

The confidentiality of information pertaining to medical information, such as substance abuse prognosis and treatment, is strictly regulated by both federal and Georgia law. Both bodies of law place a large emphasis on keeping such patient information private and confidential unless the patient gives consent to its release or the disclosure has been deemed absolutely necessary either through legislation or judicial proceedings. Even when such information must be disclosed, there are a number of safeguards that must be implemented in order to limit the scope of those who receive such information. The Georgia Code has similarly strict, if not stricter, guidelines for the dissemination of information regarding AIDS patients. All of these areas require that the information remain confidential unless there is a specific and compelling need for its disclosure.

Under federal law, all information pertaining to the identity, diagnosis or treatment of any patient maintained “in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States” shall be confidential. 42 U.S.C. § 290dd-2(a) (2000). However, there are certain permitted disclosures. First, any record may be disclosed as long as the patient it concerns gives prior written consent to such disclosure. 42 U.S.C. § 290dd-2(b)(1). Second any record may be disclosed to medical personnel “to the extent needed to meet a bona fide medical emergency.” 42 U.S.C. § 290dd-2(b)(2)(A). Also, any record may be disclosed to authorized personnel for the purposes of “conducting scientific research, management audits, financial audits, or program evaluation,” as long as the proper precautions are taken in order to prevent the

actual identification of any particular patient from being revealed. 42 U.S.C. § 290dd-2(b)(2)(B).

Finally, an appropriate court order can demand the disclosure of such information. In order to attain such an order, an applicant must show a good cause need for the order. U.S.C. § 290dd-2(b)(2)(C). The court considers a number of factors in determining whether a good cause exists. First, the court considers if there is a need to avoid “substantial risk of death or serious bodily harm.” Id. The court must also weigh “the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.” Id. The court must also find that other ways of obtaining the information are not available or would be ineffective. 42 C.F.R. 2.64 [CITE].

If the court decides to grant such an order, the court will consider the extent of disclosure which is actually necessary, and impose appropriate safeguards against unauthorized disclosures. U.S.C. § 290dd-2(b)(2)(C). An order is also the only manner in which information may be attained to initiate or support any criminal charges against a patient, or to use in investigating that patient. U.S.C. § 290dd-2(c).

An applicant for such an order must have a “legally recognized interest in the disclosure which is sought.” 42 C.F.R. 2.64(a) [CITE]. The application must also use a fictitious name to identify the patient and must avoid any other patient-identifying information, unless the patient has given written consent or the court has ordered the record of the proceeding to be sealed from the public. Id. The patient and the person holding the patient information must also be given adequate notice of the application in a

manner which will not disclose any patient-identifying information to any other persons. 42 C.F.R. 2.64(b)(1)[CITE].

The patient and record holder are also required to have an opportunity to file a written response to the application, or to appear in person for the purpose of providing evidence pertaining to the regulatory and statutory criteria of issuing an order. 42 C.F.R. 2.64(b)(1) [CITE]. Unless the patient requests an open hearing, any review of the evidence or hearing pertaining to the application will be held in the judge's chambers or in a manner which ensures that the patient identifying information is only disclosed to the party to the proceeding, the patient, and the person holding the record. 42 C.F.R. 2.64(b)(1) [CITE].

The federal government also took a significant step toward regulating the disclosure of medical information among health insurance providers and health care providers outside the scope of the legal system. On August 21, 1996, Congress enacted The Health Insurance Portability and Accountability Act ("HIPAA") with the intended purpose of improving the administration and efficiency of the nation's health care system. Matthew Bender, *Medical Records Privacy Under HIPAA*, § 1.01 (Matthew Bender & Company, Inc. 2006). As a means of achieving this end, HIPAA required health care plans, health care clearinghouses, and health care providers to adopt certain safeguards to protect the privacy of health information. Id.

These safeguards apply in the electronic transmission of "protected health information" by "covered entities." "Covered entities" are defined under HIPAA as a health plan, a health care clearinghouse, or a "health care provider who transmits any health information in electronic form in connection with a transaction" covered by the

Act. 45 C.F.R. § 160.103 (2005). Protected health information, as defined by HIPAA, is individually identifiable health information that is transmitted by electronic media, maintained in electronic media, or transmitted or maintained in any other form or medium. Id.

The general rule under HIPAA is that a covered entity may not disclose protected health information without valid authorization. 45 C.F.R. § 164.508(a) (2003). A valid authorization contains the following elements. First, there must be a description of the information to be disclosed that identifies the information “in a specific and meaningful fashion.” 45 C.F.R. § 164.508(c)(1)(i) (2003). Second, the authorization must contain the name or specific identification of the person or persons authorized to make the requested use or disclosure. 45 C.F.R. § 164.508(c)(1)(ii) (2003). Third, the name or other specific identification of the person or persons “to whom the covered entity may make the requested use or disclosure” must also be included. 45 C.F.R. § 164.508(c)(1)(iii) (2003).

The authorization must also contain a description of each purpose of the requested use or disclosure. 45 C.F.R. § 164.508(c)(1)(iv) (2003). However, this requirement can be satisfied by the simple statement “at the request of the individual” when the individual initiates the authorization and does not elect to provide a state of the purpose. 45 C.F.R. § 164.508(c)(1)(iv) (2003). Also, the authorization must include a date or expiration event that “relates to the individual or the purpose of the use or disclosure.” 45 C.F.R. § 164.508(c)(1)(v) (2003). Should the purpose of the disclosure be for research, statements such as “end of the research study,” “none,” or similar language is sufficient. 45 C.F.R. § 164.508(c)(1)(v) (2003).

Finally, a valid authorization must also contain a signature of the individual along with the date. 45 C.F.R. § 164.508(c)(1)(vi) (2003). If the authorization is signed by a personal representative of the individual, it must also include a description of the representative's authority to act for the individual. Id.

However, under HIPAA there are certain permitted disclosures the covered entities can make without such authorization. First, a covered entity may use or disclose protected health information for its own treatment, payment or health care operations. 45 C.F.R. § 164.506(c)(1) (2005). Second, a covered entity may disclose such information "for treatment activities of a health care provider." 45 C.F.R. § 164.506(c)(2) (2005). Third, a covered entity may disclose such information "to another covered entity or a health care provider for the payment activities of the entity that receives the information." 45 C.F.R. § 164.506(c)(3) (2005).

A covered entity may also disclose protected health information "to another covered entity for health care operations activities of the entity that receives the information, if each entity either has or had a relationship with the individual who is the subject of the protected health information being requested, the protected health information pertains to such relationship" and the disclosure is for the purpose performing and maintaining health care operations, or for the purpose of health care fraud and abuse detection compliance. 45 CFR § 164.506 (c)(4)(i-ii) (2005). A covered entity that participates in an organized health care arrangement may also disclose such information to another entity that participates in the same arrangement for any health care operations activities of the organized arrangement. 45 CFR § 164.506 (c)(5) (2005).

Similar provisions guarding against the disclosure of medical information exist under Georgia law. O.C.G.A. § 24-9-40(a) governs the disclosure of *any* medical information concerning a patient. Under this code section, there are only specific, limited situations in which a physician or health care provider can be required to disclose such information. Otherwise, the disclosure of information shall not be required.

First, a physician or health care facility may be required to release any medical information concerning a patient to the Department of Human Resources, “its divisions, agents, or successors when required in the administration of public health programs pursuant to” O.C.G.A. § 31-12-2. O.C.G.A. § 24-9-40(a) (2005). The public health programs in question pertain mostly to disclosing information to the Department of Human Resources for the purpose of monitoring possible public health risks, such as illnesses that may have been caused by bioterrorism and epidemic or pandemic disease. O.C.G.A. § 31-12-2(b) (2005).

The other exceptions are when disclosure is “required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient...or on appropriate court order or subpoena.” O.C.G.A. § 24-9-40(a) (2005). Any physician or health care provider making such exempted disclosures shall be excused from any liability to the patient. O.C.G.A. § 24-9-40(a) (2005). Also, any privilege that a patient has in confidentiality shall be waived to the extent that the “patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding.” Id. This code provision does not apply, however, to psychiatrists or to hospitals which treat a patient solely for mental illness. Id. This code section does, however, apply to pharmacists. O.C.G.A. § 24-9-40(a) (2005).

The Georgia Constitution and existing case law place a heavy emphasis on protecting one's privacy in their own medical records. In King v. State, 272 Ga. 788, 789 (Ga. 2000), the Georgia Supreme Court noted that Georgia citizens have a "liberty of privacy" protected by the Georgia Constitution which provides that no person shall be deprived of liberty without due process of law. Ga. Const. art. I, § I, para. I. This level of protection exceeds even the protection provided by the United States Constitution. King, 272 Ga. at 789.

In King, the State sought to subpoena King's medical records at the hospital she was treated at following a single-car collision in order to obtain information pertaining to her blood-alcohol level. King, 272 Ga. at 789. The Court reasoned that because a patient's medical records are a matter which a reasonable person would consider to be private, there was a constitutional right to privacy. King, 272 Ga. at 790. Accordingly, records could "not be disclosed without her consent unless their production is required by the law of Georgia." Id. The Court held that the use of a subpoena to obtain King's medical records violated her due process rights, because it did not provide her with an opportunity to be heard before the disclosure of her medical records to the prosecution. King, 272 Ga. at 791.

Conversely, the Georgia Supreme Court determined in the identically-named case of King v. State, 276 Ga. 126 (Ga. 2003.), that a defendant in a criminal action was not entitled to an opportunity to be heard when the State requested a search warrant to obtain his personal medical records. Similar to the previous King case, the State sought information pertaining to the defendant's treatment at a hospital after crashing his car, in an effort to prosecute him for driving under the influence. King, 276 Ga. at 127. The

Court determined that the defendant's constitutional right to privacy was not violated when the State obtained this medical information through a search warrant because "the process for obtaining a search warrant has procedural safeguards that limit the State's ability to obtain a defendant's private records." King, 276 Ga. at 128. Also, the court was satisfied that the State had a compelling public interest in violating the defendant's fundamental right to privacy, and that the intrusion was narrowly tailored to achieve that interest. King, 276 Ga. at 127-128.

The Georgia Supreme Court has also established that in the proper situation one's statutory privilege in keeping medical information private may be overridden when countervailing interests demand it. In Bobo v. State, 256 Ga. 357 (Ga. 1986), a criminal defendant sought the disclosure of the psychiatric history of the State's primary witness. The witness in question had voluntarily sought assistance from the psychiatrist who examined her, and under O.C.G.A. § 24-9-21, that communication was confidential on public policy grounds. Bobo, 256 Ga. at 358.

The Court relied on the 11th circuit case of United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), in determining that a privilege cannot prevail "where the privileged information was at the heart of the defendant's case." Bobo, 256 Ga. at 359. The Court stated that "when the privilege of a witness stands in the way of the defendant's right to confront the witnesses against him, then, upon a proper showing by the defendant, the balance must be tipped in favor of his constitutional rights," including his right of confrontation. Id.

In order to abrogate such a privilege, the Court stated that the defendant must make a showing of necessity by proving that the information is critical to his defense and

that substantially similar information is not otherwise available to him. Bobo, 256 Ga. at 360. The Court determined that the defendant lacked the required level of necessity because, while he wanted to use the confidential information to prove that the witness' post-traumatic stress disorder might cause her difficulty in identifying him, he was already able to use the fact that the patient suffered from this condition at trial. Bobo, 256 Ga. at 361. Such condition characteristically includes memory loss, and there was no confidential information which related specifically to the witness' inability to identify the assailant. Id. The Court also gave weight to the fact that other impeaching evidence pertaining to the witness' ability to identify the assailant was already available to the defendant. Id.

Georgia law also places particularly strict restrictions around the dissemination of confidential AIDS information. According the Official Code of Georgia, no person or legal entity that receives confidential AIDS information under the Code, or who is responsible for maintaining such information, shall intentionally or knowingly disclose that information to another person or legal entity, or be compelled to disclose that information through any judicial process such as a subpoena or court order. O.C.G.A. § 24-9-47(b)(1)(A-B) (2005). However, the information may be disclosed to any person or legal entity whom the patient identified by the information permits. O.C.G.A. § 24-9-47(d) (2005).

There are also a number of other exceptions. For example, such information may be disclosed to any government agency if that information is authorized or required by law to be reported to that agency. O.C.G.A. § 24-9-47(e) (2005). Another significant exception exists when a physician finds that a patient is infected with HIV and reasonably

believes that “the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient,” in which case the physician can disclose the information to the specific people at risk after first attempting to notify the patient that such disclosures are going to be made. O.C.G.A. § 24-9-47(g) (2005).

Perhaps most notably, confidential AIDS information may be disclosed in a manner consistent with how medical information is disclosed, as referenced in O.C.G.A. § 24-9-40. O.C.G.A. § 24-9-47(s) (2005). For example, the information can be disclosed if the person identified by the information consents in writing to its disclosure, or has been notified of a request for its disclosure at least 10 days before the disclosure and does not object to it prior to the time specified for that disclosure in the notice. O.C.G.A. § 24-9-47(s)(1)(A-B) (2005).

The information may also be disclosed if “[a] superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means.” O.C.G.A. § 24-9-47(s)(2) (2005). This is accomplished when someone petitions the court for an order requiring the disclosure of the information, and demonstrates a clear and compelling need. O.C.G.A. § 24-9-47(t)(2) (2005). In determining if a compelling need exists, the court shall weigh the “public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.” O.C.G.A. § 24-9-47(s)(2) (2005). Should the court determine that such a disclosure is

authorized, it will impose appropriate safeguards in order to protect against unauthorized disclosures. Id..

Violations of these regulations carry with them significant sanctions. Any violation of the federal law mentioned above carries with it possible criminal sanctions under Title 18 of the United States Code. 42 U.S.C. § 290dd-2(f) (2005). If a covered entity violates an administrative rule of HIPAA, the Department of Health and Human Services has the power to impose civil penalties against it. 45 C.F.R. § 160.402(a) (2005). Similarly, any person or legal entity violating Georgia law will be guilty of a misdemeanor. O.C.G.A. § 24-9-47(o) (2005). Also, a violation of federal or Georgia law would leave a person or legal entity responsible for the disclosure open to civil liability.

Both federal and Georgia law reflect a strong public interest in keeping medical information private. An analysis of the relevant law seems to value confidentiality over disclosure, unless there is a strong governmental interest which has been codified into law, or a compelling need is demonstrated through the judicial process. In either case, if disclosure is required, both the legislative and judicial system have in place valuable safeguards to limit the scope of the disclosure to only the information that is relevant, and to only those that have a significant interest in acquiring the information.