

Basics of 42 CFR, Part 2

What type of information does it protect?

- > **Identifiable information.** Part 2 protects any information obtained by a “federally assisted” substance use treatment program that can directly or indirectly identify an individual as receiving or seeking treatment for substance use. This can include information beyond treatment records, such as name, address, or social security number. [§2.12\(a\)\(1\)](#)

Why is this information protected?

- > 42 CFR, Part 2 recognizes that without strong guarantees of confidentiality, people in need of substance use treatment may be reluctant to seek services due to concerns about collateral consequences that can result when a person’s drug use is revealed, such as: arrest and prosecution, loss of custody or parental rights, loss of employment, and eviction from public housing. Additionally, protecting confidentiality is important to protect the individual against stigmatization.

What kind of organizations are subject to Part 2?

- > Part 2 applies to any “federally assisted” program that provides substance use or alcohol treatment, diagnoses, or referrals to treatment. It applies both to organizations whose sole purpose is to diagnose and treat substance use disorders, as well as units within larger organizations such as a clinic within a jail, prison, or hospital. [§ 2.11](#)
- > There is a low bar to be considered a “federally assisted” program. Most drug and alcohol treatment programs are “federally assisted,” which means that the program derives some type of benefit from the U.S. government. This includes treatment providers that rely on federal grant money, organizations accepting Medicaid, private clinics that are licensed by the DEA to provide medication-assisted treatment, and those receiving non-profit status under the federal tax code. Even clinics that don’t meet any of these requirements must comply if their state law requires them to follow Part 2.

What are the consent requirements?

- > In general, Part 2 requires individual consent before identifiable information about substance use treatment can be shared. There are substantive and procedural requirements for obtaining and documenting an individual’s consent to disclose substance use information. For instance, consent must include a set of elements, such as the name of the parties involved in disclosure, the reason for disclosure, type of information requested, preclusions against re-disclosure, and the duration of consent. [Subpart C](#)

In what situations is consent not required?

- > **Medical Emergencies.** Part 2 permits patient-identifying information from a protected source to be disclosed to medical staff for the purpose of treating a physical or mental health condition that poses an immediate threat to the individual's health. [§2.51](#)
- > **Qualified Service Organization Agreements (QSOAs).** QSOAs permit information to flow from Part 2 covered programs to Qualified Service Organizations (QSOs), which provide services such as accounting, claim processing, or legal services for the Part 2 entity and agree to protect the confidentiality of that information from disclosures that could result in stigma or prosecution. QSOAs can be used to specify which entities in large organizations need access to protected information. [§ 2.12 \(c\) \(4\)](#)
- > **Direct Administrative Control.** Patient consent is not required when information is shared among people working within the same Part 2 program that need access to patient information to determine a diagnosis, deliver treatment, or make a treatment referral for alcohol or drug use; or with an organization with "direct administrative control" in cases where there is a legitimate need for the information. [§ 2.12\(c\)\(3\)](#)

How is 42 CFR Part 2 more restrictive than HIPAA?

- > Unlike HIPAA, Part 2's consent requirements apply to care providers when disclosures are for purposes of coordinating an individual's treatment for other health conditions.
- > HIPAA's standards are more relaxed when it comes to affording law enforcement access to treatment records. 42 CFR, Part 2 requires a special court order that depends on the satisfaction of higher standards before disclosure can be made to law enforcement. [§§ 2.61–2.65](#)

How does Part 2 Apply to the Criminal Justice System?

- > **Police.** Most of the time, without consent, police will need a court order to obtain information from a substance use treatment provider protected by Part 2. There are two scenarios where police do not need consent or a court order to access personal information from a treatment provider:
 - > Medical emergency
 - > Crime committed on premises of the treatment facility

- > **Court orders.** A court order will generally be required before a court can acquire information from a substance use treatment program without consent. §§.2.61-67 Court orders are granted only when:
 - > Disclosure is needed to protect against an existing threat to life or serious bodily injury
 - > Disclosure is necessary for further investigation of a serious crime
- > **Prosecutors, Defenders, and the Courts.** Courts and lawyers are not “federally assisted” programs, but the rules protecting substance use treatment information have become increasingly important as court appearances are frequently used to divert people from incarceration and place them in treatment. Most of the time consent is required before substance use programs can share information with anyone working in the court system to make sure treatment information is not used to substantiate prosecutions. Part 2 has a special provision for when criminal justice entities, like drug courts or diversion programs, make referrals to substance use treatment providers as part of a conditional disposition. This provision allows substance use treatment programs in the community to share information with the court (or other entity tasked with monitoring progress), with the individual’s consent. § 2.35 Courts have upheld that it is constitutional to require confidentiality waivers as a condition of participating in a drug court.
- > **Jails and Prisons.** Part 2 does NOT permit protected information about substance use to flow to or from a correctional facility absent an individual’s consent.
- > **Community Corrections.** Parole and probation officers are not “federally assisted” programs and therefore they can disclose information they learn through interviewing their client to others. However, they cannot request and then receive substance use treatment information from community providers without prior, valid consent. If a probation or parole officer needs protected information, then courts can require a waiver of confidentiality for both substance use and mental health information as a condition of release from prison or probation. § 2.35 [Click here](#) for an example of a consent form used for participation in a treatment program overseen by community corrections.

Additional Resources

The Legal Action Center, “Confidentiality of Alcohol and Drug Records in the 21st Century.”
http://www.lac.org/doc_library/lac/publications/Confidentiality_of_Alcohol_and_Drug_Records_in_the_21st_Century-1-20-10.pdf

Substance Abuse and Mental Health Services Administration, “Applying the Substance Abuse Confidentiality Regulations, 42 CFR Part 2.”
http://www.samhsa.gov/about/laws/SAMHSA_42CFRPART2FAQII_Revised.pdf

42 CFR, Part 2 <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div5&view=text&node=42:1.0.1.1.2&idno=42#42:1.0.1.1.2.1.1.3>