

HEALTH INFORMATION AND DATA SHARING Fact Sheet

The Limits of HIPAA in Keeping Reproductive Health Records Private


In its recent decision in [*Dobbs v. Jackson's Women's Health Organization*](#), the United States Supreme Court held there is no constitutional right to abortion. The dissenters in *Dobbs* warned of far-reaching state restrictions that may include blocking pregnant individuals from traveling to another state to terminate a pregnancy; prohibiting pregnant individuals from obtaining abortion pills out-of-state; and even criminalizing the provision of information to those seeking out-of-state abortions.

With these broad ramifications in mind, the threat of law enforcement gaining access to health records is a growing concern. On June 29, 2022, the Department of Health and Human Services (HHS) issued [guidance on how the Health Insurance Portability and Accountability Act \(HIPAA\) safeguards reproductive health records](#). In this Network for Public Health Law fact sheet, we provide additional guidance on how HIPAA applies to abortion records. We caution that HIPAA includes several provisions permitting disclosure of an individual's abortion records to law enforcement when specific conditions are met.

The Privacy Landscape for Reproductive Health Records

Unlike other categories of sensitive health information that receive heightened privacy protections, such as human immunodeficiency virus, sexually transmissible infections, mental health and substance use treatment, there are generally no similarly *elevated* protections for records relating to reproductive health. If the information is protected health information transmitted or maintained by, or on behalf of, a HIPAA covered entity, such as a covered health care provider, it is subject to HIPAA's Privacy Rule. It may also be protected by other generally applicable health privacy laws, such as state medical record privacy laws.

Law Enforcement Access to Reproductive Health Records



The Privacy Rule generally requires a written authorization from the individual before a covered health care provider may disclose abortion-related protected health information. However, the Privacy Rule also provides several avenues for law enforcement officials to gain access to abortion records, without the individual's authorization, when certain conditions are met. These avenues are discussed in sections 1 through 4 below.

1. Disclosures for Law Enforcement Pursuant to Process


The Privacy Rule's permitted disclosures for law enforcement at [45 C.F.R. § 164.512\(f\)\(1\)](#) allow for certain process-related disclosures of protected health information to a law enforcement official without the individual's authorization. Protected health information may be disclosed, for example, when the law enforcement official provides a court order, court-ordered warrant, subpoena or summons issued by a judicial officer, or grand jury subpoena. It may also be disclosed if the law enforcement official presents an administrative subpoena or summons, or civil or authorized investigative demand, so long as "the information sought is relevant and material to a legitimate law enforcement inquiry," and certain other conditions are met. Release of protected health information pursuant to the above processes must comply with, and is limited by, the requirements of such process. For example, release of protected health information pursuant to a court order should be limited to the information expressly stated in the order. [The HHS guidance](#) emphasizes that the Privacy Rule permits, but *does not require*, disclosures of protected health information to law enforcement. This is true of most disclosures allowed by the Privacy Rule.

2. Disclosures for Law Enforcement Relating to Victims of a Crime, Crime on the Premises, and Other Permitted Disclosures

The Privacy Rule's permitted disclosures for law enforcement at [45 C.F.R. § 164.512\(f\)\(2\)-\(6\)](#) include several additional bases upon which law enforcement may gain access to abortion-related protected health information. When certain conditions are met, the Privacy Rule permits a covered health care provider to disclose to law enforcement certain protected health information:

- (1) to identify a "suspect, fugitive, material witness, or missing person;"
- (2) about the victim of a crime;
- (3) to alert law enforcement to a death that may have been caused by criminal conduct;
- (4) to notify law enforcement of a crime on the premises of the covered health care provider;
- and,
- (5) in the context of emergency care on the premises of the covered health care provider, to notify law enforcement of limited details about the crime, victim and perpetrator.

Even though the Privacy Rule does not require these disclosures, the threat of disclosure causes particular concern in the current climate in which some states may criminalize abortion. The [HHS guidance](#) notes that state fetal homicide laws do not typically punish the pregnant person and "appellate courts have overwhelmingly rejected efforts to use existing criminal and civil laws intended for other purposes (e.g., to protect children) as the basis for arresting, detaining, or forcing



interventions on pregnant individuals” (internal quotations omitted). Nevertheless, it remains to be seen how these provisions will affect the privacy of abortion-related protected health information in states with far-reaching abortion restrictions, particularly those that criminalize abortion.

3. Disclosures Where Required by Law

The Privacy Rule at [45 C.F.R. § 164.512\(a\)](#) allows disclosures of protected health information where the disclosure is mandated by law and limited to specifications within the legal mandate. Even where the disclosure is required by law, a disclosure *to law enforcement* must still meet the requirements of the Privacy Rule for disclosures for law enforcement (as discussed above). For example, if a law enforcement official relies on an administrative subpoena for the legal mandate to disclose the information, the requested information must be “relevant and material to a legitimate law enforcement inquiry.”

In its recent bulletin, [HHS emphasizes](#) that HIPAA’s permitted disclosures where “required by law” are limited to “a mandate contained in law” and “that is enforceable in a court of law.” Thus, for instance, a simple written request for abortion-related protected health information on law enforcement letterhead, accompanied by a statement that the records custodian has a duty to cooperate with a law enforcement inquiry, would *not* be sufficient to release reproductive health records under HIPAA’s required by law provision. What’s more, the [HHS guidance](#) reminds readers that any disclosure pursuant to the required by law provision is limited to the requirements of the law in question.


4. Disclosures to Avert a Serious Threat to Health and Safety

HIPAA’s Privacy Rule at [45 C.F.R. § 164.512\(j\)](#) further permits a covered health care provider, where permitted by law and professional ethics, to disclose protected health information where “necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.” A disclosure under this provision may only be made to an individual in a position to prevent the harm.

The recent [HHS guidance](#) takes the position that it is *not* consistent with professional ethics to make a disclosure to law enforcement or other person “regarding an individual’s interest, intent, or prior experience with reproductive health care.” To illustrate this point, HHS provides an example of a pregnant individual in a state that prohibits abortion who notifies the provider of her intent to seek an abortion out of state. According to the [HHS guidance](#), HIPAA’s permitted disclosures to avert a serious threat to health and safety would *not* allow the provider to disclose this information to law enforcement.

Government Access to Reproductive Records Outside of Law Enforcement Disclosures

Although the Privacy Rule includes permitted disclosures to law enforcement, there are additional channels within the Rule through which government agencies may access protected health information regarding abortion. When certain conditions are met, disclosures of protected health information are permitted to: an entity authorized to receive reports of abuse, neglect, or domestic



violence; an entity investigating health care fraud or conducting other health oversight activities; and a public health agency authorized by law to receive the information for public health purposes. The Privacy Rule permits but does not require these types of disclosures, although other state laws (such as mandatory child abuse and neglect reporting) may require disclosure. The Privacy Rule further permits certain disclosures without an individual's authorization during judicial and administrative proceedings, such as in response to a court order or a subpoena accompanied by a qualified protective order.

Developing and Implementing Strong HIPAA Policies and Procedures and Training

An added risk to the privacy of reproductive health records is that records custodians will bend to law enforcement pressure even if the law enforcement request fails to meet HIPAA's requirements. It is therefore important for covered entities to develop, review, and update clear policies and procedures for releasing protected health information, including to law enforcement. The HIPAA Privacy Rule further requires covered entities to train workforce members on policies and procedures, which should include the prerequisites for, and limitations on, disclosures to law enforcement. Covered entities should also consider using a checklist for disclosures to law enforcement that requires identification and documentation of the permitted basis for the disclosure.


Beyond HIPAA: Court Records, Device and App Data, and Other Information Outside the Protections of the Privacy Rule

HIPAA does not protect all health information. Its protections apply only to protected health information maintained by, or on behalf of, HIPAA covered entities—health plans, health care clearinghouses, and covered health care providers. It does not, for example, apply to health information contained within court records, or health records in the hands of non-covered entities, such as anti-abortion “crisis pregnancy centers” that do not meet the definition of covered entity, anti-abortion call centers that are not covered entities, or individuals who might wish to intimidate persons seeking an abortion.

HIPAA also generally does not protect data collected by mobile devices and apps. HHS recently announced additional [new HIPAA guidance on mobile and app data](#), noting that the Privacy Rule does not protect search histories, data voluntarily shared on the internet, and location data. The guidance further cautions that data on an individual's devices or apps may be seen by, or sold to, third parties. To mitigate the risk of device and app data falling into the wrong hands, HHS advises consumers to avoid downloading needless apps, deny unnecessary app requests to access location data, and disable location services on devices.

Conclusion

In the aftermath of the Supreme Court's decision finding no constitutional right to abortion, state actors may have new incentives to investigate reproductive health records. HIPAA permits certain



disclosures of protected health information to law enforcement when all conditions are met. To reduce the risk of unauthorized disclosures, covered entities can review or revise policies and procedures. They can also appropriately train all staff to ensure that all conditions and limitations on disclosures to law enforcement are met. Nevertheless, the Privacy Rule provides a relatively broad range of circumstances under which abortion records may be lawfully provided to law enforcement officials. Furthermore, HIPAA does not apply to all health information. Individuals should be aware that their internet searches, and even physical location, may be tracked by their devices, and should take appropriate precautions.

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