

**1024 HEALTH INFORMATION PORTABILITY AND ACCOUNTABILITY
ACT OF 1996 (HIPAA): Policy for Responding to Government Search
Warrants, Subpoenas, and Requests for Documents**

Introduction

Minnewaska Area Schools Day Treatment has adopted this Policy for Responding to Government Search Warrants, Subpoenas, and Requests for Documents to comply with our duties under the Health Information Portability and Accountability Act of 1996 (“HIPAA”), the Department Health and Human Services (“DHHS”) security and privacy regulations, and the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) accreditation standards, as well as our duty to protect the confidentiality and integrity of confidential medical information as required by law, professional ethics, and accreditation requirements. Minnewaska Area Schools Day Treatment has adopted this Policy for Responding to Government Search Warrants, Subpoenas, and Requests for Documents to tell employees how to respond if a government agency (federal, state, or local) seeks medical or business records pursuant to a request for records, a subpoena for records, or a search warrant for records. All personnel of Minnewaska Area Schools Day Treatment must comply with this policy. Familiarity with this policy and demonstrated competence in the requirements of the policy are an important part of every employee’s responsibilities.

Assumptions

This Policy for Responding to Government Search Warrants, Subpoenas, and Requests for Documents is based on the following assumptions:

- Both the federal and state governments have various rights to inspect, copy, and seize documents, even documents that must otherwise be kept confidential.
- Various laws and regulations control the governments’ rights to inspect, copy, and seize documents.
- Government requests and demands for documents can take various forms, including informal requests, formal requests, subpoenas, court orders, and search warrants.
- An improper response to a government request or demand for documents can have adverse effects on Minnewaska Area Schools Day Treatment, its officers, and its employees. In criminal investigations, an improper response can constitute the crime of obstruction of justice.
- Several departments of Minnewaska Area Schools Day Treatment could receive government requests or demands for documents, including the health information management department and the financial services department.

- Any unauthorized alteration, concealment, or destruction of records or information that may be evidence in a legal proceeding can harm Minnewaska Area Schools Day Treatment by resulting in a court imposing discovery sanctions, such as the following: fines; instructing the jury that the missing or altered record was adverse to Minnewaska Area Schools Day Treatment; or a separate lawsuit for spoliation of evidence, a lawsuit that could result in a large damage award and possibly punitive damages. In addition, in a criminal matter, such spoliation could constitute the crime of obstruction of justice.

Definitions

- **Affidavit:** In this context, an affidavit is a sworn statement detailing the probable cause for a search warrant. Probable cause consists of facts and circumstances making it more likely than not that evidence, contraband, or fruits of a crime are in the particular place to be searched.
- **Privileged information:** Information that is protected from seizure and use in court, such as by the attorney-client privilege, the peer review privilege, and the like.
- **Request for records:** A written document asking the facility to release records to a named entity.
- **Search warrant:** A governmental (court or agency) order authorizing the agency representative to search for and to seize documents or other evidence located in the particular place to be searched.
- **Spoliation:** The improper alteration, concealment, or destruction of potential evidence.
- **Subpoena:** A court order for Minnewaska Area Schools Day Treatment to produce records for another facility or person, in this case for a government agency.

Overall Policy

- Minnewaska Area Schools Day Treatment will release records when so required by law and will cooperate with lawful searches but will protect confidential information, such as patient information and legally privileged information, to the extent authorized by law.
- Minnewaska Area Schools Day Treatment and its personnel will not attempt to obstruct an investigation or destroy, alter, or conceal documents or other evidence sought in an investigation.

Specific Procedures

- Upon receipt of any request or subpoena for records from any governmental agency, all employees must forward the request to legal counsel.
- The department director of the department receiving the request or subpoena must maintain a log of such documents, including time and date of receipt, the name of the requesting entity, documents or information requested, date forwarded to the legal department, date received back from the legal department, and date request or

subpoena complied with or, if the legal department opines that Minnewaska Area Schools Day Treatment should not comply, the date that the decision was communicated to the requester.

- If a law enforcement officer or other government agent arrives with what he or she says is a “search warrant,” the senior person present in the concerned department should take the following steps:
 1. Ask to see the agent’s identification. Record the agent’s name, identification number, and agency.
 2. Ask to see the “warrant” and any supporting documentation and ask to make a copy if the requester wants it back.
 3. Notify corporate counsel immediately at [phone number]. If corporate counsel is not available, notify outside counsel [name] at [phone number]. If counsel is not at work, page counsel or call counsel at home at the following numbers: [names] [numbers]. If possible, fax to counsel a copy of the search warrant and any supporting documentation. Also, notify the following facility personnel: chief executive officer [name] [phone number], compliance officer [name] [phone number], risk manager [name] [phone number], chief financial officer [name] [phone number]. [Add any other people that you want notified].
 4. Comply with any and all instructions from corporate legal counsel.
 5. Ask nonessential personnel to leave and secure the area to prevent entry by anyone other than counsel or other authorized personnel.
 6. If the document appears to be something other than a search warrant, such as a request for records or a subpoena, ask the agent whether he or she can leave the request with you and explain that you will promptly handle the matter. If the agent states that it is a search warrant, ask him or her to wait until counsel arrives before proceeding.
 7. Immediately suspend any destruction or relocation of any records.
 8. Do not consent to a search even if the agent states that he or she has a search warrant and that you might as well consent. Rather, tell the agent that you have no authority to consent but that, to the extent that the warrant gives the agent authority, you will cooperate with the search.
 9. Do not attempt to keep the agents from conducting the search other than by asking them to wait until counsel arrives. If they begin to search anyway, do not impede them. Any attempt to frustrate the search may constitute the crime of obstruction of justice and may result in your arrest and prosecution.
 10. You do not have to answer questions, but it is your decision whether to do so or not. Do not tell facility employees not to answer questions because the agents may view such advice as constituting the crime of obstruction of justice. Rather, you may tell employees that they are not required by law to answer questions but whether to do so or not is their decision. If they still ask you whether to answer questions, tell them that you cannot advise them one way or the other. Nor can corporate counsel, because he or she represents the facility, not individual employees.

11. If legally privileged documents are on the premises and counsel has not arrived to handle them, ask the agents to segregate them from the other records and mark them as privileged. If the agent(s) refuse(s) to segregate the records, document the name, badge number, and other relevant information regarding the agent(s) who refused the request, and the day, time, and place of the request.
12. If more than one agent is conducting the search, assign trusted employees to accompany each agent to assist as appropriate and to monitor the search. Such employees can help prevent damage to records and computer equipment by unlocking cabinets, copying computer files, and the like. The employees should take extensive notes about what the agents do, including the following information:
 - a. When the search started.
 - b. Identity of the agent and of any personnel assisting the agent.
 - c. What was searched, such as rooms, file cabinets, computers, and so forth.
 - d. Order in which areas were searched.
 - e. Names and job titles of employees interviewed or attempted to be interviewed by agents during the search.
 - f. Questions or comments asked or made by the agents.
 - g. Any requests made to agents during the search and their responses, such as, "Can you wait until I unlock the cabinet?"
 - h. Any improper actions or comments by the agents.
 - i. When the search ended.
13. Attempt to copy any documents the agents seek to remove from the premises, including backup disks of all computer files.
14. Obtain a detailed receipt of all documents and other evidence seized.
15. Ensure that the employees accompanying the agents have taken detailed notes. If not, instruct them to write down all that they remember about the information outlined in item 12 a - i above.
16. Prepare an after-action report, including but not limited to, the information outlined in item 12 a - i above.
17. Do not talk to the press unless and until after the legal department and public affairs department have given permission to do so.

Enforcement

All officers, agents, and employees of Minnewaska Area Schools Day Treatment **must** adhere to this policy, and all supervisors are responsible for enforcing this policy. Minnewaska Area Schools Day Treatment will not tolerate violations of this policy. Violation of this policy is grounds for disciplinary action, up to and including termination of employment and criminal or professional sanctions in accordance with Minnewaska Area Schools Day Treatment's medical information sanction policy and personnel rules and regulations. In addition, improper interference with a search may constitute the crime of obstruction of justice, a charge that could lead to arrest and prosecution.

Signature of Officer, Agent, or Employee

Date

Title of Officer, Agent, or Employee

Printed Name of Officer, Agent, or Employee

Witness

Printed Name of Witness

References: Gabriel L. Imperato, "Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization," 51 ALABAMA L. REV. 205 (Fall 1999); Karen S. Boxer, "Preparing for the Worst: What to do When the Feds Knock at Your Door," 2 HEALTH CARE FRAUD & ABUSE NEWS 1 (September 1999); Mark A. Srere, "How to Respond to Gov't Court-Ordered Search Warrants," 13 No. 10 ENVIRONMENTAL COMPLIANCE & LITIGATION STRATEGY 4 (Mar. 1998); Anne C. Flannery & Kristine Zaleskas, "Damage Control: Managing the Inevitable Corporate Crisis," 1121 PRACTISING LAW INSTITUTE/CORPORATE COMPLIANCE 423 (May-July, 1999).