

A Quick Guide to State Laws On Sensitive Health Information

Sharing sensitive information between health and justice systems requires an understanding of state law, which often differs from its federal counterparts, HIPAA and 42 CFR, Part 2. You will need to look to your state statutes and court decisions in your jurisdiction to understand when disclosure of health information requires individual consent, and how the law shields such information from being used in ways that could negatively affect the individual patient. While state law is often more stringent than federal provisions, neither state nor federal law should be perceived as insurmountable barriers that forbid interagency collaboration and coordination of services.

The state laws aim to uphold the same core values as federal legislation, such as preventing discrimination and increasing access to care. State laws also strive to strike a balance between the need to share information for the public good with a respect for the privacy of information on individuals.

This brief guide provides an overview of three types of laws at the state level that govern sensitive health information. These are the laws that you will need to understand when setting up an information sharing initiative involving health and criminal justice agencies. This list is by no means exhaustive. Because laws differ from state to state, it is essential that you consult your own state's law.

Mental Health Records

State laws protect the privacy of information related to mental health in various ways:

- > **State statutes:** Every state has legislation governing disclosure of health records.
 - > **General mental health privacy statutes:** Most states have general mental health privacy legislation that governs all mental health records. These statutes apply to all providers and most contain so called “treatment exceptions” similar to HIPAA, which allow different providers to share certain information with one another in order to deliver and coordinate care.
 - > **Laws governing specific providers:** Many state laws have explicit consent requirements that apply to specific types of mental health providers. For example, some states, including Colorado, Massachusetts, and New Mexico, require patient consent before any mental health information collected by a psychologist or psychotherapist can be shared. Such laws are stricter than HIPAA, because they do not have a treatment exception, which means patient consent is required before a mental health provider can share information for purposes of coordinating care.

- > **Laws governing involuntary commitment records:** State laws protect the privacy of individuals who are involuntarily committed to psychiatric treatment. However, these laws often permit limited sharing of information necessary to facilitate civil involuntary inpatient or outpatient commitment process.
- > **State constitutions:** Though the bulk of law governing privacy is determined by statute, a few state courts recognize a right to privacy of medical information under their state's Constitution. For example, Georgia recognizes an implied right to privacy of medical records under its State Constitution. *King v. State*, 535 S.E.2d 492, 494-95 (Ga. 2000).

Substance Use Records

Most states have legislation and regulations governing substance use records that impose confidentiality requirements on patient identity and treatment records. Nearly all state laws mirror or explicitly adopt the requirements found in 42 CFR, Part 2. Keep in mind that no state law may authorize or compel a disclosure that is prohibited by 42 CFR, Part 2.

- > **Consent:** 42 CFR, Part 2 requires consent prior to sharing information that might identify an individual as someone diagnosed or seeking treatment for a substance use condition except in a limited set of circumstances (e.g. medical emergencies).
- > **Confidentiality:** 42 CFR, Part 2 also protects confidentiality of substance use treatment information as a safeguard against potentially deleterious risks of disclosure and to encourage individuals to seek treatment without fear of negative consequences. For example, the federal law prohibits the use of confidential treatment records, without an individual's consent, to prosecute people in a criminal court.
- > **State law may cover additional treatment facilities not covered by federal rules:** 42 CFR, Part 2 only applies to "federally assisted" programs. However, state laws often extend consent requirements and confidentiality protections to additional facilities that do not meet the definition of "federally assisted" such as some private treatment programs. For example, Iowa's administrative code provides that, "even if a program is not federally funded [it must comply] with the federal confidentiality regulations." [Iowa Admin. Code r. 641-155.21\(10\) \(f\)](#)
- > **State law applies when it is stricter than Part 2:** Some state laws impose more stringent consent requirements than those laid out in 42 CFR, Part 2. In these instances, state law governs.

HIV/AIDS

- > The majority of states have statutes or regulations that specifically regulate the disclosure of information related to human immunodeficiency virus (HIV) or to information related to communicable diseases. It is important to understand this law as many people in contact with the criminal justice system who have a substance use or mental health condition also have a communicable disease.

Treatment Exceptions

- > Most of the time consent is required to permit sharing of sensitive health information. However, treatment exceptions allow health providers to share patient information in order to deliver and coordinate care and services. Treatment exceptions are important because they allow providers to enhance continuity in care.
- > Most state laws governing the use of medical and mental health records (similar to HIPAA), have a provision that allows sharing of information for treatment purposes, although a few states do not have such an exception, and require consent (for example, See. [Fla. Stat. Ann § 394.4615](#) and [Wash. Rev. Code Ann. § 71.05.630](#)). Again, where your state law is stricter, it governs.
- > You should become familiar with the scope of your state's treatment exception. Look to see how courts in your jurisdiction have interpreted it in different contexts. Some statutes explicitly define the entities and professionals that are permitted to share information under their statute's treatment exceptions, while others are vaguer. For example, some states broadly state that mental health records may be shared among entities that provide health, mental health, social and welfare services, involved in caring for, treating, or rehabilitating a patient. You will need to consult with a lawyer with experience in the interpretation of state statutes to determine whether your information sharing plans meet with your state's treatment exceptions.

Sharing information with Correctional Facilities

- > Similar to HIPAA's "lawful custody" exception, state law may permit community health providers to share specific types of clinical information with a correctional facility or a corrections officer who is responsible for the supervision of a person who is receiving inpatient or outpatient evaluation or treatment.
 - > For example, Washington law allows health providers and criminal justice agencies to share patient information in ways that foster continuity of care as people cycle through community and correctional treatment settings. The law limits the type of information they can share and who is allowed access to it. The law permits: (1) clinical reports produced by community treatment providers that are necessary to monitor progress in a supervision plan to be shared with justice officials; (2) The discharge summary, including a record or summary of all somatic treatments, at the termination of any treatment provided as part of the supervision plan; and (3) Any information necessary to establish or implement changes in the person's treatment plan or the level or kind of supervision as determined by resource management services. In cases involving a person transferred back to a correctional facility, disclosure shall be made to clinical staff only. [RCW § 71.05.630 \(2\)\(j\)](#)

Additional Resources

Pritts, Joy, Lewis, Stephanie, Jacobson, Robin, Lucia, Kevin, and Kayne, Kyle. *Privacy and Security Solutions for Interoperable Health Information Exchange: Report on State Law Requirements for Patient Permission to Disclose Health Information* Washington, D.C.: Healthy Policy Institute and O'Neill Institute for National and Global Health Law (2009). [Link](#).

The Center on Medical Record Rights and Privacy, the Health Policy Institute at Georgetown University. [Link](#).

Pritts, Joy, Choy, Angela, Emmart, Leigh, and Husted, Joanne. *The State of Health Privacy: Volume I and Volume II*. Washington, D.C.: The Center on Medical Record Rights and Privacy, the Health Policy Institute at Georgetown University. [Vol. 1 Link](#). [Vol. 2 Link](#).