

TO: Representative Martin LaLonde, Chair, House Judiciary Committee

FROM: Stuart G. Schurr, Esq., General Counsel, DAIL *SGS*

DATE: March 10, 2023

SUBJECT: H.171 (Draft No. 3.1); Access to Records

The Department of Disabilities, Aging, and Independent Living (“DAIL”) wishes to respond to the Committee’s request for input concerning the proposed language in 33 V.S.A. § 6911(a). More specifically, it is DAIL’s understanding that the Committee is seeking clarification as to the authority under which Adult Protective Services (APS) may access the records identified in this section and, if such access is deemed appropriate, the Committee would like to determine the limitations of that access.

As proposed, to substantiate a report under 33 V.S.A. Chapter 69, the DAIL Commissioner, or the Commissioner’s designee, must determine, by a preponderance of the evidence, that the alleged perpetrator maltreated the vulnerable adult. To meet this burden, and to provide services, in furtherance of the purpose of this chapter “to protect vulnerable adults whose health and welfare may be adversely affected through abuse, neglect, or exploitation,” APS routinely requires access to the records and documents listed in 33 V.S.A. § 6911(a)(1), many of which contain the protected health information (PHI) of the alleged victim.

Generally, the HIPAA Privacy Rule prohibits a “covered entity,” which includes health care providers, clearinghouses, and health plans, from using or disclosing PHI unless authorized by the individual, except where this prohibition would result in unnecessary interference with access to quality health care or with certain other important public benefits or priorities. For example, the Privacy Rule explicitly allows covered entities to use and disclose PHI for treatment, payment, and health care operations without authorization. In addition, a covered entity, without first obtaining a written authorization or providing an opportunity to agree or object, “may disclose [PHI] about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence: (i) To the extent the disclosure is **required by law** and the disclosure complies with and is limited to the relevant requirements of such law.” 45 C.F.R. § 164.512(c)(1)(i) (Emphasis added). Further, when a covered entity, in its professional judgment, believes that disclosure is necessary to prevent serious harm to the individual or other potential victims, it may disclose the information to a government authority, such as APS,

without an authorization, even when a statute or regulation merely **authorizes** the disclosure. 45 C.F.R. § 164.512(c)(1)(iii)(A) (Emphasis added).

DAIL acknowledges that, notwithstanding the proposed language in 33 V.S.A. § 6911(a)(1), the disclosure of such confidential information by a covered entity remains optional, and the covered entity may choose not to disclose it to APS. In such cases, the process identified in 33 V.S.A. § 6911(a)(3) through (5) would enable DAIL to pursue a court order directing a covered entity, or other custodian of the records, to disclose the requested documents. DAIL supports this proposed framework, which would authorize the court to determine whether APS has demonstrated the requisite good cause to order the disclosure of the requested records.¹

As to the *scope* of APS' access to records, DAIL wants to make clear that, while there are circumstances under which it will request the disclosure of confidential information (e.g., health records needed to determine whether the alleged victim meets the statutory definition of a vulnerable adult), it is not seeking to include language in this Bill directing or authorizing the release of privileged communications or to expand the list of exceptions set forth in the Vermont Rules of Evidence under which privileged communications may be disclosed. Accordingly, DAIL proposes that the following sentence in 33 V.S.A. § 6911(a)(1) be struck:

“Providing access to records relevant to an investigation by the Department or law enforcement under this provision shall not be deemed a violation of any confidential communication privilege. Access to any records that would violate attorney-client privilege shall not be provided without a court order.”

Finally, DAIL also requests that the proposed language in 33 V.S.A. § 6911(a)(7) be struck and that the following, which mirrors the language in 33 V.S.A. § 6915(i), be inserted:

“A person who in good faith makes an alleged victim’s information or a copy of the information available to an investigator in accordance with this section shall be immune from civil or criminal liability for disclosure of the information unless the person’s actions constitute gross negligence, recklessness, or intentional misconduct. Nothing in this section shall be construed to provide civil or criminal immunity to a person suspected of having abused, neglected, or exploited a vulnerable adult.”

¹ Kindly note that Chapter 69 already addresses APS' access to non-PHI (i.e., financial records) and provides APS similar judicial recourse when certain individuals refuse to consent to the disclosure of such records. See 33 V.S.A § 6915.