



State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE

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MEMORANDUM

TO: All County Prosecutors

FROM: Peter C. Harvey
First Assistant Attorney General

DATE: December 2, 2002

SUBJECT: Directive Concerning the Use of Grand Jury Subpoenas to Compel Hospitals to Produce Medical Records

1. Introduction and Overview.

For many years, county prosecutors have routinely used grand jury subpoenas to obtain medical records from hospitals. Recently, some hospitals have challenged the authority of a prosecutor to gain access to hospital records without first obtaining written authorization from the patient to whom medical services were provided. This issue was first raised in Passaic County in the case of State v. Hendley. In that matter, a hospital filed a motion to quash a grand jury subpoena. The Passaic County Assignment Judge, the Honorable Robert J. Passero, A.J.S.C., rejected the hospital's motion and ruled in an unreported decision that the broad powers of the grand jury to investigate crimes outweighs the hospital's assertion of the patient-physician privilege codified at N.J.S.A. 2A:84A-22.1 et seq. and N.J.R.E. 506.

The Division of Criminal Justice and the Division of Law have conducted extensive research on this matter and have determined that under State and Federal law, neither the patient-physician privilege nor any other principle of law precludes a prosecutor from using a grand jury subpoena to compel the production of medical records that are relevant to a criminal investigation. Accordingly, except as otherwise noted in § 3, infra, a hospital must comply with a grand jury subpoena calling for the production of medical records.



It is instructive to note that federal regulations recently promulgated pursuant to the Health Insurance Portability and Accountability Act (HIPPA) expressly authorize hospitals to disclose patient records pursuant to a grand jury subpoena and without first obtaining a release from or providing notice to a patient. See 45 C.F.R. § 164.512(f)(1)(ii)(B). These regulations represent the latest and most comprehensive statement of patient privacy rights.

It is nonetheless necessary and appropriate to make certain that county prosecutors and the Division of Criminal Justice take additional steps to safeguard the privacy rights of patients, and especially those patients who are crime victims. See New Jersey Constitution, Art. 1, para. 22 (requiring victims of crime to be treated with fairness, compassion, and respect by the criminal justice system). Accordingly, county prosecutors and the Division of Criminal Justice are hereby directed to observe the following procedures and confidentiality safeguards.

2. Specificity and Limitations on Grand Jury Subpoenas to Compel Production of Medical Records.

A grand jury subpoena seeking medical records should be narrowly focused and should be used only to compel the production of medical records that are reasonably believed to be relevant to the investigation and a determination of the appropriate offense, if any, to be charged. The scope of a subpoena duces tecum should be limited to compel only the production of those medical records that relate, for example, to injuries that were sustained by the victim in the course of the specific criminal act or episode that is under investigation. (Note, however, that it is conceivable that, depending on the circumstances, records pertaining to medical services provided on other occasions may also be relevant to the criminal investigation.) Prosecutors should therefore make certain that such subpoenas specify, to the greatest extent practicable, the date on which the suspected crime occurred so as to limit the scope of the subpoena.

3. Certain Types of Medical Records That Should be Obtained by Court Order Rather than Grand Jury Subpoena.

As a general proposition, a grand jury subpoena should not be used to compel hospitals to produce medical records that are reasonably believed to include :

(1) confidential communications that are subject to the psychologist-patient privilege established by N.J.S.A. 45:14B-28 and N.J.R.E. 505 (which privilege is broader than the physician-patient privilege);

(2) information that a person has AIDS or HIV infection, which information is confidential and subject to disclosure restrictions pursuant to the “AIDS Assistance Act” codified at N.J.S.A. 26:5C-1. (Note that N.J.S.A. 26:5C-9(a) generally requires a court order based upon a showing of good cause before the record of a person who has or is suspected of having AIDS or HIV infection may be disclosed, and N.J.S.A. 26:5C-9(b) permits a court to authorize disclosure of a person’s AIDS/HIV records “for the purpose of conducting an investigation of or prosecution for a crime of which the person is suspected only if the crime is a first degree crime and there is a reasonable likelihood that the record in question will disclose material information of substantial value to the investigation or prosecution.”); or

(3) information about substance abuse diagnosis and treatment that is protected under 42 U.S.C. § 290dd-2, 42 U.S.C. § 290ee-3, and 42 C.F.R. Part 2. (Note that these federal laws and regulations which restrict law enforcement access to drug and alcohol abuse counseling records generally do not apply to a hospital’s emergency department or the general treatment areas of the hospital; rather, these restrictions apply only to those medical personnel in a general medical care facility whose “primary function” is the provision of alcohol or drug abuse diagnoses, treatment or referral for treatment. See 42 C.F.R. § 2.1-2.12.)

A county prosecutor or the Division of Criminal Justice should apply to a judge for a court order, in lieu of a grand jury subpoena, to compel a hospital to disclose any of these specially protected types of medical records. As a general proposition, and because the prosecutor may not know whether such specially protected materials are in the possession of the hospital, it is the hospital’s responsibility to redact such protected information from other materials provided to the prosecutor pursuant to the subpoena. The hospital in that event would be expected to move to quash the subpoena with respect to the protected information. The Division of Law has advised the University of Medicine and Dentistry of New Jersey and other hospitals that they should resist subpoenas that seek psychologist-patient, AIDS/HIV, substance abuse and substance treatment records. The Division of Law has also asked hospitals to consult with the prosecutor’s office when such records are within the scope of the records sought by the grand jury subpoena.

4. Preservation of Confidentiality of Medical Records.

It is the responsibility of the county prosecutors and the Division of Criminal Justice to ensure that all medical records obtained by means of a grand jury subpoena are kept strictly confidential and are used only for criminal investigatory purposes. Prosecutors must at all times safeguard the secrecy of the grand jury process and must take special precautions to guard against the unauthorized disclosure of medical records.

Accordingly, medical records obtained by grand jury subpoena should be segregated in the prosecutor's file to make certain that they are not turned over as part of a routine discovery package. These records should not be disclosed to defense counsel unless and until the assistant prosecutor or deputy attorney general handling the case has specifically determined that (1) the medical record is required to be turned over in discovery pursuant to R. 3:13-3, and (2) there is no basis to redact information and to seek a protective order. It is the responsibility of the county prosecutor or the Division of Criminal Justice to apply for a protective order pursuant to R. 3:13-3f when necessary to preclude the inappropriate disclosure of any medical record or portion thereof. (For example, if medical records obtained by a grand jury subpoena include information that is subject to the "rape shield" law codified at N.J.S.A. 2C:14-7 and N.J.R.E. 412 (e.g., information concerning whether the victim had previously engaged in sexual intercourse, or had an abortion), the county prosecutor or Division of Criminal Justice should seek a protective order and should not disclose this information unless expressly ordered to do so by a court of competent jurisdiction.)

5. Disputes and Controversies.

County prosecutors should notify the Division of Criminal Justice if a hospital moves to quash a grand jury subpoena for medical records, or if the prosecutor deems it necessary to seek an order to show cause to compel production of documents pursuant to a grand jury subpoena. The Division of Criminal Justice will assist the county prosecutors in any such litigation. All questions concerning the implementation of this Directive should be directed to the Chief of the Appellate Bureau, Division of Criminal Justice, or to the Counsel to the Director of the Division of Criminal Justice.

6. Authority and Effective Date.

This Directive is issued pursuant to the authority set forth in N.J.S.A. 52:17B-101, which provides that the powers of the Attorney General relating to

the enforcement and prosecution of the criminal business of the State and of any county shall be exercised by the Attorney General through the Division of Criminal Justice. This Directive shall take effect immediately and shall remain in force until such time as it may be modified or rescinded by the Director of the Division of Criminal Justice.

/djv

cc: Vaughn L. McKoy, First Deputy Director

Andy Rossner, Deputy Director

Patti Prezioso, Chief, Law Enforcement Services

Ron Susswein, Counsel to the Director

Boris Moczula, Chief, Appellate Bureau

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