

The SouthEast Alaska Regional Health Consortium (“SEARHC”) is strictly limited by federal law in how it can release patient health information for use in judicial proceedings and pursuant to certain subpoenas. **This memorandum explains the procedure for obtaining patient health records that include substance use disorder (SUD) records created by SEARHC’s 42 C.F.R. Part 2 Programs. If you are not seeking SUD records, please refer to SEARHC’s memorandum regarding non-SUD records.**

Generally, patient records may be disclosed to third parties with the consent of the patient (or the patient’s authorized representative) or by following the procedures outlined below. Without the patient’s written consent, the laws and regulations discussed below have requirements that must all be met before SEARHC may release patient SUD information. These restrictions apply to document production and to testimony in court, depositions, or before grand juries.

SUD records held by SEARHC are also subject to the requirements of other federal laws, including the Federal Privacy Act and the HIPAA Privacy Rule. However, 42 C.F.R. Part 2’s protections are generally stricter in this context, and so this memorandum focuses on those requirements.

I. 42 C.F.R. Part 2 Federal Confidentiality Regulations Governing Substance Use Disorder Records.

Certain records related to substance use disorder (“SUD”) treatment, diagnosis, and referral are protected by the federal regulations at 42 C.F.R. Part 2 (“Part 2”). Part 2 prohibits using SUD records to initiate or substantiate criminal charges against a patient or to conduct any criminal investigation of a patient, or to use in any civil, criminal, administrative, or legislative proceedings against a patient without either (1) the patient’s consent or (2) a valid court order making specific findings.ⁱ This prohibition applies not only to health care providers such as SEARHC, but it also applies to any person who receives the records from SEARHC. Violations of Part 2 are subject to both criminal and civil penalties.ⁱⁱ

Court orders in non-criminal proceedings. In a non-criminal proceeding or investigation, any person with a legal interest in the disclosure of SUD records may ask a court for an order authorizing the release of the records.ⁱⁱⁱ This application may be filed separately or as part of a pending civil action. The application must use a pseudonym for the patient, unless the patient is the applicant, the patient has given written consent for the order to be filed, or the proceeding is confidential (such as Child In Need of Aid (CINA) cases).

Both the patient and SEARHC must be given notice of the application for the records and must have an opportunity to respond to the application, either in a written response or an in-person appearance. Depending on the applicable court rules, at least ten days’ notice is typically needed.^{iv}

A court ordering the release of SUD records must make certain specific findings.^v If the court order does not make these findings, then SEARHC cannot release the records. The court must find that:

1. Other ways of obtaining the information are not available or would not be effective, and
2. The public interest and need for the use or disclosure of the information outweighs the potential injury to the patient, the physician-patient relationship, and the treatment services.

The order must also do the following:

1. “Limit use or disclosure to only those parts of the patient’s record, or testimony relating those parts of the patient’s record, which are essential to fulfill the objective of the order.”
2. “Limit use or disclosure to those persons whose need for information is the basis for the order.”
3. “Include such other measures as are necessary to limit use or disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which use or disclosure of a patient’s record, or testimony relating the contents of the record, has been ordered.”

Court orders in criminal proceedings. Specific rules apply to applications for SUD records for criminal investigations or prosecutions of patients.^{vi} SEARHC must receive adequate notice of the application for the records, an opportunity to appear and be heard for the limited purpose of providing evidence about the propriety of releasing the records, *and* an opportunity to be represented by counsel. Again, at least ten days’ notice is typically necessary.

The court order must limit the records that may be disclosed and to whom they may be disclosed AND must also make ALL the following specific findings:

1. “The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.”
2. “There is a reasonable likelihood that the records or testimony will disclose information of substantial value in the investigation or prosecution.”
3. “Other ways of obtaining the information are not available or would not be effective.”
4. “The potential injury to the patient, to the physician-patient relationship and to the ability of the part 2 program to provide services to other patients is outweighed by the public interest and the need for the disclosure.”
5. “If the applicant is a law enforcement agency or official, that: (i) The person holding the records has been afforded the opportunity to be represented by independent counsel; and (ii) Any person holding the records which is an entity within federal, state, or local government has in fact been represented by counsel independent of the applicant.”

Confidential communications. In both criminal and non-criminal proceedings, a court order may authorize the release of “confidential communications” made by the patient to the SUD provider in the course of diagnosis, treatment, or referral for treatment *only* when one of the following conditions are met:

1. “The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;
2. The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or
3. The disclosure is in connection with a civil, criminal, administrative, or legislative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.”^{vii}

Requirement for both a court order *and* a subpoena. Part Two requires **BOTH** a court order authorizing disclosure **AND** a subpoena or other legal document *requiring* the disclosure before SEARHC can be required to release the SUD records.^{viii}

II. Federal HIPAA Privacy Rule and Reproductive Health Records.

As a health care provider, SEARHC is a “covered entity” that is also required to comply with HIPAA, or the Health Insurance Portability and Accountability Act of 1996.^{ix} HIPAA limits the use and disclosure of Protected Health Information, or “PHI,” which includes individual patients’ health records. Under HIPAA, covered entities, which include health care providers, are prohibited from using or disclosing patient records unless they have the patient’s consent or the use or disclosure is specifically authorized by law.

HIPAA has additional protections for PHI that is related to reproductive health care.^x When SEARHC receives a request (including a court order) seeking PHI that is potentially related to reproductive health care and the request is for law enforcement purposes or for use in a judicial proceeding (among other purposes), the requestor *must* provide an attestation stating that they will not use the records to investigate or prosecute any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, where the health care provided was legal. The requestor must use SEARHC’s attestation form for this purpose.

III. Conclusion.

As noted above, SEARHC is **required** to follow multiple federal laws and regulations before releasing patient health information, including SUD records. Please contact SEARHC’s Legal Department at 3100 Channel Drive, Suite 300, Juneau, AK 99801, by calling 907.463.4054, or by email at courtdocs@searhc.org if you have any questions about these requirements.

-
- i 42 C.F.R. § 2.12(d)(1). Further, patient consent for the use and disclosure of records in a civil, criminal, administrative, or legislative investigation or proceeding cannot be combined with a consent to use or disclose the records for any other purpose. 42 C.F.R. § 2.31(d).
- ii 42 C.F.R. § 2.3.
- iii 42 C.F.R. § 2.64.
- iv *See, e.g.*, Alaska R. Civ. P. 77(c)(2) (“The time for filing opposition to the motion or other application shall be 10 days from the date of service of the motion or application.”).
- v 42 C.F.R. § 2.64(d), (e).
- vi 42 C.F.R. § 2.65.
- vii 42 C.F.R. § 2.63(a).
- viii 42 C.F.R. § 2.61(a) (“An order of a court of competent jurisdiction entered under this subpart is a unique kind of court order. Its only purpose is to authorize a use or disclosure of patient information which would otherwise be prohibited by 42 USC 290dd-2 and the regulations in this part. Such an order does not compel use or disclosure. A subpoena or a similar legal mandate must be issued in order to compel disclosure. This mandate may be entered at the same time as and accompany an authorizing court order entered under the regulations in this part.”).
- ix 45 C.F.R. Parts 160 and 164, Subparts A and E.
- x 45 C.F.R. § 164.509. HIPAA defines reproductive health care very broadly as: “health care . . . that affects the health of an individual in all matters relating to the reproductive system and to its functions and processes.” 45 C.F.R. § 160.103. Examples include: “contraception, including emergency contraception; preconception screening and counseling; management of pregnancy and pregnancy-related conditions, including pregnancy screening, prenatal care, miscarriage management, treatment for preeclampsia, hypertension during pregnancy, gestational diabetes, molar or ectopic pregnancy, and pregnancy termination; fertility and infertility diagnosis and treatment, including assisted reproductive technology and its components (*e.g.*, in vitro fertilization (IVF)); diagnosis and treatment of conditions that affect the reproductive system (*e.g.*, perimenopause, menopause, endometriosis, adenomyosis); and other types of care, services, and supplies used for the diagnosis and treatment of conditions related to the reproductive system (*e.g.*, mammography, pregnancy-related nutrition services, postpartum care products).” HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32,976, 33,006 (Apr. 26, 2024) (codified at 45 C.F.R. Parts 160 and 164).