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HOUSE BILL NO. 2515

House Amendments in [] - February 3, 2011

A *BILL to amend and reenact § 32.1-127.1:03 of the Code of Virginia, relating to sharing of health records.*

Patron Prior to Engrossment—Delegate BaCote

Referred to Committee on Health, Welfare and Institutions

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 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.

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 requestor's choosing, as provided in subsection E. [However, health care records 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 required, or (iii) the health care entity determines that the integrity of the records could be compromised in the electronic format requested.]*

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

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60 information received from another entity in a nonstandard format or containing nonstandard data content
61 into standard data elements or a standard transaction; or (ii) receives a standard transaction from another
62 entity and processes or facilitates the processing of health information into nonstandard format or
63 nonstandard data content for the receiving entity.

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

65 "Health care provider" means those entities listed in the definition of "health care provider" in
66 § 8.01-581.1, except that state-operated facilities shall also be considered health care providers for the
67 purposes of this section. Health care provider shall also include all persons who are licensed, certified,
68 registered or permitted or who hold a multistate licensure privilege issued by any of the health
69 regulatory boards within the Department of Health Professions, except persons regulated by the Board of
70 Funeral Directors and Embalmers or the Board of Veterinary Medicine.

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

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

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

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

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

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

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

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

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

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

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

98 3. The release of juvenile health records to a secure facility or a shelter care facility pursuant to
99 § 16.1-248.3.

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

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

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

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

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

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

123 6. As required or authorized by law relating to public health activities, health oversight activities,
124 serious threats to health or safety, or abuse, neglect or domestic violence, relating to contagious disease,
125 public safety, and suspected child or adult abuse reporting requirements, including, but not limited to,
126 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,
127 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,
128 54.1-2966, 54.1-2966.1, 54.1-2967, 54.1-2968, 54.1-3408.2, 63.2-1509, and 63.2-1606;

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

130 8. In connection with the health care entity's own health care operations or the health care operations
131 of another health care entity, as specified in 45 C.F.R. § 164.501, or in the normal course of business in
132 accordance with accepted standards of practice within the health services setting; however, the
133 maintenance, storage, and disclosure of the mass of prescription dispensing records maintained in a
134 pharmacy registered or permitted in Virginia shall only be accomplished in compliance with
135 §§ 54.1-3410, 54.1-3411, and 54.1-3412;

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

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

139 11. To the guardian ad litem and any attorney representing the respondent in the course of a
140 guardianship proceeding of an adult patient who is the respondent in a proceeding under Chapter 10
141 (§ 37.2-1000 et seq.) of Title 37.2;

142 12. To the guardian ad litem and any attorney appointed by the court to represent an individual who
143 is or has been a patient who is the subject of a commitment proceeding under § 19.2-169.6, Article 5
144 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title
145 16.1, or a judicial authorization for treatment proceeding pursuant to Chapter 11 (§ 37.2-1100 et seq.) of
146 Title 37.2;

147 13. To a magistrate, the court, the evaluator or examiner required under Article 16 (§ 16.1-335 et
148 seq.) of Chapter 11 of Title 16.1 or § 37.2-815, a community services board or behavioral health
149 authority or a designee of a community services board or behavioral health authority, or a
150 law-enforcement officer participating in any proceeding under Article 16 (§ 16.1-335 et seq.) of Chapter
151 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
152 the proceeding, and to any health care provider evaluating or providing services to the person who is the
153 subject of the proceeding or monitoring the person's adherence to a treatment plan ordered under those
154 provisions. Health records disclosed to a law-enforcement officer shall be limited to information
155 necessary to protect the officer, the person, or the public from physical injury or to address the health
156 care needs of the person. Information disclosed to a law-enforcement officer shall not be used for any
157 other purpose, disclosed to others, or retained;

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

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

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

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

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

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

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

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

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

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

183 privileges;

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

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

196 26. To the Office of the Inspector General for Behavioral Health and Developmental Services
197 pursuant to Article 3 (§ 37.2-423 et seq.) of Chapter 4 of Title 37.2;

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

200 28. To law-enforcement officials by each licensed emergency medical services agency, (i) when the
201 individual is the victim of a crime or (ii) when the individual has been arrested and has received
202 emergency medical services or has refused emergency medical services and the health records consist of
203 the prehospital patient care report required by § 32.1-116.1;

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

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

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

217 32. To the State Health Commissioner pursuant to § 32.1-48.015 when such records are those of a
218 person or persons who are subject to an order of quarantine or an order of isolation pursuant to Article
219 3.02 (§ 32.1-48.05 et seq.) of Chapter 2;

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

224 34. To notify a family member or personal representative of an individual who is the subject of a
225 proceeding pursuant to Article 16 (§ 16.1-335 et seq.) of Chapter 11 of Title 16.1 or Chapter 8
226 (§ 37.2-800 et seq.) of Title 37.2 of information that is directly relevant to such person's involvement
227 with the individual's health care, which may include the individual's location and general condition,
228 when the individual has the capacity to make health care decisions and (i) the individual has agreed to
229 the notification, (ii) the individual has been provided an opportunity to object to the notification and
230 does not express an objection, or (iii) the health care provider can, on the basis of his professional
231 judgment, reasonably infer from the circumstances that the individual does not object to the notification.
232 If the opportunity to agree or object to the notification cannot practicably be provided because of the
233 individual's incapacity or an emergency circumstance, the health care provider may notify a family
234 member or personal representative of the individual of information that is directly relevant to such
235 person's involvement with the individual's health care, which may include the individual's location and
236 general condition if the health care provider, in the exercise of his professional judgment, determines
237 that the notification is in the best interests of the individual. Such notification shall not be made if the
238 provider has actual knowledge the family member or personal representative is currently prohibited by
239 court order from contacting the individual; and

240 35. To a threat assessment team established by a public institution of higher education pursuant to
241 § 23-9.2:10 when such records concern a student at the public institution of higher education, including
242 a student who is a minor.

243 Notwithstanding the provisions of subdivisions 1 through 35, a health care entity shall obtain an
244 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. Requests for copies of health records shall (i) be in writing, dated and signed by the requester; (ii) identify the nature of the information requested; ~~and~~ (iii) include evidence of the authority of the requester to receive such copies and identification of the person to whom the information is to be disclosed; ~~and~~ (iv) *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 requestor as if it were an original. Within 15 days of receipt of a request for copies of health records, the health care entity shall do one of the following: (i ~~a~~) furnish such copies to any requester authorized to receive them *in electronic format if so requested, unless the health care entity does not utilize electronic records*; (ii ~~b~~) inform the requester if the information does not exist or cannot be found; (iii ~~c~~) 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 (iv ~~d~~) deny the request (a 1) under subsection F, (b 2) on the grounds that the requester has not established his authority to receive such health records or proof of his identity, or (c 3) 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 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 or the individual's treating clinical psychologist 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 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 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 opinion the denial is based. The designated reviewing physician or clinical psychologist 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 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

306 be made
307 Information or Health Records to be disclosed
308 Purpose of Disclosure or at the Request of the Individual
309 As the person signing this authorization, I understand that I am
310 giving my permission to the above-named health care entity for
311 disclosure of confidential health records. I understand that the
312 health care entity may not condition treatment or payment on my
313 willingness to sign this authorization unless the specific
314 circumstances under which such conditioning is permitted by law
315 are applicable and are set forth in this authorization. I also
316 understand that I have the right to revoke this authorization
317 at any time, but that my revocation is not effective until
318 delivered in writing to the person who is in possession of
319 my health records and is not effective as to health records
320 already disclosed under this authorization. A copy of this
321 authorization and a notation concerning the persons or agencies
322 to whom disclosure was made shall be included with my original
323 health records. I understand that health information disclosed
324 under this authorization might be redisclosed by a recipient
325 and may, as a result of such disclosure, no longer be protected
326 to the same extent as such health information was protected by
327 law while solely in the possession of the health care entity.
328 This authorization expires on (date) or (event)
329 Signature of Individual or Individual's Legal Representative
330 if Individual is Unable to Sign
331 Relationship or Authority of Legal Representative
332 Date of Signature

333 H. Pursuant to this subsection:

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

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

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

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

356 **NOTICE TO INDIVIDUAL**

357 The attached document means that (insert name of party requesting or causing issuance of the
358 subpoena) has either asked the court or administrative agency to issue a subpoena or a subpoena has
359 been issued by the other party's attorney to your doctor, other health care providers (names of health
360 care providers inserted here) or other health care entity (name of health care entity to be inserted here)
361 requiring them to produce your health records. Your doctor, other health care provider or other health
362 care entity is required to respond by providing a copy of your health records. If you believe your health
363 records should not be disclosed and object to their disclosure, you have the right to file a motion with
364 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.

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 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

486 I. Health care entities may testify about the health records of an individual in compliance with
487 §§ 8.01-399 and 8.01-400.2.

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

ENGROSSED

HB2515E