



# Criminal Court Orders Authorizing Disclosure of Part 2 Records

## What you need to know

Substance use disorder (SUD) treatment providers frequently receive court orders and other requests for patient information covered by the federal confidentiality protections for SUD treatment (42 USC § 290dd-2 and 42 CFR Part 2, referred to collectively as “Part 2”).<sup>1</sup> A general court order, subpoena, warrant, or official request for records, however, does not permit the disclosure of Part 2 records.<sup>2</sup> Federal law generally prohibits a person from using or disclosing (i.e., sharing) Part 2 records to apply for a warrant, criminally investigate, initiate, or substantiate criminal charges against a patient, absent patient consent or a special court order.<sup>3</sup> A court may issue an order authorizing the use or disclosure of Part 2 records to investigate or prosecute a patient only if the court finds that the alleged crime is “extremely serious,” among other factors.<sup>4</sup> These confidentiality protections are essential so that people feel safe seeking SUD treatment.<sup>5</sup>

Many lawyers and judges are more familiar with privacy protections for general health information and may not be aware of Part 2’s heightened confidentiality protections. To help clarify Part 2’s heightened court order requirements, this resource provides sample provisions for a criminal court order authorizing disclosure of a patient’s Part 2 records.<sup>5</sup>

SUD treatment providers may use this resource to help determine whether they have received a Part 2 compliant court order, but it should not replace legal advice from local counsel. Court orders authorizing disclosures of a patient’s confidential communications must meet additional requirements (42 CFR § 2.63). There are different requirements for civil court orders (42 CFR § 2.64); see the Center of Excellence for Protected Health Information’s resource: “Civil Court Orders Authorizing Disclosure of SUD Treatment Records Protected by Part 2.”

## **What does a valid Part 2 court order look like in a criminal case?**

A court order authorizing the disclosure of Part 2 records to conduct a criminal investigation or prosecution of a patient must contain the following elements:

### **1. Criteria**

The court must find that all the following criteria are met:

- a) the crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury;<sup>7</sup>
- b) there is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
- c) other ways of obtaining the information are not available or would not be effective; and
- d) the public interest and need for the disclosure outweigh the potential injury to the patient, the physician- patient relationship, and the ability of the Part 2 program to provide services to other patients.<sup>8</sup>

### **2. Limitations on disclosure**

After the court finds the criteria have been met, it must impose limitations on the disclosure of any Part 2 records, including the following: limiting the amount of information to be disclosed and used to the parts of the patient's record that are essential to fulfill the objective of the order; limiting disclosure to the law enforcement and prosecutorial officials who are conducting the investigation or prosecution;<sup>9</sup> and imposing other measure as necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.<sup>10</sup>

The sample court order language on the next page illustrates the minimum legal requirements for a Part 2 court order. Additional federal, state, or local provisions may also apply in your jurisdiction. The formatting and style of the court order may also vary by jurisdiction.

## Sample criminal court order provisions authorizing disclosure of Part 2 records<sup>11</sup>

Upon reading petitioner's application for disclosure of John Doe's records from Blue Sky Treatment Program to conduct a criminal investigation or prosecution of a patient in connection with a criminal proceeding and following a hearing at which Blue Sky Treatment Program had an opportunity to present evidence, in accordance with 42 USC § 290dd-2 and 42 CFR §§ 2.61 and 2.65, this court finds:

- The crime involved is extremely serious, as that term is defined in 42 CFR § 2.65(d)(1);
- There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
- Other ways of obtaining the information are not available or would not be effective;
- The potential injury to the patient, to the physician-patient relationship and to the ability of the Part 2 program to provide services to other patients is outweighed by the public interest and need for the disclosure.

IT IS HEREBY:

ORDERED that Blue Sky Treatment Program comply with this order by producing the following:

*[Description of any Part 2 records to be disclosed; must be limited to "essential" information but may include information such as date of admission, diagnosis, summary of treatment plan, attendance, date of discharge, and more. Information contained in confidential patient communications may not be included unless the court order is necessary under 42 CFR § 2.63(a)(1) or (2) or is authorized under 42 CFR § 2.63(a)(3).]*

*[Description of any testimony to be required.]*

ORDERED that in accordance with 42 CFR § 2.65(e)(1), disclosure of the records and testimony referenced in this order is limited to the parts of John Doe's records which are essential to fulfill the objective of the order.

ORDERED that in accordance with 42 CFR § 2.65(e)(2), disclosure of the records and testimony referenced in this order is limited to the following law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and who must limit their use of the records to investigate and prosecute the extremely serious crime specified in the application:

*[Description of law enforcement and prosecutorial officials authorized to receive records; must be officials who are responsible for or are conducting the investigation or prosecution.]*

ORDERED that in accordance with 42 CFR § 2.65(e)(3), the following measures must be taken to limit disclosure for the protection of the patient, the physician-patient relationship, and the treatment services:

*[May include measures such as sealing the record.]*

## Additional considerations and practice tips

### **Preliminary hearing.**

A valid Part 2 court order authorizing the use and disclosure of records for a criminal investigation or prosecution should only be issued after a hearing at which the record holder has an opportunity to present evidence about whether the court should authorize the disclosure.<sup>12</sup> If you receive a court order but did not receive notice of a preliminary hearing and have never appeared before the judge, this may be a flag that the court order does not comply with Part 2. In practice, however, this does not mean you should ignore the court order. Always consult with local counsel and contact the court if you have any questions about the preliminary hearing.

### **No patient-identifying information disclosed prior to the court order.**

The application for a court order and the court order itself must use a fictitious name (like John Doe) and not disclose any patient-identifying information.<sup>13</sup> When responding to a court order and speaking with attorneys, litigants, and court employees, remember that you must continue to maintain the patient's confidentiality until the court order is actually entered. This means that you may not confirm the individual's identity as a patient at the Part 2 program or share any other identifying information until the court has issued its court order.<sup>14</sup>

### **HIPAA-protected health information.**

A court order issued under 42 CFR § 2.65 also meets the requirements for a court order authorizing disclosure of protected health information under the HIPAA Privacy Rule.<sup>15</sup>

## For more information

### **Resources**

This resource is one of many that are available within the Center of Excellence for Protected Health Information's resource library, which can be found at [coephi.org](http://coephi.org).

### **Request Technical Assistance**

You can request brief, individualized technical assistance and join our mailing list for updates, including news about the publication of new resources and training opportunities, [here](#).

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## Disclaimer

*Resources, training, technical assistance, and any other information provided through the Center of Excellence for Protected Health Information do not constitute legal advice. For legal advice, including legal advice on other applicable state and federal laws, please seek out local counsel.*

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## References

1. For more information about how to determine when Part 2 applies to substance use disorder (SUD) treatment records, see 42 CFR §§ 2.11, 2.12 (definitions of “program” and “federally assisted”); see also CoE-PHI resource: [I provide SUD services in an FQHC: Does 42 CFR Part 2 apply to me?](#)
2. See 42 CFR § 2.61(b)(1) (“A person holding records subject to the regulations in this part . . . may not disclose the records in response to the subpoena unless a court of competent jurisdiction enters an authorizing order under the regulations in this part.”). For more information about responding to a subpoena in a criminal case, see Legal Action Center’s [Sample Letter in Response to a Subpoena](#); For information about how to respond to arrest warrants and inquiries from law enforcement, see [CoE-PHI Resource: Arrest Warrants & Law Enforcement Inquiries in SUD Settings](#).
3. 42 CFR § 2.12(d).
4. See 42 CFR § 2.65.
5. See 42 CFR § 2.11 (definition of “Part 2 program”).
6. See 42 CFR §§ 2.61, 2.65.
7. The regulations define “extremely serious” crimes to include a crime “which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect.” *Id.* at § 2.65(d)(1). Drug-related crimes frequently do not meet the definition of “extremely serious.”
8. See 42 USC § 290dd-2(b)(2)(C), (c); 42 CFR § 2.65(d).
9. 42 CFR § 2.65(e)(2).
10. See 42 CFR § 2.65(e).
11. These sample provisions illustrate the minimum necessary requirements to comply with the Part 2 court order requirements. Additional information may be required to comply with other applicable laws and local court rules.
12. See 42 CFR § 2.65(a)-(c).
13. See 42 CFR § 2.65(a). The application may disclose patient-identifying information only if the court has sealed the record of the proceeding from the public.
14. *Id.*
15. See 42 CFR § 164.512(e).