

### **Answers to Category Three Scenarios**

Note: The answers to these case scenarios are based solely on federal law. Readers should also apply relevant state laws where appropriate.

#### **Scenario 1: Municipal Community Centers and School District**

Law(s) referenced in this answer: FERPA

Kathy works for a city agency that runs community centers serving youth. The agency issues community center membership cards with a unique identifier for each member youth. Her agency wants to collect some demographic information to inform their understanding of the youth who currently do and do not access the centers. Kathy contacts the school district to request some basic identifying information about the youth who frequent the community centers. Specifically, she asks the school district for each child's school ID number, date of birth, sex, school, and home zip code.

#### **Who has the information?**

The school district.

#### **Who wants the information?**

A city agency that runs community centers serving youth

#### **What specific information does the requester want?**

The following information about each student who frequents the community centers:

- school ID number
- date of birth
- sex
- school
- home zip code

#### **What does the requester want to do with the information?**

The agency wants to collect some demographic information to inform their understanding of the youth who currently do and do not access the centers.

#### **Which laws pertain?**

FERPA.

#### **What does the law permit?**

A student's home address and phone number are considered "directory information" under FERPA. According to the U.S. Department of Education, directory information includes, but is not limited to, the following data about a student:

- Name

- Student identifier
- Address and telephone number
- Date and place of birth
- Participation in school activities and sports
- Dates of attendance
- Photograph

A school may release directory information without obtaining parental consent *if* the school has already notified parents about the specific types of directory information it may disclose *and* parents have the opportunity to notify the school in writing that they do not want information about their child disclosed. Thus, in this scenario, the school may release information about a particular child if the school has previously provided notice to parents as to what directory information will be disclosed to third parties and the child's parent did not opt out. (Please note: it is not clear whether a child's gender can be included as directory information. There is no specific mention of gender in any Department of Education guidance on directory information.)

If the school district has not provided such notice and/or a child's parent has opted out of allowing the school to disclose directory information, the school will need signed authorization from the child's parent to release the information to the city agency.

Under FERPA, written authorization to release education records must:

- Specify the records to be disclosed
- State the purpose of the disclosure
- Identify the party or class of parties to whom disclosure is to be made
- Be signed and dated by the parent or guardian

## **Scenario 2: Law Enforcement Agency, School, Department of Behavioral Health, Social Services Agency**

Law(s) referenced in this answer: FERPA, state law, HIPAA, 42 CFR Part 2.

The county sheriff's department stations deputy sheriffs in two local area high schools. Six years ago, the sheriff's department and the school district started a diversion program in the two high schools. The diversion program targets students who commit low-level offenses on school grounds. In lieu of arrest, the student is assessed by a school guidance counselor and referred to one of the following interventions, depending on the student's needs: a conflict resolution class run by a local social services agency; substance abuse counseling or mental health treatment through the county department of behavioral health; and/or afterschool tutoring by volunteer teachers. The sheriff's department now wants to collect data and present a report to the county commissioners to demonstrate the program's success. The department hopes to obtain additional funding from the county to replicate the program in other

schools. Specifically, the department wants to collect process data on how many youth successfully completed the program including the prescribed interventions. The department also wants to present youth outcome data including each youth's school disciplinary record, grades at school, and records of arrests/juvenile court adjudications after exiting the diversion program. The department wants to connect the data to show that youth who successfully completed the interventions had a low recidivism rate and did better in school. The report to the commissioners would not contain any personal identifiers and would instead present de-identified aggregate data.

**Who has the information?**

The two local high schools, the social services agency, the county department of behavioral health, the sheriff's department, and the juvenile court.

**Who wants the information?**

The sheriff's department.

**What specific information does the requester want?**

From the two local high schools: grades and school disciplinary records for youth who participated in the diversion program; the names of youth who received tutoring as a requirement of the diversion program.

From the local services agency: the names of referred youth who completed the conflict resolution class as a requirement of the diversion program.

From the department of behavioral health services: the names of referred youth who completed treatment as a requirement of the diversion program.

From the sheriff's department: the post-diversion program arrest records of youth who participated in the diversion program.

From the juvenile court: the post-diversion adjudication records of youth who participated in the diversion program

**What does the requester want to do with the information?**

The sheriff's department wants to report de-identified aggregate data on the outcomes of youth who participated in the program to the county commissioners. To do that, the department will first have to link data from multiple sources on each youth. Once the

**Which laws pertain?**

For information from the two local high schools: FERPA.

For information from the local services agency: it is unclear what laws would govern release of information about a youth's participation in a conflict resolution class.

For information from the department of behavioral health services: HIPAA applies to both the mental health and substance abuse treatment records. 42 CFR Part 2 also applies to the substance abuse treatment records.

For information from the sheriff's department: state law.

For information from the juvenile court: state law.

### **What does the law permit?**

FERPA governs the release of a student's grades and school disciplinary records to a third party. The school may release a student's records to the sheriff department if the school obtains a signed authorization from each student's parent. Under FERPA, written authorization to release education records must:

- Specify the records to be disclosed
- State the purpose of the disclosure
- Identify the party or class of parties to whom disclosure is to be made
- Be signed and dated by the parent or guardian

A provision in FERPA allows schools to release student records absent parental authorization for studies for the purpose of improving instruction. That exception could not be used in this case because the objective in collecting the data is not to improve the school's instruction.

HIPAA governs the release of mental health treatment information. The department of behavioral health may release information about a youth's mental health treatment upon receipt of a signed authorization. Under HIPAA, an authorization must contain the following eight elements:

- Specific description of PHI to be released
- Name/description of persons or class of persons authorized to disclose PHI
- Name/description of persons or class of persons authorized to receive PHI
- Expiration date or event
- Statement of individual's right/procedure to revoke authorization
- Statement that disclosed PHI may be subject to re-disclosure by recipient and not protected by HIPAA
- Signature of individual & date (or of the individual's personal representative with a description of that person's authority to act)

- Purpose of disclosure (“at request of individual” suffices)

State law dictates who must sign the authorization. If state law allows a youth to consent to receive mental health treatment, the youth who must sign the release. If state law requires parental consent for a youth to receive treatment, then the parent must sign the authorization to release information.

Federal regulations govern the release of substance abuse treatment information. The department of behavioral health may release information about a youth’s substance abuse treatment if the department obtains a signed authorization. Federal D&A regulations require the following elements in an authorization to release records:

- Name/designation of persons authorized to disclose information
- Name/designation of persons or organization authorized to receive the information
- Patient’s name
- Purpose of the disclosure
- Specifics as to what information is to be disclosed
- Patient’s signature and the date
- Statement of individual’s right/procedure to revoke authorization
- Expiration date or event

Again, state law dictates who must sign the authorization. If state law allows a youth to consent to receive substance abuse treatment, the youth must sign the release. If state law requires parental consent for a youth to receive treatment, then the parent must sign the authorization to release information.

Both HIPAA and the federal drug and alcohol regulations have research exceptions to the general rule that treatment providers must have signed authorizations before they may release personally identifiable information to third parties.

Federal regulations allow a substance abuse treatment provider to release patient information to individuals conducting “scientific research” if the researcher fulfills certain conditions. These include proving that they have qualifications to conduct the research; (2) developing a research protocol for securing and redisclosing the information that does not identify any patient; (3) securing three or more individuals who have certified in writing that they reviewed the patient protection protocols and determined that the risks of disclosure are outweighed by the benefits of the research; and (4) agreeing that they will not identify any individual in any report or otherwise disclose patient identities. The sheriff department would likely not be able to qualify as a researcher under this exception. However, the sheriff’s department may be able to

partner with researchers at a local university who could satisfy these requirements and conduct the research on their behalf..

Similarly, the HIPAA privacy rule allows covered entities to release protected health information to researchers without signed authorizations in certain limited circumstances. Some that may apply here are the following:

- **Institutional Review Board (IRB) Approval.** The covered entities obtained documented Institutional Review Board (IRB) or Privacy Board Approval to conduct records research, when researchers are unable to use de-identified information, and the research could not practicably be conducted if research participants' authorization were required.<sup>1</sup>
- **Preparatory to Research.** The researcher, either in writing or orally, represented that the use or disclosure of the protected health information is solely to prepare a research protocol or for similar purposes preparatory to research, that the researcher will not remove any protected health information from the covered entity, and that protected health information for which access is sought is necessary for the research purpose.<sup>2</sup>
- **Limited Data Sets with a Data Use Agreement.** The covered entity and the researcher enter into to a data use agreement that explains the limitations of the data set and how it will be used (e.g. for research, public health, or health care operations). These limitations must satisfy the requirements in 45 CFR 164.514, which outlines standards for the de-identification of protected health information.<sup>3</sup>

Again, the sheriff's department will likely not be able to satisfy these conditions on its own. However, it may be able to partner with a research university.

FERPA, HIPAA, and the federal drug and alcohol regulations all allow the release of de-identified information without first obtaining a signed authorization from the appropriate party. The challenge in this scenario is that the only way to link information about a particular youth from various sources is by using personal identifiers; once the information is linked, the personal identifiers can be stripped and the data aggregated.

Finally, in this scenario, the sheriff's department will have to consult state law to determine how it may obtain information from the juvenile court about youth who participated in the diversion program. Similarly, the department must consult state law regarding its desired use of the youth's arrest information for purposes of preparing the report to the county commissioners.

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<sup>1</sup> See 45 CFR § 164.512(i)(1)(i).

<sup>2</sup> See 45 CFR § 164.512(i)(1)(ii).

<sup>3</sup> 45 CFR § 164.514.