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**HOUSE BILL NO. 1146**

Offered January 9, 2008

Prefiled January 9, 2008

*A BILL to amend and reenact § 32.1-127.1:03 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 8 of Title 37.2 a section numbered 37.2-804.2, relating to disclosure of mental health records.*

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 Patron—Fralin
 

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Referred to Committee for Courts of Justice

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

**1. That § 32.1-127.1:03 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 8 of Title 37.2 a section numbered 37.2-804.2 as follows:**

§ 32.1-127.1:03. Health records privacy.

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

Pursuant to this subsection:

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

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

3. No person to whom health records are disclosed shall redisclose or otherwise reveal the health records of an individual, beyond the purpose for which such disclosure was made, without first obtaining the individual's specific authorization to such redisclosure. This redisclosure prohibition shall not, however, prevent (i) any health care entity that receives health records from another health care entity from making subsequent disclosures as permitted under this section and the federal Department of Health and Human Services regulations relating to privacy of the electronic transmission of data and protected health information promulgated by the United States Department of Health and Human Services as required by the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 1320d et seq.) or (ii) any health care entity from furnishing health records and aggregate or other data, from which individually identifying prescription information has been removed, encoded or encrypted, to qualified researchers, including, but not limited to, pharmaceutical manufacturers and their agents or contractors, for purposes of clinical, pharmaco-epidemiological, pharmaco-economic, or other health services research.

B. As used in this section:

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

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

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

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

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

"Health care provider" means those entities listed in the definition of "health care provider" in § 8.01-581.1, except that state-operated facilities shall also be considered health care providers for the

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59 purposes of this section. Health care provider shall also include all persons who are licensed, certified,  
60 registered or permitted or who hold a multistate licensure privilege issued by any of the health  
61 regulatory boards within the Department of Health Professions, except persons regulated by the Board of  
62 Funeral Directors and Embalmers or the Board of Veterinary Medicine.

63 "Health plan" means an individual or group plan that provides, or pays the cost of, medical care.  
64 "Health plan" shall include any entity included in such definition as set out in 45 C.F.R. § 160.103.

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

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

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

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

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

79 "Psychotherapy notes" means comments, recorded in any medium by a health care provider who is a  
80 mental health professional, documenting or analyzing the contents of conversation during a private  
81 counseling session with an individual or a group, joint, or family counseling session that are separated  
82 from the rest of the individual's health record. "Psychotherapy notes" shall not include annotations  
83 relating to medication and prescription monitoring, counseling session start and stop times, treatment  
84 modalities and frequencies, clinical test results, or any summary of any symptoms, diagnosis, prognosis,  
85 functional status, treatment plan, or the individual's progress to date.

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

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

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

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

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

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

101 2. In compliance with a subpoena issued in accord with subsection H, pursuant to a search warrant  
102 or a grand jury subpoena, pursuant to court order upon good cause shown or in compliance with a  
103 subpoena issued pursuant to subsection C of § 8.01-413;

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

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

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

111 6. As required or authorized by law relating to public health activities, health oversight activities,  
112 serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease,  
113 public safety, and suspected child or adult abuse reporting requirements, including, but not limited to,  
114 those contained in §§ 32.1-36, 32.1-36.1, 32.1-40, 32.1-41, 32.1-127.1:04, 32.1-276.5, 32.1-283,  
115 32.1-283.1, 37.2-710, 37.2-839, 53.1-40.10, 54.1-2400.6, 54.1-2400.7, 54.1-2403.3, 54.1-2506,  
116 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 63.2-1509, and 63.2-1606;

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

118 8. In connection with the health care entity's own health care operations or the health care operations  
119 of another health care entity, as specified in 45 C.F.R. § 164.501, or in the normal course of business in  
120 accordance with accepted standards of practice within the health services setting; however, the

121 maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a  
 122 pharmacy registered or permitted in Virginia shall only be accomplished in compliance with  
 123 §§ 54.1-3410, 54.1-3411, and 54.1-3412;

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

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

127 11. To the guardian ad litem and any attorney representing the respondent in the course of a  
 128 guardianship proceeding of an adult patient who is the respondent in a proceeding under Chapter 10  
 129 (§ 37.2-1000 et seq.) of Title 37.2;

130 12. To the attorney appointed by the court to represent an individual who is or has been a patient  
 131 who is the subject of a civil commitment proceeding under Article 5 (§ 37.2-814 et seq.) of Chapter 8  
 132 of Title 37.2 or a judicial authorization for treatment proceeding pursuant to Chapter 11 (§ 37.2-1100 et  
 133 seq.) of Title 37.2;

134 13. *To any magistrate, court, mental health examiner required under § 37.2-815, or employee or*  
 135 *designee of a community services board or behavioral health authority involved in an involuntary*  
 136 *commitment proceeding under Chapter 8 (§ 37.2-800 et seq.) of Title 37.2 regarding the subject of such*  
 137 *proceeding;*

138 ~~14~~14. To the attorney and/or guardian ad litem of a minor who represents such minor in any judicial  
 139 or administrative proceeding, if the court or administrative hearing officer has entered an order granting  
 140 the attorney or guardian ad litem this right and such attorney or guardian ad litem presents evidence to  
 141 the health care entity of such order;

142 ~~15~~15. With regard to the Court-Appointed Special Advocate (CASA) program, a minor's health  
 143 records in accord with § 9.1-156;

144 ~~16~~16. To an agent appointed under an individual's power of attorney or to an agent or decision  
 145 maker designated in an individual's advance directive for health care or for decisions on anatomical gifts  
 146 and organ, tissue or eye donation or to any other person consistent with the provisions of the Health  
 147 Care Decisions Act (§ 54.1-2981 et seq.);

148 ~~17~~17. To third-party payors and their agents for purposes of reimbursement;

149 ~~18~~18. As is necessary to support an application for receipt of health care benefits from a  
 150 governmental agency or as required by an authorized governmental agency reviewing such application or  
 151 reviewing benefits already provided or as necessary to the coordination of prevention and control of  
 152 disease, injury, or disability and delivery of such health care benefits pursuant to § 32.1-127.1:04;

153 ~~19~~19. Upon the sale of a medical practice as provided in § 54.1-2405; or upon a change of  
 154 ownership or closing of a pharmacy pursuant to regulations of the Board of Pharmacy;

155 ~~20~~20. In accord with subsection B of § 54.1-2400.1, to communicate an individual's specific and  
 156 immediate threat to cause serious bodily injury or death of an identified or readily identifiable person;

157 ~~21~~21. Where necessary in connection with the implementation of a hospital's routine contact process  
 158 for organ donation pursuant to subdivision B 4 of § 32.1-127;

159 ~~22~~22. In the case of substance abuse records, when permitted by and in conformity with requirements  
 160 of federal law found in 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2;

161 ~~23~~23. In connection with the work of any entity established as set forth in § 8.01-581.16 to evaluate  
 162 the adequacy or quality of professional services or the competency and qualifications for professional  
 163 staff privileges;

164 ~~24~~24. If the health records are those of a deceased or mentally incapacitated individual to the  
 165 personal representative or executor of the deceased individual or the legal guardian or committee of the  
 166 incompetent or incapacitated individual or if there is no personal representative, executor, legal guardian  
 167 or committee appointed, to the following persons in the following order of priority: a spouse, an adult  
 168 son or daughter, either parent, an adult brother or sister, or any other relative of the deceased individual  
 169 in order of blood relationship;

170 ~~25~~25. For the purpose of conducting record reviews of inpatient hospital deaths to promote  
 171 identification of all potential organ, eye, and tissue donors in conformance with the requirements of  
 172 applicable federal law and regulations, including 42 C.F.R. § 482.45, (i) to the health care provider's  
 173 designated organ procurement organization certified by the United States Health Care Financing  
 174 Administration and (ii) to any eye bank or tissue bank in Virginia certified by the Eye Bank Association  
 175 of America or the American Association of Tissue Banks;

176 ~~26~~26. To the Office of the Inspector General for Mental Health, Mental Retardation and Substance  
 177 Abuse Services pursuant to Article 3 (§ 37.2-423 et seq.) of Chapter 4 of Title 37.2;

178 ~~27~~27. To an entity participating in the activities of a local health partnership authority established  
 179 pursuant to Article 6.1 (§ 32.1-122.10:001 et seq.) of Chapter 4 of this title, pursuant to subdivision 1 of  
 180 this subsection;

181 ~~28~~28. To law-enforcement officials by each licensed emergency medical services agency, (i) when

182 the individual is the victim of a crime or (ii) when the individual has been arrested and has received  
183 emergency medical services or has refused emergency medical services and the health records consist of  
184 the prehospital patient care report required by § 32.1-116.1;

185 2829. To law-enforcement officials, in response to their request, for the purpose of identifying or  
186 locating a suspect, fugitive, person required to register pursuant to § 9.1-901 of the Sex Offender and  
187 Crimes Against Minors Registry Act, material witness, or missing person, provided that only the  
188 following information may be disclosed: (i) name and address of the person, (ii) date and place of birth  
189 of the person, (iii) social security number of the person, (iv) blood type of the person, (v) date and time  
190 of treatment received by the person, (vi) date and time of death of the person, where applicable, (vii)  
191 description of distinguishing physical characteristics of the person, and (viii) type of injury sustained by  
192 the person.

193 2930. To law-enforcement officials regarding the death of an individual for the purpose of alerting  
194 law enforcement of the death if the health care entity has a suspicion that such death may have resulted  
195 from criminal conduct;

196 3031. To law-enforcement officials if the health care entity believes in good faith that the  
197 information disclosed constitutes evidence of a crime that occurred on its premises;

198 3132. To the State Health Commissioner pursuant to § 32.1-48.015 when such records are those of a  
199 person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article  
200 3.02 (§ 32.1-48.05 et seq.) of Chapter 2 of this title; and

201 3233. To the Commissioner of the Department of Labor and Industry or his designee by each  
202 licensed emergency medical services agency when the records consist of the prehospital patient care  
203 report required by § 32.1-116.1 and the patient has suffered an injury or death on a work site while  
204 performing duties or tasks that are within the scope of his employment.

205 Notwithstanding the provisions of subdivisions 1 through 3233 of this subsection, a health care entity  
206 shall obtain an individual's written authorization for any disclosure of psychotherapy notes, except when  
207 disclosure by the health care entity is (i) for its own training programs in which students, trainees, or  
208 practitioners in mental health are being taught under supervision to practice or to improve their skills in  
209 group, joint, family, or individual counseling; (ii) to defend itself or its employees or staff against any  
210 accusation of wrongful conduct; (iii) in the discharge of the duty, in accordance with subsection B of  
211 § 54.1-2400.1, to take precautions to protect third parties from violent behavior or other serious harm;  
212 (iv) required in the course of an investigation, audit, review, or proceeding regarding a health care  
213 entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review  
214 entity; or (v) otherwise required by law.

215 E. Requests for copies of health records shall (i) be in writing, dated and signed by the requester; (ii)  
216 identify the nature of the information requested; and (iii) include evidence of the authority of the  
217 requester to receive such copies and identification of the person to whom the information is to be  
218 disclosed. The health care entity shall accept a photocopy, facsimile, or other copy of the original signed  
219 by the requestor as if it were an original. Within 15 days of receipt of a request for copies of health  
220 records, the health care entity shall do one of the following: (i) furnish such copies to any requester  
221 authorized to receive them; (ii) inform the requester if the information does not exist or cannot be  
222 found; (iii) if the health care entity does not maintain a record of the information, so inform the  
223 requester and provide the name and address, if known, of the health care entity who maintains the  
224 record; or (iv) deny the request (a) under subsection F, (b) on the grounds that the requester has not  
225 established his authority to receive such health records or proof of his identity, or (c) as otherwise  
226 provided by law. Procedures set forth in this section shall apply only to requests for health records not  
227 specifically governed by other provisions of state law.

228 F. Except as provided in subsection B of § 8.01-413, copies of an individual's health records shall  
229 not be furnished to such individual or anyone authorized to act on the individual's behalf when the  
230 individual's treating physician or the individual's treating clinical psychologist has made a part of the  
231 individual's record a written statement that, in the exercise of his professional judgment, the furnishing  
232 to or review by the individual of such health records would be reasonably likely to endanger the life or  
233 physical safety of the individual or another person, or that such health record makes reference to a  
234 person other than a health care provider and the access requested would be reasonably likely to cause  
235 substantial harm to such referenced person. If any health care entity denies a request for copies of health  
236 records based on such statement, the health care entity shall inform the individual of the individual's  
237 right to designate, in writing, at his own expense, another reviewing physician or clinical psychologist,  
238 whose licensure, training and experience relative to the individual's condition are at least equivalent to  
239 that of the physician or clinical psychologist upon whose opinion the denial is based. The designated  
240 reviewing physician or clinical psychologist shall make a judgment as to whether to make the health  
241 record available to the individual.

242 The health care entity denying the request shall also inform the individual of the individual's right to  
243 request in writing that such health care entity designate, at its own expense, a physician or clinical

psychologist, whose licensure, training, and experience relative to the individual's condition are at least equivalent to that of the physician or clinical psychologist upon whose professional judgment the denial is based and who did not participate in the original decision to deny the health records, who shall make a judgment as to whether to make the health record available to the individual. The health care entity shall comply with the judgment of the reviewing physician or clinical psychologist. The health care entity shall permit copying and examination of the health record by such other physician or clinical psychologist designated by either the individual at his own expense or by the health care entity at its expense.

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

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

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

AUTHORIZATION TO RELEASE CONFIDENTIAL HEALTH RECORDS

Individual's Name .....

Health Care Entity's Name .....

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

Information or Health Records to be disclosed .....

Purpose of Disclosure or at the Request of the Individual .....

As the person signing this authorization, I understand that I am giving my permission to the above-named health care entity for disclosure of

confidential health records. I understand that the health care entity may not condition treatment or payment on my willingness to sign this authorization

unless the specific circumstances under which such conditioning is permitted by law are applicable and are set forth in this authorization. I also

understand that I have the right to revoke this authorization at any time, but that my revocation is not effective until delivered in writing to the person

who is in possession of my health records and is not effective as to health records already disclosed under this authorization. A copy of this

authorization and a notation concerning the persons or agencies to whom disclosure was made shall be included with my original health records. I

understand that health information disclosed under this authorization might be redisclosed by a recipient and may, as a result of such disclosure, no longer

be protected to the same extent as such health information was protected by law while solely in the possession of the health care entity.

This authorization expires on (date) or (event) .....

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

Relationship or Authority of Legal Representative .....

Date of Signature .....

H. Pursuant to this subsection:

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

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

tecum earlier than 15 days from the date of the subpoena, a copy of the order shall accompany the subpoena.

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

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

**NOTICE TO INDIVIDUAL**

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

2. Any party filing a request for a subpoena duces tecum or causing such a subpoena to be issued for an individual's health records shall include a Notice in the same part of the request in which the recipient of the subpoena duces tecum is directed where and when to return the health records. Such notice shall be in boldface capital letters and shall include the following language:

**NOTICE TO HEALTH CARE ENTITIES**

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

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

NO MOTION TO QUASH WAS FILED; OR

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

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

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

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

4. Except to deliver to a clerk of the court or administrative agency subpoenaed health records in a sealed envelope as set forth, health care entities shall not respond to a subpoena duces tecum for such health records until they have received a certification as set forth in subdivision 5 or 8 of this subsection

from the party on whose behalf the subpoena duces tecum was issued.

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

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

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

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

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

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

b. All filed motions to quash have been resolved by the court or administrative agency and the disclosures sought in the subpoena duces tecum are consistent with such resolution and that, since no health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall comply with the subpoena duces tecum by returning the health records designated in the subpoena by the return date on the subpoena or five days after receipt of certification, whichever is later;

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

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

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

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

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

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

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

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

444 I. Health care entities may testify about the health records of an individual in compliance with  
445 §§ 8.01-399 and 8.01-400.2.

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

453 § 37.2-804.2. *Emergency custody and involuntary admissions; access to health records.*

454 Any health care provider, as defined in § 32.1-127.1:03, shall, upon request, disclose to a magistrate,  
455 court, mental health examiner required under § 37.2-815, or employee or designee of a community  
456 services board or behavioral health authority involved in the emergency custody, temporary detention,  
457 or involuntary commitment process of an individual all health records of the individual necessary to  
458 enable each of them to perform his duties under this chapter, as authorized by subsection D of  
459 § 32.1-127.1:03. These health care entities shall also disclose to one another such records as necessary  
460 to provide treatment to the individual and to monitor such treatment.