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## SENATE BILL NO. 350

Offered January 12, 2022

Prefiled January 11, 2022

*A BILL to amend and reenact §§ 8.01-413 and 32.1-127.1:03 of the Code of Virginia, relating to health records; patient's right to disclosure.*

Patron—Surovell

Referred to Committee on Education and Health

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

**1. That §§ 8.01-413 and 32.1-127.1:03 of the Code of Virginia are amended and reenacted as follows:**

**§ 8.01-413. Certain copies of health care provider's records or papers of patient admissible; right of patient, his attorney and authorized insurer to copies of such records or papers; subpoena; damages, costs and attorney fees.**

A. In any case where the health care provider's original records or papers of any patient in a hospital or institution for the treatment of physical or mental illness are admissible or would be admissible as evidence, any typewritten copy, photograph, photostatted copy, or microphotograph or printout or other hard copy generated from computerized or other electronic storage, microfilm, or other photographic, mechanical, electronic, imaging, or chemical storage process thereof shall be admissible as evidence in any court of the Commonwealth in like manner as the original, if the printout or hard copy or microphotograph or photograph is properly authenticated by the employees having authority to release or produce the original records or papers.

Any health care provider whose records or papers relating to any such patient are subpoenaed for production as provided by law may comply with the subpoena by a timely mailing to the clerk issuing the subpoena or in whose court the action is pending properly authenticated copies, photographs or microphotographs in lieu of the originals. The court whose clerk issued the subpoena or, in the case of an attorney-issued subpoena, in which the action is pending, may, after notice to such health care provider, enter an order requiring production of the originals, if available, of any stored records or papers whose copies, photographs or microphotographs are not sufficiently legible.

Except as provided in subsection G, the party requesting the subpoena duces tecum or on whose behalf an attorney-issued subpoena duces tecum was issued shall be liable for the reasonable charges of the health care provider for the service of maintaining, retrieving, reviewing, preparing, copying, and mailing the items produced pursuant to subsections B2, B3, B4, and B6, as applicable.

B. Copies of a health care provider's records or papers, *including any changes made to the health care provider's records or papers and an audit trail for such records or papers if requested*, shall be furnished within 30 days of receipt of such request to the patient, his attorney, his executor or administrator, or an authorized insurer upon such patient's, attorney's, executor's, administrator's, or authorized insurer's written request, which request shall comply with the requirements of subsection E of § 32.1-127.1:03. If a health care provider is unable to provide such records or papers within 30 days of receipt of such request, such provider shall notify the requester of such records or papers in writing of the reason for the delay and shall have no more than 30 days after the date of such written notice to comply with such request.

However, copies of a patient's records or papers shall not be furnished to such patient when the patient's treating physician, clinical psychologist, or clinical social worker in the exercise of professional judgment, has made a part of the patient's records or papers a written statement that in his opinion the furnishing to or review by the patient of such records or papers would be reasonably likely to endanger the life or physical safety of the patient or another person, or that such records or papers make reference to a person, other than a health care provider, and the access requested would be reasonably likely to cause substantial harm to such referenced person. In any such case, if requested by the patient or his attorney or authorized insurer, such records or papers shall be furnished within 30 days of the date of such request to the patient's attorney or authorized insurer, rather than to the patient.

If the records or papers are not provided to the patient in accordance with this section, then, if requested by the patient, the health care provider denying the request shall comply with the patient's request to either (i) provide a copy of the records or papers to a physician, clinical psychologist, or clinical social worker of the patient's choice whose licensure, training, and experience, relative to the patient's condition, are at least equivalent to that of the treating physician, clinical psychologist, or clinical social worker upon whose opinion the denial is based, who shall, at the patient's expense, make

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59 a judgment as to whether to make the records or papers available to the patient or (ii) designate a  
60 physician, clinical psychologist, or clinical social worker whose licensure, training, and experience,  
61 relative to the patient's condition, are at least equivalent to that of the treating physician, clinical  
62 psychologist, or clinical social worker upon whose opinion the denial is based and who did not  
63 participate in the original decision to deny the patient's request for his records or papers, who shall, at  
64 the expense of the provider denying access to the patient, review the records or papers and make a  
65 judgment as to whether to make the records or papers available to the patient. In either such event, the  
66 health care provider denying the request shall comply with the judgment of the reviewing physician,  
67 clinical psychologist, or clinical social worker.

68 Except as provided in subsection G, a reasonable charge may be made by the health care provider  
69 maintaining the records or papers for the cost of the services relating to the maintenance, retrieval,  
70 review, and preparation of the copies of the records or papers, pursuant to subsections B2, B3, B4, and  
71 B6, as applicable. Any health care provider receiving such a request from a patient's attorney or  
72 authorized insurer shall require a writing signed by the patient confirming the attorney's or authorized  
73 insurer's authority to make the request, which shall comply with the requirements of subsection G of §  
74 32.1-127.1:03, and shall accept a photocopy, facsimile, or other copy of the original signed by the  
75 patient as if it were an original.

76 B1. A health care provider shall produce the records or papers in either paper, hard copy, or  
77 electronic format, as requested by the requester. If the health care provider does not maintain the items  
78 being requested in an electronic format and does not have the capability to produce such items in an  
79 electronic format, such items shall be produced in paper or other hard copy format.

80 B2. When the records or papers requested pursuant to subsection B1 are produced in paper or hard  
81 copy format from records maintained in (i) paper or other hard copy format or (ii) electronic storage, a  
82 health care provider may charge the requester a reasonable fee not to exceed \$0.50 per page for up to  
83 50 pages and \$0.25 per page thereafter for such copies, \$1 per page for hard copies from microfilm or  
84 other micrographic process, and a fee for search and handling not to exceed \$20, plus all postage and  
85 shipping costs.

86 B3. When the records or papers requested pursuant to subsection B1 are produced in electronic  
87 format from records or papers maintained in electronic storage, a health care provider may charge the  
88 requester a reasonable fee not to exceed \$0.37 per page for up to 50 pages and \$0.18 per page thereafter  
89 for such copies and a fee for search and handling not to exceed \$20, plus all postage and shipping costs.  
90 Except as provided in subsection B4, the total amount charged to the requester for records or papers  
91 produced in electronic format pursuant to this subsection, including any postage and shipping costs and  
92 any search and handling fee, shall not exceed \$150 for any request made on and after July 1, 2017, but  
93 prior to July 1, 2021, or \$160 for any request made on or after July 1, 2021.

94 B4. When any portion of records or papers requested to be produced in electronic format is stored in  
95 paper or other hard copy format at the time of the request and not otherwise maintained in electronic  
96 storage, a health care provider may charge a fee pursuant to subsection B2 for the production of such  
97 portion, and such production of such portion is not subject to any limitations set forth in subsection B3,  
98 whether such portion is produced in paper or other hard copy format or converted to electronic format  
99 as requested by the requester. Any other portion otherwise maintained in electronic storage shall be  
100 produced electronically. The total search and handling fee shall not exceed \$20 for any production made  
101 pursuant to this subsection where the production contains both records or papers in electronic format and  
102 records or papers in paper or other hard copy format.

103 B5. Upon request, a patient's account balance or itemized listing of charges maintained by a health  
104 care provider shall be supplied at no cost up to three times every 12 months to either the patient or the  
105 patient's attorney.

106 B6. When the record requested is an X-ray series or study or other imaging study and is requested to  
107 be produced electronically, a health care provider may charge the requester a reasonable fee, which shall  
108 not exceed \$25 per X-ray series or study or other imaging study, and a fee for search and handling,  
109 which shall not exceed \$10, plus all postage and shipping costs. When an X-ray series or study or other  
110 imaging study is requested to be produced in hard copy format, or when a health care provider does not  
111 maintain such X-ray series or study or other imaging study being requested in an electronic format or  
112 does not have the capability to produce such X-ray series or study or other imaging study in an  
113 electronic format, a health care provider may charge the requester a reasonable fee, which may include a  
114 fee for search and handling not to exceed \$10 and the actual cost of supplies for and labor of copying  
115 the requested X-ray series or study or other imaging study, plus all postage and shipping costs.

116 B7. Upon request by the patient, or his attorney, of records or papers as to the cost to produce such  
117 records or papers, a health care provider shall inform the patient, or his attorney, of the most  
118 cost-effective method to produce such a request pursuant to subsection B2, B3, B4, or B6, as applicable.

119 B8. Production of records or papers to the patient, or his attorney, requested pursuant to this section  
120 shall not be withheld or delayed solely on the grounds of nonpayment for such records or papers.

C. Upon the failure of any health care provider to comply with any written request made in accordance with subsection B within the period of time specified in that subsection and within the manner specified in subsections E and F of § 32.1-127.1:03, the patient, his attorney, his executor or administrator, or authorized insurer may cause a subpoena duces tecum to be issued. The subpoena may be issued (i) upon filing a request therefor with the clerk of the circuit court wherein any eventual suit would be required to be filed, and upon payment of the fees required by subdivision A 18 of § 17.1-275, and fees for service or (ii) by the patient's attorney in a pending civil case in accordance with § 8.01-407 without payment of the fees established in subdivision A 23 of § 17.1-275.

A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date production of the record is desired.

No subpoena duces tecum for records or papers shall set a return date by which the health care provider must comply with such subpoena 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 orders that records or papers be disclosed pursuant to a subpoena duces tecum earlier than 15 days from the date of the subpoena, a copy of such order shall accompany such subpoena.

As to a subpoena duces tecum issued with at least a 15-day return date, if no motion to quash is filed within 15 days of the issuance of the subpoena, the party requesting the subpoena duces tecum or the party on whose behalf the subpoena was issued shall certify to the subpoenaed health care provider that (a) the time for filing a motion to quash has elapsed and (b) no such motion was filed. Upon receipt of such certification, the subpoenaed health care provider shall comply with the subpoena duces tecum by returning the specified records or papers by either (1) the return date on the subpoena or (2) five days after receipt of such certification, whichever is later.

The subpoena shall direct the health care provider to produce and furnish copies of the records or papers to the requester or clerk, who shall then make the same available to the patient, his attorney, or his authorized insurer.

If the court finds that a health care provider willfully refused to comply with a written request made in accordance with subsection B, either (A) by failing over the previous six-month period to respond to a second or subsequent written request, properly submitted to the health care provider in writing with complete required information, without good cause or (B) by imposing a charge in excess of the reasonable expense of making the copies and processing the request for records or papers, the court may award damages for all expenses incurred by the patient or authorized insurer to obtain such copies, including a refund of fees if payment has been made for such copies, court costs, and reasonable attorney fees.

If the court further finds that such subpoenaed records or papers, subpoenaed pursuant to this subsection, or requested records or papers, requested pursuant to subsection B, are not produced for a reason other than compliance with § 32.1-127.1:03 or an inability to retrieve or access such records or papers, as communicated in writing to the subpoenaing party or requester within the time period required by subsection B, such subpoenaing party or requester shall be entitled to a rebuttable presumption that expenses and attorney fees related to the failure to produce such records or papers shall be awarded by the court.

D. The provisions of this section shall apply to any health care provider whose office is located within or outside the Commonwealth if the records pertain to any patient who is a party to a cause of action in any court in the Commonwealth, and shall apply only to requests made by the patient, his attorney, his executor or administrator, or any authorized insurer, in anticipation of litigation or in the course of litigation.

E. As used in this section, "health care provider" has the same meaning as provided in § 32.1-127.1:03 and includes an independent medical copy retrieval service contracted to provide the service of retrieving, reviewing, and preparing such copies for distribution.

F. Notwithstanding the authorization to admit as evidence patient records in the form of microphotographs, prescription dispensing records maintained in or on behalf of any pharmacy registered or permitted in the Commonwealth shall only be stored in compliance with §§ 54.1-3410, 54.1-3411 and 54.1-3412.

G. The provisions of this section governing fees that may be charged by a health care provider whose records are subpoenaed or requested pursuant to this section shall not apply in the case of any request by a patient for a copy of his own records, which shall be governed by subsection J of § 32.1-127.1:03. This subsection shall not be construed to affect other provisions of state or federal statute, regulation or any case decision relating to charges by health care providers for copies of records requested by any person other than a patient when requesting his own records pursuant to subsection J of § 32.1-127.1:03.

**§ 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, *including any changes made to the health records and an audit trail for such records if requested*, except as provided in subsections E and F 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.

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

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

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

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

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

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

"Individual" means a patient who is receiving or has received health services from a health care

entity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. To the guardian ad litem and any attorney representing the respondent in the course of a guardianship proceeding of an adult patient who is the respondent in a proceeding under Chapter 20

305 (§ 64.2-2000 et seq.) of Title 64.2;

306 12. To the guardian ad litem and any attorney appointed by the court to represent an individual who  
307 is or has been a patient who is the subject of a commitment proceeding under § 19.2-169.6, Article 5  
308 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title  
309 16.1, or a judicial authorization for treatment proceeding pursuant to Chapter 11 (§ 37.2-1100 et seq.) of  
310 Title 37.2;

311 13. To a magistrate, the court, the evaluator or examiner required under Article 16 (§ 16.1-335 et  
312 seq.) of Chapter 11 of Title 16.1 or § 37.2-815, a community services board or behavioral health  
313 authority or a designee of a community services board or behavioral health authority, or a  
314 law-enforcement officer participating in any proceeding under Article 16 (§ 16.1-335 et seq.) of Chapter  
315 11 of Title 16.1, § 19.2-169.6, or Chapter 8 (§ 37.2-800 et seq.) of Title 37.2 regarding the subject of  
316 the proceeding, and to any health care provider evaluating or providing services to the person who is the  
317 subject of the proceeding or monitoring the person's adherence to a treatment plan ordered under those  
318 provisions. Health records disclosed to a law-enforcement officer shall be limited to information  
319 necessary to protect the officer, the person, or the public from physical injury or to address the health  
320 care needs of the person. Information disclosed to a law-enforcement officer shall not be used for any  
321 other purpose, disclosed to others, or retained;

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

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

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

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

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

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

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

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

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

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

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

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

360 26. To the Office of the State Inspector General pursuant to Chapter 3.2 (§ 2.2-307 et seq.) of Title  
361 2.2;

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

364 28. To law-enforcement officials by each licensed emergency medical services agency, (i) when the  
365 individual is the victim of a crime or (ii) when the individual has been arrested and has received  
366 emergency medical services or has refused emergency medical services and the health records consist of

the prehospital patient care report required by § 32.1-116.1;

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

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

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

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

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

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

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

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

Notwithstanding the provisions of subdivisions 1 through 35, a health care entity shall obtain an individual's written authorization for any disclosure of psychotherapy notes, except when disclosure by the health care entity is (i) for its own training programs in which students, trainees, or practitioners in mental health are being taught under supervision to practice or to improve their skills in group, joint, family, or individual counseling; (ii) to defend itself or its employees or staff against any accusation of wrongful conduct; (iii) in the discharge of the duty, in accordance with subsection B of § 54.1-2400.1, to take precautions to protect third parties from violent behavior or other serious harm; (iv) required in the course of an investigation, audit, review, or proceeding regarding a health care entity's conduct by a duly authorized law-enforcement, licensure, accreditation, or professional review entity; or (v) otherwise required by law.

E. Health care records required to be disclosed pursuant to this section shall be made available electronically only to the extent and in the manner authorized by the federal Health Information Technology for Economic and Clinical Health Act (P.L. 111-5) and implementing regulations and the Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.) and implementing regulations. Notwithstanding any other provision to the contrary, a health care entity shall not be required to provide records in an electronic format requested if (i) the electronic format is not reasonably available without additional cost to the health care entity, (ii) the records would be subject to modification in the format requested, or (iii) the health care entity determines that the integrity of the records could be compromised in the electronic format requested. Requests for copies of or electronic

access to health records shall (a) be in writing, dated and signed by the requester; (b) identify the nature of the information requested; and (c) include evidence of the authority of the requester to receive such copies or access such records, and identification of the person to whom the information is to be disclosed; and (d) specify whether the requester would like the records in electronic format, if available, or in paper format. The health care entity shall accept a photocopy, facsimile, or other copy of the original signed by the requester as if it were an original. Within 30 days of receipt of a request for copies of or electronic access to health records, the health care entity shall do one of the following: (1) furnish such copies of or allow electronic access to the requested health records to any requester authorized to receive them in electronic format if so requested; (2) inform the requester if the information does not exist or cannot be found; (3) if the health care entity does not maintain a record of the information, so inform the requester and provide the name and address, if known, of the health care entity who maintains the record; or (4) deny the request (A) under subsection F, (B) on the grounds that the requester has not established his authority to receive such health records or proof of his identity, or (C) as otherwise provided by law. Procedures set forth in this section shall apply only to requests for health records not specifically governed by other provisions of state law.

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

The health care entity denying the request shall also inform the individual of the individual's right to request in writing that such health care entity designate, at its own expense, a physician, clinical psychologist, or clinical social worker, whose licensure, training, and experience relative to the individual's condition are at least equivalent to that of the physician, clinical psychologist, or clinical social worker 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, clinical psychologist, or clinical social worker. The health care entity shall permit copying and examination of the health record by such other physician, clinical psychologist, or clinical social worker 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, clinical psychologist, or clinical social worker shall be accompanied by a statement from the custodian of the health record that the individual's treating physician, clinical psychologist, or clinical social worker 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, 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**

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

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

559 NO MOTION TO QUASH WAS FILED; OR

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

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

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

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

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

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

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

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

608 7. Concurrent with the court or administrative agency's resolution of a motion to quash, if  
609 subpoenaed health records have been submitted by a health care entity to the court or administrative  
610 agency in a sealed envelope, the court or administrative agency shall: (i) upon determining that no  
611 submitted health records should be disclosed, return all submitted health records to the health care entity  
612 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

e. 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, since no health records have previously been delivered to the court or administrative agency by the health care entity, the health care entity shall return only those health records specified in the certification, consistent with the court or administrative agency's ruling, by the return date on the subpoena or five days after receipt of the certification, whichever is later.

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

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

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

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

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

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

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

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

**674** subject of the record.