁶

The U.S. Constitution

Although the United States Constitution does not expressly refer to a “right to privacy,” the United States Supreme Court has long held that individuals have a constitutional right to privacy that protects them from governmental interference or coercion with respect to their personal decisions, beliefs, and private matters involving personal autonomy, as well as from unreasonable government intrusion and surveillance with respect to their homes, their persons, and their communications.⁷

Whalen v. Roe

The Supreme Court’s unanimous 1977 decision in *Whalen v. Roe*, however, marked the first time⁸ that the Supreme Court explicitly recognized that this constitutional right to privacy also encompassed a right to “informational privacy” that may limit the authority of government agencies to obtain, use, and disclose personal information about individuals.⁹

Whalen involved a New York statute that required doctors to send a copy of all prescriptions for “schedule II” drugs¹⁰ to the state health agency, which maintained a computerized database including the name, address, and age of the patients for whom these drugs were prescribed, the names of the prescribing physician and dispensing pharmacist, and the type and dosage of the prescribed drugs. A group of patients for whom schedule II drugs had been prescribed filed a lawsuit to stop the state health agency from obtaining, maintaining, or using personal information regarding these prescriptions, arguing that the state law requiring doctors to provide this information to the state health agency violated their constitutional right to privacy.

The U.S. Supreme Court agreed that the patients had a constitutional right to informational privacy. The

court also held, however, that the patients’ constitutional right to informational privacy was not absolute but, instead, had to be balanced against the government’s interest in obtaining, using, or disclosing personal information.

Writing for the court, Justice Stevens recognized “the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files,” but also noted that “the collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.”¹¹ As a result, he wrote, the government’s “right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures” of such personal information.¹²

The Supreme Court therefore concluded that, in light of the statutory provisions governing the protection, use, and nondisclosure of information regarding prescriptions for schedule II drugs¹³ and the necessity of disclosing similar personal, medical information to doctors, hospitals, insurance companies, and public health agencies in connection with the modern health care system, the state’s interests in obtaining personal information (that is, controlling the distribution of dangerous drugs and minimizing their misuse) outweighed the patients’ interests with respect to confidentiality. The court therefore held that the state statute requiring doctors to disclose patient information to the state health agency did not violate the patients’ constitutional right to informational privacy.¹⁴

The *Whalen* case focused primarily on the question of whether individuals could be required to disclose personal information¹⁵ to a government agency (or, stated differently, the government’s right to *obtain* personal information *from* the patients, their doctors, or their pharmacists) rather than the government’s *disclosure* of personal information to others.

The Supreme Court, however, expressly recognized in *Whalen* that violations of an individual’s constitutional right to informational privacy may occur

1. when the government *obtains and uses* personal information (even if the information is not subsequently disclosed by the government to others), or
2. when a government agency *discloses* personal information to another government agency, to other individuals, to the media, or to the public.¹⁶

Thus, a 1994 decision by the U.S. Court of Appeals for the Fourth Circuit recognized that, under

the *Whalen* decision, a child's parents had a constitutional right to informational privacy and that their constitutional right to privacy might be violated by the state's acquisition, retention, use, or disclosure of information, but held that the parents' constitutional rights were not violated by a state social services agency's refusal to expunge from the state's central registry of child abuse and neglect reports an unfounded report that they had abused or neglected their child.¹⁷

It seems clear, therefore, that the acquisition, use, or disclosure of personal information by a state or county social services agency will not violate an individual's constitutional right to privacy as long as—

- the agency has a legitimate need to obtain or use the information that outweighs the individual's interest with respect to privacy;
- the information is used only for purposes directly connected with the agency's official responsibilities;
- the agency is subject to, and follows, appropriate rules governing the confidentiality of the information.

The North Carolina Constitution

The North Carolina Constitution, like the U.S. Constitution, recognizes that individuals have a right to informational privacy that is similar in nature, scope, and application to the right to informational privacy recognized in *Whalen*.

The right to informational privacy under the North Carolina Constitution was first recognized by the North Carolina Court of Appeals in *Treants Enterprises, Inc. v. Onslow County*.¹⁸

In *Treants*, the appellate court held that a county ordinance that required businesses offering "companionship services" to collect extensive information regarding customers and to allow inspection of this personal information by any law enforcement officer violated these customers' constitutional right to privacy under both the federal and state constitutions. Writing for the court, Judge Becton concluded:

The ordinance's records requirement implicates a valid individual interest in avoiding disclosure of personal matters. Based upon the extensiveness of the data to be recorded, the requirement that the record be permanent, and the lack of any protections against unwarranted disclosure or limits upon the records' use, we conclude that the provision violates the right to privacy of patrons of companionship businesses under both the federal and state constitutions.¹⁹

The Supreme Court of North Carolina subsequently recognized a constitutional right to

informational privacy under the North Carolina Constitution in the case of *ACT-UP Triangle v. Commission for Health Services*.²⁰ The court also held, however, that given the statutory and regulatory provisions prohibiting the public disclosure of information regarding an individual's HIV status, a state rule eliminating anonymous HIV testing by public health clinics did not violate the constitutional privacy rights of patients.

Federal Statutes and Regulations

Although both the United States and North Carolina Constitutions recognize a right to informational privacy, legal rights and duties with respect to confidentiality are more often—and more explicitly—defined by federal and state laws.²¹

Looking first at *federal* statutes and regulations, there are dozens (if not hundreds) of federal laws that establish rules governing the confidentiality of information.

In many instances, federal confidentiality rules are contained in federal statutes enacted by Congress (for example, the federal Privacy Act). These statutory confidentiality rules may be supplemented by regulations that are promulgated by federal agencies to implement these statutes. For example, federal rules regarding the confidentiality of information in child welfare cases are contained in both the Child Abuse Prevention and Treatment Act (CAPTA) and in regulations promulgated by the U.S. Department of Health and Human Services (DHHS) to implement CAPTA. And in at least one case (the federal confidentiality rules governing medical records), Congress has delegated to a federal agency the authority to adopt federal regulations establishing, implementing, and enforcing confidentiality requirements after Congress was unable to resolve confidentiality issues through legislation.

The following sections of this bulletin discuss some of the federal statutes and regulations that govern the confidentiality of information and the applicability or inapplicability of these federal confidentiality rules to state and local social services agencies.

Confidentiality Rules That Apply to Federal Agencies

Some federal laws (such as the federal Privacy Act) restrict the acquisition, use, or disclosure of information by federal agencies.

Although these federal confidentiality rules do *not* apply to state or local government agencies (even if those state or local government agencies receive funding from

the federal government or are subject to other federal requirements), they may affect the authority of federal agencies to release personal information to state or local government agencies.

The Federal Privacy Act

The federal Privacy Act²² is the best-known example of a federal statute governing informational privacy.

Enacted by Congress in 1974, the Privacy Act applies to federal agencies²³ that maintain systems of records that contain personal information (including information concerning an individual's education, financial transactions, medical history, criminal history, or employment) about U.S. citizens and from which personal information may be retrieved based on an individual's name, individual identification number, or other individual identifying characteristic.

Under the Privacy Act, a federal agency that maintains a system of personal records

1. may maintain in its records only such information about an individual as is relevant and necessary for the agency's accomplishment of its legally-mandated purposes;
2. must inform each individual from whom it requests personal information of the authority under which it is requesting the information, whether disclosure of the information is mandatory or voluntary, the purposes for which the information is intended to be used, the routine uses which may be made of the information, and the effect on the individual of his or her failure to provide the requested information;
3. must make reasonable efforts to ensure that its records concerning individuals are accurate, complete, timely, and relevant;
4. must establish appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of personal records; and
5. must allow an individual, upon request, to review his or her personal information and to request correction of his or her record if he or she believes the information maintained by the agency is inaccurate, incomplete, irrelevant, or untimely.

The Privacy Act also prohibits federal government agencies from disclosing personal information contained in covered records systems to any other agency or person, without the written consent of the individual to whom the record pertains, unless the disclosure is

1. for a purpose that is compatible with the purpose for which the information was collected;

2. to officers or employees of the agency who need the record to perform their duties;
3. for specified civil or criminal law enforcement activities;
4. required by the federal Freedom of Information Act;²⁴
5. pursuant to a lawful court order; or
6. expressly allowed by other provisions of the federal Privacy Act.

The federal Privacy Act applies primarily to the acquisition, use, and disclosure of personal information by *federal* agencies. It does *not* (with two exceptions explained in the notes) govern the privacy or confidentiality of personal information contained in the records of state or local government agencies.²⁵

The Freedom of Information Act

The federal Freedom of Information Act (FoIA) is a second example of a federal confidentiality rule that applies to federal agencies.

Although FoIA requires most federal agencies to make certain information available to the public, it also includes provisions under which an agency may *refuse to disclose* information or records in its possession if public disclosure of the requested information or records would constitute a *clearly unwarranted invasion of privacy*.²⁶

FoIA therefore *allows* federal agencies to treat certain types of personal information or records (such as certain personal information from personnel or medical records) as confidential and withhold this information from public disclosure even if another federal statute or regulation does not expressly provide that the information is confidential and may not be publicly disclosed.²⁷

Like the federal Privacy Act, FoIA applies only to agencies of the federal government—*not* to state or local government agencies.

Federal Laws Governing the Confidentiality of Information Obtained from Federal Agencies

Some federal laws govern the confidentiality of information obtained *from* federal agencies.

The federal Computer Matching and Privacy Protection Act of 1988 (amending the federal Privacy Act)²⁸ is one example of this type of federal confidentiality rule. The act restricts the use and redisclosure of personal information received by state and local social services agencies and other non-federal agencies from the records systems of federal agencies for use in

computerized data matching programs related to federally-funded assistance or benefit programs for individuals.

Similarly, the federal Internal Revenue Code provides that information from federal tax returns that is shared with state or local social services agencies for the purpose of administering the Food Stamp, Medicaid, Temporary Assistance for Needy Families, and Child Support Enforcement programs is confidential and may not be redisclosed to other agencies or individuals.²⁹

Federal Confidentiality Rules That Are Linked to Federal Funding

A third type of federal confidentiality rule is found in federal statutes and regulations that impose confidentiality requirements and restrictions as a condition of receiving federal funding.

For example, the federal Family Educational Rights and Privacy Act (FERPA) prohibits the U.S. Department of Education from providing federal funding to an educational agency or institution (for example, a public school) whose policies or practices regarding the release of student education records or personally-identifiable information contained in student education records do not comply with FERPA's confidentiality requirements.³⁰

The confidentiality restrictions in FERPA and other federal laws that impose confidentiality rules as conditions of receiving federal funding, however, are not absolute.

FERPA, for example, does not prohibit the disclosure of student information:

1. for "directory" purposes;³¹
2. with the consent of the student's parent (or the student if he or she is at least 18 years old);
3. to other schools officials who have a legitimate educational interest with respect to the information;
4. to appropriate persons, in connection with an emergency, if knowledge of the information is necessary to protect the health or safety of the student or others;
5. pursuant to a court order or subpoena;
6. for other purposes or under other circumstances specified in the act.³²

Similarly, the federal statute and regulations governing the confidentiality of information regarding persons who receive treatment for alcohol or drug abuse allow treatment facilities to release otherwise confidential information

1. if the patient signs a written consent for release of the information;

2. if a court finds (following the procedures required by the federal regulations) that there is "good cause" to disclose the information;
3. to medical personnel when necessary to meet a bona fide medical emergency;
4. for research, audit, or evaluation purposes when the identity of individual patients will not be disclosed;
5. to appropriate state or local authorities in connection with the reporting of suspected child abuse or neglect under state law.³³

FERPA and the federal confidentiality rules regarding alcohol and drug abuse treatment records do not apply directly to the records of a state or local social services agency (unless the agency is also an educational institution or provides diagnosis and treatment for alcohol or substance abuse). They may, however, affect the ability of state and local social services agencies to obtain confidential information from educational institutions and alcohol and drug treatment facilities or to disclose confidential information they receive from these institutions or facilities.

Other federal confidentiality rules, however, do apply directly to state or local social services agencies that receive federal funding. For example, federal statutes regarding prevention and treatment of child abuse,³⁴ foster care assistance and child welfare services,³⁵ Food Stamps,³⁶ and Medicaid³⁷ require states, as a condition of receiving federal funding, to adopt state statutes, rules, policies, or procedures protecting the confidentiality of personal information about the individuals and families who receive assistance or services under these federally-funded social services programs.

Again, however, the federal confidentiality restrictions that apply to federally-funded public assistance and social services programs are not absolute. For example, the federal statute and regulations³⁸ governing the confidentiality of information regarding persons who apply for or receive Food Stamp benefits allow state or local social services agencies to disclose information

1. to persons directly connected with the administration or enforcement of the Food Stamp program;
2. to persons directly connected with the administration or enforcement of other federal assistance programs;
3. to federal employees for the purpose of determining eligibility or benefits under the Social Security and Supplemental Security Income (SSI) programs;
4. to persons directly connected with the administration or enforcement of federally-

- assisted state means-tested assistance programs for low-income persons;
5. to persons directly connected with federal or state programs that are required to participate in the computerized income and eligibility verification system (IEVS);
 6. to persons directly connected with the verification of the immigration status of noncitizens through the systematic alien verification and entitlements (SAVE) program;
 7. to persons directly connected with the child support enforcement (IV-D) program;
 8. to law enforcement officials investigating violations of the Food Stamp program;
 9. to the U.S. Comptroller General's office for the purpose of authorized audit examinations; or
 10. to federal, state, or local law enforcement officials for the purpose of locating a person who is a fugitive from justice with respect to a felony charge.

When a federal law imposes confidentiality requirements as a condition of receiving federal funding, the federal government generally may enforce the law's confidentiality requirements by withholding federal funding from grantees that fail to comply with those requirements.

It is less clear, however, whether the confidentiality requirements of these federal laws may be enforced by the *individuals* to whom confidential information pertains. For example, courts have held that, because FERPA's confidentiality requirements relate only to the conditions under which the federal government may deny or withhold federal funding, FERPA does not give students the right to sue an educational institution that discloses student information in violation of FERPA.³⁹ In other cases, however, courts have held that federal laws imposing confidentiality requirements as conditions of federal funding do create legal rights that may be enforced by individuals who have been harmed by the unlawful disclosure of confidential information.⁴⁰

Of course, states may, and often do, adopt *state* laws, rules, or policies that expressly recognize, repeat, or incorporate *federal* confidentiality requirements that are imposed on them as a condition of federal funding.

For example, it is clear that the General Assembly enacted G.S. 108A-80 in order to comply with the federal confidentiality requirements and restrictions attached to federal funding for public assistance and social services programs.⁴¹ And it is also clear that G.S. 108A-80 *incorporates*, to some extent, the requirements and restrictions of the federal laws governing confidentiality of social services records.

When a state incorporates federal confidentiality requirements in a state law (as in the case of G.S. 108A-80), that state law independently may create legally enforceable rights and duties with respect to confidentiality regardless of whether the confidentiality requirements of the federal law are enforceable by means other than withholding federal funding.

Other Federal Laws Governing Confidentiality

Although federal confidentiality rules often are linked to an agency's receipt of federal funding, some federal laws impose confidentiality rules on agencies and individuals regardless of whether they receive federal funding or the information is obtained by or from the federal government.

The applicability of these federal confidentiality rules to state and local social services agencies depends primarily on the type of information protected by these federal laws and the types of agencies or individuals that are subject to these laws.

The federal Videotape Privacy Protection Act, enacted under Congress's authority to regulate interstate commerce, is one example of this type of federal confidentiality rule.⁴² Under this federal statute (which preempts state laws that otherwise would allow or require the disclosure of information covered by the act), persons engaged in the rental or sale of videotaped movies are prohibited from disclosing information that personally identifies the specific videotaped materials rented or bought by consumers unless the disclosure is allowed under the act.⁴³

Similarly, the federal Privacy Act restricts, but does not completely prohibit, state and local governments (regardless of whether they receive federal funding in connection with any particular program or activity) from requiring an individual to disclose his or her social security number in connection with his or her exercise of any right, benefit, or privilege provided by law.⁴⁴

The recent federal medical privacy regulations are a third example of a broadly-applicable federal confidentiality rule that is not imposed as a condition of receiving federal funding. These regulations, issued by the U.S. Department of Health and Human Services (DHHS) under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA),⁴⁵ establish uniform national rules and procedures to protect the privacy of personal health information.⁴⁶

The HIPAA medical privacy rules apply to health care plans, health care clearinghouses, and health care providers who process health care claims, health care payment and remittance advice, or other specified

health care related transactions electronically.⁴⁷ Under the new rules, a covered entity may use or disclose an individual's medical record or other individually-identifiable health information only

1. to the extent authorized by the individual to whom the information pertains;
2. for specific purposes with the individual's consent; or
3. as otherwise expressly permitted by the federal regulation.⁴⁸

Violations of the HIPAA privacy rules will be punished by civil penalties and criminal sanctions.

Like the federal Videotape Privacy Protection Act, the HIPAA rules preempt state laws to the extent that they conflict with the new federal privacy standards, but will not affect state statutes or rules that provide greater protection for confidential health information than that provided by the federal rule.

The HIPAA privacy rule, however, does *not* apply directly to a state or local social services agency *unless* it is a covered entity under the rule (for example, a social services agency that provides home health care, family planning, or other health care services and processes health care claims or other health care related transactions electronically).⁴⁹

If a social services agency is *not* a covered entity, the rule will not prohibit the agency from using or disclosing individual medical records or personal health information that it obtains from individuals,⁵⁰ health care providers, or other agencies.

The HIPAA rule, however, may limit the ability of social services agencies to *obtain* confidential medical information from health care providers under certain circumstances.

Like other confidentiality rules, the HIPAA privacy rule is not absolute. Under the new rule, a covered health care provider may disclose personal health information without the authorization or consent of the individual to whom the information pertains when disclosure of the information is

- for the purpose of reporting child abuse or neglect to a government agency that is authorized by law to receive reports of child abuse or neglect;⁵¹
- required or allowed by law and is necessary to protect victims of abuse, neglect, or domestic violence;⁵²
- for law enforcement purposes specified in the rule;⁵³
- necessary to avert a serious threat to health or safety;⁵⁴
- pursuant to a court order, subpoena, or discovery request in connection with a judicial proceeding;⁵⁵

- for public health purposes, activities, and oversight as specified in the rule;⁵⁶
- required by other provisions of the rule.⁵⁷

State Statutes and Regulations

Just as there are dozens (if not hundreds) of federal laws regarding confidentiality, North Carolina and other states have adopted hundreds (if not thousands) of state statutes and regulations governing the confidentiality of information.

In North Carolina, confidentiality rules may be established by the General Assembly through the enactment of state statutes governing the acquisition, use, protection, and disclosure of information, or by state administrative agencies or commissions that are statutorily authorized or directed to adopt state regulations regarding confidentiality.⁵⁸

The following sections of this bulletin discuss some of the North Carolina statutes and regulations governing confidentiality and how they apply to or affect state and local social services agencies.

North Carolina's Public Records Law

All state and local government agencies in North Carolina (including state and county social services agencies) are subject to North Carolina's Public Records Law.⁵⁹

Under the state's Public Records Law, a state or local government agency must allow any person⁶⁰ to examine and copy any public record⁶¹ in the agency's custody *unless* another applicable state or federal law requires the agency to restrict or deny disclosure of information contained in the record.⁶²

As a general rule, therefore, the state's Public Records Law provides that *all* information in the public records of state or county social services agencies (including personal information about the employees and clients of these agencies) must be disclosed to anyone who requests this information *unless* (1) the state Public Records Law or another state statutes specifically exempts the information from public disclosure or (2) a state or federal confidentiality rule requires the agency to withhold some or all of the information from public disclosure.⁶³

State Statutes and Regulations Governing Social Services Records

A number of state statutes and rules expressly provide that information and records of state and county social

services agencies regarding individuals and families who receive public assistance or social services are confidential.⁶⁴ Consequently, almost all of the information contained in the public assistance and social services records of a state and county social services agency is exempt from the public disclosure requirements of the state Public Records Act.⁶⁵

G.S. 108A-80

G.S. 108A-80 is the primary, and most generally-applicable, state statute governing the confidentiality of social services records.

G.S. 108A-80 makes it unlawful for any person⁶⁶ to use, disclose, or obtain any information⁶⁷ concerning persons who apply for or receive public assistance or social services⁶⁸ that is directly or indirectly derived from the records, files, or communications of the state Department of Health and Human Services or a county department of social services or is acquired by these agencies in connection with their official duties,⁶⁹ *except* for purposes directly connected with the administration of social services programs or as otherwise allowed or required under other applicable federal or state laws or regulations.⁷⁰

Social Services Regulations

The Social Services Commission and state Department of Health and Human Services have adopted administrative regulations implementing the confidentiality restrictions of G.S. 108A-80 and specifying the circumstances under which a state or local social services agency may disclose confidential information regarding social services clients.⁷¹

The confidentiality regulations adopted by the Social Services Commission allow the disclosure of information regarding social services clients

1. with the informed, written consent of the client;⁷²
2. to other employees of the agency when necessary for referral, consultation, supervision, or determination of eligibility;⁷³
3. to other county social services departments when the client has moved and has requested assistance or services;⁷⁴
4. to the state Division of Social Services for the purpose of supervision or reporting;⁷⁵
5. for research studies if personally-identifiable information will not be rediscovered;⁷⁶
6. to other service providers with the client's consent and when necessary to meet the needs of a client or to provide eligibility information for reporting purposes;⁷⁷

7. to federal, state, or county employees for the purpose of monitoring, auditing, evaluating, or facilitating the administration of other state and federal programs if there is a legitimate need for the information and there are adequate safeguards to protect the information from redisclosure;⁷⁸
8. when necessary to comply with other federal or state laws or regulations;⁷⁹ or
9. pursuant to a court order.⁸⁰

Other State Social Services Laws

In addition to G.S. 108A-80 and the administrative regulations adopted thereunder, a number of state statutes and regulations address the confidentiality of information with respect to particular public assistance or social services programs or specific types of information obtained by social services agencies.

For example, state statutes expressly protect the confidentiality of

- information obtained by county social services departments during their investigation of cases involving suspected child abuse, neglect, or dependency;⁸¹
- information about children who are in the protective custody of the social services department or are placed by the juvenile court in cases involving child abuse, neglect, or dependency;⁸²
- nonjudicial records involving the enforcement of child support by the state child support enforcement program;⁸³
- information regarding the inspection and monitoring of adult care homes by state and county social services agencies;⁸⁴ and
- criminal records checks of foster care families.⁸⁵

Again, however, these statutes do not impose an *absolute* prohibition with respect to the disclosure of information. For example, G.S. 7B-3100 authorizes the sharing of confidential information between social services agencies and other specified agencies for the purpose of protecting or serving abused, neglected, dependent, undisciplined, or delinquent children.

State Statutes Protecting Privileged Communications

Statutes regarding privileged communications constitute a special class of state confidentiality rules.

State laws regarding privileged communications protect confidentiality by restricting the admissibility

into evidence in civil or criminal proceedings of communications that are

1. made by clients, patients, or other specified individuals
2. to attorneys, doctors, psychologists, social workers, counselors, clergy persons, or other specified persons
3. within the scope of, and relevant to, the professional relationships between these clients, patients, or individuals and the attorneys, doctors, or other professionals who counsel, treat, or serve them.⁸⁶

In their narrowest form, statutes regarding privileged communications prohibit only the compelled disclosure of privileged communications *as evidence in a legal proceeding*. Others, however, are broader and may protect privileged communications from disclosure in contexts other than pending legal proceedings.⁸⁷

Similarly, some statutes regarding privileged communications apply only to *communications between* a client, patient, or individual and his or her lawyer, doctor, or other professional confidant with respect to the subject of their relationship. Others, however, are written or applied more broadly to protect not only communications between a client, patient, or individual and a lawyer, doctor, or other professional, but also other information about the client, patient, or individual that is obtained by the attorney, doctor, or professional within the scope of the professional relationship.⁸⁸

Although statutes protecting privileged communications rarely apply with respect to information provided by clients, patients, or other individuals to state social services agencies, they may affect the ability of social services agencies to obtain privileged information from attorneys, doctors, or other professionals.

Like other confidentiality rules, however, laws regarding privileged communications are seldom absolute.

For example, most rules protecting privileged communications expressly allow a judge to compel the disclosure of an otherwise privileged communication if, in the judge's discretion, disclosure is necessary for the "proper administration of justice."⁸⁹

In addition, North Carolina law provides that the rules protecting privileged communications generally do not apply to situations in which an attorney, doctor, or other professional is legally required to report cases involving suspected child abuse or neglect, and that the rules regarding privileged communications (other than the attorney-client privilege) do not apply in civil, criminal, or juvenile proceedings involving child abuse or neglect.⁹⁰ And finally, because the rules regarding

privileged communications exist primarily for the benefit and protection of the client, patient, or individual who communicates personal information to an attorney, doctor, or other professional, the protection afforded to privileged communications under these rules may be waived, either expressly or implicitly, by the client, patient, or individual.⁹¹

Occupational Licensing Laws

State laws require the licensing, certification, or registration of individuals who are engaged in certain professions or occupations (for example, law, medicine, and clinical social work) and regulate the practice of persons engaged in these professions or occupations by establishing state licensure or certification requirements; adopting standards of practice, conduct, and ethics; and creating state agencies or commissions to enforce these requirements and standards.

In some instances, state laws regarding occupational and professional licensing impose requirements and restrictions regarding the confidentiality of information by licensed professionals.⁹²

For example, state regulations governing the practice of law prohibit attorneys from disclosing confidential information concerning a present or former client without the client's consent unless disclosure is allowed by the State Bar's rules of professional conduct or is required by other controlling laws.⁹³

Similarly, state regulations regarding the licensure of clinical social workers require licensed social workers "to protect the client's right to confidentiality as established by law and professional standards of practice" and authorize social workers to "reveal confidential information to others only with the informed consent of the client, except in those circumstances in which not to do so would violate other laws or would result in clear and imminent danger to the client or others."⁹⁴

In the case of licensed psychologists, North Carolina's licensure rules do not include specific requirements or restrictions with respect to confidentiality but instead incorporate by reference the confidentiality requirements and restrictions contained in the ethical principles and code of professional conduct adopted by the American Psychological Association.⁹⁵

State laws, however, are not always completely clear with respect to the scope of a licensed professional's obligations regarding confidentiality.

For example, the state law governing the licensing of certified public accountants prohibits CPAs from disclosing "any confidential information obtained in the course of employment or professional engagement

without the consent of the client or employer” but doesn’t define *what information* obtained in the course of employment or professional engagement is considered confidential.⁹⁶

By contrast, the State Bar’s rules of professional conduct for attorneys define confidential information as any “information protected by the attorney-client privilege under applicable law, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”⁹⁷

The confidentiality requirements established by state licensing laws are, of course, binding on the attorneys, social workers, accountants, and other professionals who are subject to licensure and regulation under those laws, and violation of those confidentiality requirements generally may result in disciplinary action by the appropriate state licensing board (for example, suspension or revocation of an individual’s license to engage in his or her occupation or profession).

The confidentiality requirements contained in state licensing rules, however, also may confer legal rights on the individuals served by attorneys, social workers, accountants, or other professionals by establishing a standard of professional conduct that will be applicable in legal proceedings alleging professional malpractice.

For these reasons, professionals who are subject to confidentiality requirements imposed by state licensing rules (or other state laws) may be reluctant to disclose confidential information to state or local social services agencies in the absence of some other state statute or rule that allows or requires them to do so or that gives a state or local social services agency the right to obtain the information notwithstanding its confidential nature.

Other State Statutes and Regulations

In addition to the state laws discussed above, other state laws protect the confidentiality of personnel records of state and local government employees,⁹⁸ information contained in the medical records of patients,⁹⁹ financial records of customers of banks,¹⁰⁰ savings and loan institutions, or credit unions,¹⁰¹ records regarding patrons of public libraries,¹⁰² and other types of personal information.

Some of these state laws (for example, the statutes governing the confidentiality of personnel records of state and county employees) apply directly to the records of state or county social services agencies. Others (like the state’s Financial Privacy Act and the state statutes governing the confidentiality of mental health records) may affect the authority of social

services agencies to obtain, use, or redisclose information or records that are classified as confidential under other state statutes or rules.

Again, however, state statutes and rules regarding confidentiality are rarely, if ever, absolute.

For example, although the personnel records of county employees are considered confidential, state law requires the disclosure of certain information regarding county employees (name, age, date of employment, current position and salary, etc.) upon the request of any person and either allows or requires the disclosure of other information about county employees under other circumstances (for example, pursuant to court order or when disclosure is essential to maintaining public confidence in the administration of county services or maintaining the level and quality of county services).¹⁰²

Similarly, although state law protects the confidentiality of mental health records, state law expressly requires or allows the disclosure of confidential information regarding patients who are treated for mental illness or developmental disabilities with the patient’s consent; pursuant to court order; in involuntary commitment and incompetency proceedings; to report suspected child abuse or neglect; for the purpose of research; or for other purposes specified by statute.¹⁰³

State Laws Regarding the Disclosure of Confidential Information to Social Services Agencies

Most of the state laws discussed above *protect* confidentiality by restricting the acquisition, use, or disclosure of information. Other state laws, however, expressly authorize certain individuals, officials, or agencies to obtain, use, or disclose information that is otherwise confidential.

For example, state law provides that, notwithstanding any other provision of state law making information confidential, state and local government agencies, employers, banks, utility companies, and other specified entities must provide otherwise confidential information to state or local child support enforcement agencies for the purpose of locating absent parents and establishing, collecting, or enforcing their child support obligations.¹⁰⁴

Similarly, North Carolina’s Juvenile Code provides that all public and private agencies must provide to the county department of social services, upon request, any information that may be relevant to the department’s investigation of suspected child abuse or neglect even if the confidentiality of the requested information is protected under another state statute.¹⁰⁵

On the other hand, some state laws expressly authorize other public agencies or individuals to obtain information or records from state or county social services agencies even though another statute (such as G.S. 108A-80 or G.S. 7B-302(a)) otherwise would prohibit the social services agency from disclosing the requested information. For example, North Carolina's Juvenile Code allows the guardian ad litem in a juvenile case to obtain records (including those of state or county social services agencies) that the guardian ad litem believes are relevant to the case even if another state law provides that the records are confidential and may not be disclosed.¹⁰⁶

The Common Law and Court Decisions

Almost all of the confidentiality rules discussed above are contained in statutes enacted by Congress or state legislatures or in the written rules and regulations adopted by federal or state administrative agencies pursuant to statutory authority. Some confidentiality rules, however, are based on the common law and court decisions rather than legislation or administrative regulations.¹⁰⁷

The Common Law Right to Privacy

Some American courts have held that the common law recognizes a right to privacy under which an individual (the plaintiff) may bring a lawsuit seeking monetary compensation based on

1. another person's (the defendant's) unreasonable public disclosure of private information about the plaintiff;¹⁰⁸
2. the defendant's intrusion into the plaintiff's private affairs;¹⁰⁹
3. the defendant's misappropriating the plaintiff's likeness or identity;¹¹⁰ or
4. the defendant's placing the plaintiff in a false light before the public.¹¹¹

Hall v. Post

Although the North Carolina Supreme Court has held that there is a right to privacy under the common law, it has not recognized a common law right to privacy with respect to claims based on the unreasonable public disclosure of private facts.

In *Hall v. Post*,¹¹² an adult woman and her adoptive mother brought a civil action for invasion of privacy against a reporter and a newspaper based on two articles the newspaper published regarding the

woman's abandonment as a four-month-old child by her biological parents, her subsequent adoption by her adoptive mother, and her biological mother's search for her seventeen years thereafter.

The North Carolina Supreme Court affirmed the trial court's dismissal of the woman's claim against the newspaper. In doing so, the Supreme Court expressly refused to recognize a common law claim for unreasonable public disclosure of private information because, the court reasoned, such a claim would duplicate or overlap tort claims based on intentional infliction of emotional distress and raise potential constitutional issues if applied to the press.¹¹³

Individuals, state or local government employees, and state or local government agencies, therefore, may not be held civilly liable in North Carolina for invading an individual's common law right to privacy through the public disclosure of private information.¹¹⁴

Infliction of Emotional Distress

Although *Hall* refused to recognize a claim for public disclosure of private information based on a common law right to privacy, the Supreme Court simultaneously held that a person may be held liable for inflicting emotional distress through the unreasonable public disclosure of personal information.¹¹⁵

And in *Woodruff v. Miller*, the North Carolina Court of Appeals held an individual liable for intentional infliction of emotional distress based on his public disclosure of a criminal charge that had been filed against a public school superintendent more than thirty years earlier (when the superintendent was a college student).¹¹⁶

Because the personal information that was disclosed in the *Woodruff* case was a matter of public record, it follows that the public disclosure by a state or local government agency or employee of sensitive or embarrassing information that has been classified as confidential under applicable statutes or regulations also may be the basis for a claim based on negligent or intentional infliction of emotional distress.¹¹⁷

Contracts

All of the confidentiality rules discussed above are rules that are imposed on individuals and agencies by law—constitutional provisions, federal statutes and regulations, state statutes and rules, the common law and court decisions.

Individuals, government agencies, and other entities, however, may *voluntarily assume* legal obligations with respect to confidentiality by entering

into contracts that require them to protect the confidentiality of certain information or restrict their right to use or disclose confidential information.¹¹⁸

The confidentiality requirements and restrictions in contracts are, of course, legally binding and legally enforceable as between the individuals, entities, or agencies that are parties to those contracts. And in some instances, the confidentiality provisions in contracts also create legally enforceable rights on the part of individuals, entities, or agencies who are *not* parties to those contracts.

The new HIPAA medical privacy rules, for example, require covered entities (health plans, health care clearinghouses, and almost all health care providers) to enter into contractual commitments with their “business associates” (that is, entities that receive personal health information from covered entities in order to perform legal, management, administrative, or related services for covered entities) to safeguard the confidentiality of personal health information they provide to these business associates.¹¹⁹ Contracts between covered entities and their business associates must

- be in writing;
- establish the permitted and required uses and disclosures of protected information by the business associate;
- prohibit the unauthorized use or disclosure of protected health information by the business associate;
- require the business associate to establish appropriate safeguards to prevent the unauthorized use or disclosure of protected health information;
- require the business associate to report incidents involving the unauthorized use or disclosure of protected information;
- require the business associate to impose contractual requirements and restrictions on its subcontractors with respect to the use and disclosure of protected health information; and
- authorize termination of the contract by the covered entity if the business associate materially breaches the confidentiality requirements and restrictions contained in the contract.¹²⁰

The proposed HIPAA medical privacy rules also required that the contracts between covered entities and business associates include a provision making the individuals to whom protected health information pertains third-party beneficiaries to the confidentiality provisions of these contracts.¹²¹ As a third-party beneficiary to such a contract, an individual would have had the legal right to sue a business associate for compensatory damages or other legal relief if the

business associate used or disclosed protected health information about the individual in violation of the confidentiality requirements and restrictions contained in the contract between the business associate and a covered entity.

The final HIPAA privacy rule, however, deleted the requirement that the individuals to whom protected health information pertains be designated as third-party beneficiaries of the contracts between covered entities and their business associates.¹²² Nonetheless, it still may be possible for an individual to whom protected health information pertains to claim under state law that he or she is a third-party beneficiary to such contracts and sue the business associate of a covered entity (and, perhaps, the covered entity) if the business associate improperly uses or discloses protected health information pertaining to the individual.¹²³

The confidentiality rules adopted by North Carolina’s Social Services Commission also contemplate the imposition of confidentiality requirements and restrictions through contracts between state or local social services agencies and other individuals, entities, or agencies.

Under these rules, every contract by a county social services agency for the provision of services to individuals on behalf of the agency must include a provision under which the service provider agrees not to use or disclose confidential information received from the social services agency or regarding persons receiving social services except as allowed or required by law.¹²⁴ Failure of a service provider to comply with these contractual provisions regarding confidentiality is a ground for terminating the contract.¹²⁵

Professional and Ethical Standards

“Professional codes of ethics are prescriptive rules of conduct, describing how certain professionals should act with clients, agencies, other professionals, and the community at large.”¹²⁶

In many instances, these professional codes of ethics include specific requirements with respect to the protection of confidential information received by members of the profession in connection with their work.

As noted above, the confidentiality requirements of some professional ethical codes have been expressly recognized by or incorporated into state laws or rules that govern the licensing or regulation of those professions.

In other instances, however, the confidentiality rules contained in professional codes of ethics (for example, the ethical standards of the American Medical Association and the National Association of Social Workers and the accreditation standards of the

Joint Commission on Accreditation of Healthcare Organizations) have not been expressly incorporated into state law.

The confidentiality rules in professional ethical codes vary somewhat from profession to profession. They all, however, generally require professionals to protect the confidentiality of certain types of information that they obtain in the course of their professional activities and allow or require professionals to disclose confidential information to others under some circumstances.

For example, the National Association of Social Workers (NASW) Code of Ethics reflects the importance of confidentiality in the practice of social work.¹²⁷ Recognizing that “the confidential nature of communications between social workers and their clients has been a cardinal principle of social work from the earliest years of the profession” and that confidentiality is an essential element of and an inherent characteristic of the relationship between a social worker and his or her client,¹²⁸ NASW’s most recent Code of Ethics, adopted in 1996, includes provisions

- requiring social workers to respect their clients’ right to privacy by not soliciting information from or about clients unless the information is needed to provide social services;
- requiring social workers to treat all personal information about clients as confidential and to protect the confidentiality of all personal information obtained in the course of providing professional social work services;
- requiring that social workers discuss with clients the nature of confidentiality and limitations of clients’ right to confidentiality and review with their clients the circumstances in which confidential information may be requested and in which disclosure of confidential information may be legally required;
- allowing social workers to disclose confidential information about clients when the disclosure is appropriate and the client (or a person legally authorized to consent on behalf of the client) has provided valid, informed consent to the disclosure or when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person;
- requiring that, if disclosure of confidential information is required or allowed, social workers disclose only information that is directly relevant to the purpose for which the disclosure is made, and disclose the least

amount of confidential information necessary to achieve the desired purpose;

- prohibiting social workers from discussing confidential information in public or in semi-public areas or any other setting unless privacy can be ensured;
- requiring social workers to take reasonable steps to ensure that clients’ records are stored in a secure location and that clients’ records are not available to others who are not authorized to have access.¹²⁹

Professional codes of ethics, of course, are binding on the members of professional associations and violation of the confidentiality requirements contained in professional codes may result in disciplinary action by or expulsion from a professional association.¹³⁰ In addition, the confidentiality rules contained in professional standards may create legally-enforceable rights and obligations if they are incorporated by state licensing laws or are recognized by state courts as establishing a standard of professional care or conduct in lawsuits based on professional malpractice, negligence, or breach of fiduciary duty.¹³¹ And even when the confidentiality rules in professional ethical codes have not been incorporated into state law, they may affect the acquisition, use, protection, and disclosure of information by state and county social services agencies. For example, a professional may refuse to disclose to a state or county social services agency information that is considered confidential under his or her profession’s ethical standards unless (a) the individual to whom the information pertains consents to the disclosure, or (b) the social services agency can cite a federal or state law that *requires* disclosure of the information to the agency.

The Legal Framework of Confidentiality

Given that confidentiality rules arise from a number of different sources and that there are undoubtedly thousands of different rules that apply to different types of information, apply to different individuals, entities, and agencies, and impose different requirements and restrictions with respect to the acquisition, use, protection, and disclosure of information, how do the rules governing confidentiality all “fit together?”

It has been suggested that one way to understand confidentiality is to view confidentiality rules as forming a hierarchy or “ladder” of legal requirements.¹³²

It may be helpful to think of the various confidentiality provisions as a series of umbrellas in horizontal rows. The umbrellas in the top row are the largest, with

the greatest legal force, and in each lower row the umbrellas are successively smaller.

Constitutional provisions are the umbrellas in the top row ... [covering] every person and agency All statutes, regulations, and other provisions (which are "below" the constitution) must comply or be consistent with [these constitutional provisions]. * * *

On the next row below are statutes. Generally, a separate federal statute (umbrella) covers each particular area, such as education, public assistance, child welfare, and alcohol and substance abuse. Each federal statute covers all state and local agencies throughout the country that receive federal funding in that area. [Similarly, state statutes are "umbrellas" that cover specific types of information, persons, or agencies in the state.]

Below the statutes are regulations. While statutes often contain fairly general language, regulations supply the details and are intended to guide agencies in implementation of the statutes. * * *

The last row of "umbrellas" consists of professional ethical standards. While these do not have the force of law, they nevertheless establish accepted guidelines for practice.¹³³

Although the hierarchy or "umbrella" framework of confidentiality rules undoubtedly is helpful in understanding confidentiality, it is not entirely accurate or satisfactory.

It is, of course, true that there is a hierarchy of laws in which

1. constitutional provisions are "at the top" because they have the ultimate, greatest, and most comprehensive legal force and effect;
2. statutes are "under" constitutional provisions because they may not be legally inconsistent with constitutional requirements or restrictions;
3. regulations are "under" statutes because they are adopted pursuant to, and must be consistent with, statutory authority; and
4. agency policies and professional ethical standards are "at the bottom" in the sense that they have no independent legal force or effect and must "give way" to applicable constitutional, statutory, or regulatory provisions.

The hierarchy or "umbrella" model of confidentiality rules, however, may obscure three important points.

First, although constitutional provisions regarding informational privacy are legally "at the top" of the legal hierarchy, they are rarely relevant with respect to day-to-day problems involving the confidentiality of information.

Instead, constitutional restrictions on the acquisition, use, and disclosure of confidential

information may be thought of as a "safety net" that lies "underneath" federal and state confidentiality rules. As a safety net, constitutional provisions regarding confidentiality come into play only on a case-by-case basis when federal or state confidentiality rules fail to provide sufficient protection for individual privacy or confidentiality. They provide, at best, *general* guidelines regarding confidentiality rather than *detailed* rules that answer day-to-day issues and problems regarding the acquisition, use, protection, and disclosure of confidential information.

Second, the hierarchy model of confidentiality outlined above does not adequately address the relationship between confidentiality rules that arise under *federal* law and those that arise under *state* law.

Under our federal system of government, some subjects fall under the exclusive authority of the federal government, some subjects fall under the exclusive authority of state or local governments, and some subjects are under the authority of both the federal government and state or local governments.

In those areas within the authority of the federal government, the supremacy clause of the U.S. Constitution requires that the federal constitution, federal statutes, and federal regulations be given precedence over state constitutions, statutes, and rules. Federal laws or regulations regarding confidentiality, therefore, may in some instances "trump" state confidentiality rules that are inconsistent with federal law or even completely preempt all state rules with respect to a particular subject or agency. For example, the federal medical privacy rules preempt state confidentiality rules to the extent that state confidentiality rules allow disclosure of personal health information under circumstances in which the federal rules prohibit disclosure of that information.

In other instances, however, state confidentiality rules apply to matters that do not fall within the federal government's authority or establish confidentiality requirements that complement or supplement the confidentiality requirements of federal laws without being inconsistent with those federal requirements. Again using the federal HIPAA privacy rules as an example, state laws and regulations may impose confidentiality requirements and restrictions with respect to personal health information that are *more stringent or restrictive* than those contained in the federal rule.

Thus, in some cases, federal and state statutes (or federal and state regulations) governing confidentiality may be placed on the "same row" or level of confidentiality rules. In other instances, federal confidentiality rules may be "higher" than state confidentiality rules. And in some cases, state confidentiality rules may be "above" federal rules.

Third, confidentiality rules appear to resemble a worn out patchwork quilt with lots of holes and confusing or conflicting patterns more than a system of interlocking umbrellas that covers everyone and everything regarding confidentiality.

For example, the “top umbrellas” (constitutional provisions recognizing the right to privacy) do not “cover” everyone and everything related to privacy. Instead, the right to privacy under both the U.S. Constitution and North Carolina’s constitution applies with respect to *governmental* violations of individual privacy, not violations of privacy by individuals or non-governmental entities. Similarly, the “lower umbrellas” (statutes and regulations) often apply only to particular programs, particular types of information, particular individuals, entities, or agencies, or particular situations. So even when all of these confidentiality “umbrellas” are put together, they do not cover everyone and everything regarding confidentiality and instead leave a number of significant “gaps” in which the answers to questions involving confidentiality are far from clear.

Conclusion

The first two *Social Services Bulletins* on the subject of confidentiality and social services have addressed two questions. First, what is confidentiality? And second, where do confidentiality rules come from?

What is confidentiality? Confidentiality refers to the rights, obligations, requirements, and restrictions that apply with respect to the acquisition, use, protection, and disclosure of information. There is, however, no general, universally applicable definition of confidentiality. Instead, the meaning, nature, and scope of confidentiality is determined in any particular instance by the specific provisions of the rule (or rules) that governs the acquisition, use, protection, and disclosure of a particular type of information by a particular individual, entity, or agency for a particular purpose.

Where do confidentiality rules come from?

Confidentiality rules are derived from a number of legal and quasi-legal sources: federal and state constitutional provisions regarding individual privacy; federal and state statutes and regulations governing the acquisition, use, protection, and disclosure of information; the common law and court decisions; contractual provisions; and professional ethical standards.

Although it would be virtually impossible to identify every rule regarding confidentiality, there undoubtedly are *thousands* of rules that govern the confidentiality of information. Most of these

confidentiality rules do not apply specifically to state or local social services agencies or affect their authority to obtain, use, or disclose information. But many rules do, or potentially could, affect the authority of state and local social services agencies to obtain, use, or disclose information.

Thus, in order to determine whether a social services agency may obtain, use, or disclose information in any particular situation, one must first identify *all* of the rules that govern, or may govern, the confidentiality of that information. And in doing so, social services agencies must look not only to the federal and state statutes and regulations governing the confidentiality of social services records, but also the confidentiality requirements and restrictions that arise under other federal and state laws, constitutional provisions, the common law, contracts, and professional ethical standards.

And once all of the rules that may apply to the acquisition, use, protection, or disclosure of a particular type of information by a particular individual, entity, or agency for a particular purpose in a particular situation have been identified, one must still determine how the applicable rules (which may be somewhat unclear or inconsistent) relate to each other.

Both of these tasks will be addressed in subsequent *Social Services Bulletins* that will

- identify and summarize many of the federal and state laws that govern the acquisition, use, protection, and disclosure of information by social services agencies;
- provide a framework for analyzing issues involving confidentiality; and
- address some of the questions, issues, and problems regarding confidentiality that social services agencies frequently encounter.

Notes

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¹ While employees of state and county social services agencies understand that personal information in their agencies’ records is confidential, they too often have only a scanty or inaccurate knowledge of the legal and professional rules governing the confidentiality of social services records and may not fully appreciate the complex nature of confidentiality. Suanna J. Wilson, *Confidentiality in Social Work* (New York: Free Press, 1978), 202.

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² This bulletin generally uses the term “information” to refer to any type of information, data, communication, or record, regardless of its form or content.

³ This bulletin generally uses the term “social services agencies” to refer to state social services agencies (for example, the state Department of Health and Human Services and its Division of Social Services) and county social services agencies (for example, county departments of social services). Although this series of *Social Services Bulletins* will focus primarily on the confidentiality rules that apply to (or are commonly encountered by) county departments of social services, other public human services agencies may find it useful in analyzing questions, issues, and problems regarding the acquisition, use, and protection of confidential information.

⁴ This bulletin generally uses the term “rule” to refer to any law, regulation, professional code, standard, requirement, or restriction regarding the acquisition, use, protection, or disclosure of confidential information.

⁵ Unless otherwise noted, references to the “confidentiality” of information include requirements or restrictions with respect to: (1) the acquisition of information, (2) the use of information, (3) the protection of information from inappropriate or unlawful use or disclosure, and (4) the disclosure of information.

⁶ This bulletin discusses the sources of confidentiality rules in general. A subsequent *Social Services Bulletin* will list and summarize most of the federal and state statutes and regulations that apply to, or that are commonly encountered by, state and local social services agencies.

Some of the confidentiality rules discussed in this bulletin do not apply directly, or may be only marginally relevant, to state or local social services agencies. Nonetheless, there are several reasons *why* social services employees, officials, and attorneys need to know where confidentiality rules come from. First, if the meaning, nature, and scope of confidentiality are determined by rules, one must know *where* to look for these rules. Second, because more than one rule may apply with respect to the confidentiality of information in a particular situation, it is important to examine *all* of the potential sources of confidentiality rules. Third, a more thorough understanding the sources of confidentiality may enhance one’s understanding of the meaning, nature, and scope confidentiality in general. Fourth, the nature, scope, applicability, and enforceability of confidentiality rules depend, at least to some extent, on their source. Fifth, a particular confidentiality rule often may be better understood in the context of the overall general legal framework of confidentiality, rather than in isolation. And sixth, because all confidentiality rules are not “created equal,” the source of a particular confidentiality rule may give it more or less weight vis a vis other competing rules governing the acquisition, use, or disclosure of information.

⁷ In its broadest sense, an individual’s constitutional right to privacy has been described as “the right to be let alone” (that is, to be free from governmental or public intrusion into one’s private or personal affairs). *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion by Justice Brandeis).

⁸ Although the 1977 decision in *Whalen* marked the first time the Supreme Court explicitly recognized a general constitutional right with respect to informational privacy, earlier decisions found constitutional rights with respect to the privacy of certain information implicit in the Constitution’s guarantees of freedom of speech, freedom of association, freedom from unreasonable searches, and freedom from self-incrimination. *See NAACP v. Alabama*, 357 U.S. 449 (1958), *Shelton v. Tucker*, 364 U.S. 479 (1960) (first amendment protection of free speech and association); *Davis v. United States*, 328 U.S. 582 (1946), *Katz v. United States*, 389 U.S. 347 (1967) (fourth amendment’s protection against unreasonable searches and seizures); *Boyd v. United States*, 116 U.S. 616 (1886), *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (fifth amendment’s right against self-incrimination). *See also Watkins v. United States*, 354 U.S. 178 (1957); *Doe v. McMillan*, 412 U.S. 306, 320 (1973) (concurring opinion).

⁹ 429 U.S. 589 (1977). *See also Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). The constitutional right to informational privacy recognized in *Whalen* and *Nixon* is based on the personal “liberty” and “due process” clauses of the 14th and 5th amendments to the constitution.

If a state or local government violates an individual’s constitutional right to privacy, the individual may sue the state or local government for injunctive relief and monetary damages in state or federal court under 42 U.S.C. 1983. Lawsuits against state and local government agencies, officials, and employees are discussed in Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1999).

The *Whalen* case and the constitutional right to informational privacy are discussed in more detail in Gary R. Clouse, *The Constitutional Right to Withhold Private Information*, 77 NW Univ. L. Rev. 536 (1982), and Note, *The Constitutional Right to Confidentiality*, 51 Geo. Wash. L. Rev. 133 (1982).

¹⁰ Schedule II drugs are drugs (such as opium, cocaine, methadone, amphetamines, and methaqualone) that have accepted medical uses but are also sold or used illegally.

¹¹ 429 U.S. at 605–06.

¹² 429 U.S. at 606.

¹³ Under the state law upheld in *Whalen*, information about patients for whom schedule II drugs were prescribed was retained in a vault in a room that was surrounded by a wire fence and protected by an alarm system, and was maintained on computer tapes that were kept in a locked

cabinet and run on a non-networked computer. The personal information obtained by the agency could be reviewed only by forty-one health department employees whose jobs involved maintaining the records system or investigating cases involving the misuse of schedule II drugs. Based on these facts, the Supreme Court concluded that there was, at best, a remote chance that personal information would be publicly disclosed in an inappropriate, unreasonable, or unlawful manner.

¹⁴ Federal district and appellate courts have been somewhat erratic and inconsistent in their application of the Supreme Court's decision in *Whalen*. In *McElrath v. Califano*, 615 F.2d 434 (7th Cir. 1980), a federal court of appeals held that federal and state regulations requiring families to provide the social security numbers of household members to state or local social services agencies as a condition of receiving public assistance did not violate the families' right to privacy. In *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), another federal appellate court held that, despite the Supreme Court's ruling in *Whalen*, the U.S. "Constitution does not encompass a general right to nondisclosure of private information" contained in juvenile probation records. Other federal courts, however, have held that the U.S. Constitution *may* limit the right of a government agency to obtain sensitive medical information about individuals [*see Schacter v. Whalen*, 581 F.2d 35 (2d Cir. 1978); *United States v. Westinghouse*, 638 F.2d 570 (3d Cir. 1980)] or to disclose sensitive personal information to the public [*see Plante v. Gonzales*, 575 F.2d 1119 (5th Cir. 1978); *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); *Doe v. Webster*, 606 F.2d 1226 (D.C. Cir. 1979); *Doe v. City of New York*, 15 F.3d 264 (2nd Cir. 1994); *Sheets v. Salt Lake County*, 45 F.3d 1393 (10th Cir. 1995)]. In most of these cases, however, the courts, while recognizing a constitutionally-protected right to informational privacy, concluded that the government's interest in obtaining, using, or disclosing personal information outweighed the individuals' rights with respect to personal privacy. The constitutional right to informational privacy recognized in *Whalen* therefore represents the *minimum* legally-permissible standard with respect to the acquisition, use, and disclosure of personal information by government agencies. The federal government, states, and local governments may, and often do, enact laws and regulations providing greater legal protection or more stringent restrictions with respect to the confidential information.

¹⁵ The precise scope of an individual's constitutional right with respect to the privacy of personal information is unclear. In its broadest sense, "personal" information might include *all* information pertaining to a specific person, regardless of whether the information might be considered private, intimate, personally embarrassing, sensitive, confidential, or secret. *See Laurence S. Tribe, American Constitutional Law §§15–17 at 967 (1978)*. The private, intimate, personally embarrassing, sensitive, confidential, or secret nature of information, however, is almost certainly relevant

in determining whether the individual's interest with respect to personal privacy outweighs any competing governmental interest with respect to acquisition, use, or disclosure of the information. Thus, the government's acquisition, use, or disclosure of personal information in such a manner that the information cannot be linked to a specific, identifiable individual probably does not violate the constitutional right to informational privacy recognized in *Whalen*. *See United States v. Little*, 321 F.Supp. 388, 392 (D. Del. 1971); *cf. Hawaii Psychiatric Society v. Ariyoshi*, 481 F.Supp. 1028 (D. Hawaii 1979).

¹⁶ 429 U.S. at 599–600. *See also David S. Bazelon, Probing Privacy*, 12 Gonz. L. Rev. 587, 613 (1977) (governmental infringement of informational privacy rights may occur at (a) the point at which personal information is collected *or* (b) the point at which personal information is disseminated *or* (c) both).

¹⁷ *Hodges v. Jones*, 31 F.3d 157 (4th Cir. 1994). *See also Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994) (holding that New York's central registry of child abuse and neglect reports violated a parent's constitutional right to due process but not addressing directly the parent's constitutional right to informational privacy).

¹⁸ 83 N.C.App. 345, 350 S.E.2d 365 (1986), *affirmed on other grounds* 320 N.C. 776, 360 S.E.2d 783 (1987).

¹⁹ 83 N.C.App. at 359, 350 S.E.2d at 373. The plaintiffs in *Treats* sought only injunctive relief. It is unclear whether a plaintiff whose state constitutional right to informational privacy has been violated may sue the state or a local government for compensatory or punitive damages arising from the unlawful acquisition, use, or disclosure of personal information. *See Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (discussing liability under the common law for violation of "self-executing" constitutional provisions).

²⁰ 345 N.C. 699, 483 S.E.2d 388 (1997).

²¹ As discussed in the preceding section, federal and state laws governing the confidentiality of information are relevant in determining whether the acquisition, use, or disclosure of personal information by a government agency violates an individual's *constitutional* right to informational privacy. As Justice Stevens noted in *Whalen v. Roe*, the government's authority to obtain or use personal information is generally accompanied by statutory or regulatory restrictions regarding the use or disclosure of this information, and the existence and extent of these legal restrictions or safeguards against the unwarranted use or disclosure of information are factors that a court will consider in balancing an individual's interest in privacy against the government's interest in obtaining, using, or disclosing personal information.

²² 5 U.S.C. 552a.

²³ The term "agency" is defined in 5 U.S.C. 552a(a)(1), 552(f), and 551(1) to include most (but not all) federal executive

agencies. The act's provisions also apply to contractors that maintain record systems on behalf of federal agencies whose records are subject to the act. 5 U.S.C. 552a(m).

²⁴ Under the federal Freedom of Information Act (5 U.S.C. 552), federal agencies are *not* required to disclose information or records to the public if the requested information or records are considered confidential and protected from public disclosure under another federal statute (other than the Privacy Act), if the public disclosure of the information or records (such as personnel, medical, or similar records) would constitute a clearly unwarranted invasion of privacy, or if the requested information falls within another specific exemption from disclosure under the Freedom of Information Act.

²⁵ See *St. Michael's Convalescent Hospital v. California*, 643 F.2d 1369, 1373–74 (9th Cir. 1981) (holding that the federal Privacy Act does not apply to a state government agency that administers the federal-state Medicaid program). As noted in the text, two provisions of the federal Privacy Act may apply to state or local government agencies. One set of provisions [5 U.S.C. 552a(a)(8)–(12); 552a(o)–(r)] restricts the use and redisclosure of federal agency records that are disclosed to state or local government agencies in connection with computerized data matching programs related to federally-funded public assistance or social services programs administered by state or local social services agencies. A second provision [5 U.S.C. 552a (note)] limits (but doesn't completely negate) the authority of governmental agencies (including state and local government agencies) to require an individual to disclose his or her social security number in connection with his or her exercise of any right, benefit, or privilege provided by law. See David M. Lawrence, Local Government Requirements for and Use of Social Security Account Numbers, *Local Government Law Bulletin No. 55* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1994). The federal Social Security Act, however, expressly requires states to require that applicants for and recipients of assistance or benefits under the Medicaid, Food Stamp, unemployment compensation, and Temporary Assistance for Needy Families programs furnish their social security numbers and that the state use social security numbers in the administration of these programs. 42 U.S.C. 1320b-7(a)(1).

²⁶ 5 U.S.C. 552(b)(6). The Freedom of Information Act also allows an agency to refuse a request for public disclosure of information or records if (a) the requested information or records are considered confidential and protected from public disclosure under another federal statute (other than the Privacy Act), or (b) if the requested information or records fall within another specific exemption from disclosure under the act.

²⁷ For example, although there is no federal statute that explicitly provides that the claim and benefit records of persons who have applied for or are receiving Social Security

(OASDI) or Supplemental Security Income (SSI) benefits are confidential and protected from public disclosure, the federal Social Security Administration treats the information in these records as confidential and exempt from public disclosure under the Freedom of Information Act because public disclosure would constitute a "clearly unwarranted invasion of the personal privacy" of Social Security and SSI claimants and beneficiaries. See 20 C.F.R. 402.100; *Schechter v. Weinberger*, 506 F.2d 1275 (D.C. Cir. 1974) (holding that 42 U.S.C. 1306 does not make all information and records involving federal Social Security programs confidential or exempt from public disclosure).

²⁸ 5 U.S.C. 552a(a)(8)–(12); 552a(o)–(r).

²⁹ 26 U.S.C. 6103.

³⁰ 20 U.S.C. 1232g; 34 C.F.R. 99. FERPA is sometimes referred to as the "Buckley amendment."

³¹ Directory information means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended. 20 U.S.C. 1232g(a)(5)(A).

³² 20 U.S.C. 1232g(b), (d).

³³ 42 U.S.C. 290dd-2. The federal statute and rule, however, limit the *redisclosure* confidential alcohol or drug treatment information. See 42 C.F.R. 2.12(d)(2)(iii), 2.32.

³⁴ 42 U.S.C. 5106a(b)(2)(A)(v), (vi), and (vii), 5106a(b)(3), 5106a(b)(4).

³⁵ 42 U.S.C. 671(a)(8); 45 C.F.R. 1355.21(a), 1355.30, 205.50.

³⁶ 7 U.S.C. 2020(e)(8); 7 C.F.R. 272.1(c).

³⁷ 42 U.S.C. 1396a(a)(7); 42 C.F.R. 431.300 et seq., 431.940 et seq.

³⁸ 7 U.S.C. 2020(e)(8); 7 C.F.R. 272.1(c).

³⁹ See *Girardier v. Webster College*, 563 F.2d 1267 (8th Cir. 1977); *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989) (no private right of action under FERPA). See also *Chapa v. Adams*, 168 F.3d 1036 (7th Cir. 1999) (holding that the federal statute restricting the disclosure of information regarding participants in substance abuse programs does not create a private right of action on behalf of persons whose right to confidentiality under the statute has been violated). See also *Trott Brothers, Inc. v. Emison*, 841 S.W.2d 604 (Ark. 1992) (holding that the confidentiality restrictions of the federal Juvenile Justice and Delinquency Prevention Act did not override the provisions of the state's public records law with respect to a newspaper's request that the sheriff disclose the names of three juvenile delinquents who had escaped from detention and the reasons for their initial arrest).

⁴⁰ See *Fay v. South Colonie Central School Dist.*, 802 F.2d 21 (2nd Cir. 1986) (holding that FERPA's confidentiality requirements may be enforced by students under 42 U.S.C. 1983). The potential liability of state and local governments and public officials under 42 U.S.C. 1983 is discussed in Anita R. Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Towns* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1999), Ch. 6. It is unclear whether federal confidentiality requirements with respect to social services records may be enforced by individuals through a private right of action under applicable federal laws or through a civil rights action under 42 U.S.C. 1983.

⁴¹ See 47 N.C.Atty.Gen.Op. 211 (1978), N.C.Atty.Gen. Advisory Opinion, 1997 WL 613032 (April 4, 1997).

⁴² 18 U.S.C. 2710.

⁴³ The act allows the disclosure of personally identifiable information (a) with the written consent of a consumer; (b) to others when required in the ordinary course of business; (c) to a law enforcement officer pursuant to a valid warrant or subpoena; or (d) pursuant to a court order issued upon a showing of compelling need. A consumer who is harmed by the wrongful disclosure of videotape rental records in violation of the act may bring a civil action in federal court against the videotape service provider for compensatory damages (\$2,500 minimum award), punitive damages, and attorneys fees.

⁴⁴ 5 U.S.C. 552a (note). See David M. Lawrence, Local Government Requirements for and Use of Social Security Account Numbers, *Local Government Law Bulletin* No. 55 (Institute of Government, March, 1994).

⁴⁵ Pub.Law 100-191.

⁴⁶ 65 Fed.Reg. 82,462 (Dec. 28, 2000); 45 C.F.R. Parts 160 and 164. The HIPAA privacy rule became effective April 14, 2001. Most entities covered by the HIPAA privacy rule must comply with its confidentiality requirements by April 14, 2003. The HIPAA privacy rule is discussed in more detail in Jill D. Moore, Medical Privacy: A Summary of the New Federal Regulation, *Health Law Bulletin* (Institute of Government, UNC-CH, forthcoming July, 2001).

⁴⁷ 45 C.F.R. 160.102, 164.104, 164.500(a). The term health care provider includes any person or organization that furnishes preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, assessment, counseling, service, or other procedures related to the physical or mental health of an individual or that dispenses a drug, device, or equipment in accordance with a prescription. 45 C.F.R. 160.103. Although DHHS did not have the authority to regulate directly the practices of other entities that may handle personal health information, the provisions of the HIPAA privacy rule will nonetheless affect non-covered entities that do business with entities covered by the new rules or that seek health information from covered entities.

⁴⁸ 45 C.F.R. 164.502. If the HIPAA privacy rules authorize the disclosure of personal health information, a covered entity generally may disclose only the minimum amount of information necessary to accomplish the purpose for which the disclosure is made and must comply with the rule's procedures and conditions regarding disclosure of information. 45 C.F.R. 164.502(b).

⁴⁹ See 65 Fed.Reg. 82,479 (Dec. 28, 2000). Although both Medicaid and Health Choice (the state's health insurance plan for uninsured children) are considered "health plans" under HIPAA and county departments of social services determine eligibility for and enroll beneficiaries in Medicaid and Health Choice, local welfare agencies that administer Medicaid and state health insurance programs for children are not considered "health plans" or business associates of health plans under HIPAA based solely on their administration of these programs.

⁵⁰ A social services agency's use or disclosure of personal health information, however, may be restricted by federal or state laws other than HIPAA.

⁵¹ 45 C.F.R. 164.512(b)(1)(ii).

⁵² 45 C.F.R. 164.512(c)(1).

⁵³ 45 C.F.R. 164.512(f).

⁵⁴ 45 C.F.R. 164.512(j).

⁵⁵ 45 C.F.R. 164.512(e).

⁵⁶ 45 C.F.R. 164.512(b), 164.512(d).

⁵⁷ 45 C.F.R. 164.512.

⁵⁸ In most instances, the confidentiality rules promulgated by state administrative agencies or commissions must be adopted through the rule-making and review process set forth in the state's Administrative Procedure Act (G.S. Chapter 150B). Although the "operations manuals" of state agencies often include policies or procedures regarding confidentiality, these state policies and procedures generally are not legally binding because they have not been adopted pursuant to the Administrative Procedure Act. See *Duke Univ. Medical Ctr. v. Bruton*, 134 N.C.App. 39, 516 S.E.2d 633 (1999). Because these state confidentiality policies and procedures do not have the force and effect of law, they generally will not be considered or discussed as confidentiality rules in this bulletin or subsequent *Social Services Bulletins* regarding confidentiality.

⁵⁹ G.S. 132-1. North Carolina's Public Records Law is discussed in detail in David M. Lawrence, *Public Records Law for North Carolina Local Governments* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997).

⁶⁰ Under the Public Records Law, "any person" means any person (including corporations and nonresidents), regardless of whether the person has any "legitimate" purpose (or articulates any purpose) for examining or copying a record.

⁶¹ North Carolina's Public Records Law defines public record as documents, other papers, photographs, recordings,

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magnetic tapes, electronic data-processing records, or other records regardless of their physical form or characteristics that are made or received pursuant to law or ordinance in connection with the transaction of public business. G.S. 132-1. While all information included in public records is subject to the Public Records Law, the law does not require the public disclosure of information that has been received by a state or local government agency, official, or employee but has not been *recorded* in a public record.

⁶² When a state or local government record includes both “public” and “confidential” information, the Public Records Law requires the agency to disclose the public portion of the record by extracting or redacting the confidential information from the record. G.S. 132-6(c).

⁶³ Unlike the federal Freedom of Information Act, the state Public Records Law does not allow an agency, in the absence of an applicable federal or state law expressly prohibiting or restricting the disclosure of personal or confidential information, to refuse to disclose information on the basis that public disclosure would constitute a clearly unwarranted invasion of public privacy.

⁶⁴ A subsequent *Social Services Bulletin* will list and provide a more detailed analysis of all of the state statutes and regulations regarding the confidentiality of social services records.

⁶⁵ A state statute that merely exempted specific information or records from public disclosure under the state Public Records Law would not necessarily guarantee the confidentiality or nondisclosure of the information because the statute’s exemption of the information from the Public Records Law would mean only that the agency is not *required* to publicly disclose the information and *not* that the agency is *prohibited* from disclosing the information.

⁶⁶ G.S. 108A-80 is applicable not only to officials and employees of state and county social services agencies, but also to other state and local government officials and employees, volunteers working in state or local social services agencies, and other persons who obtain information from social services records.

⁶⁷ G.S. 108A-80 applies not only to the written records and computer databases of state and local social services agencies and the information in these records, but also to unwritten communications of, and unwritten information obtained by, social services officials or employees.

⁶⁸ Under G.S. 108A-80, the information must relate in some way to a person or family who has applied for or received assistance or services from a state or local social services agency.

⁶⁹ Under G.S. 108A-80, information regarding the clients of social services agencies is not confidential unless it is directly or indirectly derived from information obtained by or in the custody of the state Department of Health and Human Services or a county social services department. Information

about social services clients that is acquired from a source that is entirely independent of a state or local social services agency is not protected under G.S. 108A-80.

⁷⁰ G.S. 108A-80(b) expressly requires the public disclosure of the names and addresses of, and amounts of assistance received by, persons who receive Work First (TANF) cash assistance or assistance under the State-County Special Assistance program.

⁷¹ The confidentiality rules adopted by the state Social Services Commission are codified in Chapter 24B of Title 10 of the N.C. Administrative Code. They apply to all public assistance and social services programs administered by the DHHS Division of Social Services and county departments of social services other than the state Medicaid program. Confidentiality rules for the state Medicaid program are codified in 10 N.C. Admin. Code 50A.0401 et seq. The confidentiality rules in 10 N.C. Admin. Code Ch. 24B are supplemented by other rules regarding confidentiality with respect to particular public assistance or social services programs.

⁷² See 10 N.C. Admin. Code 24B.0401 through 24B.0406.

⁷³ 10 N.C. Admin. Code 24B.0501.

⁷⁴ 10 N.C. Admin. Code 24B.0501.

⁷⁵ 10 N.C. Admin. Code 24B.0501.

⁷⁶ 10 N.C. Admin. Code 24B.0502.

⁷⁷ 10 N.C. Admin. Code 24B.0601.

⁷⁸ 10 N.C. Admin. Code 24B.0503.

⁷⁹ 10 N.C. Admin. Code 24B.0504.

⁸⁰ 10 N.C. Admin. Code 24B.0505.

⁸¹ G.S. 7B-302(a).

⁸² G.S. 7B-2901(b).

⁸³ G.S. 110-139(b).

⁸⁴ G.S. 131D-2, 131D-27.

⁸⁵ G.S. 131D-10.3A.

⁸⁶ See G.S. 8-53 (physician-patient privilege); G.S. 8-53.2 (communications to clergy); G.S. 8-53.3 (communications between patients and psychologists); G.S. 8-53.4 (communications between students and school counselors); G.S. 8-53.5 (communications to marital and family therapist); G.S. 8-53.7 (communications to certified social workers); G.S. 8-53.8 (communications to licensed counselors); G.S. 8-53.9 (communications to optometrists); G.S. 8-53.10 (communications to peer support counselors); G.S. 8-53.11 (communications to journalists). North Carolina also recognizes a non-statutory attorney-client privilege. See *Michael v. Foil*, 100 N.C. 178, 6 S.E. 264 (1888).

⁸⁷ See *Watts v. Cumberland County Hospital System, Inc.*, 75 N.C.App. 1, 330 S.E.2d 242 (1985) (holding that G.S. 8-53 makes patient information in medical records confidential and that breach of confidentiality restrictions of G.S. 8-53 by physician constitutes medical malpractice).

⁸⁸ See *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962) (holding that physician-patient

privilege under G.S. 8-53 applies not only to information communicated by patient to doctor, but also to knowledge obtained by doctor through observation or examination related to the patient's treatment).

⁸⁹ See G.S. 8-53 (physician-patient privilege); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983); State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992). By contrast, courts may lack the authority to compel disclosure of communications between an individual and a clergy person under G.S. 8-53.2. See State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986).

⁹⁰ See G.S. 7B-310; State v. Efird, 309 N.C. 802, 309 S.E.2d 228 (1983); State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

⁹¹ See Green ex rel. Green v. Maness, 69 N.C.App. 292, 316 S.E.2d 917 (1984).

⁹² State laws impose confidentiality requirements with respect to certified public accountants, licensed dieticians, massage therapists, optometrists, and other licensed professionals.

⁹³ 27 N.C. Admin. Code 2.1, Rule 1.6.

⁹⁴ 21 N.C. Admin. Code 63.0507.

⁹⁵ 21 N.C. Admin. Code 54.1608.

⁹⁶ 21 N.C. Admin. Code 8N.0205.

⁹⁷ 27 N.C. Admin. Code 2.1, Rule 1.6.

⁹⁸ G.S. 126-22 through 30 (state employees); G.S. 153A-98 (county employees); G.S. 160A-168 (municipal employees); G.S. 115C-319 through 321 (public school employees); G.S. 115D-27 through 30 (community college employees); G.S. 130A-42 (district health department employees); G.S. 122C-158 (area mental health employees). State laws regarding the confidentiality of public personnel records are discussed in detail in chapter 6 of Lawrence, *Public Records Law*.

⁹⁹ G.S. 131E-97 (medical records and accounts regarding patients of health care facilities); G.S. 130A-12 (medical records of patients of local health departments); G.S. 122C-52 (records of patients of area mental health programs); G.S. 90-85.36 (patient prescription records maintained by pharmacists). Laws governing the confidentiality of medical records are discussed in detail in chapter 12 of Lawrence, *Public Records Law* and in the chapter on Medical Records in Anne M. Dellinger (ed.) *Healthcare Facilities Law* (Boston: Little, Brown and Company, 1991).

¹⁰⁰ G.S. Ch. 53B.

¹⁰¹ G.S. 125-19.

¹⁰² See G.S. 153A-98(b), (c).

¹⁰³ See G.S. 122C-53 through 122C-56.

¹⁰⁴ G.S. 110-139.

¹⁰⁵ G.S. 7B-302(e). The statute does not require disclosure if the requested information is protected by the attorney-client privilege or if disclosure of the information would violate a federal statute or regulation.

¹⁰⁶ G.S. 7B-601(c).

¹⁰⁷ The common law generally refers to a body of legal principles and rules that has been created, developed, and expanded by English and American courts over many centuries. The common law, therefore, is found primarily in the written opinions and decisions of courts rather than the text of constitutions, statutes, and regulations. The common law in North Carolina is legally binding and remains in full force and effect until it is expressly abrogated by statute or court decision. G.S. 4-1.

¹⁰⁸ In order to establish a claim based on unreasonable public disclosure of private facts, a plaintiff would have to prove that the defendant publicized "private facts" of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. See Hall v. Post, 323 N.C. 259, 264, 312 S.E.2d 711, 714 (1988) citing the Restatement (Second) of Torts. The requirement that private facts be publicized is satisfied if information is communicated either to the public at large or in such a manner that the information will almost certainly become a matter of public knowledge. Liability, however, will not be imposed for publishing information that is already "in the public domain." In determining whether information is of "legitimate public concern," courts must draw a line between information to which the public is entitled and the publication of information that constitutes a "morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern." 323 N.C. at 272, 276-77, 372 S.E.2d at 719, 720-21.

¹⁰⁹ In order to establish a claim based on intrusion of privacy, a plaintiff must prove that the defendant intentionally intruded, physically or otherwise, upon the plaintiff's solitude, seclusion, or private affairs or concerns, and that the intrusion would be considered highly offensive to a reasonable person. See Smith v. Jack Eckerd Corp., 101 N.C.App. 566, 400 S.E.2d 99 (1991).

¹¹⁰ See Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

¹¹¹ See Renwick v. News and Observer, 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984).

¹¹² Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1989).

¹¹³ In the *Hall* case, the three judges of the court of appeals and two of the seven supreme court justices voted to recognize a claim for invasion of privacy based on unreasonable public disclosure of public facts. See Hall v. Post, 85 N.C.App. 610, 355 S.E.2d 819 (1987); 323 N.C. 259, 270, 372 S.E.2d 711, 717 (1989) (JJ. Frye and Meyer, concurring). Unlike the court of appeals, however, Justices Frye and Meyer would have held that the newspaper articles regarding the plaintiff's adoption did *not* violate her right to privacy because, even if the public disclosure of private facts regarding the plaintiff's adoption would have been highly offensive to a reasonable person, the public

disclosure of this information was of legitimate concern to the public rather than a morbid and sensational prying into private lives for its own sake.

¹¹⁴ The Supreme Court's decision in *Hall* would not affect an individual's right to sue the state or a county if a state or county agency or employee violated the individual's *constitutional* right to informational privacy by publicly disclosing personal information. See note 19.

¹¹⁵ See *Hall v. Post*, 323 N.C. 259, 268, 372 S.E.2d 711, 716 (1989). In order to establish a claim for intentional infliction of emotional distress a plaintiff must prove that the defendant engaged in "extreme and outrageous" conduct that was intended to cause severe emotional distress and, in fact, resulted in the plaintiff's severe emotional distress. The unreasonable public disclosure of personal information also might be the basis for a claim of negligent infliction of emotional distress. In order to establish a claim for negligent infliction of emotional distress, a plaintiff must prove that the defendant engaged in negligent conduct, that it was reasonably foreseeable that the defendant's negligence would result in the plaintiff's severe emotional distress, and that the plaintiff suffered severe emotional distress as a result of the defendant's negligence. See *Johnson v. Ruark Obstetrics & Gynecology Assoc.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

¹¹⁶ *Woodruff v. Miller*, 64 N.C.App. 364, 307 S.E.2d 176 (1983).

¹¹⁷ See *Williams v. City of Minneola*, 575 So.2d 683 (Fla.Dist.Ct.App. 1991) (city police department was held liable for intentional infliction of emotional distress based on police officers' disclosure of videotape and photographs of autopsy that were not required to be publicly disclosed under the state's public records law).

¹¹⁸ Although it is true that a party to a contract may have little, if any, "real" choice in some situations with respect to whether to accept a particular contractual provision or whether to enter into a contract, contracts are, by definition, legal agreements that are entered into *voluntarily* by two or more parties, and one may always legally and theoretically, if not practically, refuse to enter into a contract or accept any particular contractual provision.

¹¹⁹ 45 C.F.R. 164.502(e), 164.504(e).

¹²⁰ 45 C.F.R. 164.504(e)(2).

¹²¹ 64 Fed.Reg. 59918, 59948, 60055 (Nov. 3, 1999).

¹²² 65 Fed.Reg. 82506 (Dec. 28, 2000).

¹²³ See 65 Fed.Reg. 82506 (Dec. 28, 2000). See *Holshouser v. Shaner Hotel Group Properties*, 134 N.C.App. 391, 518 S.E.2d 17 (1999) (contract must have been executed with the intent of parties to provide some direct, rather than incidental, benefit by creating legally enforceable rights on the part of a nonparty who seeks to enforce the contract as a third-party beneficiary).

¹²⁴ 10 N.C. Admin. Code 24B.0602.

¹²⁵ 10 N.C. Admin. Code 24B.0605.

¹²⁶ Donald T. Dickson, *Confidentiality and Privacy in Social Work* (New York: The Free Press, 1998), 70.

¹²⁷ The National Association of Social Workers (NASW) Code of Ethics is binding only on NASW members. While NASW is the largest national organization of professional social workers and includes social workers who practice in a variety of settings (including state and county social services agencies, community mental health centers, private clinical practice, schools, and hospitals), not all professional social workers are members of NASW—and most employees of state and county social services agencies are not NASW members or eligible for membership in NASW. Nonetheless, the ethical standards of professional social workers with respect to confidentiality clearly influence the day-to-day practices of state and county social services agencies with respect to the confidentiality and almost certainly have influenced the enactment, scope, and interpretation of federal and state laws governing the acquisition, use, protection, and disclosure of information by social services agencies.

¹²⁸ Wilson, *Confidentiality in Social Work*, 215, 233.

¹²⁹ The NASW Code of Ethics is accessible on-line at: <http://www.naswdc.org/code.htm>.

¹³⁰ Dickson, *Confidentiality and Privacy in Social Work*, 70–71. Violation of professional ethical standards, however, may be penalized by the professional organization and may result in expulsion from the profession.

¹³¹ See *Jones v. Asheville Radiological Group, PA*, 134 N.C.App. 528, 518 S.E.2d 528 (1999), reversed on other grounds 351 N.C. 348, 524 S.E.2d 804 (2000).

¹³² Mark I Soler et al., *Glass Walls: Confidentiality Provisions and Interagency Collaborations* (San Francisco: Youth Law Center, 1993), 14; Mark I. Soler and Clark M. Peters, *Who Should Know What? Confidentiality and Information Sharing in Service Integration* (New York: National Center for Service Integration, 1993), 10.

¹³³ Soler, *Glass Walls*, 14.

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