

Responding to Subpoenas for Health Information: Guidance for Local Health Departments

I. Background: Subpoenas for Confidential Medical Information

A subpoena is a form of court order that directs the person named in the subpoena to appear at a designated time and place to testify, to produce documents, or both. Subpoenas require a response; however, they do not necessarily require the health department to disclose confidential medical information. The information may be privileged information that, under NC state law, should not be disclosed without either the patient's permission or a court order. Information that is not privileged is likely to be "protected health information" under HIPAA, which should only be disclosed in accordance with the HIPAA privacy rule.

II. Relevant Laws

A. State Laws

1. Physician-patient privilege (G.S. 8-53): Information that a physician (or a person acting under the direction of a physician) acquires in the course of caring for a patient is privileged under NC state law. This means that the health care provider is not required to testify or provide the information in court proceedings, unless the patient authorizes the provider to do so or the judge orders the provider to do so. The judge may order the provider to disclose the information only after finding that the disclosure is necessary to a proper administration of justice.
2. Health department records (G.S. 130A-12): Local health department records that contain privileged medical information are confidential and not public records.
3. Other privileges (see G.S. 8-53.2 through 8-53.12): The physician-patient privilege is not the only privilege that may be relevant to information acquired by health departments. There are other statutes in North Carolina that create privileges for psychologists, marital-family therapists, clinical social workers, professional counselors, and others.

B. HIPAA Privacy Rule

1. Protected health information (45 C.F.R. §§ 164.501, 164.502(a)): The HIPAA privacy rule prohibits covered entities from disclosing "protected health information" (PHI) except as permitted or required by the privacy rule. Protected health information is defined as information held or disclosed by the covered entity in any form (electronic, paper records, oral

communications) that identifies an individual and relates to: (i) the individual's past, present, or future physical or mental health or condition; (ii) the provision of health care to the individual; or (iii) the past, present, or future payment for the provision of health care to the individual.

2. Disclosing PHI in response to a subpoena (45 C.F.R. § 164.512(e)): The privacy rule allows for the disclosure of PHI in response to a subpoena in the following circumstances:
 - a. The information may be disclosed if the individual who is the subject of the information properly authorizes the disclosure.
 - b. The information may be disclosed without the individual's authorization if:
 - i. The covered entity receives satisfactory assurance from the party requesting the PHI that it has made reasonable efforts to give notice of the request to the individual who is the subject of the PHI; or
 - ii. The covered entity receives satisfactory assurance from the party requesting the PHI that it has made reasonable efforts to obtain a protective order.

The rule contains detailed criteria for determining when the party has provided satisfactory assurance and what constitutes a qualified protective order. A covered entity should consult the rule and an attorney before disclosing PHI in response to a subpoena.

III. When is Information Privileged and When is it PHI?

It is not possible to give a generic answer to this question. Whether information is privileged depends upon who acquired the information and under what circumstances. However, it is likely that much of the information acquired by health department employees and contained in health department medical records is privileged.

Individually identifiable health information acquired or maintained by the HIPAA-covered components of the health department is PHI if it meets the definition of PHI, above. *Information does not have to be privileged to be PHI.* Information may be both privileged and PHI, or it may be just PHI.

IV. Responding to Subpoenas for Patient Health Information

- A. There are three basic ways to respond to a subpoena:
 1. Formally challenge the subpoena, working through your attorney, who may file a motion to quash or modify the subpoena.
 2. Ask the party who issued the subpoena to excuse you from the requirements.

3. Comply with the subpoena—but this does not necessarily mean disclosing privileged or protected health information.

Although you are not required by any law to do so, it is always a good idea to notify a party who subpoenas medical information that you believe it is privileged and will not testify or produce the documents absent a court order. This allows the party to decide whether to seek the court order in advance, seek the individual's authorization for disclosure, excuse you from the subpoena, or take other action.

B. Complying with the subpoena

1. The subpoena should direct a particular person to appear at a particular place and time to testify, produce records, or both. The person named in the subpoena complies by appearing at the designated place and time. If the subpoena was for testimony, the person should be prepared to testify. If the subpoena was for documents, the person should have the documents and be prepared to produce them.
 - a. Alternative procedure if subpoena is for documents only: Some courts permit health departments to respond to a subpoena for medical records by submitting certified copies of the records to the clerk of court at any time before the date specified in the subpoena. The documents should be sealed in an envelope and accompanied by a note indicating: (1) the case for which the documents have been requested (e.g., Smith v. Jones), and (2) that the documents are believed to be privileged and cannot be disclosed without a court order. The documents can be delivered in person to the clerk's office or sent by registered mail. If you deliver them in person, be sure to obtain a receipt for the records. If you follow this procedure, it is wise to notify the attorney who subpoenaed the records that they contain privileged information and have been submitted to the clerk of court under seal.
2. If the person is asked to testify to privileged information, or to produce documents containing privileged information, the person may reply that the information requested is privileged and may ask for a judge to determine whether he or she must provide the testimony or produce the documents.
3. If a subpoena requests information that is *not* subject to a privilege but that *is* PHI, the covered entity must either notify the individual who is the subject of the PHI or obtain the satisfactory assurances described above before disclosing the information. Consult the rule and an attorney. Do not follow the HIPAA procedures unless you are *certain* the information is not privileged. If you are uncertain, treat the information as if it is privileged.