

# POLICY & PROCEDURE



<b>TITLE: SUBPOENA of Medical Records</b>				
<b>Scope/Purpose:</b> To ensure proper disclosure and release of Protected Health Information (PHI)				
<b>Division/Department:</b> All Health Point Clinics			<b>Policy/Procedure #:</b>	
<b>Original Date:</b> 12/15/12			<input type="checkbox"/> <b>New</b> <input checked="" type="checkbox"/> <b>Replacement for:</b> Same	
<b>Date Reviewed:</b>	<b>Date Revised:</b>	<b>Implementation:</b>	<b>CPIC Approved:</b>	<b>Board Approved:</b>
05/14/14	05/26/14	07/11/14	07/11/14	
<b>Responsible Party: Director Of Practice Management</b>				

## DEFINITIONS:

### **Protected Health Information (PHI)**

All individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. Individually identifiable health information is information, including demographic data that relates to:

- the individual's past, present or future physical or mental health or condition, the provision of health care to the individual, or the past, present, or future payment for the provision of health care to the individual, and
- that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number).

### **Medical records**

Any records pertaining to the identity, diagnosis, evaluation or treatment of a patient by a physician that are created or maintained by a physician

### **Patient**

Any person who consults or is seen by a physician to receive medical care

### **Minor**

A person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes (Texas Family Code Annotated Subsection 11.01, 12.04, 14.02, 14.04, 35.01-35.09).

### **Legally authorized representative**

Texas law identifies the following individuals as meeting the requirement for authorizing disclosure of health care information about a patient:

- A legal guardian of a patient who has been judged incompetent by a court to manage his or her personal affairs

- An agent of the patient under a durable power of attorney for health care
- An attorney or guardian ad litem appointed by a court for the patient
- A personal representative or statutory beneficiary of a deceased patient
- An attorney retained by the patient or the patient's legally authorized representative.

**Deposition**

Witness's sworn testimony outside of court. It is used to gather information as part of the discovery process.

**Affiant**

Any person having the intellectual capacity to take an oath and affirmation and who has knowledge of the facts that are in dispute

**Affidavit**

A written statement of facts voluntarily made by an affiant under oath or affirmation administered by a person authorized to do so by law.

**Witness**

Someone who has, claims to have, or is thought by someone with authority to compel testimony to have knowledge relevant to an event or matter of interest.

**Attorney ad Litem**

An attorney appointed for the patient, as authorized by the Texas Mental Health Code, the Mentally Retarded Persons Act of 1977, the Probate Code, the Family Code and the Health and Safety Code provisions regarding court-ordered treatment for alcohol and substance abuse. Evidence of appointment should be secured prior to release of PHI.

**Letters Testamentary or Letters of Administration**

Court-issued papers reflecting an individual's appointment as legal representative on behalf of a deceased person.

**Statute of limitations**

A legislative act that limits the time when someone (plaintiff) may bring a lawsuit

**Subpoena**

A legal document, issued in the course of a lawsuit, which is used to compel attendance of a witness at a judicial proceeding or a deposition.

**Court order/court subpoena**

An official legal order that compels a witness to appear in court and to provide testimony or produce records in a particular case. The order must be signed by a judge. Failure to present or produce could result in contempt of court charges.

**Notary subpoena**

A valid subpoena prepared by a notary public, court reporting service, or medical record

copying service. Patient or legal representative authorization is required for release of information.

**Subpoena duces tecum**

A court document requiring a witness to produce in court or in a deposition a specified document in his control or possession.

**A Subpoena Instanter** – a law enforcement officer who serves a second subpoena

**POLICY:**

In order to be valid, a subpoena must be issued in the name of “The State of Texas” and include:

- The style of the suit and its cause number
- The court in which the suit is pending
- The date on which the subpoena was issued
- The person to whom the subpoena is directed
- The time, place and nature of the action required
- The party who issued the subpoena and the party’s attorney, if applicable
- Language which discusses contempt enforcement for non compliance with a subpoenas
- The signature of the person issuing the subpoena

Subpoenas are served by a sheriff or constable, the office of the District Attorney or a person who is not a party to the subpoena and is 18 years of age or older. A civil subpoena is only valid against persons who reside or are found within one hundred and fifty miles (150) from a county in which a suit is pending.

A Subpoena Instanter requires the immediate appearance of the witness before court.

A Subpoena Duces Tecum requires the witness (Custodian of records) to bring with him certain documents that are in his or her possession. In this type of subpoena, the witness may be placed on stand-by basis by contacting the courtroom where his or her appearance is required and asking to be called when needed at the moment.

**Physician-patient confidentiality privilege**

If the subpoena is accompanied by a consent form from the patient or patient’s representative, and authorizes the release of the requested information, then the requested documents should be provided to the requesting party. If the patient has not authorized the release of the requested records, the Center (on behalf of the physician) should claim the physician-patient confidentiality privilege on behalf of the patient. The privilege does not apply to a civil or administrative proceeding in the following situations:

**A. Exceptions to the physician-patient confidentiality in court or administrative proceeding**

- In a proceeding brought by a patient against a physician, including a malpractice proceeding, criminal proceeding, or license revocation proceeding in which the patient is a complaining witness and disclosure is relevant to a claim or defense of the physician
- If the patient or a person authorized to act on the patient's behalf submits a written consent to the release of confidential information
- In a proceeding to substantiate and collect on a claim for medical services provided to the patient
- In a civil action or administrative proceeding, if relevant, brought by the patient or a person on the patient's behalf, if the patient or person is attempting to recover monetary damages for a physical or mental condition including the patient's death
- In a disciplinary investigation or proceeding conducted under this subtitle, if the Board of Medical Examiners (BME) protects the identity of any patient whose billing or medical records are provided (unless consent or an exception exists)
- In a criminal investigation of a physician in which the BME is participating, or assisting in the investigation or proceeding by providing certain billing or medical records obtained from the physician, if the BME protects the identity of a patient whose billing or medical records are provided in the investigation or proceeding (unless consent or an exception exists)
- In an involuntary civil commitment proceeding, proceeding for court-ordered treatment, or probable cause hearing under Chapter 462, 574, or 593 of the Health and Safety Code
- If the patient's physical or mental condition is relevant to the execution of a will
- If the information is relevant to a proceeding for unauthorized release of confidential and privileged communications
- In a criminal prosecution in which the patient is a victim, witness, or defendant
- To satisfy a request for billing or medical records of a deceased or incompetent person
- To a court or a party to an action under a court order or court subpoena.

**B. Exceptions to the Physician-Patient confidentiality in other situations.**

In situations other than civil or administrative proceedings, disclosure of medical records without the patient's consent may be made by the physician to:

- A governmental agency, if the disclosure is required or authorized by law
- Medical or law enforcement personnel, if the physician determines that there is a probability of imminent physical injury to the patient, the physician, or another person, or immediate mental or emotional injury to the patient
- Qualified personnel for research or for a management audit, financial audit, or program evaluation, but the personnel may not directly or indirectly identify a patient in any report of the research, audit, or evaluation or otherwise disclose identity in any manner

- Those parts of the medical records reflecting specific services provided if necessary in the collection of fees for medical services provided by a physician, professional association, or other entity qualified to provide or arrange for medical services
- A person who has the consent of the patient
- A person, corporation, or governmental agency involved in the payment or collection of fees for medical services provided by a physician
- Another physician or other personnel acting under the direction of the physician who participate in the diagnosis, evaluation, or treatment of the patient
- An official legislative inquiry regarding state hospitals or state schools, if information or a record that identifies a patient or client is not released for any purpose, unless proper consent to the release is given by the patient, and only records created by the state hospital or school or its employees are included
- Health care personnel of a penal or other custodial institution in which the patient is detained if the disclosure is for the sole purpose of providing health care to the patient

The physician-patient confidentiality privilege does not apply in criminal proceedings if the party is a victim, or defendant. It is often unclear when a criminal proceeding has begun, so caution should be used when determining whether it is appropriate to provide medical records in a criminal case. Seek legal counsel or contact Texas Association of Community Health Centers (TACHC) if a subpoena is received in a criminal case.

If the Center does not receive sufficient information with the subpoena to be able to identify whether or not physician-patient confidentiality privilege applies, the Center should withhold the medical records until the center:

- Receives a consent form signed by the patient or patient representative
- Is ordered by the court to produce the requested documents
- Receives evidence from the issuing source that an exception to the privilege applies

If the Center is summoned by the court to appear with the requested documents, the Center should be prepared to provide the documents. The Center should consult with legal counsel or Texas Association of Community Health Centers (TACHC) before appearing in court.

### **C. HIPPA Compliance**

45 CFR 164.512 (e) (i)(ii) states that an entity may disclose protected health information if the entity receives assurances from the party seeking the information. The statement must indicate the following:

- That the requestor has made reasonable efforts to ensure that the party whose records are requested has been given sufficient notice of the request; or
- To secure a qualified protective order; or

- The entity may make the disclosure if the entity makes reasonable efforts to notify the individual or seek a qualified protective order. If the conditions have been met, a qualified protective order is not required.
- The assurances must state: (a) a reasonable effort has been made to notify the party whose records have been requested of the request; (b) the notice includes sufficient detail to permit the patient to object to the subpoena in court,(c) the time for the patient to object has passed and no objections were filed, or the court overruled the objections.
- The subpoena itself may satisfy the conditions if: (a) the patient is a party to the litigation; (b) a copy of the subpoena was served on the patient or the patient' attorney; and (c) the time for raising objections has elapsed and no objections were made, or the court overruled the objections.

## PROCEDURE:

### **RECEIPT OF A SUBPOENA**

The Executive Director (or his/her designee) must be immediately notified when a subpoena for health or billing records is served.

#### **A. Subpoena for General Health Records.**

1. If the subpoena is accompanied by a valid (HIPPA-compliant) signed consent form, or if it is clear that no physician-patient confidentiality privilege exists, and then the Center should
  - a. request that enough time be given to allow for copying of the medical records and/or travel to court, as indicated; and
  - b. obtain the exact date and time that the records need to be in court. The records related to a liability claim are required to be provided in ten (10) days.
2. If required, and with the Executive Director (or his/her designee) approval, take the original and a copy (see Preparation of a Record for Court) of the record to court. Generally, a certified copy of the record will suffice. If there are any questions, contact the Executive Director (or his/her designee) immediately.
3. The Subpoena will specify the medical record(s) needed by providing the client name and dates of services. Additional documents may be added to the subpoena, such as itemized bills.
  - a. The records must be accompanied by a Medical Record Transmittal Affidavit. The Privacy Officer or designee must provide a copy of billing documents, and testimony on billing matters can only be given by the Privacy Officer or designee from that department.
4. Failure to bring subpoenaed documents or to appear in court may result in a contempt of court ruling

**B. Special circumstances: Drug or alcohol abuse/chemical dependency treatment records and/or genetic information.**

1. The following health information is not subject to subpoena pursuant to federal and state laws:
  - a. drug or alcohol abuse/chemical dependency treatment records;
  - b. Mental Health records and psychiatric notes;
  - c. AIDS-related information and HIV test results; and/or
  - d. Genetic information
  
2. If records requested reveal treatment for drug or alcohol abuse, a “Motion to Quash Subpoena” or “Motion for Protective Order” must be filed unless a valid HIPPA-compliant consent is obtained from the client or court order (issued by a judge). (See 42 USC §290dd-2; 42 CFR §§2.1-2.67) Contact Center legal counsel before releasing these records.

**FEES**

1. Seek legal counsel in the event a Center staff member (employee or contractor) is to serve as a witness regarding the process or any fees and expenses for complying with the subpoena.
2. Under Texas law, the Center is only entitled to a fee of one dollar (\$1) for copying the medical record when responding to a subpoena (Tex. Civ. Prac. & Rem. Code Sec. 22.004). The Center may still bill the attorney requesting the medical record for copying fees at the amounts designated by the Texas Medical Board. However, there is no requirement that the attorney pay the bill, so the Center cannot refuse to produce the record for failure of the party to pay the copying fees.
3. A party who is subpoenaed to appear in court shall be paid ten (10.00) per day for each day the witness attends court. The witness is not entitled to reimbursement for travel expenses. The party summoning the witness shall pay the witness for one day at the time the subpoena is served.

**PREPARATION OF THE MEDICAL RECORD FOR COURT**

It is recommended the Center seek legal counsel concerning preparation of medical records and/or billing for court subpoena. Otherwise, as a general rule, the following procedure should be followed:

1. Notify the Executive Director (or his/her designee) and the attending physician/provider that the record has been subpoenaed.
2. Verify that the record is complete, including all appropriate signatures on respective reports.
3. Remove all correspondence and miscellaneous information not subject to the subpoena including:
  - Any medical records pertaining to encounters or documents not subpoenaed

- Information or records not created during the time frame of the request
  - Drug or alcohol abuse treatment, mental health treatment or genetic information
  - Confidential information about another patient or family member who has not consented to the release.
4. Number the pages in the lower left corner prior to photocopying. Note pages that have writing on the both sides and label pages #a and #b.
  5. Secure the original and copies in separate envelopes marked with the patient's name and the medical record number and marked "Original" or "Copy" and "Confidential".
  6. Prepare a receipt for the original record in case it has to be retained in court. Indicate on the receipt: "I, the undersigned, agree to act as trustee for the medical record produced in court (Identify Record) and promise to return the same to the \_\_\_\_\_ (Center's name) \_\_\_\_\_ upon completion of the trial."
  7. Obtain a signature of the Court Clerk or attorney on the receipt.
  8. If the copies of the medical records are acceptable to the court, return the original to the Center.
  9. Document in the *Disclosure of Information Log* that the medical record was taken to court and the date this occurred.
  10. File the subpoena and receipt in the medical record, if applicable.
  11. Secure the Medical record with the Executive Director (or his/her designee) until all legal proceedings and actions are completed.

**A. Production of voluminous records or objection to subpoena request**

1. If a subpoena is served which asks for records for which there would be a physician/patient privilege or some other privilege, it is best to consult an **attorney so that a response could be filed stating the specific objection to the subpoena request**. If there is no objection filed, the records must be produced. In some cases, it might be sufficient to get a written waiver from the requesting attorney that certain records do not have to be produced pursuant to the subpoena. The objection must be filed before the records are due to be produced.
2. In some situations, it might be necessary to object to a request as unreasonably burdensome. That objection should be based on the following factors:
  - quantity of materials subpoenaed;
  - the ease or burden of collecting and transporting the material;
  - the length of time before the deposition;
  - the availability of the information from the sources;
  - the relevance of the materials.

St. Luke's Episcopal Hospital v. Garcia, 928 SW2d 307, 310



3. As a general rule, requests going back five (5) years are usually going to be considered reasonable in time. For requests going back longer than five (5) years, the request might be reasonable in certain situations.
4. Once an objection is made, it is up to the requesting attorney to get the objection resolved or have the court rule on the request.
5. The Rules of Civil Procedure require that the parties try to resolve the objection among themselves before taking it to the court.
6. The primary concern of the court relating to whether a request for production or subpoena for records is reasonable is whether the requested information is RELEVANT to the litigation.

## **COURT REPORTERS**

Court reporters may obtain copies of medical records on behalf of the court subpoena or on behalf of an attorney by presentation of a subpoena and patient authorization. This is known as a deposition where the witness is examined outside of the courtroom. Follow the procedure outlined above for responding to a subpoena.

The court reporter may mail the typed deposition for signature subsequent to the deposition or may come on site. When the court reporter arrives:

1. Obtain the subpoena or client authorization and witness fee.
2. After being sworn in, answer all the questions as if you were in front of a judge since your testimony and the records may be introduced as evidence during the court proceedings.
3. The deponent ( person giving the deposition) must carefully review the copies of the records and all questions and answers given for factual accuracy prior to signing the deposition, as the staff member will be asked to sign his/her deposition testimony under penalty of perjury.

## **CONDUCT AS A WITNESS**

If a Center staff member is subpoenaed to testify as a witness, the person should take the following actions:

1. Be sure there is a medical authorization signed by the patient or the proceeding is one in which there is an exception to the physician/patient privilege. Check with the Center's attorney if it is not clear.
2. Review the patient's medical records which have been subpoenaed.
3. Be familiar with your education, credentials, training, and experience to qualify you to address a particular health issue.
4. Be professional while testifying.
5. Testify to facts and avoid speculation.

6. Do not assume anything.
7. Listen closely to the questions and be sure you understand the question that is asked.
8. Do not volunteer information. Just answer the question asked.
9. Say “I don’t know” or “I’m not sure” if you are not sure of the answer.
10. Do not give opinions unless you are an expert on the subject who is qualified to give an opinion.
11. Be courteous.

Be dignified, avoid flippancy, and use plain and simple language. Seek clarification until you understand the question. Do not elaborate on answers or volunteer any information not requested. Be direct and if you do not know the answer, simply state so. Only qualified witnesses may make or express clinical opinions.

During cross examination, be certain that you understand the question before answering. Be direct and honest and answer only the question being asked. Be direct. If you do not know the answer, simply state so. Avoid being irritated and defensive.

The following are questions that are customarily asked of a witness related to the authenticity of the medical record:

1. “State your name and title.”
2. “Are you the Custodian of Medical Records?”
3. “Are the said records a true and exact copy of the original medical record?”
4. “Are the entries in the medical record made in the regular course of business?”
5. There may be other questions pertaining to the timeliness and completeness of the record.

#### RELATED POLICY:

##### RELEASE OF MEDICAL RECORDS

#### REFERENCES:

See also

U.S. Department of Health and Human Services. HIPAA web site, [www.hhs.gov/ocr/hipaa](http://www.hhs.gov/ocr/hipaa).

Texas Medical Association.

Texas Family Code.

Texas Medical Board

REQUIRED BY:  
 Federal Law  
 State Law  
 DSHS

ATTACHMENTS/ENCLOSURES:

Authorization to Use and Release of Protected Health Information  
 Consent for Disclosure of Health Information (To Third Parties) form  
 Medical records Invoice  
 Notice of Privacy Practices (NPP) Behavioral Health Addendum  
 Patient Acknowledgement of NPP Behavioral Health Addendum form

**POLICY/PROCEDURE TRACKING FORM**

<b>TITLE: SUBPOENA of Medical Records</b>				
<b>Scope/Purpose:</b> To ensure proper disclosure and release of Protected Health Information (PHI)				
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05/14/14	06/26/14	07/11/14	07/11/14	
<b>Date of Revision</b>		<b>Description of Changes</b>		
05/26/14		Clarification based on legal feedback		