

# **ETHICS: Data Privacy**

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- ▶ **Overview of Data Privacy and Practices**  
**Classification, sources and types of data**
- ▶ **Chapter 13; HIPAA and Chemical Dependency**  
**Data**
- ▶ **Data-sharing for multi-disciplinary teams**
- ▶ **Discovery; Cross-over CHIPS and Criminal**
- ▶ **Inadvertent Release and Inadvertent Receipt**

**Competence** - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation.

MN Rules of Professional Conduct, Rule 1:1

**“For the things we have to learn before we can do them, we learn by doing them.”**

— Aristotle, The Nicomachean Ethics



# Overview of Data Privacy & Practices

## Data Privacy regulations strive to balance:

- ▶ The public's right to know about their government;
- ▶ The government's need to have/use data to do its work;
- ▶ Individual privacy rights.

# Overview of Data Privacy & Practices

- ▶ Data Privacy is the relationship between technology and the legal right to, or public expectation of, privacy in the collection and sharing of data.

## Overview of Data Privacy & Practices

HIPAA	FOIA
FCRA	DPPA
COPPA/CIPA	TRA
FERPA	FTA
FCRA	PPA
FISMA	MMRA

WE COULD GO ON....



## **Minnesota Government Data Practices Act; Ch. 13**

The Minnesota Government Data Practices Act (AKA Ch. 13) was enacted in 1979 to assist with the classification and regulation of government data.



## Minnesota Government Data Practices Act; Ch. 13

### Ch. 13:

- ▶ Defines what is government data.
- ▶ Presumes government data are public.
- ▶ Classifies certain data as not public.
- ▶ Provides rights for the public and data subjects.
- ▶ Requires that data on individuals are accurate, complete, current, and secure.
- ▶ Includes penalties, both civil and criminal, for breaches.

## **Minnesota Government Data Practices Act; Ch. 13**

“Government data” means all data collected, created, received, maintained, or disseminated by any government entity regardless of its physical form, storage media, or conditions of use.

Ch. 13.02, subd. 7

## **Minnesota Government Data Practices Act; Ch. 13**

“Government data” is government data,  
no matter where it is stored.

## Minnesota Government Data Practices Act; Ch. 13

There are two types of data under Ch. 13:

- ▶ **Data on individuals**: an individual can be identified as the subject of the data (13.02, subd. 5)
- ▶ **Data NOT on individuals**: data that are not about individuals, e.g., data on businesses, organizations, or intangible objects (13.02, subd. 4)

## Minnesota Government Data Practices Act; Ch. 13

What is **PUBLIC** data?

# Minnesota Government Data Practices Act; Ch. 13

What is **PRIVATE** data?

# Minnesota Government Data Practices Act; Ch. 13

What is **CONFIDENTIAL** data?

# Minnesota Government Data Practices Act; Ch. 13

What is **NONPUBLIC** data?



# Minnesota Government Data Practices Act; Ch. 13

What is  
**PROTECTED NONPUBLIC** data?

## Welfare Data; Minn. Stat. 13.46

- ▶ Substantial portions of the data collected, created, received, maintained and disseminated in conjunction with a Child Protection matter, will be “Welfare Data”

## Welfare Data; Minn. Stat. 13.46

- ▶ Data on individuals” collected, maintained, used, or disseminated by the welfare system are private data on individuals and shall not be disclosed except pursuant to informed consent, a court order or for a variety of other reasons. [Statute lists 33 exceptions that allow disclosure of data], including, but not limited to:
  - ▶ To health care provider to coordinate services;
  - ▶ To an investigator as to criminal or civil or administrative proceeding related to the administration of the program;
  - ▶ In case of emergency to protect health or safety.

## Welfare Data; Minn. Stat. 13.46

- ▶ Welfare System is broadly defined and includes:
  - ▶ the Department of Human Services
  - ▶ local social services agencies
  - ▶ county public health agencies
  - ▶ the public authority responsible for child support enforcement
  - ▶ persons, agencies, institutions, organizations and other entities under contract to any of the above agencies to the extent specified in the contract

Minn. Stat. 13.46, Subd. 1

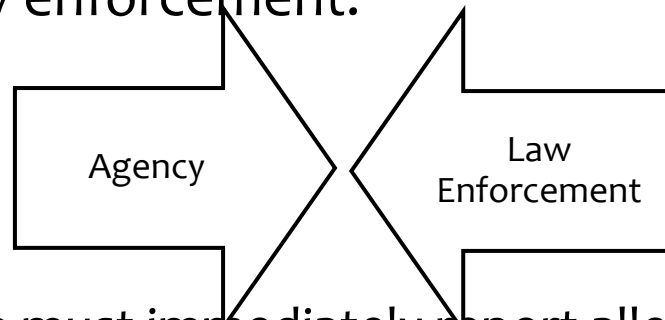
## **Reporting of Maltreatment of Minors; MN Stat. 626.556**

**The public policy of the Reporting of Maltreatment of Minor's Act is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or neglect**

- The agency and law enforcement must collaborate to comply with mandated duties:
  - Cross Report Minn. Stat. 626.556, Subd. 10(a)
  - Collaborate to coordinate the planning and execution of their respective investigation and assessments Minn. Stat. 626.556, Subd. 10(b)(5)

## Reporting of Maltreatment of Minors; MN Stat. 626.556

- Information must be shared between the agency and law enforcement:



- Each must immediately report allegations of child maltreatment to the other entity.

Minn. Stat. 626.556, Subd. 10 (a)

- If report involves possible criminal conduct, law enforcement and agency shall coordinate the planning an execution of respective investigations

Minn. Stat. 626.556, Subd. 10 (b) (5)

## Reporting of Maltreatment of Minors; MN Stat. 626.556

- ▶ Cross Report to Law Enforcement and vice versa
  - ▶ Failure of agency to report to LE may result in disciplinary action
  - ▶ Failure of law enforcement to report to agency may result in disciplinary action

## Reporting of Maltreatment of Minors; MN Stat. 626.556

- ▶ Identity of Reporters – Confidential
  - ▶ Protect the rights of the person making the report
  - ▶ Intentional disclosure of reporters identity prior to completion of investigation is a misdemeanor



# Reporting of Maltreatment of Minors Act

- ▶ Both law enforcement and agency shall prepare a separate report of the results of the investigation or assessment. Minn. Stat. 626.556, Subd. 10
- ▶ Agency shall provide relevant private data to the mandated reporter Minn. Stat. 626.556, Subd. 10j (a)
- ▶ Agency may provide data to other mandated reporters with ongoing responsibility for the health, education or welfare of the child. *Id.*

# HIPAA in a Nutshell

- ▶ The Health Insurance Portability and Accountability Act (HIPAA) protects the privacy of individually identified health information (PHI) that is held by covered entities and their business associates (BA).

## HIPAA in a Nutshell

- ▶ HIPAA has both a Privacy and a Security function and each covered entity is required to have designated official for both functions.

## HIPAA in a Nutshell

- ▶ Who is a COVERED ENTITY under HIPAA?
  - ▶ County departments such as public health, social services, jail/corrections and administration/human resources.
  - ▶ The County may be considered a hybrid for HIPAA purposes as a result of its organizational structure – having both covered and not-covered operations.

## HIPAA in a Nutshell

**DID YOU  
KNOW** 

HIPAA applies to the county's business associates that have access to PHI in carrying out any covered functions on our behalf.

# HIPAA in a Nutshell

Covered entities are required to provide a written privacy notice whenever collecting PHI that provides:

- ▶ Permitted uses and disclosures of PHI;
- ▶ List of the individual's rights;
- ▶ List of the County's duties to protect PHI;
- ▶ Notice of use for treatment reminders and to offer alternative services; and
- ▶ Contact information for complaints.

# HIPAA in a Nutshell

Covered Entities may ONLY use or disseminate PHI when authorized by the HIPAA Privacy Rule OR the individual gives consent in writing.

## HIPAA in a Nutshell

- ▶ A KEY ASPECT of the Privacy Rule is the principle of “minimum necessary” use and disclosure.

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## HIPAA in a Nutshell



What happens when an IMPERMISSIBLE use or disclosure of PHI occurs?

## HIPAA in a Nutshell

### RESPECT FOR RIGHTS OF THIRD PERSONS -

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

- ▶ **MN Rules of Professional Conduct, Rule 4.4(b)**

## HIPAA in a Nutshell

Also, you will need to be familiar with the Minnesota Health Records Act (Minn. Stat. § 144.291) which:

- ▶ Protects privacy of health records by provider or received from a provider.
- ▶ Includes a few **NARROW** exceptions to the general consent requirement; and
- ▶ Allows for disclosure of records by mental health provider to law enforcement in **LIMITED** circumstances.

## Chemical Dependency Data

- ▶ Federal regulations 42 CFR Part 2 (“Part 2”) provide special protections to ensure privacy related to Substance Use Disorders and treatment data.
- ▶ Enacted to encourage individuals with SUDs to enter and remain in treatment

## Chemical Dependency Data

Part 2 generally prohibits treatment programs and certain third-party recipients from disclosing patient identities or records without patient consent, except in the following circumstances:

- ▶ Medical emergencies, 42 CFR § 2.51
- ▶ Child abuse or neglect reports required by state law, 42 CFR § 2.12(c)(6)
- ▶ Reporting a patient's crime on program premises or against program personnel, 42 CFR § 2.12(c)(5)
- ▶ Qualified audit or evaluation of the program, 42 CFR § 2.53
- ▶ Research requests, 42 CFR § 2.52
- ▶ Qualified Service Organization Agreements, 42 CFR § 2.12(c)(4)
- ▶ Court orders authorizing disclosure and use of the patient records, 42 CFR §§ 2.61-2.67

## Chemical Dependency Data

Each disclosure made with the patient's written consent must be accompanied by one of the following written statements:

- (1) This information has been disclosed to you from records protected by federal confidentiality rules (42 CFR part 2). The federal rules prohibit you from making any further disclosure of information in this record that identifies a patient as having or having had a substance use disorder either directly, by reference to publicly available information, or through verification of such identification by another person unless further disclosure is expressly permitted by the written consent of the individual whose information is being disclosed or as otherwise permitted by 42 CFR part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose (see §2.31). The federal rules restrict any use of the information to investigate or prosecute with regard to a crime any patient with a substance use disorder, except as provided at §§2.12(c)(5) and 2.65; or
- (2) 42 CFR part 2 prohibits unauthorized disclosure of these records.

## Chemical Dependency Data

Part 2 recognizes the sensitivity of SUD patient records by requiring a special court order before turning over patient records in response to a subpoena, search warrant, or law enforcement request. 42 USC § 290dd-2; 42 CFR §§ 2.61-2.67.

Sample forms are available from the Legal Action Center to help programs and courts comply with the Part 2-specific court order requirements, including:

- ▶ Sample letter in response to a subpoena – civil cases
- ▶ Sample letter in response to a subpoena – criminal cases
- ▶ Sample court order
- ▶ Sample standing court order

<https://lac.org/addiction-confidentiality-42-cfr-part-2-important/>

# Chemical Dependency Data

## What is the difference between Part 2 and HIPAA?

- ▶ Both Part 2 and HIPAA protect patient privacy by regulating the way that patient information can be shared and disclosed. HIPAA applies to many types of patient information, not just SUD information, and generally is less protective of patient privacy than Part 2.
- ▶ One of the most important differences between Part 2 and HIPAA is the privacy protections for patient records in criminal and civil legal proceedings. Part 2 requires a specific court order for the disclosure of Part 2-protected information in response to a subpoena, search warrant, or law enforcement request.
- ▶ HIPAA also permits disclosures *without patient consent* for “treatment, payment, or healthcare operations.” Part 2 requires patient consent authorizing disclosure of SUD records for treatment, payment, or healthcare operations. 42 CFR § 2.33.



# Multidisciplinary Team

- ▶ A county shall establish a Multidisciplinary Team;
- ▶ Who? Team “May include but not be limited to the director of the local welfare agency or designees, the county attorney or designees, the county sheriff or designees, representatives of health and education, representatives of mental health or other appropriate human services or community-based agencies and parent groups.”

Minn. Stat. 626.558



# Multidisciplinary Team

- ▶ Team Duties
- ▶ Generally - A multidisciplinary child protection team may provide public and professional education, develop resources for prevention, intervention, and treatment, and provide case consultation.
- ▶ “Case Consultation” means a case review process in which recommendations are made concerning services to be provided to the identified children and family

## Multidisciplinary Team

- ▶ Information Sharing
- ▶ The Agency may make available to the case consultation committee, all records collected and maintained by the agency under section 626.556 (Maltreatment Reporting Act) and in connection with case consultation.
- ▶ A member may share information acquired in the member's professional capacity with the committee to assist in case consultation
- ▶ All members must annually sign a data-sharing agreement approved by the Commissioner of Human Services, assuring compliance with Chapter 13

# Multidisciplinary Team

- ▶ All data acquired by the case consultation committee or subcommittee in exercising case consultation duties are confidential as defined in 13.02, subd. 3
- ▶ All data from the case consultation team shall not be disclosed except to the extent necessary to perform case consultation, and shall not be subject to subpoena or discovery.
- ▶ No member shall disclose what transpired in case consultation except to carry out the case consultation plan.



***What happens in case consultation stays in case consultation!***

# Discovery; MN Rules Juv. Protection, Rule 17

## **Rule 17.01. Disclosure by Petitioner Without Court Order**

Upon the request of any party, the petitioner shall without court order make the following disclosures:

(a) **Documents and Tangible Items.** The petitioner shall allow access at any reasonable time to all information, material, and items within the petitioner's possession or control which relate to the case. The petitioner shall permit inspection and copying of any relevant documents, recorded statements, or other tangible items which relate to the case within the possession or control of the petitioner and shall provide any party with the substance of any oral statements which relate to the case. The release of a videotaped statement of a child abuse victim or alleged victim shall be governed by Minnesota Statutes, section 611A.90. The petitioner shall not disclose the name of or any identifying information regarding a reporter of maltreatment except as provided in Minnesota Statutes, section 626.556, subdivision 11.

## Discovery; MN Rules Juv. Protection, Rule 17

### Rule 17.01. Disclosure by Petitioner Without Court Order

Upon the request of any party, the petitioner shall without court order make the following disclosures:

(b) **Witnesses.** The petitioner shall disclose to all other parties and the county attorney the names and addresses of the persons intended to be called as witnesses at trial. The county attorney or petitioner shall permit all other parties to inspect and copy such witnesses' written or recorded statements that relate to the case within the petitioner's knowledge.

(c) **Expert Witnesses.** The petitioner shall disclose to all other parties and the county attorney:

- (1) the names and addresses of all persons intended to be called as expert witnesses at trial;
- (2) the subject matter about which each expert witness is expected to testify; and
- (3) a summary of the grounds for each opinion to be offered.

# Discovery; MN Rules Juv. Protection, Rule 17

## Rule 17.02. Disclosure by Other Parties Without Court Order

Upon the request of a party or the county attorney, any party who is not the petitioner shall without court order make the following disclosures:

(a) **Documents and Tangible Objects.** The party shall disclose and permit the county attorney, attorney for petitioner, or any other party to inspect and copy any book, paper, report, exam, scientific test, comparison, document, photograph, or tangible object which the party intends to introduce in evidence at the trial or concerning which the party intends to offer evidence at the trial.

(b) **Witnesses.** Each party shall disclose to every other party and the county attorney the names and addresses of the persons the party intends to call as witnesses at trial. Each party shall permit every other party and the county attorney to inspect and copy such witnesses' written or recorded statements within the party's knowledge as relate to the case.

(c) **Expert Witnesses.** Each party shall disclose to all other parties and the county attorney:

- (1) the names and addresses of all persons intended to be called as expert witnesses at trial;
- (2) the subject matter about which each expert witness is expected to testify; and
- (3) a summary of the grounds for each opinion to be offered.

## **Discovery; MN Rules Juv. Protection, Rule 17**

### **Rule 17.03.Information Not Discoverable**

The following information shall not be discoverable by any party or the county attorney with or without a court order:

(a) documents containing privileged information between an attorney and client, legal research, records, correspondence, reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the attorney for a party or other staff of an attorney for a party; and

(b) except as otherwise required by this rule, reports, memoranda, or internal documents made by an attorney for a party or staff of an attorney for a party.



## **Discovery; MN Rules Juv. Protection, Rule 17**

### **Rule 17.04. Discovery Upon Court Order**

Upon written motion of any party or the county attorney, the court may authorize other discovery methods, including, but not limited to, the following:

**(a) Physical and Mental Examinations.**

**(b) Depositions.**

**(c) Reports or Examinations and Tests.**

(i.e., physical or mental examinations, chemical dependency assessments and treatment records, scientific tests)

**(d) Experts.**

(facts known and opinions held)

## **Discovery; MN Rules Juv. Protection, Rule 17**

### **Rule 17.06.Regulation of Discovery**

**Subd. 1.Continuing Duty to Disclose.**

**Subd. 2.Protective Orders.**

**Subd. 3.Timely Discovery.**

**Subd. 4.Sanctions.**

**Subd. 5.Failure to Act.**

## Discovery; Ethical Obligations

### EXPEDITING LITIGATION –

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

- ▶ MN Rules of Professional Conduct, Rule 3.2

## Discovery; Tips and Tricks

- ▶ Redaction
- ▶ Training your agency on the content of chronos



# Criminal Case Crossover:

- ▶ Who has access?
- ▶ Agency shall make available to the investigating, petitioning, or prosecuting authority any record which contains information relating to any prior incidents of neglect of abuse involving any of the same persons

# Criminal Case Crossover:

- ▶ When a non-investigating, petitioning or prosecuting authority seeks access you can counsel agency to respond

Ch. 13.03, subd. 6

# Criminal Case Crossover:

## State v. Hokanson

- ▶ Communicate and coordinate
- ▶ Utilize *in camera* review via State v. Paradee



Questions??