



COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Mark R. Herring
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

MEMORANDUM

TO: Karin Clark
Virginia Department of Social Services

FROM: Jennifer C. Williamson
Senior Assistant Attorney General

DATE: December 21, 2017

SUBJECT: Fast-track Regulation for General Provisions for Confidential Information;
22VAC40-910 (4855/7978)

I am in receipt of the attached regulations regarding amendments to the General Provisions for Confidential Information. You have asked the Office of the Attorney General to review and determine if the State Board of Social Services ("State Board") has the statutory authority to promulgate the specified regulations and whether the specified regulations comport with applicable state law.

Pursuant to Va. Code § 63.2-217, the State Board is required to promulgate regulations as may be necessary or desirable to carry out the purposes of Title 63.2 of the Code of Virginia. Consequently, it is my opinion that the State Board has the authority to promulgate these regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act and Executive Orders 17 (2014) and 58 (1999), and the State Board has not exceeded that authority.

If you have any questions, please feel free to call me at 225-3197.

Attachment

Project 5164 - Fast-Track

DEPARTMENT OF SOCIAL SERVICES

Update General Provisions for Confidential Information

22VAC40-910-10. Definitions.

The following words and terms when used in this chapter will have the following meanings unless the context clearly indicates otherwise:

"Agency" means a local department of social services.

"Agent" means any individual authorized to act on behalf of or under the direction of the Commissioner of the Virginia Department of Social Services or State Board of Social Services for the sole purpose of accessing confidential client records in the administration of public assistance, child support enforcement, or social services programs.

"Client" means any applicant for or recipient of public assistance or social services or any individual about whom the child support enforcement division maintains information.

"Client record" or "client information" means any identifying or nonidentifying information, including information stored in computer data banks or computer files relating to a client.

"Department" means the Virginia Department of Social Services.

"Human research" means any formal and structured evaluation involving individuals in a special project, program, or study.

"Legally responsible person" means (i) the biological or adoptive parent or other relative with whom the child primarily resides and who has legal custody of the child; (ii) the biological or adoptive parent with whom the child does not primarily reside and who has legal custody of the child; or (iii) a committee or guardian appointed by a court to represent the interest of a client.

"Near fatality" means an act that, as certified by a physician, places the child in serious or critical condition. Serious or critical condition is a life-threatening condition or injury.

"Provider" means any person, agency or organization providing public assistance, child support enforcement services, or social services through a contract or an agreement with the department or agency.

"Public assistance" means Temporary Assistance for Needy Families (TANF); auxiliary grants to the aged, blind and disabled; medical assistance; energy assistance; food stamps; employment services; child care; and general relief.

"Research" means a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to general knowledge related to specific programs, including research for the development of new knowledge or techniques that would be useful in the administration of public assistance, child support enforcement, or social services programs.

"Social services program" means foster care, adoption, adoption assistance, adult services, adult protective services, child protective services, domestic violence services, family preservation, or any other services program implemented in accordance with regulations promulgated by the State Board of Social Services.

22VAC40-910-20. General provisions.

A. Except as otherwise provided in these regulations or consistent with other federal and state laws or regulations, no person shall disclose or use, or authorize, permit or acquiesce to the use of any client information that is directly or indirectly derived from the client records of the department, agency, provider, or the State Board of Social Services. Exceptions to this provision are provided in 22VAC40-910-80, 22VAC40-910-90 and 22VAC40-910-100.

B. Protecting confidential information. All client records, which could disclose the client's identity, are confidential and must be protected in accordance with federal and state laws and regulations. Such client information includes, but is not limited to:

1. Name, address and any types of identification numbers assigned to the client and all individuals for whom the client receives assistance on behalf of, including but not limited to social security number;
2. Public assistance, child support enforcement services, or social services provided to the client;
3. Information received for verifying income and eligibility;
4. Evaluation of the client's confidential information;
5. Social and medical data about the client and all individuals for whom the client receives assistance on behalf of, including diagnoses and past histories of disease or disabilities;
6. Information received from third parties such as an employer; and
7. Information associated with processing and rendering appeals.

C. Ownership of client records.

1. Client records are the property of the department or agency. Employees and agents of the department or agency must protect and preserve such records from dissemination except as provided herein.
2. Only authorized employees and agents may remove client records from the department or agency's premises.
3. The department and agency shall destroy client records pursuant to records retention schedules consistent with federal and state regulations.

D. Disclosure of client information.

1. Consent. As part of the application process for public assistance or social services, the client or legally responsible person must be informed of the need to consent to a third-party release of client information necessary for verifying his eligibility or information provided. Whenever a person or organization that is not performing one or more of the functions delineated in 22VAC40-910-80 C or does not have a legitimate interest pursuant to 22VAC40-910-100 requests client information, the person or organization must obtain written permission from the client or the legally responsible person for the release of the client information unless one of the conditions delineated in this subsection exists. A client's authorization for release of client information obtained by the department, agency or provider also satisfies this requirement.

Client records may be released without the client's written permission ~~under the following conditions:~~ if a court of competent jurisdiction has ordered the production of client records and the department, agency or provider does not have sufficient time to notify the client or legally responsible person before responding to the order

~~a. A court of competent jurisdiction has ordered the production of client records and the department, agency or provider does not have sufficient time to notify the client or legally responsible person before responding to the order.~~

~~b. For research purposes as provided in 22VAC40-910-50.~~

2. The Commissioner of the Virginia Department of Social Services, the State Board of Social Services and their agents shall have the discretion to release nonidentifying statistical information. A client's written permission is not required in order to release nonidentifying statistical information when such release is permissible in accordance with state and federal law and regulations.

3. The Commissioner of the Virginia Department of Social Services, the State Board of Social Services and their agents do not have to obtain consent from the client to obtain or review client records.

22VAC40-910-90. Confidential client information pertaining to child support enforcement.

A. Confidentiality of child support enforcement client information is assured by §§ 63.2-102 and 63.2-103 of the Code of Virginia.

B. Information may be released only for a purpose directly connected with the administration of the child support enforcement program, except as herein provided or pursuant to §§ 63.2-102, 63.2-103, 63.2-1906 and 63.2-1940 of the Code of Virginia.

C. Purposes directly related to the administration of the child support enforcement program include but are not limited to:

1. Determining the amount of child support;
2. Providing child support enforcement services; and
3. Conducting or assisting in an investigation or prosecution of a civil or criminal proceeding related to the administration of the child support enforcement program.

~~D. The following regulatory provisions provide guidance on the release of child support enforcement client information:~~

- ~~1. Entities to whom the Division of Child Support Enforcement can release client information is governed by 22VAC40-880-520;~~
- ~~2. The release of client information to and from the Internal Revenue Service is governed by 22VAC40-880-530;~~
- ~~3. Request for client information from the general public is governed by 22VAC40-880-540;~~

~~4. Requests for client information from parents is governed by 22VAC40-880-550;~~

~~5. Release of health insurance information is governed by 22VAC40-880-560; and~~

~~6. Release of client records to law enforcement agencies and Commonwealth's and county or city attorneys is governed by 22VAC40-880-520.~~ B. Release of health insurance information is governed by 22VAC40-880-560.

22VAC40-910-100. Confidential client information pertaining to social services programs.

A. Confidentiality of client information of social services programs is assured by §§ 63.2-104 and 63.2-105 of the Code of Virginia.

B. Releasing confidential social services information.

1. The Commissioner of the Virginia Department of Social Services, the State Board of Social Services and their agents shall have access to all social services client records pursuant to § 63.2-104 of the Code of Virginia.

2. Social services client records must be confidential and can only be released to persons having a legitimate interest in accordance with federal and state laws and regulations pursuant to § 63.2-104 of the Code of Virginia. Section 63.2-104 of the Code of Virginia does not apply to the disclosure of adoption records, reports and information. The disclosure of adoption records, reports and information is governed by § 63.2-1246 of the Code of Virginia.

3. The following statutory and regulatory provisions provide guidance on the definition of legitimate interest as applied to specific social services programs:

a. Adult Protective Services client records can be released to persons having a legitimate interest pursuant to ~~22VAC40-740-50~~ 22VAC30-100-50.

b. Child Protective Services Client Records and Information Disclosure:

- (1) Child protective services client records can be released to persons having a legitimate interest pursuant to § 63.2-105 A of the Code of Virginia.
- (2) The public has a legitimate interest to limited information about child abuse or neglect cases that resulted in a child fatality or near fatality. Pursuant to the Child Abuse and Prevention Treatment Act (CAPTA), as amended (P.L. 108-36 (42 USC § 5106a)) states must have provisions that allow for public disclosure of the findings or information about the case of child abuse or neglect that has resulted in a child fatality or near fatality. Accordingly, agencies must release the following information to the public, providing that nothing disclosed would be likely to endanger the life, safety, or physical or emotional well-being of a child or the life or safety of any other person; or that may compromise the integrity of a Child Protective Services investigation, or a civil or criminal investigation, or judicial proceeding:
 - (a) The fact that a report has been made concerning the alleged victim child or other children living in the same household;
 - (b) Whether an investigation has been initiated;
 - (c) The result of the completed investigation;
 - (d) Whether previous reports have been made concerning the alleged victim child or other children living in the same household and the dates thereof, a summary of those previous reports, and the dates and outcome of any investigations or actions taken by the agency in response to those previous reports of child abuse or neglect;
 - (e) The agency's activities in handling the case.
- (3) Information regarding child protective services reports, complaints, investigation and related services and follow-up may be shared with the appropriate Family Advocacy Program representative of the United States Armed Forces as provided in

22VAC40-720, Child Protective Services Release of Information to Family Advocacy Representatives of the United States Armed Forces.

(4) The agency must release child protective services client records in the instances of mandatory disclosure as provided in 22VAC40-705-160. The local department may release the information without written consent.

4. Foster care client records about children in foster care or their parents can be released upon order of the court. For instance, client records may be released to the guardian ad litem and the court appointed special advocate who are appointed for a child as a result of a court order or to attorneys representing the child or the child's parents.