FINAL PROPOSED RULE #23-P33

Final Proposed Filing - Coversheet

Instructions:

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the "Rule on Rulemaking" adopted by the Office of the Secretary of State, this filing will be considered complete upon filing and acceptance of these forms with the Office of the Secretary of State, and the Legislative Committee on Administrative Rules.

All forms shall be submitted at the Office of the Secretary of State, no later than 3:30 pm on the last scheduled day of the work week.

The data provided in text areas of these forms will be used to generate a notice of rulemaking in the portal of "Proposed Rule Postings" online, and the newspapers of record if the rule is marked for publication. Publication of notices will be charged back to the promulgating agency.

PLEASE REMOVE ANY COVERSHEET OR FORM NOT REQUIRED WITH THE CURRENT FILING BEFORE DELIVERY!

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I approve the contents of this filing entitled:

Reporting of Offender Information

/s/ Todd W. Daloz , on 11/21/23

(signature) (date)

Printed Name and Title:

RECEIVED BY: _____

- ☐ Coversheet
- ☐ Adopting Page
- ☐ Economic Impact Analysis
- ☐ Environmental Impact Analysis
- ☐ Strategy for Maximizing Public Input
- ☐ Scientific Information Statement (if applicable)
- ☐ Incorporated by Reference Statement (if applicable)
- ☐ Clean text of the rule (Amended text without annotation)
- ☐ Annotated text (Clearly marking changes from previous rule)
- ☐ ICAR Minutes
- ☐ Copy of Comments
- ☐ Responsiveness Summary

1. TITLE OF RULE FILING:
   Reporting of Offender Information
2. PROPOSED NUMBER ASSIGNED BY THE SECRETARY OF STATE
   23P033
3. ADOPTING AGENCY:
   Department of Corrections
4. PRIMARY CONTACT PERSON:
   (A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE).

   Name: Christopher Antoine, Staff Attorney

   Agency: Agency of Human Services, Department of Corrections

   Mailing Address: 280 State Drive Waterbury, VT 0567

   Telephone: 8022412442 Fax: 802-241-0020

   E-Mail: Christopher.Antoine@vermont.gov

   Web URL *(WHERE THE RULE WILL BE POSTED)*: www.doc.vermont.gov
5. SECONDARY CONTACT PERSON:
   (A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON).

   Name: Ana Burke, Senior Policy & Implementation Analyst

   Agency: Agency of Human Services, Department of Corrections

   Mailing Address: 280 State Drive Waterbury, VT 05671

   Telephone: 802-241-2442 Fax: 802-241-0020

   E-Mail: ana.burke@vermont.gov
6. RECORDS EXEMPTION INCLUDED WITHIN RULE:
   (DOES THE RULE CONTAIN ANY PROVISION DESIGNATING INFORMATION AS CONFIDENTIAL; LIMITING ITS PUBLIC RELEASE; OR OTHERWISE, EXEMPTING IT FROM INSPECTION AND COPYING?) Yes

   IF YES, CITE THE STATUTORY AUTHORITY FOR THE EXEMPTION:

   28 V.S.A. § 204(d); 42 C.F.R. Part 2.

   PLEASE SUMMARIZE THE REASON FOR THE EXEMPTION:

   Prior to the sentencing of an individual for specific crimes, the Department of Corrections (DOC) may conduct a Presentence Investigation, which is the process by which DOC staff investigate and compile a report on a

defendant's assessed risk, background, and offense. This written report includes confidential information related to the defendant and impacted parties, if applicable. To that end, the DOC shall not disclose a report, or its contents, to anyone outside of the DOC except for parties with a specific interest (e.g., the court, a treatment provider).

This rule further derives authority from 42 C.F.R. Part 2, which prohibits the disclosure of any records of patients with substance use disorders without a signed release.

7. LEGAL AUTHORITY / ENABLING LEGISLATION:
(THE SPECIFIC STATUTORY OR LEGAL CITATION FROM SESSION LAW INDICATING WHO THE ADOPTING ENTITY IS AND THUS WHO THE SIGNATORY SHOULD BE. THIS SHOULD BE A SPECIFIC CITATION NOT A CHAPTER CITATION).

   28 V.S.A. § 102(c)and 3 V.S.A. § 801(b)(11).

8. EXPLANATION OF HOW THE RULE IS WITHIN THE AUTHORITY OF THE AGENCY:
   28 V.S.A. § 102(b)(2)establishes the authority by which the Commissioner shall oversee the policies that govern the operations of the Department of Corrections (DOC) including the records of individuals under the custody or supervision of the DOC.

9. THE FILING HAS CHANGED SINCE THE FILING OF THE PROPOSED RULE.

10. THE AGENCY HAS INCLUDED WITH THIS FILING A LETTER EXPLAINING IN DETAIL WHAT CHANGES WERE MADE, CITING CHAPTER AND SECTION WHERE APPLICABLE.

11. SUBSTANTIAL ARGUMENTS AND CONSIDERATIONS WERE NOT RAISED FOR OR AGAINST THE ORIGINAL PROPOSAL.

12. THE AGENCY HAS INCLUDED COPIES OF ALL WRITTEN SUBMISSIONS AND SYNOPSES OF ORAL COMMENTS RECEIVED.

13. THE AGENCY HAS INCLUDED A LETTER EXPLAINING IN DETAIL THE REASONS FOR THE AGENCY'S DECISION TO REJECT OR ADOPT THEM.

14. CONCISE SUMMARY (**150 WORDS OR LESS**):

   The Vermont Department of Corrections (DOC) is proposing the repeal of the Reporting of Offender Information Rule, APA #96-18/CVR #13-130-017 because it

is no longer the guiding document for this subject matter. DOC policy, #251.01, Offender/Inmate Records and Access to Information, dated 8/18/2019, and its associated guidance documents, and APA Rule #19-035/ CVR 13-130-036, describe the procedures that the DOC shall follow when releasing, or permitting the inspection of, a record belonging to individual under the custody or supervision of the DOC.

15. EXPLANATION OF WHY THE RULE IS NECESSARY:

The Rule, APA #96-18/CVR #13-130-017, is no longer relevant because the DOC promulgated APA rule #19-035/ CVR 13-130-036 and policy #251.01,Offender/Inmate Records and Access to Information, regarding the release, and inspection of, an individual's record who is under the custody or supervision of the DOC pursuant to V.S.A. §107(b)(5).

16. EXPLANATION OF HOW THE RULE IS NOT ARBITRARY:

This rule is no longer necessary because the guiding documents for this subject matter are covered in promulgated APA rule #19-035/ CVR 13-130-036 and policy #251.01,Offender/Inmate Records and Access to Information.

17. LIST OF PEOPLE, ENTERPRISES AND GOVERNMENT ENTITIES AFFECTED BY THIS RULE:

(1)Incarcerated and supervised individuals in the care and custody of the Department of Corrections.

(2) VT Agency of Digital Services

(3) JailTracker (administrator of the Offender Management System)

(4) Law enforcement

(5) Attorney General's Office

(6) Defender General and Prisoner Rights office

(7) Justice Related Advocacy Groups

(8) Department of Corrections staff

18. BRIEF SUMMARY OF ECONOMIC IMPACT (150 WORDS OR LESS):

It is anticipated that the repeal of this Rule will not have an impact on the DOC's budget because the corresponding policy to the rule the DOC seeks to repeal was superseded and replaced by updated policy, #250.01 and promulgated rule, APA rule #19-035/ CVR 13-

130-036 in 2019. For similar reasons, it is anticipated that the entities listed in question 11 will not be affected.

19. A HEARING WAS HELD.

20. HEARING INFORMATION
(THE FIRST HEARING SHALL BE NO SOONER THAN 30 DAYS FOLLOWING THE POSTING OF NOTICES ONLINE).

IF THIS FORM IS INSUFFICIENT TO LIST THE INFORMATION FOR EACH HEARING, PLEASE ATTACH A SEPARATE SHEET TO COMPLETE THE HEARING INFORMATION.

Date: 10/30/2023
Time: 10:00 AM
Street Address: 280 State Drive, Waterbury, VT
Zip Code: 05671-2000
URL for Virtual:

Date:
Time: AM
Street Address:
Zip Code:
URL for Virtual:

Date:
Time: AM
Street Address:
Zip Code:
URL for Virtual:

Date:
Time: AM
Street Address:
Zip Code:
URL for Virtual:

21. DEADLINE FOR COMMENT (NO EARLIER THAN 7 DAYS FOLLOWING LAST HEARING):

KEYWORDS (PLEASE PROVIDE AT LEAST 3 KEYWORDS OR PHRASES TO AID IN THE SEARCHABILITY OF THE RULE NOTICE ONLINE).

Records of individuals under the custody or supervision of the DOC

Files of individuals under the custody or supervision of the DOC

Release of Information

Inspection

Confidentiality

280 State Drive – Center Building
Waterbury, VT 05671-1000

OFFICE OF THE SECRETARY
TEL: (802) 241-0440
FAX: (802) 241-0450

JENNEY SAMUELSON
SECRETARY

TODD W. DALOZ
DEPUTY SECRETARY

STATE OF VERMONT
AGENCY OF HUMAN SERVICES

MEMORANDUM

TO: Sarah Copeland Hanzas, Secretary of State

FROM: Jenney Samuelson, Secretary, Agency of Human Services

DATE: January 31, 2023

SUBJECT: Signatory Authority for Purposes of Authorizing Administrative Rules

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I hereby designate Deputy Secretary of Human Services Todd W. Daloz as signatory to fulfill the duties of the Secretary of the Agency of Human Services as the adopting authority for administrative rules as required by Vermont's Administrative Procedure Act, 3. V.S.A § 801 et seq.

Cc: Todd W. Daloz

Adopting Page

Instructions:

This form must accompany each filing made during the rulemaking process:

Note: To satisfy the requirement for an annotated text, an agency must submit the entire rule in annotated form with proposed and final proposed filings. Filing an annotated paragraph or page of a larger rule is not sufficient. Annotation must clearly show the changes to the rule.

When possible, the agency shall file the annotated text, using the appropriate page or pages from the Code of Vermont Rules as a basis for the annotated version. New rules need not be accompanied by an annotated text.

1. TITLE OF RULE FILING:
   Reporting of Offender Information
2. ADOPTING AGENCY:
   Department of Corrections
3. TYPE OF FILING (*PLEASE CHOOSE THE TYPE OF FILING FROM THE DROPDOWN MENU BASED ON THE DEFINITIONS PROVIDED BELOW*):
   - **AMENDMENT** - Any change to an already existing rule, even if it is a complete rewrite of the rule, it is considered an amendment if the rule is replaced with other text.
   - **NEW RULE** - A rule that did not previously exist even under a different name.
   - **REPEAL** - The removal of a rule in its entirety, without replacing it with other text.

   This filing is **A REPEAL OF AN EXISTING RULE** .

4. LAST ADOPTED (*PLEASE PROVIDE THE SOS LOG#, TITLE AND EFFECTIVE DATE OF THE LAST ADOPTION FOR THE EXISTING RULE)*:
   SOS Rule Log #96-18, CVR 13-130-017, Reporting of Offender Information (255), March 6, 1996.

State of Vermont
Agency of Administration
109 State Street
Montpelier, VT 05609-0201
www.aoa.vermont.gov

[phone] 802-828-3322

Kristin L. Clouser, Secretary

INTERAGENCY COMMITTEE ON ADMINISTRATIVE RULES (ICAR) MINUTES

Meeting Date/Location: September 11, 2023, virtually via Microsoft Teams
Members Present: Chair Sean Brown, Brendan Atwood, Jennifer Mojo, John Kessler, Diane Sherman, Michael Obuchowski, Nicole Dubuque, and Jared Adler (exited meeting at 4:00 PM)
Minutes By: Melissa Mazza-Paquette

- 2:00 p.m. meeting called to order, welcome and introductions.
- Review and approval of minutes from the August 14 and August 30, 2023 meetings.
- No additions/deletions to agenda. Agenda approved as drafted.
- Public comment made by Jay Greene of the Office of Racial Equity regarding the 'Amyotrophic Lateral Sclerosis (ALS) Registry Rule' proposed rule by the Vermont Department of Health:
    - Suggests that the reporting mechanism also incorporate options for non-binary people to be correctly reported in their gender identity on their legal documentation to the national data set as well.
- Presentation of Proposed Rules on pages 2-6 to follow:
    1. Judicial Nominating Board Rule Amendments, Judicial Nominating Board, page 2
    2. Suitability in Annuity Transactions (Reg. I-2023-01), Department of Financial Regulation, page 3
    3. Amyotrophic Lateral Sclerosis (ALS) Registry Rule, Vermont Department of Health, page 4
    4. Reporting of Offender Information, Agency of Human Services, Department of Corrections page 5
    5. Child Support Guidelines, Agency of Human Services, Department for Children and Families, Office of Child Support, page 6
- Due to the meeting running past the scheduled time and therefore lack of quorum, the following rules were moved to the October ICAR meeting:
    6. Residential Care Home and Assisted Living Residence Licensing Regulations, Agency of Human Services, Department of Disabilities, Aging, and Independent Living
    7. Independent School Program Approval Rules, State Board of Education
    8. Vermont Low Emission Vehicle and Zero Emission Vehicle Rules, Agency of Natural Resources
    9. Investigation and Remediation of Contaminated Properties Rule (IRule), Agency of Natural Resources
- Next scheduled meeting is October 9, 2023 at 2:00 p.m.
- 4:10 p.m. meeting adjourned.

Proposed Rule: Reporting of Offender Information, Agency of Human Services, Department of Corrections
Presented By: Chris Antoine and Ana Burke

Motion made to accept the rule by Diane Sherman, seconded by Nicole Dubuque, and passed unanimously except for Brendan Atwood who abstained, with the following recommendations:

1. Remove Administrative Rule Review coversheet.
2. Proposed Rule Coversheet:
    a. #10: Complete.
    b. #11 (2): If 'IT division' should be the 'Agency of Digital Services', include them as a separate entity.
    c. #12 and Economic Impact Analysis: Consider including language stating the old rules are superseded and replaced, and the reasoning it doesn't affect those listed in #11. Also include that information in the Economic Impact Analysis.
3. Public Input Maximization Plan, #4: Complete.

Department of Corrections

The following changes were made to Proposed Rule, #APA #96-18/CVR #13-130-017, Reporting of Offender Information.

ICAR Recommendations:

(1) Proposed Rule Coversheet:

a. Complete #10 in proposed filing (#16 in final proposed filing): Explanation of how the rule is not arbitrary as defined in 3 V.S.A § 801(b)(13)(A):
    i. Added: This rule is no longer necessary because the guiding documents for this subject matter are covered in promulgated APA rule #19-035/ CVR 13-130-036 and policy #251.01,Offender/Inmate Records and Access to Information.

b. If "IT Division"should be the "Agency of Digital Services," include them as a separate entity #11 (2) in proposed filing (#17 in final proposed filing):
    i. Replaced: "IT Division" with "Agency of Digital Services."

c. Consider including language stating the old rules are superseded and replaced, and the reasoning it doesn't affect those listed in #11 and include that information in #12 in proposed filing (#18 in final proposed rule filing):
    i. Amended to read: It is anticipated that the repeal of this Rule will not have an impact on the DOC's budget because the corresponding policy to the rule the DOC seeks to repeal was superseded and replaced by updated policy, #250.01 and promulgated rule, APA rule #19-035/ CVR 13-130-036 in 2019. For similar reasons, it is anticipated that the entities listed in question 11 will not be affected.

Department of Corrections

Post-ICAR filing with the Secretary of State:

(1) Update the authority on the Proposed Rule Coversheet #7. Updated to include:
   a. 28 V.S.A. § 102(c), which confers rulemaking authority. The previous filing only included the authority by which the Comissioner shall oversee the policies that govern the operations of the department; and
   b. 3 V.S.A. § 801(b)(11), which shifts rulemaking authority from the Commissioner to the Secretary of the Agency.

(2) Update the hearing date. The filing was delayed which means we did not meet the intended original filing date and had to reschedule the hearing for 10/30/2023.

Economic Impact Analysis

Instructions:

In completing the economic impact analysis, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule; estimates the costs and benefits for each category of people enterprises and government entities affected by the rule; compares alternatives to adopting the rule; and explains their analysis concluding that rulemaking is the most appropriate method of achieving the regulatory purpose. If no impacts are anticipated, please specify "No impact anticipated" in the field.

Rules affecting or regulating schools or school districts must include cost implications to local school districts and taxpayers in the impact statement, a clear statement of associated costs, and consideration of alternatives to the rule to reduce or ameliorate costs to local school districts while still achieving the objectives of the rule (see 3 V.S.A. § 832b for details).

Rules affecting small businesses (excluding impacts incidental to the purchase and payment of goods and services by the State or an agency thereof), must include ways that a business can reduce the cost or burden of compliance or an explanation of why the agency determines that such evaluation isn't appropriate, and an evaluation of creative, innovative or flexible methods of compliance that would not significantly impair the effectiveness of the rule or increase the risk to the health, safety, or welfare of the public or those affected by the rule.

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1. TITLE OF RULE FILING:

   Reporting of Offender Information

2. ADOPTING AGENCY:

   Department of Corrections

3. CATEGORY OF AFFECTED PARTIES:

   LIST CATEGORIES OF PEOPLE, ENTERPRISES, AND GOVERNMENTAL ENTITIES POTENTIALLY AFFECTED BY THE ADOPTION OF THIS RULE AND THE ESTIMATED COSTS AND BENEFITS ANTICIPATED:

   Individuals under the custody or supervision of the Department of Corrections

   The Department of Corrections

4. IMPACT ON SCHOOLS:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON PUBLIC EDUCATION, PUBLIC SCHOOLS, LOCAL SCHOOL DISTRICTS AND/OR TAXPAYERS CLEARLY STATING ANY ASSOCIATED COSTS:

No impact.

5. ALTERNATIVES: *CONSIDERATION OF ALTERNATIVES TO THE RULE TO REDUCE OR AMELIORATE COSTS TO LOCAL SCHOOL DISTRICTS WHILE STILL ACHIEVING THE OBJECTIVE OF THE RULE.*

   Not applicable.

6. IMPACT ON SMALL BUSINESSES:
   INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON SMALL BUSINESSES (EXCLUDING IMPACTS INCIDENTAL TO THE PURCHASE AND PAYMENT OF GOODS AND SERVICES BY THE STATE OR AN AGENCY THEREOF):

   No impact.

7. SMALL BUSINESS COMPLIANCE: *EXPLAIN WAYS A BUSINESS CAN REDUCE THE COST/BURDEN OF COMPLIANCE OR AN EXPLANATION OF WHY THE AGENCY DETERMINES THAT SUCH EVALUATION ISN'T APPROPRIATE.*

   No impact.

8. COMPARISON:
   COMPARE THE IMPACT OF THE RULE WITH THE ECONOMIC IMPACT OF OTHER ALTERNATIVES TO THE RULE, INCLUDING NO RULE ON THE SUBJECT OR A RULE HAVING SEPARATE REQUIREMENTS FOR SMALL BUSINESS:
   The repeal of Reporting of Offender Information Rule, APA #96-18/CVR #13-130-017 should not represent any discernable economic impact between the current rule and repealing this rule.

9. SUFFICIENCY: *DESCRIBE HOW THE ANALYSIS WAS CONDUCTED, IDENTIFYING RELEVANT INTERNAL AND/OR EXTERNAL SOURCES OF INFORMATION USED.*
   Not applicable.

Environmental Impact Analysis

Instructions:

In completing the environmental impact analysis, an agency analyzes and evaluates the anticipated environmental impacts (positive or negative) to be expected from adoption of the rule; compares alternatives to adopting the rule; explains the sufficiency of the environmental impact analysis. If no impacts are anticipated, please specify "No impact anticipated" in the field.

Examples of Environmental Impacts include but are not limited to:

- Impacts on the emission of greenhouse gases
- Impacts on the discharge of pollutants to water
- Impacts on the arability of land
- Impacts on the climate
- Impacts on the flow of water
- Impacts on recreation
- Or other environmental impacts

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1. TITLE OF RULE FILING:

   Reporting of Offender Information

2. ADOPTING AGENCY:

   Department of Corrections

3. GREENHOUSE GAS: *EXPLAIN HOW THE RULE IMPACTS THE EMISSION OF GREENHOUSE GASES (E.G. TRANSPORTATION OF PEOPLE OR GOODS; BUILDING INFRASTRUCTURE; LAND USE AND DEVELOPMENT, WASTE GENERATION, ETC.):*
   No impact.

4. WATER: *EXPLAIN HOW THE RULE IMPACTS WATER (E.G. DISCHARGE / ELIMINATION OF POLLUTION INTO VERMONT WATERS, THE FLOW OF WATER IN THE STATE, WATER QUALITY ETC.):*
   No impact.

5. LAND: *EXPLAIN HOW THE RULE IMPACTS LAND (E.G. IMPACTS ON FORESTRY, AGRICULTURE ETC.):*
   No impact.

6. RECREATION: *EXPLAIN HOW THE RULE IMPACTS RECREATION IN THE STATE:*
   No impact.

7. CLIMATE: *EXPLAIN HOW THE RULE IMPACTS THE CLIMATE IN THE STATE:*
   No impact.

8. OTHER: *EXPLAIN HOW THE RULE IMPACT OTHER ASPECTS OF VERMONT'S ENVIRONMENT:*
   No impact.

9. SUFFICIENCY: *DESCRIBE HOW THE ANALYSIS WAS CONDUCTED, IDENTIFYING RELEVANT INTERNAL AND/OR EXTERNAL SOURCES OF INFORMATION USED.*
   No impact.

Public Input Maximization Plan

Instructions:

Agencies are encouraged to hold hearings as part of their strategy to maximize the involvement of the public in the development of rules. Please complete the form below by describing the agency's strategy for maximizing public input (what it did do, or will do to maximize the involvement of the public).

This form must accompany each filing made during the rulemaking process:

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1. TITLE OF RULE FILING:

   Reporting of Offender Information

2. ADOPTING AGENCY:

   Department of Corrections

3. PLEASE DESCRIBE THE AGENCY'S STRATEGY TO MAXIMIZE PUBLIC INVOLVEMENT IN THE DEVELOPMENT OF THE PROPOSED RULE, LISTING THE STEPS THAT HAVE BEEN OR WILL BE TAKEN TO COMPLY WITH THAT STRATEGY:

   The Department of Corrections (DOC) will hold a public hearing and post the proposed repeal of the Reporting of Offender Information Rule, APA #96-18/CVR #13-130-017 on its website to elicit feedback from the public.

   The DOC shall include a printed copy of the proposal to repeal the Rule in each of the DOC law libraries. The DOC shall make a printed copy available to all incarcerated individual upon request to the Law Librarian, Legal Assistant, or any other law library staff. Further, a digital copy of the proposal to repeal the rule shall be added to the tablets that are available to incarcerated individuals. Each DOC correctional facility shall make an announcement to all incarcerated individuals that a copy of the proposed rule is available to them for review and comment in the law library and tablets, as applicable.

4. BEYOND GENERAL ADVERTISEMENTS, PLEASE LIST THE PEOPLE AND ORGANIZATIONS THAT HAVE BEEN OR WILL BE INVOLVED IN THE DEVELOPMENT OF THE PROPOSED RULE:

DOC shall ensure that staff and individuals under the custody or supervision of the DOC have the opportunity to review and comment on the proposal to repeal the Rule.

Prior to the filing of the rule with the Interagency Committee on Administrative Rules (ICAR), the DOC informed, and provided a copy of the filing, the Department of Public Safety, Prisoner's Rights Office - Defender General, and the Attorney General's office of the intent to repeal this rule.

VERMONT **Department of Corrections**

Proposed Repeal of APA Rule 96-18/CVR 13-130-017:

Reporting of Offender Information

Name: Seaman, Kip

Facility: NWSCF

Comments: APPROPRIATE. 10/10/23

Department of Corrections

Public Comments and Responsiveness Summary on the Proposed Repeal of APA #96-18/CVR 13-130-017, Reporting of Offender Information

Dates of Public Comment: September 27, 2023 – November 7, 2023

Comments Received:

1. Kip Scanlon, Incarcerated individual, Northwest State Correctional Facility
   Appropriate.

   DOC Response: Thank you for reviewing the proposal and expressing your support for the repeal of APA #96-18/CVR 13-130-017, *Reporting of Offender Information*.

Department of Corrections

Minutes from the Public Hearing on the Proposed Repeal of APA #96-18/CVR 13-130-017, Reporting of Offender Information

Date of Hearing: October 30th, 2023

DOC Staff Members Present:

Christopher Antoine, DOC Staff Attorney; and
Ana Burke, Senior Policy and Implementation Analyst

Other Active Participants:

None.

No members of the public attended the hearing.

Proposal to Repeal APA #96-18/CVR 13-130-017, Reporting of Offender Information

The Vermont Department of Corrections (DOC) is proposing the repeal of the Reporting of Offender Information Rule, APA #96-18/CVR #13-130-017, because it is no longer the guiding document for this subject matter. DOC policy, #251.01, Offender/Inmate Records and Access to Information, dated 8/18/2019, and its associated guidance documents, and APA Rule #19-035/ CVR 13-130-036, describe the procedures that the DOC shall follow when releasing, or permitting the inspection of, a record belonging to individual under the custody or supervision of the DOC.

Votes

None.

~~13 130 017. Reporting of Offender Information (255)~~

~~**SECTION 1.** Authority~~

~~33 V.S.A."4913(a) and 6903 Counseling Service of Addison County, Inc., 146 Vt. 61 (1985); 28 V.S.A. §505(b); 28V.S.A. §204(d); 42 C.F.R. Part 2~~

~~**SECTION 2.** Purpose~~

~~This policy establishes the guidelines for the reporting of offender information to courts, state's attorneys, the Vermont Parole Board, the commissioner of Social and Rehabilitative Services, the Commissioner of Aging and Disabilities, other agencies and departments as noted in this policy and third parties.~~

~~**SECTION 3.** Applicability/Accessibility~~

~~This policy applies to all Department of Corrections employees, volunteers, and service providers and to all offender information in the control and custody of the Department. Anyone may have a copy of this policy.~~

~~**SECTION 4.** Definitions~~

~~Counseling Notes: written comments by DOC employees or health care providers in an offender's mental health records that document the author's hypothesis or opinion about an offender's behavior for future evaluation by the author, and are written solely for the author's future evaluation.~~

~~Criminal History Information: documents, forms, reports, or data of a specific offender currently or formerly under supervision by the Department, or currently or formerly confined in any Department correctional facility, that pertain to that offender's involvement in the criminal justice system, including but not limited to arrest/search warrants, court orders, indictments, information or formal charges, presentence reports, Intermediate Sanction Reports, pre-parole reports, supervisory history of probationers and parolees, investigations, pleadings in criminal proceedings, pleas, motions, citations, summons, appearance bonds, notice/receipts of bail, a court order or mittimus, and records of judicial proceedings.~~

~~Foreseeable Risk of Harm: a case-by-case determination by department employees in consultation with treatment providers and others involved in the offender's case planning that is based upon: (1) an offender's prior criminal background, personal history and current conduct; (2) the type of crime for which the offender was most recently convicted; and (3) the surrounding circumstances in which the offender is being supervised, including the relationship of the offender to a third party or third parties.~~

~~Information: any statement, whether or not it is in writing, that pertains to a specific offender.~~

~~Intermediate Sanction Report: the Intermediate Sanction Report (ISR) is a statute mandated, court ordered assessment of offender criminogenic risk/need and the planned correctional response to controlling that risk/need. It is considered, regardless of format, the equivalent of a pre-sentence investigation.~~

~~Non-Confidential Information: (1) the name of a specific offender; (2) the offender's current offense; (3) date and length of sentence received; (4) date of commencement of furlough, supervised community sentence, probation, parole, or incarceration; (5) the offender's attorney of record; and (6) the DOC employee assigned to supervise the offender.~~

~~Offender: any person convicted of a crime of offense who is placed in the care, custody, or supervision of the Vermont Department of Corrections.~~

~~Presentence Report: any written report prepared by DOC employees and provided to a judge that contains a recommendation for a sentence and factual information pertaining to the offender and/or victim.~~

~~Reporting: any communication of offender information that is made by a DOC employee, volunteer, agent or contractor that is required by law or this policy whether or not a request for such information is made.~~

~~Serious Risk of Danger: a case-by-case determination by a therapist, a medical professional, mental health professional, or other person as defined in 12 V.S.A. §1612(a) that is based upon: (1) the offender's proclivity to violent behavior as evidenced by prior criminal background or history of mental health treatment:~~

~~and (2) the expressed intent of that offender to harm the person or property of an identifiable third party.~~

~~Service Provider: an employee, agency or department providing a service to offenders pursuant to an agreement or contract with the Vermont Department of Corrections.~~

~~Special Relationship: a relationship between an offender and a third party that has been established as a result of the supervision of the offender by the Department; e.g. a special relationship may exist between a third party and the DOC if an offender is required or allowed to work or live with the third party.~~

~~Supervising Employees: DOC staff and employees who are tasked with monitoring offenders, or involved in directly working with, or supervision, offenders in the community.~~

~~Treatment Notes: any written notes used in the Department's programs for offenders that address need areas such as violence, sexual deviancy, or drug/alcohol abuse.~~

~~Treatment notes would include daily journals, thinking reports, treatment group or review form, treatment team log book, relapse prevention plans, sexual autobiographies, and references or documentation pertaining to identifiable victims.~~

~~SECTION 5.~~ ~~Policy~~

~~Department employees, volunteers, and service providers shall report offender information to state officials and third parties in the following situations:~~

~~A.~~ ~~Supervising employees shall disclose non-confidential information pertaining to that offender to a third party and/or to appropriate law enforcement officials where there is a foreseeable risk of harm to that third party by the offender. While sound judgement and common sense should be exercised to avoid causing unjustified alarm, fear or reaction, Department employees should realize that the offender's behavior patterns, need areas, personal history and special relationship to a third party may create a foreseeable risk of harm to that third party triggering the need to disclose information. This does not prevent the offender from being~~

~~encouraged or permitted to make the required disclosure with the understanding that an employee will verify the disclosure.~~

~~The determination of a foreseeable risk of harm is a question of fact that should be determined on a case-by-case basis. Those usually involved in the determination include supervising employees, any employees or service providers working with the offender in a treatment program, and any caseworkers involved in the offender's case planning. the Department's Legal Division should be consulted where the issue of foreseeable risk of harm is unclear.~~

~~**B.** Service providers and Department employees who are physicians, medical specialists, nurses, dentists, mental health professionals, probation/parole officers, or supervising employees who have reasonable cause to believe that an offender has abused or neglected a child, shall make a report within 24 hours to the Commissioner of SRS. If there is a reason to believe that an offender under the supervision or control of the Department has abused, neglected or exploited an elderly or disabled adult, a report shall be make to the commissioner of the Department of Aging and Disability. The report shall occur within 24 hours of gaining that knowledge. Additional reporting pursuant to Policy 291 - Reporting Incidents - shall also be made.~~

~~**C.** Department employees who are not supervising offenders and who have reasonable cause to believe that an offender has abused or neglected a child, may make a report to the commissioner of SRS. If a non-supervising employee of the Department has reason to believe that an offender under the supervision or control of the Department has abused, neglected or exploited an elderly or disabled adult, a report may be made to the Commissioner of the Department of Aging and Disability. However, a report also shall be made pursuant to Policy 291.~~

~~**D.** Service providers or Department employees who are authorized to practice medicine, dentistry, nursing or mental health care, shall notify an identifiable victim as soon as possible when an offender poses a serious risk of danger to the person. A report shall also be made pursuant to Policy 291.~~

~~**E.** Department employees shall provide the Vermont Parole Board information required to address parole and supervised community sentences, except that disclosure of counseling and treatment notes shall not be made. Information from alcohol and drug treatment programs shall be provided to the Board but only after the offender executes a written consent pursuant to 42 C.F.R. Part 2.~~

~~**F.** Department employees shall provide a sentencing court information required for a presentence report or Intermediate Sanctions Report except that disclosure of counseling and treatment notes shall not be made.~~

~~**G.** Department employees, volunteers and service providers shall report to law enforcement authorities (e.g. State Police, States Attorney) admissions of past criminal conduct by offenders when (1) the admission was not made during the course of health care, mental health care, alcohol and drug abuse treatment, or spiritual guidance or counseling of a penitential character; and (2) the admission is specific as to surrounding circumstances including the identity of the victim(s).~~

~~**H.** Any person may be provided offender criminal history information (except presentence reports and Intermediate Sanction Reports) by the commissioner, designee, the Director of Correctional Services, or the site manager, if it is determined that an emergency exists or exceptional circumstances warrant the disclosure of criminal history information in order to control a disturbance, apprehend an escapee, ensure institutional safety or protection of any offender, or otherwise address a legitimate public safety interest.~~

~~**I.** The Department of corrections shall, upon request, notify the Vermont print media and the Vermont law enforcement community of an offender's name, current offense, and identity of supervising officer, when an offender is released from confinement from a correctional facility and placed on supervision in the community. Law enforcement officials shall be provided the offender's residential address if:~~

~~**1)** there is reason to believe that public protection and/or protection of the offender is an issue; and~~

~~**2)** the law enforcement agency agrees not to make public the offender's residential address.~~

~~If an offender is serving a sentence for any violent or sexual offense involving a minor as a victim, the Department of SRS shall be notified of the offender's name, current offense, identity of supervising officer, and place of residence and employment.~~

~~**SECTION 6.** Legal Guidance~~

~~Department employees, volunteers, and service providers are encouraged to seek guidance at any time from the Department's Legal Division whenever there is a~~

~~question about the application of this policy in a given situation. Statutory Authority: 28 V.S.A. § 204 (d), 505 (b); 33 V.S.A., § 4913(a), 6903~~

~~**Effective Date:** March 6, 1996 (SOS Rule Log #96-18)~~

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

The Vermont Statutes Online have been updated to include the actions of the 2023 session of the General Assembly.

NOTE: The Vermont Statutes Online is an unofficial copy of the Vermont Statutes Annotated that is provided as a convenience.

Title 28 : Public Institutions and Corrections

Chapter 005 : Probation

Subchapter 001 : General Provisions

(Cite as: 28 V.S.A. § 204)

§ 204. Submission of written report; production of records

(a) A court, before which a person is being prosecuted for any crime, may in its discretion order the Commissioner to submit a written report as to the circumstances of the alleged offense and the character and previous criminal history record of the person, with recommendation. If the presentence investigation report is being prepared in connection with a person's conviction for a sex offense that requires registration pursuant to 13 V.S.A. chapter 167, subchapter 3, the Commissioner shall obtain information pertaining to the person's juvenile record, if any, in accordance with 33 V.S.A. §§ 5117 and 5119(f)(6), and any deferred sentences received for a registrable sex offense in accordance with 13 V.S.A. § 7041(h), and include such information in the presentence investigation report.

(b) The court shall order such a report to be made before imposing sentence when the respondent is adjudged guilty of a felony, except as otherwise provided by rules of the Supreme Court. If the report has been made to any court within the State within a period of two years with reference to such individual, in connection with the same or another offense, submission of a copy of that report may fulfill the requirements of this section, if the court to which the report is to be submitted approves. Upon request, the Commissioner shall furnish a State's Attorney with a copy of any report made within the State once sentence has been passed in connection with the offense for which the report was made.

(c) The report ordered by the court under this section or section 204a of this title shall be made not less than one week nor more than three weeks from the date of the order. This three-week limit may be extended by order of the court.

(d)(1) Except as provided in subdivision (2) of this subsection, any presentence investigation report or parole summary prepared by any employee of the Department in the discharge of the employee's official duty, except as provided in subdivision 204a(b)(5) and section 205 of this title, is confidential and shall not be disclosed to anyone outside the Department other than the judge or the Parole Board.

(2)(A) The court or Board shall permit inspection of the presentence investigation report or parole summary, redacted of information that may compromise the safety or confidentiality of any person, by the State's Attorney and by the defendant or inmate or his or her attorney; and

(B) the court or Board may, in its discretion, permit the inspection of the presentence investigation report or parole summary or parts thereof by other persons having a proper interest in the report or parole summary, whenever the best interests or welfare of the defendant or inmate makes that action desirable or helpful.

(e) The presentence investigation report ordered by the court under this section or section 204a of this title shall include the comments or written statement of the victim, or the victim's guardian or next of kin if the victim is incompetent or deceased, whenever the victim or the victim's guardian or next of kin choose to submit comments or a written statement.

(f) Except as otherwise provided by law, reports and records subject to this section may be inspected, pursuant to a court order issued ex parte, by a State or federal prosecutor as part of a criminal investigation if the court finds that the records may be relevant to the investigation. The information in the files may be used for any lawful purpose but shall not otherwise be made public.

(g) The presentence investigation report ordered by the court under this section or section 204a of this title shall set forth information concerning the defendant's custodial relationships pursuant to 13 V.S.A. § 7030. (Added 1971, No. 199 (Adj. Sess.), § 20; amended 1973, No. 109, § 10, eff. May 25, 1973; 1981, No. 223 (Adj. Sess.), § 18; 1989, No. 293 (Adj. Sess.), § 7; 1995, No. 170 (Adj. Sess.), § 18, eff. Sept. 1, 1996; 2005, No. 192 (Adj. Sess.), § 11, eff. May 26, 2006; 2009, No. 1, § 35; 2009, No. 58, § 19; 2013, No. 168 (Adj. Sess.), § 3, eff. June 3, 2014; 2015, No. 29, § 21; 2015, No. 137 (Adj. Sess.), § 3, eff. May 25, 2016; 2017, No. 113 (Adj. Sess.), § 169; 2021, No. 104 (Adj. Sess.), § 3, eff. July 1, 2022.)

Title 42 —Public Health
Chapter I —Public Health Service, Department of Health and Human Services
Subchapter A —General Provisions

PART 2—CONFIDENTIALITY OF SUBSTANCE USE DISORDER PATIENT RECORDS

Authority: 42 U.S.C. 290dd–2.

Source: 82 FR 6115, Jan. 18, 2017, unless otherwise noted.

Subpart A—Introduction

§ 2.1 Statutory authority for confidentiality of substance use disorder patient records.

Title 42, United States Code, Section 290dd–2(g) authorizes the Secretary to prescribe regulations. Such regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this statute, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

§ 2.2 Purpose and effect.

(a) ***Purpose.*** Pursuant to 42 U.S.C. 290dd–2(g), the regulations in this part impose restrictions upon the disclosure and use of substance use disorder patient records which are maintained in connection with the performance of any part 2 program. The regulations in this part include the following subparts:

(1) Subpart B of this part: General Provisions, including definitions, applicability, and general restrictions;

(2) Subpart C of this part: Disclosures with Patient Consent, including disclosures which require patient consent and the consent form requirements;

(3) Subpart D of this part: Disclosures without Patient Consent, including disclosures which do not require patient consent or an authorizing court order; and

(4) Subpart E of this part: Court Orders Authorizing Disclosure and Use, including disclosures and uses of patient records which may be made with an authorizing court order and the procedures and criteria for the entry and scope of those orders.

(b) ***Effect.***

(1) The regulations in this part prohibit the disclosure and use of patient records unless certain circumstances exist. If any circumstance exists under which disclosure is permitted, that circumstance acts to remove the prohibition on disclosure but it does not compel disclosure. Thus, the regulations do not require disclosure under any circumstances.

(2) The regulations in this part are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to ensure that a patient receiving treatment for a substance use disorder in a part 2 program is not made more vulnerable by reason of the availability of their patient record than an individual with a substance use disorder who does not seek treatment.

(3) Because there is a criminal penalty for violating the regulations, they are to be construed strictly in favor of the potential violator in the same manner as a criminal statute (see *M. Kraus & Brothers* v. *United States,* 327 U.S. 614, 621–22, 66 S. Ct. 705, 707–08 (1946)).

§ 2.3 Criminal penalty for violation.

Under 42 U.S.C. 290dd–2(f), any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined in accordance with Title 18 of the U.S. Code.

§ 2.4 Reports of violations.

(a) The report of any violation of the regulations in this part may be directed to the United States Attorney for the judicial district in which the violation occurs.

(b) The report of any violation of the regulations in this part by an opioid treatment program may be directed to the United States Attorney for the judicial district in which the violation occurs as well as to the Substance Abuse and Mental Health Services Administration (SAMHSA) office responsible for opioid treatment program oversight.

Subpart B—General Provisions

§ 2.11 Definitions.

For purposes of the regulations in this part:

Central registry means an organization which obtains from two or more member programs patient identifying information about individuals applying for withdrawal management or maintenance treatment for the purpose of avoiding an individual's concurrent enrollment in more than one treatment program.

Diagnosis means any reference to an individual's substance use disorder or to a condition which is identified as having been caused by that substance use disorder which is made for the purpose of treatment or referral for treatment.

Disclose means to communicate any information identifying a patient as being or having been diagnosed with a substance use disorder, having or having had a substance use disorder, or being or having been referred for treatment of a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person.

Federally assisted —see § 2.12(b).

Informant means an individual:

(1) Who is a patient or employee of a part 2 program or who becomes a patient or employee of a part 2 program at the request of a law enforcement agency or official; and

(2) Who at the request of a law enforcement agency or official observes one or more patients or employees of the part 2 program for the purpose of reporting the information obtained to the law enforcement agency or official.

Maintenance treatment means long-term pharmacotherapy for individuals with substance use disorders that reduces the pathological pursuit of reward and/or relief and supports remission of substance use disorder-related symptoms.

Member program means a withdrawal management or maintenance treatment program which reports patient identifying information to a central registry and which is in the same state as that central registry or is in a state that participates in data sharing with the central registry of the program in question.

Minor, as used in the regulations in this part, means an individual who has not attained the age of majority specified in the applicable state law, or if no age of majority is specified in the applicable state law, the age of 18 years.

Part 2 program means a federally assisted program (federally assisted as defined in § 2.12(b) and program as defined in this section). See § 2.12(e)(1) for examples.

Part 2 program director means:

(1) In the case of a part 2 program that is an individual, that individual.

(2) In the case of a part 2 program that is an entity, the individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer of the part 2 program.

Patient means any individual who has applied for or been given diagnosis, treatment, or referral for treatment for a substance use disorder at a part 2 program. *Patient* includes any individual who, after arrest on a criminal charge, is identified as an individual with a substance use disorder in order to determine that individual's eligibility to participate in a part 2 program. This definition includes both current and former patients.

Patient identifying information means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient, as defined in this section, can be determined with reasonable accuracy either directly or by reference to other information. The term does not include a number assigned to a patient by a part 2 program, for internal use only by the part 2 program, if that number does not consist of or contain numbers (such as a social security, or driver's license number) that could be used to identify a patient with reasonable accuracy from sources external to the part 2 program.

Person means an individual, partnership, corporation, federal, state or local government agency, or any other legal entity, (also referred to as "individual or entity").

Program means:

(1) An individual or entity (other than a general medical facility) who holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment; or

(2) An identified unit within a general medical facility that holds itself out as providing, and provides, substance use disorder diagnosis, treatment, or referral for treatment; or

(3) Medical personnel or other staff in a general medical facility whose primary function is the provision of substance use disorder diagnosis, treatment, or referral for treatment and who are identified as such providers.

Qualified service organization means an individual or entity who:

(1) Provides services to a part 2 program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, accounting, population health management, medical staffing, or other professional services, or services to prevent or treat child abuse or neglect, including training on nutrition and child care and individual and group therapy, and

(2) Has entered into a written agreement with a part 2 program under which that individual or entity:

(i) Acknowledges that in receiving, storing, processing, or otherwise dealing with any patient records from the part 2 program, it is fully bound by the regulations in this part; and

(ii) If necessary, will resist in judicial proceedings any efforts to obtain access to patient identifying information related to substance use disorder diagnosis, treatment, or referral for treatment except as permitted by the regulations in this part.

Records means any information, whether recorded or not, created by, received, or acquired by a part 2 program relating to a patient (*e.g.*, diagnosis, treatment and referral for treatment information, billing information, emails, voice mails, and texts), provided, however, that information conveyed orally by a part 2 program to a non-part 2 provider for treatment purposes with the consent of the patient does not become a record subject to this Part in the possession of the non-part 2 provider merely because that information is reduced to writing by that non-part 2 provider. Records otherwise transmitted by a part 2 program to a non-part 2 provider retain their characteristic as records in the hands of the non-part 2 provider, but may be segregated by that provider. For the purpose of the regulations in this part, records include both paper and electronic records.

Substance use disorder means a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems such as impaired control, social impairment, risky use, and pharmacological tolerance and withdrawal. For the purposes of the regulations in this part, this definition does not include tobacco or caffeine use.

Third-party payer means an individual or entity who pays and/or agrees to pay for diagnosis or treatment furnished to a patient on the basis of a contractual relationship with the patient or a member of the patient's family or on the basis of the patient's eligibility for federal, state, or local governmental benefits.

Treating provider relationship means that, regardless of whether there has been an actual in-person encounter:

(1) A patient is, agrees to, or is legally required to be diagnosed, evaluated, and/or treated, or agrees to accept consultation, for any condition by an individual or entity, and;

(2) The individual or entity undertakes or agrees to undertake diagnosis, evaluation, and/or treatment of the patient, or consultation with the patient, for any condition.

Treatment means the care of a patient suffering from a substance use disorder, a condition which is identified as having been caused by the substance use disorder, or both, in order to reduce or eliminate the adverse effects upon the patient.

Undercover agent means any federal, state, or local law enforcement agency or official who enrolls in or becomes an employee of a part 2 program for the purpose of investigating a suspected violation of law or who pursues that purpose after enrolling or becoming employed for other purposes.

Withdrawal management means the use of pharmacotherapies to treat or attenuate the problematic signs and symptoms arising when heavy and/or prolonged substance use is reduced or discontinued.

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43036, July 15, 2020]

§ 2.12 Applicability.

(a) ***General*** —

(1) ***Restrictions on disclosure.*** The restrictions on disclosure in the regulations in this part apply to any records which:

(i) Would identify a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person; and

(ii) Contain drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or contain alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for that treatment, or making a referral for that treatment.

(2) ***Restriction on use.*** The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient (42 U.S.C. 290dd–2(c)) applies to any information, whether or not recorded, which is drug abuse information obtained by a federally assisted drug abuse program after March 20, 1972 (part 2 program), or is alcohol abuse information obtained by a federally assisted alcohol abuse program after May 13, 1974 (part 2 program); or if obtained before the pertinent date, is maintained by a part 2 program after that date as part of an ongoing treatment episode which extends past that date; for the purpose of treating a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

(b) ***Federal assistance.*** A program is considered to be federally assisted if:

(1) It is conducted in whole or in part, whether directly or by contract or otherwise by any department or agency of the United States (but see paragraphs (c)(1) and (2) of this section relating to the Department of Veterans Affairs and the Armed Forces);

(2) It is being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States including but not limited to:

(i) Participating provider in the Medicare program;

(ii) Authorization to conduct maintenance treatment or withdrawal management; or

(iii) Registration to dispense a substance under the Controlled Substances Act to the extent the controlled substance is used in the treatment of substance use disorders;

(3) It is supported by funds provided by any department or agency of the United States by being:

(i) A recipient of federal financial assistance in any form, including financial assistance which does not directly pay for the substance use disorder diagnosis, treatment, or referral for treatment; or

(ii) Conducted by a state or local government unit which, through general or special revenue sharing or other forms of assistance, receives federal funds which could be (but are not necessarily) spent for the substance use disorder program; or

(4) It is assisted by the Internal Revenue Service of the Department of the Treasury through the allowance of income tax deductions for contributions to the program or through the granting of tax exempt status to the program.

(c) *Exceptions* —

(1) ***Department of Veterans Affairs.*** These regulations do not apply to information on substance use disorder patients maintained in connection with the Department of Veterans Affairs' provision of hospital care, nursing home care, domiciliary care, and medical services under Title 38, U.S.C. Those records are governed by 38 U.S.C. 7332 and regulations issued under that authority by the Secretary of Veterans Affairs.

(2) ***Armed Forces.*** The regulations in this part apply to any information described in paragraph (a) of this section which was obtained by any component of the Armed Forces during a period when the patient was subject to the Uniform Code of Military Justice except:

(i) Any interchange of that information within the Armed Forces; and

(ii) Any interchange of that information between the Armed Forces and those components of the Department of Veterans Affairs furnishing health care to veterans.

(3) ***Communication within a part 2 program or between a part 2 program and an entity having direct administrative control over that part 2 program.*** The restrictions on disclosure in the regulations in this part do not apply to communications of information between or among personnel having a need for the information in connection with their duties that arise out of the provision of diagnosis, treatment, or referral for treatment of patients with substance use disorders if the communications are:

(i) Within a part 2 program; or

(ii) Between a part 2 program and an entity that has direct administrative control over the program.

(4) ***Qualified service organizations.*** The restrictions on disclosure in the regulations in this part do not apply to communications between a part 2 program and a qualified service organization of information needed by the qualified service organization to provide services to the program.

(5) ***Crimes on part 2 program premises or against part 2 program personnel.*** The restrictions on disclosure and use in the regulations in this part do not apply to communications from part 2 program personnel to law enforcement agencies or officials which:

(i) Are directly related to a patient's commission of a crime on the premises of the part 2 program or against part 2 program personnel or to a threat to commit such a crime; and

(ii) Are limited to the circumstances of the incident, including the patient status of the individual committing or threatening to commit the crime, that individual's name and address, and that individual's last known whereabouts.

(6) ***Reports of suspected child abuse and neglect.*** The restrictions on disclosure and use in the regulations in this part do not apply to the reporting under state law of incidents of suspected child abuse and neglect to the appropriate state or local authorities. However, the restrictions continue to apply to the original substance use disorder patient records maintained by the part 2 program including their disclosure and use for civil or criminal proceedings which may arise out of the report of suspected child abuse and neglect.

(d) ***Applicability to recipients of information*** —

(1) ***Restriction on use of information.*** The restriction on the use of any information subject to the regulations in this part to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any person who obtains that information from a part 2 program, regardless of the status of the person obtaining the information or whether the information was obtained in accordance with the regulations in this part. This restriction on use bars, among other things, the introduction of that information as evidence in a criminal proceeding and any other use of the information to investigate or prosecute a patient with respect to a suspected crime. Information obtained by undercover agents or informants (see § 2.17) or through patient access (see § 2.23) is subject to the restriction on use.

(2) ***Restrictions on disclosures*** —

(i) ***Third-party payers, administrative entities, and others.*** The restrictions on disclosure in the regulations in this part apply to:

(A) Third-party payers with regard to records disclosed to them by part 2 programs or under § 2.31(a)(4)(i)(A);

(B) Entities having direct administrative control over part 2 programs with regard to information that is subject to the regulations in this part communicated to them by the part 2 program under paragraph (c)(3) of this section; and

(C) Individuals or entities who receive patient records directly from a part 2 program or other lawful holder of patient identifying information and who are notified of the prohibition on re-disclosure in accordance with § 2.32.

(ii) Notwithstanding paragraph (d)(2)(i)(C) of this section, a non-part 2 treating provider may record information about a substance use disorder (SUD) and its treatment that identifies a patient. This is permitted and does not constitute a record that has been re-disclosed under part 2, provided that any SUD records received from a part 2 program or other lawful holder are segregated or segmented. The act of recording information about a SUD and its treatment does not by itself render a medical record which is created by a non-part 2 treating provider subject to the restrictions of this part 2.

(e) ***Explanation of applicability*** —

(1) ***Coverage.*** These regulations cover any information (including information on referral and intake) about patients receiving diagnosis, treatment, or referral for treatment for a substance use disorder created by a part 2 program. Coverage includes, but is not limited to, those treatment or rehabilitation programs, employee assistance programs, programs within general hospitals, school-based programs, and private practitioners who hold themselves out as providing, and provide substance use disorder diagnosis, treatment, or referral for treatment. However, the regulations in this part would not apply, for example, to emergency room personnel who refer a patient to the intensive care unit for an apparent overdose, unless the primary function of such personnel is the provision of substance use disorder diagnosis, treatment, or referral for treatment and they are identified as providing such services or the emergency room has promoted itself to the community as a provider of such services.

(2) ***Federal assistance to program required.*** If a patient's substance use disorder diagnosis, treatment, or referral for treatment is not provided by a part 2 program, that patient's record is not covered by the regulations in this part. Thus, it is possible for an individual patient to benefit from federal support and not be covered by the confidentiality regulations because the program in which the patient is enrolled is not federally assisted as defined in paragraph (b) of this section. For example, if a federal court placed an individual in a private for-profit program and made a payment to the program on behalf of that individual, that patient's record would not be covered by the regulations in this part unless the program itself received federal assistance as defined by paragraph (b) of this section.

(3) Information to which restrictions are applicable. Whether a restriction applies to the use or disclosure of a record affects the type of records which may be disclosed. The restrictions on disclosure apply to any part 2-covered records which would identify a specified patient as having or having had a substance use disorder. The restriction on use of part 2 records to bring criminal charges against a patient for a crime applies to any records obtained by the part 2 program for the purpose of diagnosis, treatment, or referral for treatment of patients with substance use disorders. (Restrictions on use and disclosure apply to recipients of part 2 records under paragraph (d) of this section.)

(4) ***How type of diagnosis affects coverage.*** These regulations cover any record reflecting a diagnosis identifying a patient as having or having had a substance use disorder which is initially prepared by a part 2 provider in connection with the treatment or referral for treatment of a patient with a substance use disorder. A diagnosis prepared by a part 2 provider for the purpose of treatment or referral for treatment, but which is not so used, is covered by the regulations in this part. The following are not covered by the regulations in this part:

(i) Diagnosis which is made solely for the purpose of providing evidence for use by law enforcement agencies or officials; or

(ii) A diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved does not have a substance use disorder (*e.g.*, involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43036, July 15, 2020]

§ 2.13 Confidentiality restrictions and safeguards.

(a) ***General.*** The patient records subject to the regulations in this part may be disclosed or used only as permitted by the regulations in this part and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or local authority. Any disclosure made under the regulations in this part must be limited to that information which is necessary to carry out the purpose of the disclosure.

(b) ***Unconditional compliance required.*** The restrictions on disclosure and use in the regulations in this part apply whether or not the part 2 program or other lawful holder of the patient identifying information believes that the person seeking the information already has it, has other means of obtaining it, is a law enforcement agency or official or other government official, has obtained a subpoena, or asserts any other justification for a disclosure or use which is not permitted by the regulations in this part.

(c) ***Acknowledging the presence of patients: Responding to requests.***

(1) The presence of an identified patient in a health care facility or component of a health care facility which is publicly identified as a place where only substance use disorder diagnosis, treatment, or referral for treatment is provided may be acknowledged only if the patient's written consent is obtained in accordance with subpart C of this part or if an authorizing court order is entered in accordance with subpart E of this part. The regulations permit acknowledgement of the presence of an identified patient in a health care facility or part of a health care facility if the health care facility is not publicly identified as only a substance use disorder diagnosis, treatment, or referral for treatment facility, and if the acknowledgement does not reveal that the patient has a substance use disorder.

(2) Any answer to a request for a disclosure of patient records which is not permissible under the regulations in this part must be made in a way that will not affirmatively reveal that an identified individual has been, or is being, diagnosed or treated for a substance use disorder. An inquiring party may be provided a copy of the regulations in this part and advised that they restrict the disclosure of substance use disorder patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient.

(d) ***List of disclosures.*** Upon request, patients who have consented to disclose their patient identifying information using a general designation pursuant to § 2.31(a)(4)(ii)(B) must be provided a list of entities to which their information has been disclosed pursuant to the general designation.

(1) Under this paragraph (d), patient requests:

(i) Must be made in writing; and

(ii) Are limited to disclosures made within the past two years;

(2) Under this paragraph (d), the entity named on the consent form that discloses information pursuant to a patient's general designation (the entity that serves as an intermediary, as described in § 2.31(a)(4)(ii)(B)) must:

(i) Respond in 30 or fewer days of receipt of the written request; and

(ii) Provide, for each disclosure, the name(s) of the entity(-ies) to which the disclosure was made, the date of the disclosure, and a brief description of the patient identifying information disclosed.

(3) The part 2 program is not responsible for compliance with this paragraph (d); the entity that serves as an intermediary, as described in § 2.31(a)(4)(ii)(B), is responsible for compliance with the requirement.

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43037, July 15, 2020]

§ 2.14 Minor patients.

(a) ***State law not requiring parental consent to treatment.*** If a minor patient acting alone has the legal capacity under the applicable state law to apply for and obtain substance use disorder treatment, any written consent for disclosure authorized under subpart C of this part may be given only by the minor patient. This restriction includes, but is not limited to, any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement. These regulations do not prohibit a part 2 program from refusing to provide treatment until the minor patient

consents to the disclosure necessary to obtain reimbursement, but refusal to provide treatment may be prohibited under a state or local law requiring the program to furnish the service irrespective of ability to pay.

(b) ***State law requiring parental consent to treatment.***

(1) Where state law requires consent of a parent, guardian, or other individual for a minor to obtain treatment for a substance use disorder, any written consent for disclosure authorized under subpart C of this part must be given by both the minor and their parent, guardian, or other individual authorized under state law to act in the minor's behalf.

(2) Where state law requires parental consent to treatment, the fact of a minor's application for treatment may be communicated to the minor's parent, guardian, or other individual authorized under state law to act in the minor's behalf only if:

(i) The minor has given written consent to the disclosure in accordance with subpart C of this part; or

(ii) The minor lacks the capacity to make a rational choice regarding such consent as judged by the part 2 program director under paragraph (c) of this section.

(c) ***Minor applicant for services lacks capacity for rational choice.*** Facts relevant to reducing a substantial threat to the life or physical well-being of the minor applicant or any other individual may be disclosed to the parent, guardian, or other individual authorized under state law to act in the minor's behalf if the part 2 program director judges that:

(1) A minor applicant for services lacks capacity because of extreme youthor mental or physical condition to make a rational decision on whether to consent to a disclosure under subpart C of this part to their parent, guardian, or other individual authorized under state law to act in the minor's behalf; and

(2) The minor applicant's situation poses a substantial threat to the life or physical well-being of the minor applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other individual authorized under state law to act in the minor's behalf.

§ 2.15 Incompetent and deceased patients.

(a) ***Incompetent patients other than minors*** —

(1) ***Adjudication of incompetence.*** In the case of a patient who has been adjudicated as lacking the capacity, for any reason other than insufficient age, to manage their own affairs, any consent which is required under the regulations in this part may be given by the guardian or other individual authorized under state law to act in the patient's behalf.

(2) ***No adjudication of incompetency.*** In the case of a patient, other than a minor or one who has been adjudicated incompetent, that for any period suffers from a medical condition that prevents knowing or effective action on their own behalf, the part 2 program director may exercise the right of the patient to consent to a disclosure under subpart C of this part for the sole purpose of obtaining payment for services from a third-party payer.

(b) ***Deceased patients*** —

(1) ***Vital statistics.*** These regulations do not restrict the disclosure of patient identifying information relating to the cause of death of a patient under laws requiring the collection of death or other vital statistics or permitting inquiry into the cause of death.

(2) ***Consent by personal representative.*** Any other disclosure of information identifying a deceased patient as having a substance use disorder is subject to the regulations in this part. If a written consent to the disclosure is required, that consent may be given by an executor, administrator, or other personal representative appointed under applicable state law. If there is no such applicable state law appointment, the consent may be given by the patient's spouse or, if none, by any responsible member of the patient's family.

[82 FR 6115, Jan. 18, 2017, as amended at 83 FR 251, Jan. 3, 2018]

§ 2.16 Security for records.

(a) The part 2 program or other lawful holder of patient identifying information must have in place formal policies and procedures to reasonably protect against unauthorized uses and disclosures of patient identifying information and to protect against reasonably anticipated threats or hazards to the security of patient identifying information. These formal policies and procedures must address:

(1) Paper records, including:

(i) Transferring and removing such records;

(ii) Destroying such records, including sanitizing the hard copy media associated with the paper printouts, to render the patient identifying information non-retrievable;

(iii) Maintaining such records in a secure room, locked file cabinet, safe, or other similar container, or storage facility when not in use;

(iv) Using and accessing workstations, secure rooms, locked file cabinets, safes, or other similar containers, and storage facilities that use or store such information; and

(v) Rendering patient identifying information non-identifiable in a manner that creates a very low risk of re-identification (*e.g.*, removing direct identifiers).

(2) Electronic records, including:

(i) Creating, receiving, maintaining, and transmitting such records;

(ii) Destroying such records, including sanitizing the electronic media on which such records are stored, to render the patient identifying information non-retrievable;

(iii) Using and accessing electronic records or other electronic media containing patient identifying information; and

(iv) Rendering the patient identifying information non-identifiable in a manner that creates a very low risk of re-identification (*e.g.*, removing direct identifiers).

(b) [Reserved]

§ 2.17 Undercover agents and informants.

(a) ***Restrictions on placement.*** Except as specifically authorized by a court order granted under § 2.67, no part 2 program may knowingly employ, or enroll as a patient, any undercover agent or informant.

(b) ***Restriction on use of information.*** No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is placed in a part 2 program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient.

§ 2.18 Restrictions on the use of identification cards.

No person may require any patient to carry in their immediate possession while away from the part 2 program premises any card or other object which would identify the patient as having a substance use disorder. This section does not prohibit a person from requiring patients to use or carry cards or other identification objects on the premises of a part 2 program.

§ 2.19 Disposition of records by discontinued programs.

(a) ***General.*** If a part 2 program discontinues operations or is taken over or acquired by another program, it must remove patient identifying information from its records or destroy its records, including sanitizing any associated hard copy or electronic media, to render the patient identifying information non-retrievable in a manner consistent with the policies and procedures established under § 2.16, unless:

(1) The patient who is the subject of the records gives written consent (meeting the requirements of § 2.31) to a transfer of the records to the acquiring program or to any other program designated in the consent (the manner of obtaining this consent must minimize the likelihood of a disclosure of patient identifying information to a third party); or

(2) There is a legal requirement that the records be kept for a period specified by law which does not expire until after the discontinuation or acquisition of the part 2 program.

(b) ***Special procedure where retention period required by law.*** If paragraph (a)(2) of this section applies:

(1) Records, which are paper, must be:

(i) Sealed in envelopes or other containers labeled as follows: "Records of [insert name of program] required to be maintained under [insert citation to statute, regulation, court order or other legal authority requiring that records be kept] until a date not later than [insert appropriate date]";

(A) All hard copy media from which the paper records were produced, such as printer and facsimile ribbons, drums, etc., must be sanitized to render the data non-retrievable; and

(B) [Reserved]

(ii) Held under the restrictions of the regulations in this part by a responsible person who must, as soon as practicable after the end of the required retention period specified on the label, destroy the records and sanitize any associated hard copy media to render the patient identifying information non-retrievable in a manner consistent with the discontinued program's or acquiring program's policies and procedures established under § 2.16.

(2) Records, which are electronic, must be:

(i) Transferred to a portable electronic device with implemented encryption to encrypt the data at rest so that there is a low probability of assigning meaning without the use of a confidential process or key and implemented access controls for the confidential process or key; or

(ii) Transferred, along with a backup copy, to separate electronic media, so that both the records and the backup copy have implemented encryption to encrypt the data at rest so that there is a low probability of assigning meaning without the use of a confidential process or key and implemented access controls for the confidential process or key; and

(iii) Within one year of the discontinuation or acquisition of the program, all electronic media on which the patient records or patient identifying information resided prior to being transferred to the device specified in (i) above or the original and backup electronic media specified in (ii) above, including email and other electronic communications, must be sanitized to render the patient identifying information non-retrievable in a manner consistent with the discontinued program's or acquiring program's policies and procedures established under § 2.16; and

(iv) The portable electronic device or the original and backup electronic media must be:

(A) Sealed in a container along with any equipment needed to read or access the information, and labeled as follows: "Records of [insert name of program] required to be maintained under [insert citation to statute, regulation, court order or other legal authority requiring that records be kept] until a date not later than [insert appropriate date];" and

(B) Held under the restrictions of the regulations in this part by a responsible person who must store the container in a manner that will protect the information (*e.g.*, climate controlled environment); and

(v) The responsible person must be included on the access control list and be provided a means for decrypting the data. The responsible person must store the decryption tools on a device or at a location separate from the data they are used to encrypt or decrypt; and

(vi) As soon as practicable after the end of the required retention period specified on the label, the portable electronic device or the original and backup electronic media must be sanitized to render the patient identifying information non-retrievable consistent with the policies established under § 2.16.

§ 2.20 Relationship to state laws.

The statute authorizing the regulations in this part (42 U.S.C. 290dd–2) does not preempt the field of law which they cover to the exclusion of all state laws in that field. If a disclosure permitted under the regulations in this part is prohibited under state law, neither the regulations in this part nor the authorizing statute may be construed to authorize any violation of that state law. However, no state law may either authorize or compel any disclosure prohibited by the regulations in this part.

§ 2.21 Relationship to federal statutes protecting research subjects against compulsory disclosure of their identity.

(a) ***Research privilege description.*** There may be concurrent coverage of patient identifying information by the regulations in this part and by administrative action taken under section 502(c) of the Controlled Substances Act (21 U.S.C. 872(c) and the implementing regulations at 21 CFR part 1316); or section 301(d) of the Public Health Service Act (42 U.S.C. 241(d) and the implementing regulations at 42 CFR part 2a). These research privilege statutes confer on the Secretary of Health and Human Services and on the Attorney General, respectively, the power to authorize researchers conducting certain types of research to withhold from all persons not connected with the research the names and other identifying information concerning individuals who are the subjects of the research.

(b) ***Effect of concurrent coverage.*** These regulations restrict the disclosure and use of information about patients, while administrative action taken under the research privilege statutes and implementing regulations protects a person engaged in applicable research from being compelled to disclose any identifying characteristics of the individuals who are the subjects of that research. The issuance under subpart E of this part of a court order authorizing a disclosure of information about a patient does not affect an exercise of authority under these research privilege statutes.

§ 2.22 Notice to patients of federal confidentiality requirements.

(a) ***Notice required.*** At the time of admission to a part 2 program or, in the case that a patient does not have capacity upon admission to understand his or her medical status, as soon thereafter as the patient attains such capacity, each part 2 program shall:

(1) Communicate to the patient that federal law and regulations protect the confidentiality of substance use disorder patient records; and

(2) Give to the patient a summary in writing of the federal law and regulations.

(b) ***Required elements of written summary.*** The written summary of the federal law and regulations must include:

(1) A general description of the limited circumstances under which a part 2 program may acknowledge that an individual is present or disclose outside the part 2 program information identifying a patient as having or having had a substance use disorder;

(2) A statement that violation of the federal law and regulations by a part 2 program is a crime and that suspected violations may be reported to appropriate authorities consistent with § 2.4, along with contact information;

(3) A statement that information related to a patient's commission of a crime on the premises of the part 2 program or against personnel of the part 2 program is not protected;

(4) A statement that reports of suspected child abuse and neglect made under state law to appropriate state or local authorities are not protected; and

(5) A citation to the federal law and regulations.

(c) ***Program options.*** The part 2 program must devise a notice to comply with the requirement to provide the patient with a summary in writing of the federal law and regulations. In this written summary, the part 2 program also may include information concerning state law and any of the part 2 program's policies that are not inconsistent with state and federal law on the subject of confidentiality of substance use disorder patient records.

§ 2.23 Patient access and restrictions on use.

(a) ***Patient access not prohibited.*** These regulations do not prohibit a part 2 program from giving a patient access to their own records, including the opportunity to inspect and copy any records that the part 2 program maintains about the patient. The part 2 program is not required to obtain a patient's written consent or other authorization under the regulations in this part in order to provide such access to the patient.

(b) ***Restriction on use of information.*** Information obtained by patient access to his or her patient record is subject to the restriction on use of this information to initiate or substantiate any criminal charges against the patient or to conduct any criminal investigation of the patient as provided for under § 2.12(d)(1).

Subpart C—Disclosures With Patient Consent

§ 2.31 Consent requirements.

(a) ***Required elements for written consent.*** A written consent to a disclosure under the regulations in this part may be paper or electronic and must include:

(1) The name of the patient.

(2) The specific name(s) or general designation(s) of the part 2 program(s), entity(ies), or individual(s) permitted to make the disclosure.

(3) How much and what kind of information is to be disclosed, including an explicit description of the substance use disorder information that may be disclosed.

(4)

(i) ***General requirement for designating recipients.*** The name(s) of the individual(s) or the name(s) of the entity(-ies) to which a disclosure is to be made.

(ii) ***Special instructions for entities that facilitate the exchange of health information and research institutions.*** Notwithstanding paragraph (a)(4)(i) of this section, if the recipient entity facilitates the exchange of health information or is a research institution, a written consent must include the name(s) of the entity(-ies) and

(A) The name(s) of individual or entity participant(s); or

(B) A general designation of an individual or entity participant(s) or class of participants that must be limited to a participant(s) who has a treating provider relationship with the patient whose information is being disclosed. When using a general designation, a statement must be included on the consent form that the patient (or other individual authorized to sign in lieu of the patient), confirms their understanding that, upon their request and consistent with this part, they must be provided a list of entities to which their information has been disclosed pursuant to the general designation (see § 2.13(d)).

(5) The purpose of the disclosure. In accordance with § 2.13(a), the disclosure must be limited to that information which is necessary to carry out the stated purpose.

(6) A statement that the consent is subject to revocation at any time except to the extent that the part 2 program or other lawful holder of patient identifying information that is permitted to make the disclosure has already acted in reliance on it. Acting in reliance includes the provision of treatment services in reliance on a valid consent to disclose information to a third-party payer

(7) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must ensure that the consent will last no longer than reasonably necessary to serve the purpose for which it is provided.

(8) The signature of the patient and, when required for a patient who is a minor, the signature of an individual authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of an individual authorized to sign under § 2.15. Electronic signatures are permitted to the extent that they are not prohibited by any applicable law.

(9) The date on which the consent is signed.

(b) ***Expired, deficient, or false consent.*** A disclosure may not be made on the basis of a consent which:

(1) Has expired;

(2) On its face substantially fails to conform to any of the requirements set forth in paragraph (a) of this section;

(3) Is known to have been revoked; or

(4) Is known, or through reasonable diligence could be known, by the individual or entity holding the records to be materially false.

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43037, July 15, 2020]

§ 2.32 Prohibition on re-disclosure.

(a) ***Notice to accompany disclosure.*** Each disclosure made with the patient's written consent must be accompanied by one of the following written statements:

(1) This record which has been disclosed to you is protected by federal confidentiality rules (42 CFR part 2). The federal rules prohibit you from making any further disclosure of this record unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed in this record or, is otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose (see § 2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at §§ 2.12(c)(5) and 2.65; or

(2) 42 CFR part 2 prohibits unauthorized disclosure of these records.

(b) [Reserved]

[83 FR 251, Jan. 3, 2018, as amended at 85 FR 43037, July 15, 2020]

§ 2.33 Disclosures permitted with written consent.

(a) If a patient consents to a disclosure of their records under § 2.31, a part 2 program may disclose those records in accordance with that consent to any person or category of persons identified or generally designated in the consent, except that disclosures to central registries and in connection with criminal justice referrals must meet the requirements of §§ 2.34 and 2.35, respectively.

(b) If a patient consents to a disclosure of their records under § 2.31 for payment or health care operations activities, a lawful holder who receives such records under the terms of the written consent may further disclose those records as may be necessary for its contractors, subcontractors, or legal representatives to carry out payment and/or health care operations on behalf of such lawful holder. In accordance with § 2.13(a), disclosures under this section must be limited to that information which is necessary to carry out the stated purpose of the disclosure. Examples of permissible payment or health care operations activities under this section include:

(1) Billing, claims management, collections activities, obtaining payment under a contract for reinsurance, claims filing, and/or related health care data processing;

(2) Clinical professional support services (*e.g.,* quality assessment and improvement initiatives; utilization review and management services);

(3) Patient safety activities;

(4) Activities pertaining to:

(i) The training of student trainees and health care professionals;

(ii) The assessment of practitioner competencies;

(iii) The assessment of provider or health plan performance; and/or

(iv) Training of non-health care professionals;

(5) Accreditation, certification, licensing, or credentialing activities;

(6) Underwriting, enrollment, premium rating, and other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits, and/or ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care;

(7) Third-party liability coverage;

(8) Activities related to addressing fraud, waste and/or abuse;

(9) Conducting or arranging for medical review, legal services, and/or auditing functions;

(10) Business planning and development, such as conducting cost management and planning-related analyses related to managing and operating, including formulary development and administration, development or improvement of methods of payment or coverage policies;

(11) Business management and general administrative activities, including management activities relating to implementation of and compliance with the requirements of this or other statutes or regulations;

(12) Customer services, including the provision of data analyses for policy holders, plan sponsors, or other customers;

(13) Resolution of internal grievances;

(14) The sale, transfer, merger, consolidation, or dissolution of an organization;

(15) Determinations of eligibility or coverage (*e.g.,* coordination of benefit services or the determination of cost sharing amounts), and adjudication or subrogation of health benefit claims;

(16) Risk adjusting amounts due based on enrollee health status and demographic characteristics;

(17) Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges;

(18) Care coordination and/or case management services in support of payment or health care operations; and/or

(19) Other payment/health care operations activities not expressly prohibited in this provision.

(c) Lawful holders who wish to disclose patient identifying information pursuant to paragraph (b) of this section must have in place a written contract or comparable legal instrument with the contractor or voluntary legal representative, which provides that the contractor, subcontractor, or voluntary legal representative is fully bound by the provisions of part 2 upon receipt of the patient identifying information. In making any such disclosures, the lawful holder must furnish such recipients with the notice required under § 2.32; require such recipients to implement appropriate safeguards to prevent unauthorized uses and disclosures; and require such recipients to report any unauthorized uses, disclosures, or breaches of

patient identifying information to the lawful holder. The lawful holder may only disclose information to the contractor or subcontractor or voluntary legal representative that is necessary for the contractor or subcontractor or voluntary legal representative to perform its duties under the contract or comparable legal instrument. Contracts may not permit a contractor or subcontractor or voluntary legal representative to re-disclose information to a third party unless that third party is a contract agent of the contractor or subcontractor, helping them provide services described in the contract, and only as long as the agent only further discloses the information back to the contractor or lawful holder from which the information originated.

[83 FR 251, Jan. 3, 2018, as amended at 85 FR 43037, July 15, 2020]

§ 2.34 Disclosures to prevent multiple enrollments.

(a) ***Restrictions on disclosure.*** A part 2 program, as defined in § 2.11, may disclose patient records to a central registry or to any withdrawal management or maintenance treatment program not more than 200 miles away for the purpose of preventing the multiple enrollment of a patient only if:

(1) The disclosure is made when:

(i) The patient is accepted for treatment;

(ii) The type or dosage of the drug is changed; or

(iii) The treatment is interrupted, resumed or terminated.

(2) The disclosure is limited to:

(i) Patient identifying information;

(ii) Type and dosage of the drug; and

(iii) Relevant dates.

(3) The disclosure is made with the patient's written consent meeting the requirements of § 2.31, except that:

(i) The consent must list the name and address of each central registry and each known withdrawal management or maintenance treatment program to which a disclosure will be made; and

(ii) The consent may authorize a disclosure to any withdrawal management or maintenance treatment program established within 200 miles of the program, but does not need to individually name all programs.

(b) ***Use of information limited to prevention of multiple enrollments.*** A central registry and any withdrawal management or maintenance treatment program to which information is disclosed to prevent multiple enrollments may not re-disclose or use patient identifying information for any purpose other than the prevention of multiple enrollments or to ensure appropriate coordinated care with a treating provider that is not a part 2 program unless authorized by a court order under subpart E of this part.

(c) ***Permitted disclosure by a central registry to prevent a multiple enrollment.*** When a member program asks a central registry if an identified patient is enrolled in another member program and the registry determines that the patient is so enrolled, the registry may disclose:

(1) The name, address, and telephone number of the member program(s) in which the patient is already enrolled to the inquiring member program; and

(2) The name, address, and telephone number of the inquiring member program to the member program(s) in which the patient is already enrolled. The member programs may communicate as necessary to verify that no error has been made and to prevent or eliminate any multiple enrollments.

(d) ***Permitted disclosure by a central registry to a non-member treating provider, to prevent a multiple enrollment.*** When, for the purpose of preventing multiple program enrollments or duplicative prescriptions, or to inform prescriber decision making regarding prescribing of opioid medication(s) or other prescribed substances, a provider with a treating provider relationship that is not a member program asks a central registry if an identified patient is enrolled in a member program, the registry may disclose:

(1) The name, address, and telephone number of the member program(s) in which the patient is enrolled;

(2) Type and dosage of any medication for substance use disorder being administered or prescribed to the patient by the member program(s); and

(3) Relevant dates of any such administration or prescription. The central registry and non-member program treating prescriber may communicate as necessary to verify that no error has been made and to prevent or eliminate any multiple enrollments or improper prescribing.

(e) ***Permitted disclosure by a withdrawal management or maintenance treatment program to prevent a multiple enrollment.*** A withdrawal management or maintenance treatment program which has received a disclosure under this section and has determined that the patient is already enrolled may communicate as necessary with the program making the disclosure to verify that no error has been made and to prevent or eliminate any multiple enrollments.

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43038, July 15, 2020]

§ 2.35 Disclosures to elements of the criminal justice system which have referred patients.

(a) A part 2 program may disclose information about a patient to those individuals within the criminal justice system who have made participation in the part 2 program a condition of the disposition of any criminal proceedings against the patient or of the patient's parole or other release from custody if:

(1) The disclosure is made only to those individuals within the criminal justice system who have a need for the information in connection with their duty to monitor the patient's progress (*e.g.*, a prosecuting attorney who is withholding charges against the patient, a court granting pretrial or post-trial release, probation or parole officers responsible for supervision of the patient); and

(2) The patient has signed a written consent meeting the requirements of § 2.31 (except paragraph (a)(6) of this section which is inconsistent with the revocation provisions of paragraph (c) of this section) and the requirements of paragraphs (b) and (c) of this section.

(b) ***Duration of consent.*** The written consent must state the period during which it remains in effect. This period must be reasonable, taking into account:

(1) The anticipated length of the treatment;

(2) The type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur; and

(3) Such other factors as the part 2 program, the patient, and the individual(s) within the criminal justice system who will receive the disclosure consider pertinent.

(c) ***Revocation of consent.*** The written consent must state that it is revocable upon the passage of a specified amount of time or the occurrence of a specified, ascertainable event. The time or occurrence upon which consent becomes revocable may be no later than the final disposition of the conditional release or other action in connection with which consent was given.

(d) ***Restrictions on re-disclosure and use.*** An individual within the criminal justice system who receives patient information under this section may re-disclose and use it only to carry out that individual's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

[82 FR 6115, Jan. 18, 2017, as amended at 83 FR 251, Jan. 3, 2018]

§ 2.36 Disclosures to prescription drug monitoring programs.

A part 2 program or other lawful holder is permitted to report any SUD medication prescribed or dispensed by the part 2 program to the applicable state prescription drug monitoring program if required by applicable state law. A part 2 program or other lawful holder must obtain patient consent to a disclosure of records to a prescription drug monitoring program under § 2.31 prior to reporting of such information.

[85 FR 43038, July 15, 2020]

Subpart D—Disclosures Without Patient Consent

§ 2.51 Medical emergencies.

(a) ***General rule.*** Under the procedures required by paragraph (c) of this section, patient identifying information may be disclosed to medical personnel to the extent necessary to:

(1) Meet a bona fide medical emergency in which the patient's prior written consent cannot be obtained; or

(2) Meet a bona fide medical emergency in which a part 2 program is closed and unable to provide services or obtain the prior written consent of the patient, during a temporary state of emergency declared by a state or federal authority as the result of a natural or major disaster, until such time that the part 2 program resumes operations.

(b) ***Special rule.*** Patient identifying information may be disclosed to medical personnel of the Food and Drug Administration (FDA) who assert a reason to believe that the health of any individual may be threatened by an error in the manufacture, labeling, or sale of a product under FDA jurisdiction, and that the information will be used for the exclusive purpose of notifying patients or their physicians of potential dangers.

(c) ***Procedures.*** Immediately following disclosure, the part 2 program shall document, in writing, the disclosure in the patient's records, including:

(1) The name of the medical personnel to whom disclosure was made and their affiliation with any health care facility;

(2) The name of the individual making the disclosure;

(3) The date and time of the disclosure; and

(4) The nature of the emergency (or error, if the report was to FDA).

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43038, July 15, 2020]

§ 2.52 Research.

(a) Notwithstanding other provisions of this part, including paragraph (b)(2) of this section, patient identifying information may be disclosed for the purposes of the recipient conducting scientific research if:

(1) The individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer or their designee, of a part 2 program or other lawful holder of part 2 data, makes a determination that the recipient of the patient identifying information is:

(i) A HIPAA-covered entity or business associate that has obtained and documented authorization from the patient, or a waiver or alteration of authorization, consistent with the HIPAA Privacy Rule at 45 CFR 164.508 or 164.512(i), as applicable;

(ii) Subject to the HHS regulations regarding the protection of human subjects (45 CFR part 46), and provides documentation either that the researcher is in compliance with the requirements of 45 CFR part 46, including the requirements related to informed consent or a waiver of consent (45 CFR 46.111 and 46.116) or that the research qualifies for exemption under the HHS regulations (45 CFR 46.104) or any successor regulations;

(iii) Subject to the FDA regulations regarding the protection of human subjects (21 CFR parts 50 and 56) and provides documentation that the research is in compliance with the requirements of the FDA regulations, including the requirements related to informed consent or an exception to, or waiver of, consent (21 CFR part 50) and any successor regulations; or

(iv) Any combination of a HIPAA covered entity or business associate, and/or subject to the HHS regulations regarding the protection of human subjects, and/or subject to the FDA regulations regarding the protection of human subjects; and has met the requirements of paragraph (a)(1)(i), (ii) (iii), and/or (iv) of this section, as applicable.

(2) The part 2 program or other lawful holder of part 2 data is a HIPAA covered entity or business associate, and the disclosure is made in accordance with the HIPAA Privacy Rule requirements at 45 CFR 164.512(i).

(3) If neither paragraph (a)(1) or (2) of this section apply to the receiving or disclosing party, this section does not apply.

(b) Any individual or entity conducting scientific research using patient identifying information obtained under paragraph (a) of this section:

(1) Is fully bound by the regulations in this part and, if necessary, will resist in judicial proceedings any efforts to obtain access to patient records except as permitted by the regulations in this part.

(2) Must not re-disclose patient identifying information except back to the individual or entity from whom that patient identifying information was obtained or as permitted under paragraph (c) of this section.

(3) May include part 2 data in research reports only in aggregate form in which patient identifying information has been rendered non-identifiable such that the information cannot be re-identified and serve as an unauthorized means to identify a patient, directly or indirectly, as having or having had a substance use disorder.

(4) Must maintain and destroy patient identifying information in accordance with the security policies and procedures established under § 2.16.

(5) Must retain records in compliance with applicable federal, state, and local record retention laws.

(c) ***Data linkages*** —

(1) ***Researchers.*** Any individual or entity conducting scientific research using patient identifying information obtained under paragraph (a) of this section that requests linkages to data sets from a data repository(-ies) holding patient identifying information must:

(i) Have the request reviewed and approved by an Institutional Review Board (IRB) registered with the Department of Health and Human Services, Office for Human Research Protections in accordance with 45 CFR part 46 to ensure that patient privacy is considered and the need for identifiable data is justified. Upon request, the researcher may be required to provide evidence of the IRB approval of the research project that contains the data linkage component.

(ii) Ensure that patient identifying information obtained under paragraph (a) of this section is not provided to law enforcement agencies or officials.

(2) ***Data repositories.*** For purposes of this section, a data repository is fully bound by the provisions of part 2 upon receipt of the patient identifying data and must:

(i) After providing the researcher with the linked data, destroy or delete the linked data from its records, including sanitizing any associated hard copy or electronic media, to render the patient identifying information non-retrievable in a manner consistent with the policies and procedures established under § 2.16 Security for records.

(ii) Ensure that patient identifying information obtained under paragraph (a) of this section is not provided to law enforcement agencies or officials.

(2) Except as provided in paragraph (c) of this section, a researcher may not redisclose patient identifying information for data linkages purposes.

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43038, July 15, 2020]

§ 2.53 Audit and evaluation.

(a) ***Records not copied or removed.*** If patient records are not downloaded, copied or removed from the premises of a part 2 program or other lawful holder, or forwarded electronically to another electronic system or device, patient identifying information, as defined in § 2.11, may be disclosed in the course of a review of records on the premises of a part 2 program or other lawful holder to any individual or entity who agrees in writing to comply with the limitations on re-disclosure and use in paragraph (f) of this section and who:

(1) Performs the audit or evaluation on behalf of:

(i) Any federal, state, or local governmental agency that provides financial assistance to a part 2 program or other lawful holder, or is authorized by law to regulate the activities of the part 2 program or other lawful holder;

(ii) Any individual or entity which provides financial assistance to the part 2 program or other lawful holder, which is a third-party payer covering patients in the part 2 program, or which is a quality improvement organization performing a QIO review, or the contractors, subcontractors, or legal representatives of such individual, entity, or quality improvement organization.

(iii) An entity with direct administrative control over the part 2 program or lawful holder.

(2) Is determined by the part 2 program or other lawful holder to be qualified to conduct an audit or evaluation of the part 2 program or other lawful holder.

(b) ***Copying, removing, downloading, or forwarding patient records.*** Records containing patient identifying information, as defined in § 2.11, may be copied or removed from the premises of a part 2 program or other lawful holder or downloaded or forwarded to another electronic system or device from the part 2 program's or other lawful holder's electronic records by any individual or entity who:

(1) Agrees in writing to:

(i) Maintain and destroy the patient identifying information in a manner consistent with the policies and procedures established under § 2.16;

(ii) Retain records in compliance with applicable federal, state, and local record retention laws; and

(iii) Comply with the limitations on disclosure and use in paragraph (f) of this section; and

(2) Performs the audit or evaluation on behalf of:

(i) Any federal, state, or local governmental agency that provides financial assistance to the part 2 program or other lawful holder, or is authorized by law to regulate the activities of the part 2 program or other lawful holder; or

(ii) Any individual or entity which provides financial assistance to the part 2 program or other lawful holder, which is a third-party payer covering patients in the part 2 program, or which is a quality improvement organization performing a QIO review, or the contractors, subcontractors, or legal representatives of such individual, entity, or quality improvement organization.

(iii) An entity with direct administrative control over the part 2 program or lawful holder.

(c) ***Activities included.*** Audits and evaluations under this section may include, but are not limited to:

(1) Activities undertaken by a federal, state, or local governmental agency, or a third-party payer entity, in order to:

(i) Identify actions the agency or third-party payer entity can make, such as changes to its policies or procedures, to improve care and outcomes for patients with SUDs who are treated by part 2 programs;

(ii) Ensure that resources are managed effectively to care for patients; or

(iii) Determine the need for adjustments to payment policies to enhance care or coverage for patients with SUD.

(2) Reviews of appropriateness of medical care, medical necessity, and utilization of services.

(d) ***Quality assurance entities included.*** Entities conducting audits or evaluations in accordance with paragraphs (a) and (b) of this section may include accreditation or similar types of organizations focused on quality assurance.

(e) ***Medicare, Medicaid, Children's Health Insurance Program (CHIP), or related audit or evaluation.***

(1) Patient identifying information, as defined in § 2.11, may be disclosed under paragraph (e) of this section to any individual or entity for the purpose of conducting a Medicare, Medicaid, or CHIP audit or evaluation, including an audit or evaluation necessary to meet the requirements for a Centers for Medicare & Medicaid Services (CMS)-regulated accountable care organization (CMS-regulated ACO) or similar CMS-regulated organization (including a CMS-regulated Qualified Entity (QE)), if the individual or entity agrees in writing to comply with the following:

(i) Maintain and destroy the patient identifying information in a manner consistent with the policies and procedures established under § 2.16;

(ii) Retain records in compliance with applicable federal, state, and local record retention laws; and

(iii) Comply with the limitations on disclosure and use in paragraph (f) of this section.

(2) A Medicare, Medicaid, or CHIP audit or evaluation under this section includes a civil or administrative investigation of a part 2 program by any federal, state, or local government agency with oversight responsibilities for Medicare, Medicaid, or CHIP and includes administrative enforcement, against the part 2 program by the government agency, of any remedy authorized by law to be imposed as a result of the findings of the investigation.

(3) An audit or evaluation necessary to meet the requirements for a CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must be conducted in accordance with the following:

(i) A CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must:

(A) Have in place administrative and/or clinical systems; and

(B) Have in place a leadership and management structure, including a governing body and chief executive officer with responsibility for oversight of the organization's management and for ensuring compliance with and adherence to the terms and conditions of the Participation Agreement or similar documentation with CMS; and

(ii) A CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must have a signed Participation Agreement or similar documentation with CMS, which provides that the CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE):

(A) Is subject to periodic evaluations by CMS or its agents, or is required by CMS to evaluate participants in the CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) relative to CMS-defined or approved quality and/or cost measures;

(B) Must designate an executive who has the authority to legally bind the organization to ensure compliance with 42 U.S.C. 290dd-2 and this part and the terms and conditions of the Participation Agreement in order to receive patient identifying information from CMS or its agents;

(C) Agrees to comply with all applicable provisions of 42 U.S.C. 290dd-2 and this part;

(D) Must ensure that any audit or evaluation involving patient identifying information occurs in a confidential and controlled setting approved by the designated executive;

(E) Must ensure that any communications or reports or other documents resulting from an audit or evaluation under this section do not allow for the direct or indirect identification (*e.g.,* through the use of codes) of a patient as having or having had a substance use disorder; and

(F) Must establish policies and procedures to protect the confidentiality of the patient identifying information consistent with this part, the terms and conditions of the Participation Agreement, and the requirements set forth in paragraph (e)(1) of this section.

(4) Program, as defined in § 2.11, includes an employee of, or provider of medical services under the program when the employee or provider is the subject of a civil investigation or administrative remedy, as those terms are used in paragraph (e)(2) of this section.

(5) If a disclosure to an individual or entity is authorized under this section for a Medicare, Medicaid, or CHIP audit or evaluation, including a civil investigation or administrative remedy, as those terms are used in paragraph (e)(2) of this section, the individual or entity may further disclose the patient identifying information that is received for such purposes to its contractor(s), subcontractor(s), or legal representative(s), to carry out the audit or evaluation, and a quality improvement organization which obtains such information under paragraph (a) or (b) of this section may disclose the information to that individual or entity (or, to such individual's or entity's contractors, subcontractors, or legal representatives, but only for the purposes of this section).

(6) The provisions of this paragraph do not authorize the part 2 program, the federal, state, or local government agency, or any other individual or entity to disclose or use patient identifying information obtained during the audit or evaluation for any purposes other than those necessary to complete the audit or evaluation as specified in paragraph (e) of this section.

(f) Limitations on disclosure and use. Except as provided in paragraph (e) of this section, patient identifying information disclosed under this section may be disclosed only back to the part 2 program or other lawful holder from which it was obtained and may be used only to carry out an audit or evaluation purpose or to investigate or prosecute criminal or other activities, as authorized by a court order entered under § 2.66.

(g) ***Audits and evaluations mandated by statute or regulation.*** Patient identifying information may be disclosed to federal, state, or local government agencies, and the contractors, subcontractors, and legal representatives of such agencies, in the course of conducting audits or evaluations mandated by statute or regulation, if those audits or evaluations cannot be carried out using deidentified information.

[82 FR 6115, Jan. 18, 2017, as amended at 83 FR 252, Jan. 3, 2018; 85 FR 43039, July 15, 2020]

Subpart E—Court Orders Authorizing Disclosure and Use

§ 2.61 Legal effect of order.

(a) *Effect.* 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 disclosure or use of patient information which would otherwise be prohibited by 42 U.S.C. 290dd–2 and the regulations in this part. Such an order does not compel 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.

(b) *Examples.*

(1) A person holding records subject to the regulations in this part receives a subpoena for those records. The person may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under the regulations in this part.

(2) An authorizing court order is entered under the regulations in this part, but the person holding the records does not want to make the disclosure. If there is no subpoena or other compulsory process or a subpoena for the records has expired or been quashed, that person may refuse to make the disclosure. Upon the entry of a valid subpoena or other compulsory process the person holding the records must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions of the regulations in this part.

§ 2.62 Order not applicable to records disclosed without consent to researchers, auditors and evaluators.

A court order under the regulations in this part may not authorize qualified personnel, who have received patient identifying information without consent for the purpose of conducting research, audit or evaluation, to disclose that information or use it to conduct any criminal investigation or prosecution of a patient. However, a court order under § 2.66 may authorize disclosure and use of records to investigate or prosecute qualified personnel holding the records.

§ 2.63 Confidential communications.

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:

(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 litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

(b) [Reserved]

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 80632, Dec. 14, 2020]

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) ***Application.*** An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which the applicant asserts that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given written consent (meeting the requirements of the regulations in this part) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) ***Notice.*** The patient and the person holding the records from whom disclosure is sought must be provided:

(1) Adequate notice in a manner which does not disclose patient identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in *§ 2.64(d).*

(c) ***Review of evidence: Conduct of hearing.*** Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of the regulations in this part. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) ***Criteria for entry of order.*** An order under this section may be entered only if the court determines that good cause exists. To make this determination 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 disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) ***Content of order.*** An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit 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 disclosure of a patient's record has been ordered.

§ 2.65 Procedures and criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.

(a) ***Application.*** An order authorizing the disclosure or use of patient records to investigate or prosecute a patient in connection with a criminal proceeding may be applied for by the person holding the records or by any law enforcement or prosecutorial officials who are responsible for conducting investigative or prosecutorial activities with respect to the enforcement of criminal laws. The application may be filed separately, as part of an application for a subpoena or other compulsory process, or in a pending criminal

action. An application must use a fictitious name such as John Doe, to refer to any patient and may not contain or otherwise disclose patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny.

(b) ***Notice and hearing.*** Unless an order under § 2.66 is sought in addition to an order under this section, the person holding the records must be provided:

(1) Adequate notice (in a manner which will not disclose patient identifying information to other persons) of an application by a law enforcement agency or official;

(2) An opportunity to appear and be heard for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in § 2.65(d); and

(3) An opportunity to be represented by counsel independent of counsel for an applicant who is a law enforcement agency or official.

(c) ***Review of evidence: Conduct of hearings.*** Any oral argument, review of evidence, or hearing on the application shall be held in the judge's chambers or in some other manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceedings, the patient, or the person holding the records. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) ***Criteria.*** A court may authorize the disclosure and use of patient records for the purpose of conducting a criminal investigation or prosecution of a patient only if the court finds that all of the following criteria are met:

(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 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.

(e) ***Content of order.*** Any order authorizing a disclosure or use of patient records under this section must:

(1) Limit disclosure and use to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of the extremely serious crime or suspected crime specified in the application; and

(3) Include such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.

§ 2.66 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a part 2 program or the person holding the records.

(a) *Application.*

(1) An order authorizing the disclosure or use of patient records to investigate or prosecute a part 2 program or the person holding the records (or employees or agents of that part 2 program or person holding the records) in connection with a criminal or administrative matter may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.

(2) The application may be filed separately or as part of a pending civil or criminal action against a part 2 program or the person holding the records (or agents or employees of the part 2 program or person holding the records) in which the applicant asserts that the patient records are needed to provide material evidence. The application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has provided written consent (meeting the requirements of § 2.31) to that disclosure.

(b) ***Notice not required.*** An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the part 2 program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with *§ 2.66(c).*

(c) ***Requirements for order.*** An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64.

(d) ***Limitations on disclosure and use of patient identifying information.***

(1) An order entered under this section must require the deletion of patient identifying information from any documents made available to the public.

(2) No information obtained under this section may be used to conduct any investigation or prosecution of a patient in connection with a criminal matter, or be used as the basis for an application for an order under § 2.65.

§ 2.67 Orders authorizing the use of undercover agents and informants to investigate employees or agents of a part 2 program in connection with a criminal matter.

(a) ***Application.*** A court order authorizing the placement of an undercover agent or informant in a part 2 program as an employee or patient may be applied for by any law enforcement or prosecutorial agency which has reason to believe that employees or agents of the part 2 program are engaged in criminal misconduct.

(b) ***Notice.*** The part 2 program director must be given adequate notice of the application and an opportunity to appear and be heard (for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order in accordance with § 2.67(c)), unless the application asserts that:

(1) The part 2 program director is involved in the suspected criminal activities to be investigated by the undercover agent or informant; or

(2) The part 2 program director will intentionally or unintentionally disclose the proposed placement of an undercover agent or informant to the employees or agents of the program who are suspected of criminal activities.

(c) ***Criteria.*** An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find all of the following:

(1) There is reason to believe that an employee or agent of the part 2 program is engaged in criminal activity;

(2) Other ways of obtaining evidence of the suspected criminal activity are not available or would not be effective; and

(3) The public interest and need for the placement of an undercover agent or informant in the part 2 program outweigh the potential injury to patients of the part 2 program, physician-patient relationships and the treatment services.

(d) ***Content of order.*** An order authorizing the placement of an undercover agent or informant in a part 2 program must:

(1) Specifically authorize the placement of an undercover agent or an informant;

(2) Limit the total period of the placement to twelve months, starting on the date that the undercover agent or informant is placed on site within the program. The placement of an undercover agent or informant must end after 12 months, unless a new court order is issued to extend the period of placement;

(3) Prohibit the undercover agent or informant from disclosing any patient identifying information obtained from the placement except as necessary to investigate or prosecute employees or agents of the part 2 program in connection with the suspected criminal activity; and

(4) Include any other measures which are appropriate to limit any potential disruption of the part 2 program by the placement and any potential for a real or apparent breach of patient confidentiality; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

(e) ***Limitation on use of information.*** No information obtained by an undercover agent or informant placed in a part 2 program under this section may be used to investigate or prosecute any patient in connection with a criminal matter or as the basis for an application for an order under § 2.65.

[82 FR 6115, Jan. 18, 2017, as amended at 85 FR 43039, July 15, 2020]

VERMONT

Proposed Rules Postings
A Service of the Office of the Secretary of State

Search Rules

Deadline For Public Comment

Deadline: Nov 07, 2023

The deadline for public comment has expired. Contact the agency or primary contact person listed below for assistance.

Rule Details

Rule Number:	23P033
Title:	Reporting of Offender Information.
Type:	Standard
Status:	Proposed
Agency:	Department of Corrections, Agency of Human Services
Legal Authority:	28 V.S.A. § 102(c) and 3 V.S.A. § 801(b)(11).
Summary:	The Vermont Department of Corrections (DOC) is proposing the repeal of the Reporting of Offender Information Rule, APA #96-18/CVR #13-130-017 because it is no longer the guiding document for this subject matter. DOC policy, #251.01,

	Offender/Inmate Records and Access to Information, dated 8/18/2019, and its associated guidance documents, and APA Rule #19-035/ CVR 13-130-036, describe the procedures that the DOC shall follow when releasing, or permitting the inspection of, a record belonging to individual under the custody or supervision of the DOC.
Persons Affected:	(1)Incarcerated and supervised individuals in the care and custody of the Department of Corrections. (2) VT Agency of Digital Services (3) JailTracker (administrator of the Offender Management System) (4) Law enforcement (5) Attorney General's Office (6) Defender General and Prisoner Rights office (7) Justice Related Advocacy Groups (8) Department of Corrections staff.
Economic Impact:	It is anticipated that the repeal of this Rule will not have an impact on the DOC's budget because the corresponding policy to the rule the DOC seeks to repeal was superseded and replaced by updated policy, #250.01 and promulgated rule, APA rule #19-035/ CVR 13-130-036 in 2019. For similar reasons, it is anticipated that the entities listed in question 11 will not be affected.
Posting date:	Sep 27,2023

Hearing Information

Hearing date: 10-30-2023 10:00 AM ADD TO YOUR CALENDAR
Location: Dogwood Conference Room
Address: 280 State Drive
City: Waterbury
State: VT
Zip: 05671-2000
Hearing Notes:

Hearing date: 10-30-2023 10:00 AM ADD TO YOUR CALENDAR
Location: Virtual Hearing via Microsoft Teams
Address: Meeting ID: 297 363 879 371 Passcode: W3D9DN
City: Call in (Audio Only) +1 802-828-7667,,859305181# United States, Montpeli
State: VT
Zip: n/a

Hearing Notes: Link: https://gcc02.safelinks.protection.outlook.com/ap/t-59584e83/?urlhttps: 99aa-8df519488a5b2522257d&data057C017CSOS.StatutoryFilings40vermo

Contact Information

Information for Primary Contact

PRIMARY CONTACT PERSON - A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE.

Level:	Primary
Name:	Christopher Antoine, Staff Attorney
Agency:	Department of Corrections, Agency of Human Services
Address:	280 State Drive
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Email:	christopher.antoine@vermont.gov SEND A COMMENT
Website Address:	www.doc.vermont.gov VIEW WEBSITE

Information for Secondary Contact

SECONDARY CONTACT PERSON - A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON.

Level:	Secondary
Name:	Ana Burke, Senior Policy & Implementation Analyst
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Keyword Information

Keywords:

Records of individuals under the custody or supervision of the DOC

Files of individuals under the custody or supervision of the DOC

Release of Information

Inspection

Confidentiality

Back

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VERMONT STATE ARCHIVES & RECORDS ADMINISTRATION (VSARA)

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	Newport Daily Express (jlafoe@newportvermontdailyexpress.com)	Tel: 334-6568 FAX: 334-6891 Attn: Jon Lafoe
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	The Islander (islander@vermontislander.com)	Tel: 802-372-5600 FAX: 802-372-3025
	Vermont Lawyer (hunter.press.vermont@gmail.com)	Attn: Will Hunter

FROM: APA Coordinator, VSARA **Date of Fax:** September 26, 2023

RE: The "Proposed State Rules " ad copy to run on **October 5, 2023**

PAGES INCLUDING THIS COVER MEMO: **2**

NOTE **8-pt font in body. 12-pt font max. for headings - single space body. Please include dashed lines where they appear in ad copy. Otherwise minimize the use of white space. Exceptions require written approval.**

If you have questions, or if the printing schedule of your paper is disrupted by holiday etc. please contact VSARA at 802-828-3700, or E-Mail sos.statutoryfilings@vermont.gov, Thanks.

PROPOSED STATE RULES

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By law, public notice of proposed rules must be given by publication in newspapers of record. The purpose of these notices is to give the public a chance to respond to the proposals. The public notices for administrative rules are now also available online at https://secure.vermont.gov/SOS/rules/ . The law requires an agency to hold a public hearing on a proposed rule, if requested to do so in writing by 25 persons or an association having at least 25 members.

To make special arrangements for individuals with disabilities or special needs please call or write the contact person listed below as soon as possible.

To obtain further information concerning any scheduled hearing(s), obtain copies of proposed rule(s) or submit comments regarding proposed rule(s), please call or write the contact person listed below. You may also submit comments in writing to the Legislative Committee on Administrative Rules, State House, Montpelier, Vermont 05602 (802-828-2231).

Reporting of Offender Information.

Vermont Proposed Rule: 23P033

AGENCY: Agency of Human Services, Department of Corrections

CONCISE SUMMARY: The Vermont Department of Corrections (DOC) is proposing the repeal of the Reporting of Offender Information Rule, APA #96-18/CVR #13-130-017 because it is no longer the guiding document for this subject matter. DOC policy, #251.01, Offender/Inmate Records and Access to Information, dated 8/18/2019, and its associated guidance documents, and APA Rule #19-035/ CVR 13-130-036, describe the procedures that the DOC shall follow when releasing, or permitting the inspection of, a record belonging to individual under the custody or supervision of the DOC.

FOR FURTHER INFORMATION, CONTACT: Christopher Antoine, Staff Attorney, Agency of Human Services, Department of Corrections 280 State Drive, Waterbury, VT 05671 Tel: 802-241-2442 Fax: 802-241-0020 Email: christopher.antoine@vermont.gov URL: www.doc.vermont.gov http://www.doc.vermont.gov.

FOR COPIES: Ana Burke, Senior Policy & Implementation Analyst, Agency of Human Services, Department of Corrections 280 State Drive, Waterbury, VT 05671 Tel: 802-241-2442 Fax: 802-241-0020 Email: ana.burke@vermont.gov.

Suitability in Annuity Transactions (Reg. I-2023-01).

Vermont Proposed Rule: 23P034

AGENCY: Department of Financial Regulation

CONCISE SUMMARY: The Department is proposing a new rule that requires producers, as defined in the rule, to act in the best interest of the consumer when making a recommendation of an annuity and to require insurers to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.

FOR FURTHER INFORMATION, CONTACT: Stan Macel, Assistant General Counsel, Department of Financial Regulation, 89 Main Street, Third Floor, Montpelier, VT 05620 Tel: 802-272-2338 Fax: 802-828-5593 Email: stan.macel@vermont.gov URL: https://dfr.vermont.gov/about-us/legal-general-counsel/proposed-rules-

and-public-comment.

FOR COPIES: Hillary Borcherding, Assistant General Counsel, Department of Financial Regulation, 89 Main Street, Third Floor, Montpelier, VT 05620 Tel: 802-249-6512 Email: hillary.borcherding@vermont.gov.

Manufactured Food Rule.

Vermont Proposed Rule: 23P035

AGENCY: Agency of Human Services, Department of Health

CONCISE SUMMARY: The purpose of the rule is to provide the requirements for the safe and sanitary manufacturing, packing, holding, and distributing of human food offered for sale in Vermont. This rulemaking does the following: (1) Updates the rule for consistency with Title 21 Chapter I of the C.F.R. (2) Reformats, reorganizes, and clarifies the federal regulations cited in the Incorporation by Reference section. (3) Defines the scope of the Department of Health issued food manufacturing license. Specifically, the rule clarifies the prohibition of manufacturing of food containing THC under the Department of Health license. (4) Updates the information required on food labels manufactured by license exempt food manufacturers and license exempt bakeries. (5) Modifies the rule for clarity.

FOR FURTHER INFORMATION, CONTACT: Meg McCarthy, Department of Health, 108 Cherry St, Burlington, VT 05401 Tel: 802-863-7280 Fax: 802-951-1275 Email: ahs.vdhrules@vermont.gov URL: http://www.healthvermont.gov/about-us/laws-regulations/public-comment.

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