

1 HOUSE BILL NO. 1359

2 AMENDMENT IN THE NATURE OF A SUBSTITUTE

3 (Proposed by the House Committee on Health, Welfare and Institutions

4 on _____)

5 (Patron Prior to Substitute--Delegate Byron)

6 A BILL to amend and reenact § 32.1-127.1:03 of the Code of Virginia and to amend the Code of Virginia
7 by adding a section numbered 54.1-2404.1, relating to health care; consent to services and
8 disclosure of records.

9 **Be it enacted by the General Assembly of Virginia:**

10 **1. That § 32.1-127.1:03 of the Code of Virginia is amended and reenacted and that the Code of**
11 **Virginia is amended by adding a section numbered 54.1-2404.1 as follows:**

12 **§ 32.1-127.1:03. Health records privacy.**

13 A. There is hereby recognized an individual's right of privacy in the content of his health records.
14 Health records are the property of the health care entity maintaining them, and, except when permitted or
15 required by this section or by other provisions of state law, no health care entity, or other person working
16 in a health care setting, may disclose an individual's health records.

17 Pursuant to this subsection:

18 1. Health care entities shall disclose health records to the individual who is the subject of the health
19 record, except as provided in subsections E and F and subsection B of § 8.01-413.

20 2. Health records shall not be removed from the premises where they are maintained without the
21 approval of the health care entity that maintains such health records, except in accordance with a court
22 order or subpoena consistent with subsection C of § 8.01-413 or with this section or in accordance with
23 the regulations relating to change of ownership of health records promulgated by a health regulatory board
24 established in Title 54.1.

25 3. No person to whom health records are disclosed shall redisclose or otherwise reveal the health
26 records of an individual, beyond the purpose for which such disclosure was made, without first obtaining

27 the individual's specific authorization to such redisclosure. This redisclosure prohibition shall not,
28 however, prevent (i) any health care entity that receives health records from another health care entity
29 from making subsequent disclosures as permitted under this section and the federal Department of Health
30 and Human Services regulations relating to privacy of the electronic transmission of data and protected
31 health information promulgated by the United States Department of Health and Human Services as
32 required by the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 1320d et seq.)
33 or (ii) any health care entity from furnishing health records and aggregate or other data, from which
34 individually identifying prescription information has been removed, encoded or encrypted, to qualified
35 researchers, including, but not limited to, pharmaceutical manufacturers and their agents or contractors,
36 for purposes of clinical, pharmaco-epidemiological, pharmaco-economic, or other health services
37 research.

38 4. Health care entities shall, upon the request of the individual who is the subject of the health
39 record, disclose health records to other health care entities, in any available format of the requester's
40 choosing, as provided in subsection E.

41 B. As used in this section:

42 "Agent" means a person who has been appointed as an individual's agent under a power of attorney
43 for health care or an advance directive under the Health Care Decisions Act (§ 54.1-2981 et seq.).

44 "Certification" means a written representation that is delivered by hand, by first-class mail, by
45 overnight delivery service, or by facsimile if the sender obtains a facsimile-machine-generated
46 confirmation reflecting that all facsimile pages were successfully transmitted.

47 "Guardian" means a court-appointed guardian of the person.

48 "Health care clearinghouse" means, consistent with the definition set out in 45 C.F.R. § 160.103,
49 a public or private entity, such as a billing service, repricing company, community health management
50 information system or community health information system, and "value-added" networks and switches,
51 that performs either of the following functions: (i) processes or facilitates the processing of health
52 information received from another entity in a nonstandard format or containing nonstandard data content
53 into standard data elements or a standard transaction; or (ii) receives a standard transaction from another

54 entity and processes or facilitates the processing of health information into nonstandard format or
55 nonstandard data content for the receiving entity.

56 "Health care entity" means any health care provider, health plan or health care clearinghouse.

57 "Health care provider" means those entities listed in the definition of "health care provider" in §
58 8.01-581.1, except that state-operated facilities shall also be considered health care providers for the
59 purposes of this section. Health care provider shall also include all persons who are licensed, certified,
60 registered or permitted or who hold a multistate licensure privilege issued by any of the health regulatory
61 boards within the Department of Health Professions, except persons regulated by the Board of Funeral
62 Directors and Embalmers or the Board of Veterinary Medicine.

63 "Health plan" means an individual or group plan that provides, or pays the cost of, medical care.

64 "Health plan" includes any entity included in such definition as set out in 45 C.F.R. § 160.103.

65 "Health record" means any written, printed or electronically recorded material maintained by a
66 health care entity in the course of providing health services to an individual concerning the individual and
67 the services provided. "Health record" also includes the substance of any communication made by an
68 individual to a health care entity in confidence during or in connection with the provision of health services
69 or information otherwise acquired by the health care entity about an individual in confidence and in
70 connection with the provision of health services to the individual.

71 "Health services" means, but shall not be limited to, examination, diagnosis, evaluation, treatment,
72 pharmaceuticals, aftercare, habilitation or rehabilitation and mental health therapy of any kind, as well as
73 payment or reimbursement for any such services.

74 "Individual" means a patient who is receiving or has received health services from a health care
75 entity.

76 "Individually identifying prescription information" means all prescriptions, drug orders or any
77 other prescription information that specifically identifies an individual.

78 "Parent" means a biological, adoptive or foster parent.

79 "Psychotherapy notes" means comments, recorded in any medium by a health care provider who
80 is a mental health professional, documenting or analyzing the contents of conversation during a private

81 counseling session with an individual or a group, joint, or family counseling session that are separated
82 from the rest of the individual's health record. "Psychotherapy notes" does not include annotations relating
83 to medication and prescription monitoring, counseling session start and stop times, treatment modalities
84 and frequencies, clinical test results, or any summary of any symptoms, diagnosis, prognosis, functional
85 status, treatment plan, or the individual's progress to date.

86 C. The provisions of this section shall not apply to any of the following:

87 1. The status of and release of information governed by §§ 65.2-604 and 65.2-607 of the Virginia
88 Workers' Compensation Act;

89 2. Except where specifically provided herein, the health records of minors;

90 3. The release of juvenile health records to a secure facility or a shelter care facility pursuant to §
91 16.1-248.3; or

92 4. The release of health records to a state correctional facility pursuant to § 53.1-40.10 or a local
93 or regional correctional facility pursuant to § 53.1-133.03.

94 D. Health care entities may, and, when required by other provisions of state law, shall, disclose
95 health records:

96 1. As set forth in subsection E, pursuant to the written authorization of (i) the individual or (ii) in
97 the case of a minor, (a) his custodial parent, guardian or other person authorized to consent to treatment
98 of minors pursuant to § 54.1-2969 or (b) the minor himself, if he has consented to his own treatment
99 pursuant to § 54.1-2969, or (iii) in emergency cases or situations where it is impractical to obtain an
100 individual's written authorization, pursuant to the individual's oral authorization for a health care provider
101 or health plan to discuss the individual's health records with a third party specified by the individual;

102 2. In compliance with a subpoena issued in accord with subsection H, pursuant to a search warrant
103 or a grand jury subpoena, pursuant to court order upon good cause shown or in compliance with a
104 subpoena issued pursuant to subsection C of § 8.01-413. Regardless of the manner by which health records
105 relating to an individual are compelled to be disclosed pursuant to this subdivision, nothing in this
106 subdivision shall be construed to prohibit any staff or employee of a health care entity from providing

107 information about such individual to a law-enforcement officer in connection with such subpoena, search
108 warrant, or court order;

109 3. In accord with subsection F of § 8.01-399 including, but not limited to, situations where
110 disclosure is reasonably necessary to establish or collect a fee or to defend a health care entity or the health
111 care entity's employees or staff against any accusation of wrongful conduct; also as required in the course
112 of an investigation, audit, review or proceedings regarding a health care entity's conduct by a duly
113 authorized law-enforcement, licensure, accreditation, or professional review entity;

114 4. In testimony in accordance with §§ 8.01-399 and 8.01-400.2;

115 5. In compliance with the provisions of § 8.01-413;

116 6. As required or authorized by law relating to public health activities, health oversight activities,
117 serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease,
118 public safety, and suspected child or adult abuse reporting requirements, including, but not limited to,
119 those contained in §§ 16.1-248.3, 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-127.1:04, 32.1-276.5, 32.1-
120 283, 32.1-283.1, 32.1-320, 37.2-710, 37.2-839, 53.1-40.10, 53.1-133.03, 54.1-2400.6, 54.1-2400.7, 54.1-
121 2400.9, 54.1-2403.3, 54.1-2506, 54.1-2966, 54.1-2967, 54.1-2968, 54.1-3408.2, 63.2-1509, and 63.2-
122 1606;

123 7. Where necessary in connection with the care of the individual;

124 8. In connection with the health care entity's own health care operations or the health care
125 operations of another health care entity, as specified in 45 C.F.R. § 164.501, or in the normal course of
126 business in accordance with accepted standards of practice within the health services setting; however, the
127 maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a
128 pharmacy registered or permitted in Virginia shall only be accomplished in compliance with §§ 54.1-
129 3410, 54.1-3411, and 54.1-3412;

130 9. When the individual has waived his right to the privacy of the health records;

131 10. When examination and evaluation of an individual are undertaken pursuant to judicial or
132 administrative law order, but only to the extent as required by such order;

113 11. To the guardian ad litem and any attorney representing the respondent in the course of a
134 guardianship proceeding of an adult patient who is the respondent in a proceeding under Chapter 20 (§
135 64.2-2000 et seq.) of Title 64.2;

136 12. To the guardian ad litem and any attorney appointed by the court to represent an individual
137 who is or has been a patient who is the subject of a commitment proceeding under § 19.2-169.6, Article 5
138 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1,
139 or a judicial authorization for treatment proceeding pursuant to Chapter 11 (§ 37.2-1100 et seq.) of Title
140 37.2;

141 13. To a magistrate, the court, the evaluator or examiner required under Article 16 (§ 16.1-335 et
142 seq.) of Chapter 11 of Title 16.1 or § 37.2-815, a community services board or behavioral health authority
143 or a designee of a community services board or behavioral health authority, or a law-enforcement officer
144 participating in any proceeding under Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1, § 19.2-
145 169.6, or Chapter 8 (§ 37.2-800 et seq.) of Title 37.2 regarding the subject of the proceeding, and to any
146 health care provider evaluating or providing services to the person who is the subject of the proceeding or
147 monitoring the person's adherence to a treatment plan ordered under those provisions. Health records
148 disclosed to a law-enforcement officer shall be limited to information necessary to protect the officer, the
149 person, or the public from physical injury or to address the health care needs of the person. Information
150 disclosed to a law-enforcement officer shall not be used for any other purpose, disclosed to others, or
151 retained;

152 14. To the attorney and/or guardian ad litem of a minor who represents such minor in any judicial
153 or administrative proceeding, if the court or administrative hearing officer has entered an order granting
154 the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to the
155 health care entity of such order;

156 15. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health
157 records in accord with § 9.1-156;

158 16. To an agent appointed under an individual's power of attorney or to an agent or decision maker
159 designated in an individual's advance directive for health care or for decisions on anatomical gifts and

160 organ, tissue or eye donation or to any other person consistent with the provisions of the Health Care
161 Decisions Act (§ 54.1-2981 et seq.);

162 17. To third-party payors and their agents for purposes of reimbursement;

163 18. As is necessary to support an application for receipt of health care benefits from a governmental
164 agency or as required by an authorized governmental agency reviewing such application or reviewing
165 benefits already provided or as necessary to the coordination of prevention and control of disease, injury,
166 or disability and delivery of such health care benefits pursuant to § 32.1-127.1:04;

167 19. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of ownership
168 or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;

169 20. In accord with subsection B of § 54.1-2400.1, to communicate an individual's specific and
170 immediate threat to cause serious bodily injury or death of an identified or readily identifiable person;

171 21. Where necessary in connection with the implementation of a hospital's routine contact process
172 for organ donation pursuant to subdivision B 4 of § 32.1-127;

173 22. In the case of substance abuse records, when permitted by and in conformity with requirements
174 of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;

175 23. In connection with the work of any entity established as set forth in § 8.01-581.16 to evaluate
176 the adequacy or quality of professional services or the competency and qualifications for professional staff
177 privileges;

178 24. If the health records are those of a deceased or mentally incapacitated individual to the personal
179 representative or executor of the deceased individual or the legal guardian or committee of the incompetent
180 or incapacitated individual or if there is no personal representative, executor, legal guardian or committee
181 appointed, to the following persons in the following order of priority: a spouse, an adult son or daughter,
182 either parent, an adult brother or sister, or any other relative of the deceased individual in order of blood
183 relationship;

184 25. For the purpose of conducting record reviews of inpatient hospital deaths to promote
185 identification of all potential organ, eye, and tissue donors in conformance with the requirements of
186 applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the health care provider's

187 designated organ procurement organization certified by the United States Health Care Financing
188 Administration and (ii) to any eye bank or tissue bank in Virginia certified by the Eye Bank Association
189 of America or the American Association of Tissue Banks;

190 26. To the Office of the State Inspector General pursuant to Chapter 3.2 (§ 2.2-307 et seq.) of Title
191 2.2;

192 27. To an entity participating in the activities of a local health partnership authority established
193 pursuant to Article 6.1 (§ 32.1-122.10:001 et seq.) of Chapter 4, pursuant to subdivision 1;

194 28. To law-enforcement officials by each licensed emergency medical services agency, (i) when
195 the individual is the victim of a crime or (ii) when the individual has been arrested and has received
196 emergency medical services or has refused emergency medical services and the health records consist of
197 the prehospital patient care report required by § 32.1-116.1;

198 29. To law-enforcement officials, in response to their request, for the purpose of identifying or
199 locating a suspect, fugitive, person required to register pursuant to § 9.1-901 of the Sex Offender and
200 Crimes Against Minors Registry Act, material witness, or missing person, provided that only the following
201 information may be disclosed: (i) name and address of the person, (ii) date and place of birth of the person,
202 (iii) social security number of the person, (iv) blood type of the person, (v) date and time of treatment
203 received by the person, (vi) date and time of death of the person, where applicable, (vii) description of
204 distinguishing physical characteristics of the person, and (viii) type of injury sustained by the person;

205 30. To law-enforcement officials regarding the death of an individual for the purpose of alerting
206 law enforcement of the death if the health care entity has a suspicion that such death may have resulted
207 from criminal conduct;

208 31. To law-enforcement officials if the health care entity believes in good faith that the information
209 disclosed constitutes evidence of a crime that occurred on its premises;

210 32. To the State Health Commissioner pursuant to § 32.1-48.015 when such records are those of a
211 person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article
212 3.02 (§ 32.1-48.05 et seq.) of Chapter 2;

213 33. To the Commissioner of the Department of Labor and Industry or his designee by each licensed
214 emergency medical services agency when the records consist of the prehospital patient care report required
215 by § 32.1-116.1 and the patient has suffered an injury or death on a work site while performing duties or
216 tasks that are within the scope of his employment;

217 34. To notify a family member or personal representative of an individual who is the subject of a
218 proceeding pursuant to Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1 or Chapter 8 (§ 37.2-
219 800 et seq.) of Title 37.2 of information that is directly relevant to such person's involvement with the
220 individual's health care, which may include the individual's location and general condition, when the
221 individual has the capacity to make health care decisions and (i) the individual has agreed to the
222 notification, (ii) the individual has been provided an opportunity to object to the notification and does not
223 express an objection, or (iii) the health care provider can, on the basis of his professional judgment,
224 reasonably infer from the circumstances that the individual does not object to the notification. If the
225 opportunity to agree or object to the notification cannot practicably be provided because of the individual's
226 incapacity or an emergency circumstance, the health care provider may notify a family member or personal
227 representative of the individual of information that is directly relevant to such person's involvement with
228 the individual's health care, which may include the individual's location and general condition if the health
229 care provider, in the exercise of his professional judgment, determines that the notification is in the best
230 interests of the individual. Such notification shall not be made if the provider has actual knowledge the
231 family member or personal representative is currently prohibited by court order from contacting the
232 individual;

233 35. To a threat assessment team established by a local school board pursuant to § 22.1-79.4, by a
234 public institution of higher education pursuant to § 23.1-805, or by a private nonprofit institution of higher
235 education; and

236 36. To a regional emergency medical services council pursuant to § 32.1-116.1, for purposes
237 limited to monitoring and improving the quality of emergency medical services pursuant to § 32.1-111.3.

238 Notwithstanding the provisions of subdivisions 1 through 35, a health care entity shall obtain an
239 individual's written authorization for any disclosure of psychotherapy notes, except when disclosure by

240 the health care entity is (i) for its own training programs in which students, trainees, or practitioners in
241 mental health are being taught under supervision to practice or to improve their skills in group, joint,
242 family, or individual counseling; (ii) to defend itself or its employees or staff against any accusation of
243 wrongful conduct; (iii) in the discharge of the duty, in accordance with subsection B of § 54.1-2400.1, to
244 take precautions to protect third parties from violent behavior or other serious harm; (iv) required in the
245 course of an investigation, audit, review, or proceeding regarding a health care entity's conduct by a duly
246 authorized law-enforcement, licensure, accreditation, or professional review entity; or (v) otherwise
247 required by law.

248 E. Health care records required to be disclosed pursuant to this section shall be made available
249 electronically only to the extent and in the manner authorized by the federal Health Information
250 Technology for Economic and Clinical Health Act (P.L. 111-5) and implementing regulations and the
251 Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.) and implementing
252 regulations. Notwithstanding any other provision to the contrary, a health care entity shall not be required
253 to provide records in an electronic format requested if (i) the electronic format is not reasonably available
254 without additional cost to the health care entity, (ii) the records would be subject to modification in the
255 format requested, or (iii) the health care entity determines that the integrity of the records could be
256 compromised in the electronic format requested. Requests for copies of or electronic access to health
257 records shall (a) be in writing, dated and signed by the requester; (b) identify the nature of the information
258 requested; and (c) include evidence of the authority of the requester to receive such copies or access such
259 records, and identification of the person to whom the information is to be disclosed; and (d) specify
260 whether the requester would like the records in electronic format, if available, or in paper format. The
261 health care entity shall accept a photocopy, facsimile, or other copy of the original signed by the requester
262 as if it were an original. Within 30 days of receipt of a request for copies of or electronic access to health
263 records, the health care entity shall do one of the following: (1) furnish such copies of or allow electronic
264 access to the requested health records to any requester authorized to receive them in electronic format if
265 so requested; (2) inform the requester if the information does not exist or cannot be found; (3) if the health
266 care entity does not maintain a record of the information, so inform the requester and provide the name

267 and address, if known, of the health care entity who maintains the record; or (4) deny the request (A) under
268 subsection F, (B) on the grounds that the requester has not established his authority to receive such health
269 records or proof of his identity, or (C) as otherwise provided by law. Procedures set forth in this section
270 shall apply only to requests for health records not specifically governed by other provisions of state law.

271 F. Except as provided in subsection B of § 8.01-413, copies of or electronic access to an
272 individual's health records shall not be furnished to such individual or anyone authorized to act on the
273 individual's behalf when the individual's treating physician, clinical psychologist, or clinical social worker
274 has made a part of the individual's record a written statement that, in the exercise of his professional
275 judgment, the furnishing to or review by the individual of such health records would be reasonably likely
276 to endanger the life or physical safety of the individual or another person, or that such health record makes
277 reference to a person other than a health care provider and the access requested would be reasonably likely
278 to cause substantial harm to such referenced person. If any health care entity denies a request for copies
279 of or electronic access to health records based on such statement, the health care entity shall inform the
280 individual of the individual's right to designate, in writing, at his own expense, another reviewing
281 physician, clinical psychologist, or clinical social worker whose licensure, training and experience relative
282 to the individual's condition are at least equivalent to that of the physician, clinical psychologist, or clinical
283 social worker upon whose opinion the denial is based. The designated reviewing physician, clinical
284 psychologist, or clinical social worker shall make a judgment as to whether to make the health record
285 available to the individual.

286 The health care entity denying the request shall also inform the individual of the individual's right
287 to request in writing that such health care entity designate, at its own expense, a physician, clinical
288 psychologist, or clinical social worker, whose licensure, training, and experience relative to the
289 individual's condition are at least equivalent to that of the physician, clinical psychologist, or clinical social
290 worker upon whose professional judgment the denial is based and who did not participate in the original
291 decision to deny the health records, who shall make a judgment as to whether to make the health record
292 available to the individual. The health care entity shall comply with the judgment of the reviewing
293 physician, clinical psychologist, or clinical social worker. The health care entity shall permit copying and

294 examination of the health record by such other physician, clinical psychologist, or clinical social worker
295 designated by either the individual at his own expense or by the health care entity at its expense.

296 Any health record copied for review by any such designated physician, clinical psychologist, or
297 clinical social worker shall be accompanied by a statement from the custodian of the health record that
298 the individual's treating physician, clinical psychologist, or clinical social worker determined that the
299 individual's review of his health record would be reasonably likely to endanger the life or physical safety
300 of the individual or would be reasonably likely to cause substantial harm to a person referenced in the
301 health record who is not a health care provider.

302 Further, nothing herein shall be construed as giving, or interpreted to bestow the right to receive
303 copies of, or otherwise obtain access to, psychotherapy notes to any individual or any person authorized
304 to act on his behalf.

305 G. A written authorization to allow release of an individual's health records shall substantially
306 include the following information:

307 AUTHORIZATION TO RELEASE CONFIDENTIAL HEALTH RECORDS

308 Individual's Name _____

309 Health Care Entity's Name _____

310 Person, Agency, or Health Care Entity to whom disclosure is to be made

311 _____

312 Information or Health Records to be disclosed

313 _____

314 Purpose of Disclosure or at the Request of the Individual

315 _____

316 As the person signing this authorization, I understand that I am giving my permission to the above-
317 named health care entity for disclosure of confidential health records. I understand that the health care
318 entity may not condition treatment or payment on my willingness to sign this authorization unless the
319 specific circumstances under which such conditioning is permitted by law are applicable and are set forth
320 in this authorization. I also understand that I have the right to revoke this authorization at any time, but

321 that my revocation is not effective until delivered in writing to the person who is in possession of my
 322 health records and is not effective as to health records already disclosed under this authorization. A copy
 323 of this authorization and a notation concerning the persons or agencies to whom disclosure was made shall
 324 be included with my original health records. I understand that health information disclosed under this
 325 authorization might be redisclosed by a recipient and may, as a result of such disclosure, no longer be
 326 protected to the same extent as such health information was protected by law while solely in the possession
 327 of the health care entity.

328 This authorization expires on (date) or (event) _____

329 Signature of Individual or Individual's Legal Representative if Individual is Unable to Sign

330 _____

331 Relationship or Authority of Legal Representative

332 _____

333 Date of Signature _____

334 H. Pursuant to this subsection:

335 1. Unless excepted from these provisions in subdivision 9, no party to a civil, criminal or
 336 administrative action or proceeding shall request the issuance of a subpoena duces tecum for another
 337 party's health records or cause a subpoena duces tecum to be issued by an attorney unless a copy of the
 338 request for the subpoena or a copy of the attorney-issued subpoena is provided to the other party's counsel
 339 or to the other party if pro se, simultaneously with filing the request or issuance of the subpoena. No party
 340 to an action or proceeding shall request or cause the issuance of a subpoena duces tecum for the health
 341 records of a nonparty witness unless a copy of the request for the subpoena or a copy of the attorney-
 342 issued subpoena is provided to the nonparty witness simultaneously with filing the request or issuance of
 343 the attorney-issued subpoena.

344 No subpoena duces tecum for health records shall set a return date earlier than 15 days from the
 345 date of the subpoena except by order of a court or administrative agency for good cause shown. When a
 346 court or administrative agency directs that health records be disclosed pursuant to a subpoena duces tecum
 347 earlier than 15 days from the date of the subpoena, a copy of the order shall accompany the subpoena.

348 Any party requesting a subpoena duces tecum for health records or on whose behalf the subpoena
349 duces tecum is being issued shall have the duty to determine whether the individual whose health records
350 are being sought is pro se or a nonparty.

351 In instances where health records being subpoenaed are those of a pro se party or nonparty witness,
352 the party requesting or issuing the subpoena shall deliver to the pro se party or nonparty witness together
353 with the copy of the request for subpoena, or a copy of the subpoena in the case of an attorney-issued
354 subpoena, a statement informing them of their rights and remedies. The statement shall include the
355 following language and the heading shall be in boldface capital letters:

356 **NOTICE TO INDIVIDUAL**

357 The attached document means that (insert name of party requesting or causing issuance of the
358 subpoena) has either asked the court or administrative agency to issue a subpoena or a subpoena has been
359 issued by the other party's attorney to your doctor, other health care providers (names of health care
360 providers inserted here) or other health care entity (name of health care entity to be inserted here) requiring
361 them to produce your health records. Your doctor, other health care provider or other health care entity is
362 required to respond by providing a copy of your health records. If you believe your health records should
363 not be disclosed and object to their disclosure, you have the right to file a motion with the clerk of the
364 court or the administrative agency to quash the subpoena. If you elect to file a motion to quash, such
365 motion must be filed within 15 days of the date of the request or of the attorney-issued subpoena. You
366 may contact the clerk's office or the administrative agency to determine the requirements that must be
367 satisfied when filing a motion to quash and you may elect to contact an attorney to represent your interest.
368 If you elect to file a motion to quash, you must notify your doctor, other health care provider(s), or other
369 health care entity, that you are filing the motion so that the health care provider or health care entity knows
370 to send the health records to the clerk of court or administrative agency in a sealed envelope or package
371 for safekeeping while your motion is decided.

372 2. Any party filing a request for a subpoena duces tecum or causing such a subpoena to be issued
373 for an individual's health records shall include a Notice in the same part of the request in which the

374 recipient of the subpoena duces tecum is directed where and when to return the health records. Such notice
375 shall be in boldface capital letters and shall include the following language:

376 NOTICE TO HEALTH CARE ENTITIES

377 A COPY OF THIS SUBPOENA DUCES TECUM HAS BEEN PROVIDED TO THE
378 INDIVIDUAL WHOSE HEALTH RECORDS ARE BEING REQUESTED OR HIS COUNSEL. YOU
379 OR THAT INDIVIDUAL HAS THE RIGHT TO FILE A MOTION TO QUASH (OBJECT TO) THE
380 ATTACHED SUBPOENA. IF YOU ELECT TO FILE A MOTION TO QUASH, YOU MUST FILE
381 THE MOTION WITHIN 15 DAYS OF THE DATE OF THIS SUBPOENA.

382 YOU MUST NOT RESPOND TO THIS SUBPOENA UNTIL YOU HAVE RECEIVED
383 WRITTEN CERTIFICATION FROM THE PARTY ON WHOSE BEHALF THE SUBPOENA WAS
384 ISSUED THAT THE TIME FOR FILING A MOTION TO QUASH HAS ELAPSED AND THAT:

385 NO MOTION TO QUASH WAS FILED; OR

386 ANY MOTION TO QUASH HAS BEEN RESOLVED BY THE COURT OR THE
387 ADMINISTRATIVE AGENCY AND THE DISCLOSURES SOUGHT ARE CONSISTENT WITH
388 SUCH RESOLUTION.

389 IF YOU RECEIVE NOTICE THAT THE INDIVIDUAL WHOSE HEALTH RECORDS ARE
390 BEING REQUESTED HAS FILED A MOTION TO QUASH THIS SUBPOENA, OR IF YOU FILE A
391 MOTION TO QUASH THIS SUBPOENA, YOU MUST SEND THE HEALTH RECORDS ONLY TO
392 THE CLERK OF THE COURT OR ADMINISTRATIVE AGENCY THAT ISSUED THE SUBPOENA
393 OR IN WHICH THE ACTION IS PENDING AS SHOWN ON THE SUBPOENA USING THE
394 FOLLOWING PROCEDURE:

395 PLACE THE HEALTH RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE
396 SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT OR ADMINISTRATIVE
397 AGENCY WHICH STATES THAT CONFIDENTIAL HEALTH RECORDS ARE ENCLOSED AND
398 ARE TO BE HELD UNDER SEAL PENDING A RULING ON THE MOTION TO QUASH THE
399 SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN

400 OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT OR
401 ADMINISTRATIVE AGENCY.

402 3. Upon receiving a valid subpoena duces tecum for health records, health care entities shall have
403 the duty to respond to the subpoena in accordance with the provisions of subdivisions 4, 5, 6, 7, and 8.

404 4. Except to deliver to a clerk of the court or administrative agency subpoenaed health records in
405 a sealed envelope as set forth, health care entities shall not respond to a subpoena duces tecum for such
406 health records until they have received a certification as set forth in subdivision 5 or 8 from the party on
407 whose behalf the subpoena duces tecum was issued.

408 If the health care entity has actual receipt of notice that a motion to quash the subpoena has been
409 filed or if the health care entity files a motion to quash the subpoena for health records, then the health
410 care entity shall produce the health records, in a securely sealed envelope, to the clerk of the court or
411 administrative agency issuing the subpoena or in whose court or administrative agency the action is
412 pending. The court or administrative agency shall place the health records under seal until a determination
413 is made regarding the motion to quash. The securely sealed envelope shall only be opened on order of the
414 judge or administrative agency. In the event the court or administrative agency grants the motion to quash,
415 the health records shall be returned to the health care entity in the same sealed envelope in which they
416 were delivered to the court or administrative agency. In the event that a judge or administrative agency
417 orders the sealed envelope to be opened to review the health records in camera, a copy of the order shall
418 accompany any health records returned to the health care entity. The health records returned to the health
419 care entity shall be in a securely sealed envelope.

420 5. If no motion to quash is filed within 15 days of the date of the request or of the attorney-issued
421 subpoena, the party on whose behalf the subpoena was issued shall have the duty to certify to the
422 subpoenaed health care entity that the time for filing a motion to quash has elapsed and that no motion to
423 quash was filed. Any health care entity receiving such certification shall have the duty to comply with the
424 subpoena duces tecum by returning the specified health records by either the return date on the subpoena
425 or five days after receipt of the certification, whichever is later.

426 6. In the event that the individual whose health records are being sought files a motion to quash
427 the subpoena, the court or administrative agency shall decide whether good cause has been shown by the
428 discovering party to compel disclosure of the individual's health records over the individual's objections.
429 In determining whether good cause has been shown, the court or administrative agency shall consider (i)
430 the particular purpose for which the information was collected; (ii) the degree to which the disclosure of
431 the records would embarrass, injure, or invade the privacy of the individual; (iii) the effect of the disclosure
432 on the individual's future health care; (iv) the importance of the information to the lawsuit or proceeding;
433 and (v) any other relevant factor.

434 7. Concurrent with the court or administrative agency's resolution of a motion to quash, if
435 subpoenaed health records have been submitted by a health care entity to the court or administrative
436 agency in a sealed envelope, the court or administrative agency shall: (i) upon determining that no
437 submitted health records should be disclosed, return all submitted health records to the health care entity
438 in a sealed envelope; (ii) upon determining that all submitted health records should be disclosed, provide
439 all the submitted health records to the party on whose behalf the subpoena was issued; or (iii) upon
440 determining that only a portion of the submitted health records should be disclosed, provide such portion
441 to the party on whose behalf the subpoena was issued and return the remaining health records to the health
442 care entity in a sealed envelope.

443 8. Following the court or administrative agency's resolution of a motion to quash, the party on
444 whose behalf the subpoena duces tecum was issued shall have the duty to certify in writing to the
445 subpoenaed health care entity a statement of one of the following:

446 a. All filed motions to quash have been resolved by the court or administrative agency and the
447 disclosures sought in the subpoena duces tecum are consistent with such resolution; and, therefore, the
448 health records previously delivered in a sealed envelope to the clerk of the court or administrative agency
449 will not be returned to the health care entity;

450 b. All filed motions to quash have been resolved by the court or administrative agency and the
451 disclosures sought in the subpoena duces tecum are consistent with such resolution and that, since no
452 health records have previously been delivered to the court or administrative agency by the health care

453 entity, the health care entity shall comply with the subpoena duces tecum by returning the health records
454 designated in the subpoena by the return date on the subpoena or five days after receipt of certification,
455 whichever is later;

456 c. All filed motions to quash have been resolved by the court or administrative agency and the
457 disclosures sought in the subpoena duces tecum are not consistent with such resolution; therefore, no
458 health records shall be disclosed and all health records previously delivered in a sealed envelope to the
459 clerk of the court or administrative agency will be returned to the health care entity;

460 d. All filed motions to quash have been resolved by the court or administrative agency and the
461 disclosures sought in the subpoena duces tecum are not consistent with such resolution and that only
462 limited disclosure has been authorized. The certification shall state that only the portion of the health
463 records as set forth in the certification, consistent with the court or administrative agency's ruling, shall be
464 disclosed. The certification shall also state that health records that were previously delivered to the court
465 or administrative agency for which disclosure has been authorized will not be returned to the health care
466 entity; however, all health records for which disclosure has not been authorized will be returned to the
467 health care entity; or

468 e. All filed motions to quash have been resolved by the court or administrative agency and the
469 disclosures sought in the subpoena duces tecum are not consistent with such resolution and, since no health
470 records have previously been delivered to the court or administrative agency by the health care entity, the
471 health care entity shall return only those health records specified in the certification, consistent with the
472 court or administrative agency's ruling, by the return date on the subpoena or five days after receipt of the
473 certification, whichever is later.

474 A copy of the court or administrative agency's ruling shall accompany any certification made
475 pursuant to this subdivision.

476 9. The provisions of this subsection have no application to subpoenas for health records requested
477 under § 8.01-413, or issued by a duly authorized administrative agency conducting an investigation, audit,
478 review or proceedings regarding a health care entity's conduct.

479 The provisions of this subsection shall apply to subpoenas for the health records of both minors
480 and adults.

481 Nothing in this subsection shall have any effect on the existing authority of a court or
482 administrative agency to issue a protective order regarding health records, including, but not limited to,
483 ordering the return of health records to a health care entity, after the period for filing a motion to quash
484 has passed.

485 A subpoena for substance abuse records must conform to the requirements of federal law found in
486 42 C.F.R. Part 2, Subpart E.

487 I. Health care entities may testify about the health records of an individual in compliance with §§
488 8.01-399 and 8.01-400.2.

489 J. If an individual requests a copy of his health record from a health care entity, the health care
490 entity may impose a reasonable cost-based fee, which shall include only the cost of supplies for and labor
491 of copying the requested information, postage when the individual requests that such information be
492 mailed, and preparation of an explanation or summary of such information as agreed to by the individual.
493 For the purposes of this section, "individual" shall subsume a person with authority to act on behalf of the
494 individual who is the subject of the health record in making decisions related to his health care.

495 K. Nothing in this section shall prohibit a health care provider who prescribes or dispenses a
496 controlled substance required to be reported to the Prescription Monitoring Program established pursuant
497 to Chapter 25.2 (§ 54.1-2519 et seq.) of Title 54.1 to a patient from disclosing information obtained from
498 the Prescription Monitoring Program and contained in a patient's health care record to another health care
499 provider when such disclosure is related to the care or treatment of the patient who is the subject of the
500 record.

501 L. An authorization for the release of health records executed pursuant to this section shall remain
502 in effect until (i) the authorization is revoked in writing to the person in possession of the health record
503 subject to the authorization by either the person who executed the authorization or the person who is the
504 subject of the health record, (ii) any expiration date set forth in the authorization, or (iii) the person in
505 possession of the health record becomes aware of any expiration event described in the authorization.

506 whichever occurs first. However, any revocation of an authorization for the release of health records
507 executed pursuant to this section shall not be effective to the extent that the person in possession of the
508 health record has released health records prior to such revocation in reliance upon the authorization or as
509 otherwise provided pursuant to 45 C.F.R. § 164.508. Except as expressly limited in an authorization for
510 the release of health records pursuant to this section, such authorization shall be deemed to include
511 authorization for the release of all health records of the person maintained by the health care provider to
512 whom the authorization was granted. If a health care provider receives a written revocation of an
513 authorization for the release of health records in accordance with this subsection, a copy of such written
514 revocation shall be included in the person's original health record maintained by the health care provider.

515 An authorization for the release of health records executed pursuant to this section shall, unless
516 otherwise expressly limited in the authorization, be deemed to include authorization for the person named
517 in the authorization to assist the person who is the subject of the health record in accessing health care
518 services, including scheduling appointments for the person who is the subject of the health record and
519 attending appointments together with the person who is the subject of the health record.

520 **§ 54.1-2404.1. Health care providers; release of records; actions for which an authorization**
521 **is not required.**

522 A. Subject to any limitations set forth in an authorization for the release of health care records
523 executed pursuant to § 32.1-127.1:03 and the provisions of subsection F of § 32.1-127.1:03, every health
524 care provider shall make health records, as defined in § 32.1-127.1:03, of a patient available to any person
525 designated by a patient in an authorization to release medical records pursuant to § 32.1-127.1:03 to the
526 same extent that such health records are required to be made available to the patient.

527 B. Every health care provider shall allow a spouse, parent, adult child, adult sibling, or other person
528 identified by a person to make an appointment for medical services on behalf of such person, regardless
529 of whether such person has executed an authorization to release medical records pursuant to § 32.1-
530 127.1:03; however, such health care provider shall not release protected health information to the person
531 making the appointment for medical services on behalf of the another person unless such person has
532 executed an authorization to release medical records pursuant to § 32.1-127.1:03 and unless otherwise

533 permitted or required to do so by federal or state law or regulations. Nothing in this subsection shall
534 prevent a health care provider from sharing relevant information with a spouse, parent, adult child, adult
535 sibling, or other person when the health care provider can reasonably infer, based on his professional
536 judgment, that the person who is the subject of such information does not object or where it is in the best
537 interest of such person.

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