Davis Wright Tremaine LLP

COMPARING 42 C.F.R. PART 2 WITH SAMHSA'S NEWLY PROPOSED RULE

HEALTH INFORMATION PRIVACY

The following document identifies recently released proposed changes to 42 C.F.R. Part 2 by the U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration. This document is not an official version of the proposed rule and an attorney should be contacted for specific questions about the proposed items below.

FOR MORE INFORMATION:

Rebecca L. Williams
Partner
206.757.8171
beckywilliams@dwt.com

Kathleen H. Drummy
Partner
213.633.6870
kathydrummy@dwt.com

Adam H. Greene
Partner
202.973.4213
adamgreene@dwt.com

Anna Watterson
Associate
202.973.4247
annawatterson@dwt.com

Sean Baird
Associate
206.757.8091
seanbaird@dwt.com

PART 2—CONFIDENTIALITY OF ~~ALCOHOL AND DRUG ABUSE~~SUBSTANCE USE DISORDER PATIENT RECORDS

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~~AUTHORITY: Sec. 408 of Pub. L. 92–255, 86 Stat. 79, as amended by sec. 303 (a), (b) of Pub L. 93–282, 83 Stat. 137, 138; sec. 4(c)(5)(A) of Pub. L. 94–237, 90 Stat. 244; sec. 111(c)(3) of Pub. L. 94–581, 90 Stat. 2852; sec. 509 of Pub. L. 96–88, 93 Stat. 695; sec. 973(d) of Pub. L. 97–35, 95 Stat. 598; and transferred to sec. 527 of the Public Health Service Act by sec. 2(b)(16)(B) of Pub. L. 98–24, 97 Stat. 182 and as amended by sec. 106~~

of Pub. L. 99–401, 100 Stat. 907 (42 U.S.C. 290ee–3) and sec. 333 of Pub. L. 91–616, 84 Stat. 1853, as amended by sec. 122(a) of Pub. L. 93–282, 88 Stat. 131; and sec. 111(c)(4) of Pub. L. 94–581, 90 Stat. 2852 and transferred to sec. 523 of the Public Health Service Act by sec. 2(b)(13) of Pub. L. 98–24, 97 Stat. 181 and as amended by sec. 106 of Pub. L. 99–401, 100 Stat. 907 (42 U.S.C. 290dd–3), as amended by sec. 131 of Pub. L. 102–321, 106 Stat. 368, (42 U.S.C. 290dd–2).

SOURCE: 52 FR 21809, June 9, 1987, unless otherwise noted.

Authority: 42 U.S.C. 290dd–2.

Subpart A—Introduction

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

The restrictions of these regulations upon the disclosure and use of drug abuse patient records were initially authorized by section 408 of the Drug Abuse Prevention, Treatment, and Rehabilitation Act (21 U.S.C. 1175). That section as amended was transferred by Pub. L. 98–24 to section 527 of the Public Health Service Act which is codified at 42 U.S.C. 290ee–3. The amended statutory authority is set forth below:

§ 290ee–3. CONFIDENTIALITY OF PATIENT RECORDS.

(a) Disclosure authorization

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (c) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b) Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent

(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

~~(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.~~

~~(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.~~

~~(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.~~

~~(c) Prohibition against use of record in making criminal charges or investigation of patient~~

~~Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.~~

~~(d) Continuing prohibition against disclosure irrespective of status as patient~~

~~The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.~~

~~(e) Armed Forces and Veterans' Administration; interchange of records; report of suspected child abuse and neglect to State or local authorities~~

~~The prohibitions of this section do not apply to any interchange of records—~~

~~(1) within the Armed Forces or within those components of the Veterans' Administration furnishing health care to veterans, or~~

~~(2) between such components and the Armed Forces.~~

~~The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.~~

~~(f) Penalty for first and subsequent offenses~~

~~Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.~~

~~(g) Regulations; interagency consultations; definitions, safeguards, and procedures, including procedures and criteria for issuance and scope of orders~~

~~Except as provided in subsection (h) of this section, the Secretary, after consultation with the Administrator of Veterans' Affairs and the heads of other Federal departments and agencies substantially affected thereby, shall prescribe regulations to carry out the purposes of this section. These regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection (b)(2)(C) of this section, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.~~

~~(Subsection (h) was superseded by section 111(c)(3) of Pub. L. 94–581. The responsibility of the Administrator of Veterans' Affairs to write regulations to provide for confidentiality of drug abuse patient records under Title 38 was moved from 21 U.S.C. 1175 to 38 U.S.C. 4134.)~~

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 Statutory authority for confidentiality of alcohol abuse patient records.~~

~~The restrictions of these regulations upon the disclosure and use of alcohol abuse patient records were initially authorized by section 333 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4582). The section as amended was transferred by Pub. L. 98–24 to section 523 of the Public Health Service Act which is codified at 42 U.S.C. 290dd–3. The amended statutory authority is set forth below:~~

~~§ 290dd–3. CONFIDENTIALITY OF PATIENT RECORDS~~

~~(a) Disclosure authorization~~

~~Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or~~

~~agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.~~

~~(b) Purposes and circumstances of disclosure affecting consenting patient and patient regard-less of consent~~

~~(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.~~

~~(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:~~

~~(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.~~

~~(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.~~

~~(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.~~

~~(c) Prohibition against use of record in making criminal charges or investigation of patient~~

~~Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.~~

~~(d) Continuing prohibition against disclosure irrespective of status as patient~~

~~The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.~~

~~(e) Armed Forces and Veterans' Administration; interchange of record of suspected child abuse and neglect to State or local authorities~~

~~The prohibitions of this section do not apply to any interchange of records—~~

~~(1) within the Armed Forces or within those components of the Veterans' Administration furnishing health care to veterans, or~~

~~(2) between such components and the Armed Forces.~~

~~The prohibitions of this section do not apply to the reporting under State law of incidents of suspected child abuse and neglect to the appropriate State or local authorities.~~

~~(f) Penalty for first and subsequent offenses~~

~~Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.~~

~~(g) Regulations of Secretary; definitions, safeguards, and procedures, including procedures and criteria for issuance and scope of orders~~

~~Except as provided in subsection (h) of this section, the Secretary shall prescribe regulations to carry out the purposes of this section. These regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection(b)(2)(C) of this section, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.~~

~~(Subsection (h) was superseded by section 111(c)(4) of Pub. L. 94-581. The responsibility of the Administrator of Veterans' Affairs to write regulations to provide for confidentiality of alcohol abuse patient records under Title 38 was moved from 42 U.S.C. 4582 to 38 U.S.C. 4134.)~~

§ ~~2.3~~ 2.2 Purpose and effect.

(a) Purpose. Under the statutory provisions quoted in ~~§§ 2.1 and 2.2,~~§ 2.1, these regulations impose restrictions upon the disclosure and use of ~~alcohol and drug~~substance abuse patient records which are maintained in connection with the performance of any ~~federally assisted alcohol and drug abuse~~part 2 program. The regulations specify in:

(1) ~~Definitions~~ Subpart B of this part: General Provisions, including definitions, applicability, and general restrictions ~~in subpart B (definitions applicable to § 2.34 only appear in that section)~~;

(2) Subpart C of this part: Disclosures ~~which may be made with written~~with Patient Consent, including disclosures which require patient consent and the ~~form of the written~~ consent ~~in subpart C~~form requirements;

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

(4) ~~Disclosures~~ 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 ~~in subpart E~~.

(b) Effect. (1) These regulations prohibit the disclosure and use of patient records unless certain circumstances exist. If any ~~circumstances~~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) These regulations are not intended to direct the manner in which substantive functions such as research, treatment, and evaluation are carried out. They are intended to ~~insure~~ensure that ~~an alcohol or drug abuse patient in a federally assisted alcohol or drug abuse~~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 ~~his or her~~their patient record than an individual ~~who has an alcohol or drug problem and~~with a substance use disorder who does not seek treatment.

(3) Because there is a criminal penalty (a fine—see 42 U.S.C. 290~~ee–3(f), 42 U.S.C. 290~~dd–~~3~~2(f) and ~~42 CFR 2.4~~§ 2.3) 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)).

§ ~~2.4~~2.3 Criminal penalty for violation.

Under 42 U.S.C. 290~~ee–3(f) and 42 U.S.C. 290~~dd–~~3~~2(f), any person who violates any provision of ~~those statutes~~that statute or these regulations shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

§ ~~2.5~~2.4 Reports of violations.

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

(b) The report of any violation of these regulations by ~~a methadone~~an opioid treatment program may be directed to the ~~Regional Offices of the Food and Drug~~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 these regulations:

~~Alcohol abuse means the use of an alcoholic beverage which impairs the physical, mental, emotional, or social well-being of the user.~~

~~Drug abuse means the use of a psychoactive substance for other than medicinal purposes which impairs the physical, mental, emotional, or social well-being of the user.~~

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 ~~alcohol or drug abuse~~substance use disorder or to a condition which is identified as having been caused by that ~~abuse~~substance use disorder which is made for the purpose of treatment or referral for treatment.

Disclose ~~or disclosure means a communication of patient identifying information, the affirmative~~means to communicate any information identifying 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~~'s communication of patient identifying information, or the communication of any information from the record of a patient who has been identified~~.

Federally assisted— see § 2.12(b).

Informant means an individual:

(~~a~~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

(~~b~~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 pharmacotherapy for individuals with substance use disorders which 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 not more than 125 miles from any border of the state in which the central registry is located.

Minor, as used in these regulations, 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 eighteen 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 which is an individual, that individual.

(2) In the case of a part 2 program which 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 ~~or treatment for alcohol or drug abuse at a federally assisted program and~~, 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 ~~alcohol or drug abuser~~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 ~~and speed~~ either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a part 2 program, if that number does not consist of, or contain numbers (such as a social security, or driver's license number) which could be used to identify a patient with reasonable accuracy ~~and speed~~ from sources external to the part 2 program.

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

Program means:

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

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

(~~c~~3) Medical personnel or other staff in a general medical ~~care~~ facility or general medical practice whose primary function is the provision of ~~alcohol or drug abuse~~substance use disorder diagnosis, treatment, or referral for treatment and who are identified as such providers. ~~(See § 2.12(e)(1) for examples.)~~

~~Program director means:~~

~~(a) In the case of a program which is an individual, that individual:~~

~~(b) In the case of a program which is an organization, the individual designated as director, managing director, or otherwise vested with authority to act as chief executive of the organization.~~

Qualified service organization means ~~a person which~~an individual or entity who:

(~~a~~1) Provides services to a part 2 program, such as data processing, bill collecting, dosage preparation, laboratory analyses, or legal, ~~medical,~~ 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

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

(~~1~~i) Acknowledges that in receiving, storing, processing, or otherwise dealing with any patient records from the ~~programs~~part 2 program, it is fully bound by these regulations; and

(~~2~~ii) If necessary, will resist in judicial proceedings any efforts to obtain access to patient ~~records~~identifying information related to substance use disorder diagnosis, treatment, or referral for treatment except as permitted by these regulations.

Records means any information, whether recorded or not, ~~relating to a patient~~ received or acquired by a ~~federally assisted alcohol or drug program~~part 2 program relating

to a patient. For the purpose of these regulations, 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 these regulations, this definition does not include tobacco or caffeine use. (Also referred to as substance abuse.)

Third -party payer means a person who pays, 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 ~~his~~their family or on the basis of the patient's eligibility for ~~Federal, State~~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 agrees to be diagnosed, evaluated and/or treated for any condition by an individual or entity; and

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

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

Undercover agent means ~~an officer of~~ any ~~Federal, State~~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.

~~[52 FR 21809, June 9, 1987, as amended by 60 FR 22297, May 5, 1995]~~

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.

§ 2.12 Applicability.

(a) General—(1) Restrictions on disclosure. The restrictions on disclosure in these regulations apply to any information, whether or not recorded, which:

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

(ii) Is drug abuse information obtained by a federally assisted drug abuse program after March 20, ~~1972,~~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 ~~federally assisted alcohol or drug abuse~~part 2 program after that date as part of an ongoing treatment episode which extends past that date~~)~~; for the purpose of treating ~~alcohol or drug abuse~~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. 290~~ee–3(c), 42 U.S.C. 290~~dd–~~3~~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,~~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 ~~federally assisted alcohol or drug abuse~~part 2 program after that date as part of an ongoing treatment episode which extends past that date~~),~~; for the purpose of treating ~~alcohol or drug abuse~~a substance use disorder, making a diagnosis for the treatment, or making a referral for the treatment.

(b) Federal assistance. ~~An alcohol abuse or drug abuse~~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 (~~c~~)(2) of this section relating to the Department of Veterans~~' Administration~~ 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) ~~Certification of~~ Participating provider ~~status under~~in the Medicare program;

(ii) Authorization to conduct ~~methadone~~ maintenance treatment ~~(see 21 CFR 291.505)~~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 ~~alcohol or drug abuse~~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~~federal financial assistance in any form, including financial assistance which does not directly pay for the ~~alcohol or drug abuse~~substance use disorder diagnosis, treatment, or referral ~~activities~~for treatment; or

(ii) Conducted by a ~~State~~state or local government unit which, through general or special revenue sharing or other forms of assistance, receives ~~Federal~~federal funds which could be (but are not necessarily) spent for the ~~alcohol or drug abuse~~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~~' Administration~~ Affairs. These regulations do not apply to information on ~~alcohol and drug abuse~~ patients receiving substance use disorder treatment who are maintained in connection with the Department of Veterans~~' Administration~~ Affairs provisions of hospital care, nursing home care, domiciliary care, and medical services under ~~title~~Title 38, ~~United States Code~~U.S.C. Those records are governed by 38 U.S.C. ~~4132~~7332 and regulations issued under that authority by the ~~Administrator~~Secretary of Veterans~~'~~ Affairs.

(2) Armed Forces. These regulations 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 ~~Administration~~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 these regulations 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 ~~alcohol or drug abuse~~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~~service organizations. The restrictions on disclosure in these regulations 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 these regulations do not apply to communications from part 2 program personnel to law enforcement ~~officers~~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 these regulations do not apply to the reporting under ~~State~~state law of incidents of suspected child abuse and neglect to the appropriate ~~State~~state or local authorities. However, the restrictions continue to apply to the original ~~alcohol or drug abuse~~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 these regulations 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 ~~federally assisted alcohol or drug abuse~~part 2 program, regardless of the status of the person obtaining the information or ~~of~~ whether the information was obtained in accordance with these regulations. 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 these regulations apply to:

(~~i~~A) Third -party payers with regard to records disclosed to them by ~~federally assisted alcohol or drug abuse~~part 2 programs;

(~~ii~~B) Entities having direct administrative control over part 2 programs with regard to information that is subject to these regulations communicated to them by the part 2 program under ~~§ 2.12~~paragraph (c)(3) of this section; and

(~~iii) Persons~~C) Individuals or entities who receive patient records directly from a ~~federally assisted alcohol or drug abuse program~~part 2 program or other lawful holder of patient identifying information and who are notified of the ~~restrictions on redisclosure of the records~~prohibition on re-disclosure in accordance with § ~~2.32 of these regulations.~~2.32.

(ii) [Reserved]

(e) Explanation of applicability—(1) Coverage. These regulations cover any information (including information on referral and intake) about ~~alcohol and drug abuse~~ patients receiving a diagnosis, treatment, or referral for treatment for a substance use disorder obtained by a part 2 program ~~(as the terms "patient" and "program" are defined in § 2.11) if the program is federally assisted in any manner described in § 2.12(b)~~. 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 (other than general medical practices) who hold themselves out as providing, and provide ~~alcohol or drug abuse~~substance use disorder diagnosis, treatment, or referral for treatment. However, these regulations 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 ~~alcohol or drug abuse~~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 ~~alcohol or drug abuse~~substance use disorder diagnosis, treatment, or referral for treatment is not provided by a part 2 program ~~which is federally conducted, regulated or supported in a manner which constitutes Federal assistance under § 2.12(b)~~, that patient's record is not covered by these regulations. Thus, it is possible for an individual patient to benefit from ~~Federal~~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 ~~§ 2.12~~paragraph (b) of this section. For example, if a ~~Federal~~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 these regulations unless the program itself received ~~Federal~~federal assistance as defined by ~~§ 2.12~~paragraph (b) of this section.

(3) Information to which restrictions are applicable. Whether a restriction is on use or disclosure affects the type of information which may be available. The restrictions on disclosure apply to any information which would identify a patient as ~~an alcohol or drug abuser~~having or having had a substance use disorder. The restriction on use of information to bring criminal charges against a patient for a crime applies to any information obtained

by the part 2 program for the purpose of diagnosis, treatment, or referral for treatment of ~~alcohol or drug abuse~~patients with substance use disorders. (Note that restrictions on use and disclosure apply to recipients of information under ~~§ 2.12~~paragraph (d) of this section.)

(4) How type of diagnosis affects coverage. These regulations cover any record of a diagnosis identifying a patient as ~~an alcohol or drug abuser~~having or having had a substance use disorder which is prepared in connection with the treatment or referral for treatment of ~~alcohol or drug abuse~~a patient with a substance use disorder. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by these regulations. The following are not covered by these regulations:

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

(ii) A diagnosis of drug overdose or alcohol intoxication which clearly shows that the individual involved ~~is not an alcohol or drug abuser~~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).

~~[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987, as amended at 60 FR 22297, May 5, 1995]~~

§ 2.13 Confidentiality restrictions and safeguards.

(a) General. The patient records subject to ~~which~~ these regulations ~~apply~~ may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any ~~Federal, State~~federal, state, or local authority. Any disclosure made under these regulations 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 these regulations apply whether ~~the~~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 these regulations.

(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 ~~alcohol or drug abuse~~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 ~~these regulations~~this part or if an authorizing court order is entered in accordance with subpart E of ~~these regulations~~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 ~~an alcohol or drug abuse~~a substance use disorder diagnosis, treatment, or referral for treatment facility, and if the acknowledgement does not reveal that the patient ~~is an alcohol or drug abuser~~has a substance use disorder.

(2) Any answer to a request for a disclosure of patient records which is not permissible under these regulations must be made in a way that will not affirmatively reveal that an identified individual has been, or is being, diagnosed or treated for ~~alcohol or drug abuse~~a substance use disorder. An inquiring party may be ~~given~~provided a copy of these regulations and advised that they restrict the disclosure of ~~alcohol or drug abuse~~substance use disorder patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. ~~The regulations do not restrict a disclosure that an identified individual is not and never has been a 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)(iv)(C) 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 without a treating provider relationship that serves as an intermediary, as described in § 2.31(a)(4)(iv)) 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.

§ 2.14 Minor patients.

(a~~) Definition of minor. As used in these regulations the term "minor" means a person 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 eighteen years.(b~~) State law not requiring parental consent to treatment. If a minor patient acting alone has the legal capacity under the applicable ~~State~~state law to apply for and obtain ~~alcohol or drug abuse~~substance use disorder treatment, any written consent for disclosure authorized under subpart C of ~~these regulations~~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 Statestate or local law requiring the program to furnish the service irrespective of ability to pay.

(cb) State law requiring parental consent to treatment. (1) Where Statestate law requires consent of a parent, guardian, or other personindividual for a minor to obtain alcohol or drug abuse treatment for a substance use disorder, any written consent for disclosure authorized under subpart C of these regulationsthis part must be given by both the minor and his or hertheir parent, guardian, or other personindividual authorized under Statestate law to act in the minor's behalf.

(2) Where Statestate 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 personindividual authorized under Statestate 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 these regulationsthis 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 (dc) of this section.

(dc) Minor applicant for services lacks capacity for rational choice. Facts relevant to reducing a threat to the life or physical well -being of the applicant or any other individual may be disclosed to the parent, guardian, or other personindividual authorized under Statestate 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 youth or mental or physical condition to make a rational decision on whether to consent to a disclosure under subpart C of these regulations to his or herthis part to their parent, guardian, or other personindividual authorized under Statestate law to act in the minor's behalf,; and

(2) The applicant's situation poses a substantial threat to the life or physical well -being of the applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other personindividual authorized under Statestate 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 his or hertheir own affairs, any consent which is required

under these regulations may be given by the guardian or other ~~person~~individual authorized under ~~State~~state law to act in the patient's behalf.

(2) No adjudication of incompetency. ~~For any period for which the program director determines that~~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 ~~his or her~~their own behalf, the part 2 program director may exercise the right of the patient to consent to a disclosure under subpart C of ~~these regulations~~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 ~~an alcohol or drug abuser~~having a substance use disorder is subject to these regulations. 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~~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.

§ 2.16 Security for ~~written~~ records.

(a) ~~Written records which are subject to these regulations must be maintained in a secure room, locked file cabinet, safe or other similar container when not in use; and~~ 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; and

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

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

(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) Copying, downloading, forwarding, transferring, and removing such records; and

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

(iii) Maintaining such records; and

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

(v) 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) ~~Each program shall adopt in writing procedures which regulate and control access to and use of written records which are subject to these regulations.~~ [Reserved]

§ 2.17 Undercover agents and informants.

(a) Restrictions on placement. Except as specifically authorized by a court order granted under § ~~2.67 of these regulations,~~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.

~~[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987]~~

§ 2.18 Restrictions on the use of identification cards.

No person may require any patient to carry ~~on his or her person~~in their immediate possession while away from the part 2 program premises any card or other object which would identify the patient as ~~an alcohol or drug abuser~~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 ~~purge~~remove patient identifying information from its records or destroy ~~the records unless~~ 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) ~~Procedure~~Special procedure where retention period required by law. If paragraph (a)(2) of this section applies~~, the records~~:

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

(~~1~~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]"; and

(~~2) Held under the restrictions of these regulations by a responsible person who must, as soon as practicable after the end of the retention period specified on the label, destroy the records.~~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 these regulations by a responsible person who must, as soon as practicable after the end of the 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; and

(A) All electronic media on which the patient records or patient identifying information resided prior to being transferred to the device, 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

(B) The device must be:

(1) 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

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

(C) 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

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

(ii) [Reserved]

§ 2.20 Relationship to ~~State~~state laws.

The ~~statutes~~statute authorizing these regulations (~~42 U.S.C. 290ee–3 and~~ 42 U.S.C. 290dd~~–3~~-2) ~~do~~does not preempt the field of law which they cover to the exclusion of all ~~State~~state laws in that field. If a disclosure permitted under these regulations is prohibited under ~~State~~state law, neither these regulations nor the authorizing ~~statutes~~statute may be construed to authorize any violation of that ~~State~~state law. However, no ~~State~~state law may either authorize or compel any disclosure prohibited by these regulations.

§ 2.21 Relationship to ~~Federal~~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 these regulations and by administrative action taken under~~: Section 303(a) of the Public Health Service Act (42 U.S.C. 242a(a) and the implementing regulations at 42 CFR part 2a); or~~ section 502(c) of the Controlled Substances Act (21 U.S.C. 872(c) and the implementing regulations at 21 CFR ~~1316.21). These "~~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 ~~these regulations~~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. ~~However, the research privilege granted under 21 CFR 291.505(g) to treatment programs using methadone for maintenance treatment does not protect from compulsory disclosure any information which is permitted to be disclosed under those regulations. Thus, if a court order entered in accordance with subpart E of these regulations authorizes a methadone maintenance treatment program to disclose certain information about its patients, that program may not invoke the research privilege under 21 CFR 291.505(g) as a defense to a subpoena for that information.~~

§ 2.22 Notice to patients of ~~Federal~~federal confidentiality requirements.

(a) Notice required. At the time of admission to a part 2 program or as soon thereafter as the patient is capable of rational communication, each part 2 program shall:

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

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

(b) Required elements of written summary. The written summary of the ~~Federal~~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 ~~at a facility~~ or disclose outside the part 2 program information identifying a patient as ~~an alcohol or drug abuser~~having or having had a substance use disorder.

(2) A statement that violation of the ~~Federal~~federal law and regulations by a part 2 program is a crime and that suspected violations may be reported to appropriate authorities ~~in accordance with these regulations~~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~~state law to appropriate ~~State~~state or local authorities are not protected.

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

(c) Program options. The part 2 program ~~may~~must devise ~~its own~~a notice ~~or may use the sample notice in paragraph (d)~~ to comply with the requirement to provide the patient with a summary in writing of the ~~Federal~~federal law and regulations. In ~~addition, the program may include in the~~this written summary, the part 2 program also may include information concerning ~~State~~state law and any of the part 2 program ~~policy~~'s policies that are not inconsistent with ~~State~~state and ~~Federal~~federal law on the subject of confidentiality of ~~alcohol and drug abuse~~substance use disorder patient records.

~~(d) Sample notice.~~

~~CONFIDENTIALITY OF ALCOHOL AND DRUG ABUSE PATIENT RECORDS~~

~~The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by Federal law and regulations. Generally, the program may not say to a person outside the program that a patient attends the program, or disclose any information identifying a patient as an alcohol or drug abuser Unless:~~

~~(1) The patient consents in writing:~~

~~(2) The disclosure is allowed by a court order; or~~

~~(3) The disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation.~~

~~Violation of the Federal law and regulations by a program is a crime. Suspected violations may be reported to appropriate authorities in accordance with Federal regulations.~~

~~Federal law and regulations do not protect any information about a crime committed by a patient either at the program or against any person who works for the program or about any threat to commit such a crime.~~

~~Federal laws and regulations do not protect any information about suspected child abuse or neglect from being reported under State law to appropriate State or local authorities.~~

~~(See 42 U.S.C. 290dd–3 and 42 U.S.C. 290ee–3 for Federal laws and 42 CFR part 2 for Federal regulations.)~~

~~(Approved by the Office of Management and Budget under control number 0930–0099)~~

§ 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 ~~his or her~~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 these regulations in order to provide such access to the patient.

(b) Restriction on use of information. Information obtained by patient access to ~~his or her~~their patient record is subject to the restriction on use of ~~his~~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~~'s~~ Consent

§ 2.31 ~~Form of written consent.~~Consent requirements.

(a) Required elements for written consent. A written consent to a disclosure under these regulations may be paper or electronic and must include:

(1) The ~~specific name or general designation of the program or person~~name of the patient.

(2) The name of the part 2 program(s) or other lawful holder(s) of the patient identifying information permitted to make the disclosure.

~~(2) The name or title of the individual or the name of the organization to which disclosure is to be made.~~

(3) ~~The name of the patient~~ 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) ~~The purpose of the disclosure.~~(i) The name(s) of the individual(s) to whom a disclosure is to be made; or

(ii) If the entity has a treating provider relationship with the patient whose information is being disclosed, such as a hospital, a health care clinic, or a private practice, the name of that entity; or

(iii) If the entity does not have a treating provider relationship with the patient whose information is being disclosed and is a third-party payer that requires patient identifying information for the purpose of reimbursement for services rendered to the patient by the part 2 program, the name of the entity; or

(iv) If the entity does not have a treating provider relationship with the patient whose information is being disclosed and is not covered by paragraph (a)(4)(iii) of this section, such as an entity that facilitates the exchange of health information or a research institution, the name(s) of the entity(-ies); and

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

(B) The name(s) of an entity participant(s) that has a treating provider relationship with the patient whose information is being disclosed; or

(C) 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.

(1) 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)).

(2) [Reserved]

(5) ~~How much and what kind of information is to be disclosed.~~ The purpose of the disclosure.

(6) ~~The signature of the patient and, when required for a patient who is a minor, the signature of a person authorized to give consent under § 2.14; or, when required for a patient who is incompetent or deceased, the signature of a person authorized to sign under § 2.15 in lieu of the patient.~~ A statement that the patient (or other individual authorized to sign in lieu of the patient) confirms their understanding of the terms of their consent.

(7) ~~The date on which the consent is signed.(8)~~ A statement that the consent is subject to revocation at any time except to the extent that the part 2 program or ~~person which is~~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.

(~~9~~8) The date, event, or condition upon which the consent will expire if not revoked before. This date, event, or condition must ~~insure~~ensure that the consent will last no longer than reasonably necessary to serve the purpose for which it is ~~given~~provided.

(~~b) Sample consent form. The following form complies with paragraph (a) of this section, but other elements may be added.~~9) 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.

~~1. I (name of patient) b Request b Authorize:~~

~~2. (name or general designation of program which is to make the disclosure)~~

~~3. To disclose: (kind and amount of information to be disclosed)~~

~~4. To: (name or title of the person or organization to which disclosure is to be made)~~

~~5. For (purpose of the disclosure)~~

~~6. Date (on which this consent is signed)~~

~~7. Signature of patient~~

~~8. Signature of parent or guardian (where required)~~

~~9. Signature of person authorized to sign in lieu of the patient (where required)~~

~~10. This consent is subject to revocation at any time except to the extent that the program which is to make the disclosure has already taken action in reliance on it. If not previously revoked, this consent will terminate upon: (specific date, event, or condition)~~

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

(~~c~~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 ~~a~~ reasonable ~~effort~~diligence could be known, by the ~~person~~individual or entity holding the records to be materially false.

~~(Approved by the Office of Management and Budget under control number 0930-0099)~~

§ 2.32 Prohibition on ~~redisclosure~~re-disclosure.

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

This information has been disclosed to you from records protected by ~~Federal~~federal confidentiality rules (42 CFR part 2). The ~~Federal~~federal rules prohibit you from making any further disclosure of ~~this~~ information in this record that identifies 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 unless further disclosure is expressly permitted by the written consent of the ~~person to whom it pertains~~individual whose information is being disclosed or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The ~~Federal~~federal rules restrict any use of the information to criminally investigate or prosecute any ~~alcohol or drug abuse~~ patient with a substance use disorder, except as provided at § 2.12(c)(5).

~~[52 FR 21809, June 9, 1987; 52 FR 41997, Nov. 2, 1987]~~(b) [Reserved]

§ 2.33 Disclosures permitted with written consent.

If a patient consents to a disclosure of ~~his or her~~their records under § 2.31, a program may disclose those records in accordance with that consent to any ~~individual or organization named~~person identified 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.

§ 2.34 Disclosures to prevent multiple enrollments ~~in detoxification and maintenance treatment programs~~.

(a) ~~Definitions. For purposes of this section:~~

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

~~Detoxification treatment means the dispensing of a narcotic drug in decreasing doses to an individual in order to reduce or eliminate adverse physiological or psychological effects incident to withdrawal from the sustained use of a narcotic drug.~~

~~Maintenance treatment means the dispensing of a narcotic drug in the treatment of an individual for dependence upon heroin or other morphine-like drugs.~~

~~Member program means a detoxification treatment 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 not more than 125 miles from any border of the State in which the central registry is located.~~(b) Restrictions on disclosure. A part 2 program, as defined in § 2.11, may disclose patient records to a central registry or to any ~~detoxification~~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 ~~detoxification~~withdrawal management or maintenance treatment program to which a disclosure will be made; and

(ii) The consent may authorize a disclosure to any ~~detoxification~~withdrawal management or maintenance treatment program established within 200 miles of the program after the consent is given without naming any such program.

(~~e~~b) Use of information limited to prevention of multiple enrollments. A central registry and any ~~detoxification~~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 unless authorized by a court order under subpart E of ~~these regulations~~this part.

(~~d~~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 ~~enrollment~~enrollments.

(~~e~~d) Permitted disclosure by a ~~detoxification~~withdrawal management or maintenance treatment program to prevent a multiple enrollment. A ~~detoxification~~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 ~~enrollment~~enrollments.

§ 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 ~~persons~~individuals within the criminal justice system ~~which~~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)(8) 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 ~~person(s)~~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 ~~redisclosure~~re-disclosure and use. ~~A person~~An individual within the criminal justice system who receives patient information under this section may ~~redisclose~~re-disclose and use it only to carry out that ~~per-son~~individual's official duties with regard to the patient's conditional release or other action in connection with which the consent was given.

Subpart D—Disclosures Without Patient Consent

§ 2.51 Medical emergencies.

(a) General ~~Rule~~rule. Under the procedures required by paragraph (c) of this section, patient identifying information may be disclosed to medical personnel ~~who have a need for information about a patient for the purpose of treating a condition which poses an immediate threat to the health of any individual and which requires immediate medical intervention~~to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained.

(b) Special ~~Rule~~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, ~~setting forth in writing~~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).

~~(Approved by the Office of Management and Budget under control number 0930-0099)~~

§ 2.52 Research ~~activities~~.

(a) Patient identifying information may be disclosed by the part 2 program or other lawful holder of part 2 data for the purpose of conducting scientific research if the ~~program director~~individual designated as director or managing director, or individual otherwise vested with authority to act as chief executive officer or their designee makes a determination that the recipient of the patient identifying information:

(1) ~~Is qualified to conduct the research;~~If a Health Insurance Portability and Accountability Act (HIPAA) covered entity or business associate, has obtained and documented authorization, or a waiver or alteration of authorization, consistent with the HIPAA privacy rule at 45 CFR 164.512(i); or

(2) If subject to the HHS regulations regarding the protection of human subjects (45 CFR part 46), provides documentation that the researcher is in compliance with the requirements of the HHS regulations, including the requirements related to informed consent or a waiver of consent (45 CFR 46.111 and 46.116); or

(3) If both a HIPAA covered entity or business associate and subject to the HHS regulations regarding the protection of human subjects, has met the requirements of paragraphs (a)(1) and (2) of this section; and

(~~2) Has a~~b) Any individual or entity conducting scientific research ~~protocol under which the~~using patient identifying information obtained under paragraph (a) of this section:

(~~i) Will be maintained in accordance with the security requirements of § 2.16 of these regulations (or more stringent requirements); and~~1) Is fully bound by these regulations and, if necessary, will resist in judicial proceedings any efforts to obtain access to patient records except as permitted by these regulations.

(~~ii) Will not be redisclosed except~~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 (b)(4) of this section~~; and~~.

(3) ~~Has provided a satisfactory written statement that a group of three or more individuals who are independent of the research project has reviewed the protocol and determined that:~~May include part 2 data in reports only in aggregate form to limit the potential for the disclosure of patient identities.

~~(i) The rights and welfare of patients will be adequately protected; and~~

(~~ii) The risks in disclosing patient identifying information are outweighed by the potential benefits of the research.~~4) That requests linkages to data sets from a federal data repository(-ies) holding patient identifying information must 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.

~~(b) A person conducting research may disclose patient identifying information obtained under paragraph (a) of this section only back to the program from which that information was obtained and may not identify any individual patient in any report of that research or otherwise disclose patient identities.~~

~~[52 FR 21809, June 9, 1987, as amended at 52 FR 41997, Nov. 2, 1987]~~

(i) 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) Except as provided in paragraph (b) of this section, a researcher may not use patient identifying information for data linkages purposes.

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

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

§ 2.53 Audit and evaluation ~~activities~~.

(a) Records not copied or removed. If patient records are not downloaded, copied or removed from the part 2 program premises 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 part 2 program premises to any

~~person~~individual or entity who agrees in writing to comply with the limitations on re-disclosure and use in paragraph (d) of this section and who:

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

(i) Any ~~Federal~~federal, ~~State~~state, or local ~~governmental~~government agency which provides financial assistance to the part 2 program or is authorized by law to regulate its activities; or

(ii) Any ~~private person which~~individual or entity who provides financial assistance to the part 2 program, which is a third -party payer covering patients in the part 2 program, or which is a quality improvement organization performing a utilization or quality control review; or

(2) Is determined by the part 2 program ~~director~~ to be qualified to conduct ~~the~~an audit or evaluation ~~activities~~of the part 2 program.

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

(1) Agrees in writing to:

(i) Maintain and destroy the patient identifying information in ~~accordance with the security requirements provided in § 2.16 of these regulations (or more stringent requirements)~~a manner consistent with the policies and procedures established under § 2.16;

(ii) ~~Destroy all the patient identifying information upon completion of the audit or evaluation; and~~ 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 (d) of this section; and

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

(i) Any ~~Federal, State~~federal, state, or local ~~governmental~~government agency which provides financial assistance to the part 2 program or is authorized by law to regulate its activities; or

(ii) ~~Any private person which~~ Any individual or entity who provides financial assistance to the part 2 program, which is a third ~~part~~-party payer covering patients in the

part 2 program, or which is a quality improvement organization performing a utilization or quality control review.

(c) Medicare ~~or,~~ Medicaid, Children's Health Insurance Program (CHIP), or related audit or evaluation. (1) ~~For purposes of Medicare or Medicaid audit or evaluation under this section, audit or evaluation~~Patient identifying information, as defined in § 2.11, may be disclosed under paragraph (c) 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 (d) of this section.

(2) A Medicare, Medicaid, or CHIP audit or evaluation under this section includes a civil or administrative investigation of ~~the~~a part 2 program by any ~~Federal, State~~federal, state, or local government agency ~~responsible for~~with oversight ~~of the~~responsibilities for Medicare ~~or,~~ Medicaid ~~program,~~ 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.

(~~2) Consistent with the definition of program in § 2.11, program 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 (c)(1) of this section.~~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 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 with CMS; and

(ii) A CMS-regulated ACO or similar CMS-regulated organization (including a CMS-regulated QE) must have a signed Participation Agreement 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 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;

(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 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 (c)(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 (c)(2) of this section.

(~~3~~5) If a disclosure to ~~a person~~an individual or entity is authorized under this section for a Medicare ~~or~~, Medicaid, or CHIP audit or evaluation, including a civil investigation or administrative remedy, as those terms are used in paragraph (c)(~~1~~2) of this section, then a quality improvement organization which obtains the information under paragraph (a) or (b) of this section may disclose the information to that ~~person~~individual or entity but only for ~~purposes~~the purpose of conducting a Medicare ~~or~~, Medicaid, or CHIP audit or evaluation.

(~~4~~6) The provisions of this paragraph do not authorize the ~~agency, the~~part 2 program, the federal, state, or local government agency, or any other ~~person~~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 ~~Medicare or Medicaid~~ audit or evaluation ~~activity~~ as specified in ~~this~~ paragraph (c) of this section.

(d) Limitations on disclosure and use. Except as provided in paragraph (c) of this section, patient identifying information disclosed under this section may be disclosed only back to the program from which it was obtained and 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 of these regulations.~~2.66.

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. 290~~ee–3, 42 U.S.C. 290~~dd–~~3~~2 and these regulations. 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 these regulations.

(b) Examples. (1) A person holding records subject to these regulations receives a subpoena for those records~~: a response to the subpoena is not permitted under the regulations unless an authorizing court order is entered~~. The person may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under these regulations.

(2) An authorizing court order is entered under these regulations, but the person authorized 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 authorized to disclose must disclose, unless there is a valid legal defense to the process other than the confidentiality restrictions of these regulations.

~~[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987]~~

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

A court order under these regulations 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 these regulations 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]

§ 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 it appears 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 a written consent (meeting the requirements of these regulations) 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 ~~given~~provided:

(1) Adequate notice in a manner which will 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.

(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 these regulations. 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 criminally investigate or prosecute a patient may be applied for by the person holding the records or by any ~~person~~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 with an order under this section, the person holding the records must be ~~given:~~provided

(1) Adequate notice (in a manner which will not disclose patient identifying information to ~~third parties~~other persons) of an application by a ~~person performing a~~ law enforcement ~~function~~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; and

(3) An opportunity to be represented by counsel independent of counsel for an applicant who is a ~~person performing a~~ law enforcement ~~function~~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 ~~person performing a~~ law enforcement ~~function~~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~~federal, ~~State~~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 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.

~~[52 FR 21809, June 9, 1987; 52 FR 42061, Nov. 2, 1987]~~

§ 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 criminally or administratively 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) 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 it appears 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 ~~given~~provided a written consent (meeting the requirements of § 2.31 ~~of these regulations~~) 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.

(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 of these regulations.~~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, or be used as the basis for an application for an order under § ~~2.65 of these regulations.~~2.65.

§ 2.67 Orders authorizing the use of undercover agents and informants to criminally investigate employees or agents of a part 2 program.

(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), unless the application asserts a belief that:

(1) The part 2 program director is involved in the 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 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:

(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 this 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 six months;

(3) Prohibit the undercover agent or informant from disclosing any patient identifying information obtained from the placement except as necessary to criminally investigate or prosecute employees or agents of the part 2 program; 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 criminally investigate or prosecute any patient or as the basis for an application for an order under § ~~2.65 of these regulations~~2.65.