

Medical Confidentiality Law 101: Introduction to Key Concepts for N.C. Local Public Health Agencies

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Medical confidentiality law is complex. There are multiple sources of law and they work together in ways that can be counterintuitive and administratively cumbersome. This document introduces the basics of confidentiality law and addresses some issues that arise regularly in N.C. local public health agencies.¹ It covers only a small fraction of the issues that can and do arise. Please consult an attorney if you need advice for a specific situation. Additional information about some topics is posted on the www.ncphlaw.unc.edu website. Click on Legal Information by Topic, then HIPAA & Medical Confidentiality.

1. Which laws require NC local public health agencies (LPHAs) to keep patient information confidential?

There are several laws that require LPHAs to keep patient information confidential. The major laws protecting health care information are:

- HIPAA Privacy Rule (45 CFR Parts 160 and 164): This is a federal law that governs when covered entities—a term that includes most health care providers, including LPHAs—may use and disclose protected health information. Each LPHA should have a copy of the complete text of the HIPAA regulations. It is available on-line at <http://www.hhs.gov/ocr/privacy/hipaa/administrative/combined/index.html>.
- Public health patient confidentiality law (GS 130A-12): This is a state law that applies only to North Carolina LPHAs and the NC Department of Health and Human Services (DHHS). Under this law, records in the possession of LPHAs or DHHS are confidential and not subject to NC's public records law if they contain any of the following types of information:
 - Information that is privileged under state law,
 - Information that is protected under HIPAA, or
 - Information that is collected under the authority of the child lead screening and investigation program.

This law also addresses some instances in which patient information may be disclosed.

- Privilege laws (primarily GS 8-53 [physician-patient privilege] and GS 8-53.13 [nurse-patient privilege]): These are state laws. Under GS 8-53, communications between patients and their physicians (and others working under the physician's direction) are privileged. Under GS 8-53.13, communications between patients and nurses are privileged. The historic purpose of these kinds of privileges is to prevent information

¹ There are several different types of local public health agencies in North Carolina—county health departments, district (regional) health departments, public health authorities, and consolidated human services agencies that include public health. I am using the term “local public health agency” to refer to all of them.

from being introduced into court proceedings against the patient's will. In North Carolina, privileged patient information usually may be introduced into court proceedings in only two circumstances: (1) when the patient gives permission for disclosure of the information, or (2) when the judge orders disclosure of information after finding that disclosure is necessary to a proper administration of justice.

Two laws of particular importance to LPHAs protect specific clients or categories of information:

- Title X family planning client confidentiality (42 CFR 59.11): This is a federal law that requires providers to keep information about Title X clients confidential and disclose it only with the client's documented consent, unless the disclosure is necessary to provide services to the client or is required by law.
- Communicable disease confidentiality (GS 130A-143): This is a state law that applies to information or records that identify a person who has or may have a reportable communicable disease or condition. Such information may be disclosed only when the disclosure fits into one of eleven circumstances specified in the statute.

Some LPHAs may be subject to other confidentiality laws as well, depending upon the types of health care providers and/or the types of services they offer. For example:

- School nurses who work with education records must protect them in accordance with the federal Family Educational Rights and Privacy Act (FERPA).
- Some components or employees of some LPHAs may be subject to state mental health confidentiality laws or federal substance abuse confidentiality regulations.

This list is not exhaustive. HIPAA requires each covered entity to have a privacy official. The person who acts as the privacy official for the LPHA should be familiar with the confidentiality laws that apply to the different activities of the LPHA.

2. Which information is confidential under these laws?

A LPHA's starting assumptions should always be:

- Any individually identifiable information about a patient is confidential; and
- Any individually identifiable *health* information the LHD has on a person who is not a patient might be confidential. For example, information in an environmental health report that identifies a person with a communicable disease is confidential, even if the person is not a LPHA patient and even though the environmental health report is not a patient record.

There are exceptions to these rules of thumb, but it is best to start with the assumption that individually identifiable health information is probably confidential and should not be disclosed except as allowed by HIPAA and other confidentiality laws. Consult the LPHA's privacy official or an attorney if you think you have a situation that constitutes an exception.

Under the HIPAA Privacy Rule, *protected health information* (PHI) is confidential. PHI is defined as information or records in any form (including paper records, electronic records, and oral communications) that:

- Identify an individual (or can be used to identify an individual), and
- Relate to any of the following:
 - The physical or mental health status or condition of the individual,
 - The provision of health care to the individual, or
 - Payment for the provision of health care to the individual.

Look carefully at the second and third bullet points, and you will see that under the Privacy Rule, it is not just medical status or treatment information that is confidential. The mere fact that a person is a patient is confidential (because it relates to the provision of health care), as is billing information (because it relates to payment for the provision of health care).

GS 130A-12, the main state law that addresses confidentiality of LPHA patient records, is consistent with HIPAA. It provides that LPHA records that contain information that is privileged under state law or protected under HIPAA are confidential.

3. When may LPHAs disclose confidential health information?

With the patient's (or personal representative's) permission: A LPHA may disclose information if the patient or the patient's personal representative² gives permission for the disclosure. *The permission must be in the proper form.* In most cases, the permission must be in writing on an authorization form that complies with the HIPAA Privacy Rule.

The first thing to ask when there is a question about whether a disclosure may be made is, "Should I seek the patient's permission to disclose this information?" Patient permission is often the simplest way to resolve a disclosure question. Of course, it doesn't always make sense to seek permission. For example, if a DSS employee is asking for information about a child who is the subject of a child protective services report, the LPHA is required by law to disclose the information. It does not need permission for the disclosure and it probably shouldn't seek it.

Without the patient's (or personal representative's) permission under certain circumstances that are specified in law: There are several circumstances in which a LPHA may disclose patient information without permission. I will not attempt to address all of them in this outline. The following list describes three circumstances that arise very frequently in North Carolina LPHAs.

- *Treatment, payment, and health care operations:* Since July 2004, North Carolina LPHAs have been permitted to disclose information without the patient's permission when the purpose of the disclosure is to provide for the patient's treatment, to obtain payment for treatment, or to carry out health care operations. The terms "treatment," "payment," and "health care operations" are defined in the HIPAA privacy rule. Those definitions and additional details about these types of disclosures are available in a handout on Treatment, Payment, and Health Care Operations that is available on the HIPAA & Medical Confidentiality page of the www.ncphlaw.unc.edu website.

² A personal representative is a person who is authorized by law to make health care decisions for another individual. 45 CFR 164.502(g). For more information about personal representatives and NC law, see the handout on Personal Representatives, available on the HIPAA & Medical Confidentiality page of the www.ncphlaw.unc.edu website (click on Legal Information by Topic, then HIPAA & Medical Confidentiality).

- **Required by law:** LPHAs are permitted to disclose information without a patient's permission when the disclosure is required by another law, such as a state law. For example, in NC, a LPHA must disclose PHI in the following circumstances, and it does not need the patient's permission to do so:
 - To make a report to child protective services or adult protective services.
 - To make communicable disease reports to the state or another LPHA.
 - To a medical examiner who requests it.

This is not a complete list. For more information, see the handout "Disclosures of Protected Health Information Required by North Carolina Law," on the HIPAA & Medical Confidentiality page of the www.ncphlaw.unc.edu website.

- **Court orders and subpoenas:** LHDs may disclose information without a patient's permission pursuant to a proper court order. A subpoena is a form of court order, but in North Carolina, a subpoena alone is not sufficient to permit a LPHA to disclose patient information or provide access to or copies of patient records. **LPHAs should take great care with subpoenas.** It is essential for a LPHA to have a carefully written policy on responding to subpoenas, and it is a good idea for a LPHA that has received a subpoena to consult with an attorney as well.³

There are several other circumstances in which a disclosure of information may be made without the patient's permission, provided certain criteria are met. Consult the LPHA's privacy official or an attorney if you need to know whether a LPHA may disclose information without patient permission in a particular circumstance.

4. What must the LPHA do before disclosing patient information?

Before disclosing information to a person or entity who requests it, the HIPAA Privacy Rule requires LPHAs to verify two things: (1) the requesting person's identity, and (2) the requesting person's authority to receive the information. For more information about the verification requirements, see the handout "Verifying Identity and Authority" on the HIPAA & Medical Confidentiality page of the www.ncphlaw.unc.edu website.

5. What must the LPHA do after disclosing patient information?

The LHD must document the disclosure of information. Also, under the HIPAA Privacy Rule, individuals have the right to request an accounting of disclosures of their protected health information. Some, but not all, disclosures of information must be included in any such accounting. For more information about accounting for disclosures, see the handout "Accounting for Disclosures of Protected Health Information" on the HIPAA & Medical Confidentiality page of the www.ncphlaw.unc.edu website.

³ An excellent resource for anyone who is responsible for a LPHA's subpoena policy is *Responding to Subpoenas for Health Department Records*, by John Rubin and Aimee Wall (SOG Health Law Bulletin No. 82, September 2005). A free PDF download of the bulletin is available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/hlb82.pdf>.