

DEPARTMENT OF VETERANS AFFAIRS
38CFR Part 1

Confidentiality of Certain Medical Records

AGENCY: Department of Veterans Affairs.

ACTION: Proposed regulations.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations to implement specific provisions of the Veterans Omnibus Health Care Act of 1976 and the Veterans' Benefits and Services Act of 1988 concerning the confidentiality of certain medical records. These proposed regulations protect the confidentiality of VA records pertaining to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus (HIV), and sickle cell anemia treatment, rehabilitation, education, training, evaluation and research information.

DATES: Comments must be received on or before August 25, 1993. Comments will be available for public inspection until September 7, 1993.

ADDRESSES: Interested persons are invited to submit written comments, suggestions, or objections regarding these proposed regulations to: Secretary of Veterans Affairs (271A), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. All written comments received will be available for public inspection only in the Veterans Services Unit, room 132 of the above address, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays) until September 7, 1993. A copy of any comments that concern information collection requirements should also be sent to the Office of Management and Budget at the address contained in the Paper work Reduction section of this preamble.

FOR FURTHER INFORMATION CONTACT:

Harold Ramsey, Program Specialist, Medical Administration Service (161B4), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 535-7657

SUPPLEMENTARY INFORMATION: VA is mandated by the Veterans Omnibus Health Care Act of 1976 and the Veterans' Benefits and Services Act of 1988 to publish its own regulations relative to the confidentiality of medical records relating to drug abuse, alcoholism or alcohol abuse, infection with the HIV, and sickle cell anemia. VA, generally, has been following the Department of Health and Human Services' regulations on drug and alcohol abuse which were published in the Federal Register, July 1, 1975. The Department of Health and Human Services (HHS) regulations (42 CFR 2.1-2.67) were promulgated with the enactment of legislation specific to alcohol and drug abuse programs and confidentiality of records. The proposed regulations take into consideration the existing HHS regulations in implementing the confidentiality section of the Veterans Omnibus Health Care Act of 1976. Editorial and substantive changes were made to the HHS

regulations which were published in the Federal Register, June 9, 1987. For convenience in comparing specific sections of the existing HHS regulations with these proposed VA regulations a cross index has been prepared which is set forth below. The historical development of the regulations follow. Public Law 93-282, "Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments of 1974," provided that the then Administrator of Veterans Affairs, through the then Chief Medical Director, consistent with responsibilities under title 38, United States Code, prescribe regulations applicable to the confidentiality of medical records maintained in connection with the provision of hospital care, nursing home care, domiciliary care and medical services under title 38 to patients suffering from alcohol abuse, alcoholism, and drug abuse. In prescribing and implementing these regulations. the Secretary of Veterans Affairs is to consult with the Secretary of HHS in order to achieve the maximum possible coordination of the regulations.

Congress, recognizing that the particular problems of confidentiality of records in the VA health care system would best be handled by placing applicable provisions in Title 38, United States Code. added a new section 4132, now section 7332, to title 38, United States Code, with the enactment of Public Law 94-581, Veterans Omnibus Health Care Act of 1976. The intent of this legislation was to ensure confidentiality of certain medical records by establishing sanctions for unauthorized disclosure of information, while at the same time, meeting the legitimate needs for disclosure under certain conditions. As part of this legislation, Congress imposed upon VA requirements similar to those of Public Law 93-282 noted above (38 U.S.C. 7334, formerly 4134).

Section 111 of Public Law 94-581 replaced for VA purposes, the provisions of sections 122(a) and 303 of Public Law 93-282 (21 U.S.C. 1175, for drug records; 42 U.S.C. 4582, for alcohol records) as the statutory base for confidentiality of drug and alcohol abuse records for those patients treated by VA medical facilities. Additionally, it replaced section 109 of Public Law 93-82 (38 U.S.C. 1753(b), formerly 653(b)) which provided for confidentiality of sickle cell anemia records and required VA to promulgate regulations. Public Law 94-581, Veterans Omnibus Health Care Act of 1976, addressed all three subjects drug abuse, alcoholism and sickle cell anemia records-in its confidentiality mandate. Section 121 of Public Law 100-322 provided for the confidentiality of records relating to infection with the HIV. Accordingly, drug and alcohol-abuse, infection with HIV, and sickle cell anemia records are included in these proposed regulations. VA has followed regulations on the confidentiality of patients' records related to drug and alcohol abuse as prescribed in 1975 by the Secretary of HHS. However, certain provisions of the HHS regulations are inconsistent with VA requirements. These proposed regulations address those inconsistencies, some of which follow. The concept of program as used in the HHS regulations does not have applicability to VA because, in VA, provision of medical care and treatment for the aforementioned

conditions is considered to be an integral part of VA's medical and benefits functions rather than a separate room isolated from other Department functions.

The HHS regulations leave the determination to destroy patient records to officials of an individual drug or alcohol abuse program. VA has a Department wide policy regarding record retention

The drafting of these proposed regulations has necessarily involved minor clarifying and editorial changes in the HHS regulations to more specifically use VA terminology and already established requirements. Further, changes have addressed inconsistencies between the HHS and VA applicable confidentiality statutes as well. For example, whereas the HHS regulations do not qualify the conditions under which disclosure of information from the records of deceased patients may be made, 38 U.S.C 7332 generally only allows this disclosure with consent of the patient's next of kin or personal representative when the purpose has been determined by the Under Secretary for Health or designee to be necessary to obtain VA or other survivorship benefits.

The HHS regulations as well as 38 U.S.C. 7332 allow for disclosure by an appropriate court order after the court determines the need for disclosure and imposes appropriate safeguards against unauthorized disclosure. These proposed regulations clarify the court order process and restrict mandatory disclosure to a Federal court. A VA facility in these regulations, as part of the Federal government, is not bound by an order from a State court, but may, in its discretion, honor a State court order. However, it is contemplated that VA will cooperate with State courts to the fullest extent appropriate.

The HHS regulations as revised in 1987 cover only alcohol and drug abuse information that is obtained by a specialized program or specific provider whose primary function is the provision of alcohol or drug abuse diagnosis, treatment, or referral for treatment. The 1987 regulations do not cover alcohol and drug abuse information obtained by health care facilities which provide alcohol and drug abuse care only as an incident to the provision of general medical care. The proposed regulations have been drafted to include all records which are maintained in connection with the performance of any VA program or activity (including education, training, evaluation, treatment, rehabilitation or research) relating to drug abuse, alcoholism, infection with the WV, or sickle cell anemia in order to provide greater confidentiality for patients who are provided care for these conditions.

Finally, these regulations are not intended to direct the manner in which substantive functions, such as research, treatment, and evaluation should be carried out, but rather to define the minimum requirements for the protection of confidentiality of patient records which must be satisfied in connection with the conduct of those functions in order to carry out the purposes of the authorizing legislation.

A copy of the draft regulations were reviewed by HHS staff and comments were provided for consideration concerning five proposed changes. It was suggested in the first comment that the

definition of "patient" proposed at 1.460(h) be revised to track the HHS definition at 42 CFR 2.11 and that a sentence be added to clarify the definition. The definition was revised based on these comments. In the second comment it was suggested that the Public Health Service research confidentiality protection that is mentioned at 42 CFR 2.21 of the HHS regulations be incorporated into 1.468(a) and applied to VA records. The addition was made to the proposed regulations. The third comment concerned the proposed 1.475(c) which requires that when VA is presented with an insufficient written consent for information protected by 38 U.S.C. 7332 in the process of obtaining a legally sufficient consent, VA must correspond only with the patient whose records are involved. It was suggested that VA consider permitting its facilities to notify an inquiring party of the application of 38 U.S.C. 7332 and these regulations to patient records on alcohol and drug abuse, WV, and sickle cell anemia as is provided for in 42 CFR 2.13(c)(2) for drug and alcohol records. It was further suggested that such notification should not affirmatively state that VA confidentiality laws apply to the records of an identified patient. This suggestion was not accepted, however, due to the statutory amendment to section 7332 which prohibits the disclosure to any person or entity other than the patient or subject concerned of the fact that a special written consent is required in order for such records to be disclosed.

It was suggested in the fourth comment that provisions be added to the proposed regulations to permit the disclosure of records protected by 38 U.S.C. 7332 in making child abuse and neglect reports under State law. VA cooperates in submitting child abuse and neglect reports to States but the reports do not include section 7332 type information. However, where there is a medical emergency which necessitates the disclosure of this type of information, the information may be disclosed. In the absence of a medical emergency where disclosure is indicated, a court order would authorize disclosure. Public Law 99-401, August 27, 1986, Title I, section 106, 100 Stat. 907, which amended 42 U.S.C. 290ee-3(e) and 290ee-3(e) to authorize reporting of child abuse information did not amend 38 U.S.C. 7332. In view of these additional provisions for disclosure of the 7332 information, the suggestion was not accepted.

The last comment concerned the requirement in 1.486(a) that the disclosure of HIV information under State public health reporting laws must be consistent with 38 U.S.C. 5701, formerly 3301, and 7332, i.e., that such State laws must require such disclosure and provide for a penalty or fine to be assessed against those individuals who are subject to the jurisdiction of the public health authority but fail to comply with the reporting requirements. There was concern that this requirement would lead to the underreporting to public health authorities of individuals who are infected with the HIV. However, this concern was resolved when it was determined that with the exception of one State statute all other State statutes meet the HIV infection reporting requirements of Title 38.

Cross Index

VA Regulations governing release of information from VA records containing information related to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia.

Department of Health and Human Services regulations, 42 CFR part 2 as revised June 6, 1987, and Department of Veterans Affairs regulations, 38 CFR 1.460 to 1.499.

Subpart A-Introduction

2.1

2.2

2.3-Supplemented by an unnumbered abbreviated, prefatory statement

2.4-1,463

2.5-Eliminated

Subpart B-General Provisions

2.11-1.460

2.12-1.461

2.13-1.462

2.14-1.464

2.15-1.465

2.16-1.466

2.17-1.461

2.18-1.467

2.19-Eliminated

2.20-Eliminated

2.21-1.468

2.22-Eliminated

2.23-1.469

Subpart C-Disclosures With Patient's Consent

2.31-1.475

2.32-1.476

2.33-1.477

2.34-1.478

2.35-1.479

Subpart D-Disclosures Without Patient Consent

2.51-1.485

2.52-1.488

2.53-1.489

Subpart E-Court Orders Authorizing Disclosures and Use

2.61-1.490

2.62-1.491

2.68-Eliminated

2.64-1.492

2.65-1.493

2.66-1.494

2.67-1.495

These proposed regulations are considered nonmajor under the criteria of Executive Order 12291, Federal Regulation. They will not have an annual effect on the economy of \$100 million or more; will result in no significant increase in costs or prices for

consumers, individual industries, Federal, State, or local government agencies, or geographic regions. They will have no adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export market.

These proposed regulations will impose no regulatory, paperwork or administrative burdens on small entities since the change concerns the protection of patient medical information regarding drug or alcohol abuse, infection with the WV and sickle cell anemia. For this reason, the Secretary certifies that these provisions are administrative and will not have a significant economic impact on small entities as defined in 5 U.S.C 600-612, The Regulatory Flexibility Act.

The Paperwork Reduction Act

Section 1.475 of this proposed regulation contains an information collection requirement requiring approval by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act. The Department of Veterans Affairs estimates that it will take an average of five minutes per respondent to provide the required information and there will be approximately 20,640 such requests made per year. As required by section 3504(h) of the Paperwork Reduction Act, VA is submitting a request that OMB approve the information collection requirement at 1.475. Individuals desiring to submit comments for consideration by OMB on this proposed information collection should send them to Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Joseph F. Lackey.

List of Subjects in 38 CFR Part 1

Administrative procedures, Privacy Act, Recordkeeping.

Approved: March 22, 1993

Jesse Brown

Secretary of Veteran Affairs.

For the reasons set out in the preamble, 38 CFR part 1 is proposed to be amended as follows:

PART GENERAL

1. New center headings and Sections 1.460 through 1.499 are added as follows:

Release of Information From Department of Veterans Affairs (VA) Records Relating to Drug Abuse, Alcoholism or Alcohol Abuse, Infection With the Human Immunodeficiency Virus (HIV), or Sickle Cell Anemia.

Sec.

1.460 Definitions

1.461 Applicability.

1.462 Confidentiality restrictions.

1.463 Criminal penalty for violation

- 1.464 Minor patients
- 1.465 Incompetent and deceased patients
- 1.466 Security for records.
- 1.467 Restrictions on the use of identification cards and public signs.
- 1.468 Relationship to Federal statutes protecting research subjects against compulsory disclosure of their identity.
- 1.469 Patient access and restrictions on use.
- 1.470-1.474 (Reserved)

Disclosures with Patient's Consent

- 1.475 Form of written consent
- 1.476 Prohibition on redisclosure.
- 1.477 Disclosures Permitted with written Consent.
- 1.478 Disclosures to prevent multiple enrollments in detoxification and maintenance treatment programs not applicable to records relating to sickle cell anemia or infection with the human immunodeficiency virus.
- 1.479 Disclosures to elements of the criminal justice system which have refereed patients.
- 1.480-1.484 (Reserved)

Disclosures Without Patient Consent

- 1.485 Medical emergencies
- 1.486 Disclosure of information related to infection with the human immunodeficiency virus to public health authorities.
- 1.487 Disclosure of Information related to Infection with the human immunodeficiency virus to the spouse or sexual partner of the patient
- 1.488 Research activities
- 1.489 Audit and evaluation activities.

Court Orders Authorizing Disclosure, and Use

- 1.490 Legal effect of order.
- 1.491 Order not applicable to records disclosed without consent to researchers, auditors and evaluators.
- 1.492 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

Sec.

- 1.493 Procedures and Criteria for orders authorizing disclosure and use of records to criminally investigate or prosecute patients.
- 1.494 Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute VA or employees of VA
- 1.495 Orders authorizing the use of undercover agents and informants to criminally investigate employees or agents of VA
- 1.496-1.499 [Reserved]

Release of Information From Department of Veterans Affairs Records Relating to Drug Abuse, Alcoholism or Alcohol Abuse, Infection With the Human Immunodeficiency Virus (HIV), or Sickle Cell Anemia.

Note: Sections 1.460 through 1.499 of this part concern the confidentiality of information relating to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia in VA records and are applicable in combination with other regulations pertaining to the release of information from VA records. Sections 1.500 through 1.527, Title 38, Code of Federal Regulations, implement the provisions of 38 U.S.C 5701 and 5702. Sections 1.550 through 1.559 implement the provisions of 5 U.S.C 552 (The Freedom of Information Act). Sections 1.575 through 1.584 implement the provisions of 5 U.S.C' 552a (The Privacy Act of 1974).

Authority: The provisions of 1.460 through 1.499 of this part pertain to any program or activity, including education, treatment, rehabilitation or research, which relates to drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia. The statutory authority for the drug abuse provisions an alcoholism or alcohol abuse provisions of 1.460 through 1.499 is sec. 111 of Pub. L. 94-581, the Veterans Omnibus Health Care Act of 1976 (38 U.S.C. 7331 through 7334), the authority for the human immunodeficiency virus provisions is Sec. 121 of Pub. L. 100-322, the Veterans Benefits and Services Act of 1988(38 U.S.C 7332); the authority for the sickle cell anemia provisions is sec. 109 of Pub. L. 9382, the Veterans Health tree Expansion Act of 1973 (38 U.S.C. 1751-1754, formerly 651854).

11.460 Definitions.

For purposes of 1.460 through 1.499 of this part, the following definitions apply:

(a) Alcohol abuse. The term "alcohol abuse" means the use of an alcoholic beverage which impairs the physical, mental, emotional, or social well-being of the user.

(b) Contractor. The term "contractor" means a person who provides services to VA such as data processing; dosage. preparation, laboratory analyses or medical or other professional services. Each contractor all be required to enter into a written agreement subjecting such contractor to the provisions of 1.460

through 1.499 of this part: 38 U.S.C. 5701 an 7332; and 5 U.S.C. 552a and 38 CFR 1.576(g).

(c) Diagnosis. The term "diagnosis" means any reference to an individual's alcohol or drug abuse or to a condition which is identified as having been caused by that abuse or any reference to sickle cell anemia or infection with the human immunodeficiency virus which is made for the purpose of treatment or referral for treatment. A diagnosis prepared for the purpose of treatment or referral for treatment but which is not so used is covered by 1.460 through 1.499 of this part. These regulations do no diagnosis of drug alcohol intoxication which clearly shows that the individual involved is not an alcohol or drug abuser (e.g., involuntary ingestion of alcohol or drugs or reaction to a prescribed dosage of one or more drugs).

(d) Disclose or disclosure. The term "disclose" or "disclosure" means a communication of patient identifying information, the affirmative verification of another person's communication of

patient identifying information, or the communication of any information from the record of a patient who has been identified.

(e) Drug Abuse. The term "drug abuse" means the use of a psychoactive substance for other than medicinal purposes which impairs the physical, mental, emotional, or social well-being of the user.

(f) Infection with the human immunodeficiency virus (HIV). The term "infection with the human immunodeficiency virus (HIV)" means the presence of laboratory evidence for human immunodeficiency virus infection. For the purposes of 1.460 through 1.499 of this part, the term includes the testing of an individual for the presence of the virus or antibodies to the virus and information related to such testing (including tests with negative results).

(g) Informant. The term "informant" means an individual who is a patient or employee or who becomes a patient or employee at the request of a law enforcement agency or official and who the request of a law enforcement agency or official observes one or more patients or employees for the purpose of reporting the information obtained to the law enforcement agency or official.

(h) Patient. The term "patient" means any individual or subject who has applied for or been given a diagnosis or treatment for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia and includes any individual who, after arrest on a criminal charge, is interviewed and/or tested in connection with drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia in order to determine that individual's eligibility to participate in a treatment or rehabilitation program. The term patient includes an individual who has been diagnosed or treated for alcoholism, drug abuse, HIV infection, or sickle cell anemia for purposes of participation in a VA program or activity relating to those four conditions, including a program or activity consisting of treatment, rehabilitation, education, training, evaluation, or research. The term "patient" for the purpose of infection with the human immunodeficiency virus or sickle cell anemia, includes one tested for the disease.

(i) Patient identifying information. The term "patient identifying information" means the name, address, social security number, fingerprints, photograph, or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. The term does not include a number assigned to a patient by a treatment program, if that number does not consist of, or contain numbers (such as social security, or driver's license number) which could be used to identify a patient with reasonable accuracy and speed from sources external to the treatment program.

(j) Person. The term "person" means an individual, partnership, corporation, Federal, State or local government agent or any other legal entity.

(k) Records. The term "records" means any information received, obtained or maintained, whether recorded or not, by an employee or contractor of VA, for the purpose of seeking or performing VA program or activity functions relating to drug abuse, alcoholism,

tests for or infection with the human immunodeficiency virus, or sickle cell anemia regarding an identifiable patient. A program or activity function relating to drug abuse, alcoholism, infection with the human immunodeficiency virus, or sickle cell anemia includes evaluation, treatment, education, training, rehabilitation, research, or referral for one of these conditions. Sections 1.460 through 1.499 of this part apply to a primary or other diagnosis, or other information which identifies, or could reasonably be expected to identify, a patient as having drug or alcohol abuse condition, infection with the human immunodeficiency virus, or sickle cell anemia (e.g., alcoholic psychosis, drug dependence), but only if such diagnosis or information is received, obtained or maintained for the purpose of seeking or performing one of the above program or activity functions. Sections 1.460 through 1.499 of this part do not apply if such diagnosis or other information is not received, obtained or maintained for the purpose of seeking or performing a function or activity relating to drug abuse, alcoholism, infection with the human immunodeficiency virus, or sickle cell anemia for the patient in question. Whenever such diagnosis or other information, not originally received or obtained for the purpose of obtaining or providing one of the above program or activity functions, is subsequently used in connection with such program or activity functions, those original entries become a "record" and 1.460 through 1.499 of this part thereafter apply to those entries. Segregability: These regulations do not apply to records or information contained therein, the disclosure of which (the circumstances surrounding the disclosure having been considered) could not reasonably be expected to disclose the fact that a patient has been connected with a VA program or activity function relating to drug abuse, alcoholism, infection with the human immunodeficiency virus, or sickle cell anemia.

(1) The following are examples of instances whereby records or information related to alcoholism or drug abuse are covered by the provisions of 1.460 through 1.499 of this part:

- (i) A patient with alcoholic delirium tremens is admitted for detoxification. The patient is offered treatment in a VA alcohol rehabilitation program which he declines.
- (ii) A patient who is diagnosed as a drug abuser applies for and is provided VA drug rehabilitation treatment.
- (iii) While undergoing treatment for an unrelated medical condition, a patient discusses with the physician his use and abuse of alcohol. The physician offers VA alcohol rehabilitation treatment which is declined by the patient.

(2) The following are examples of instances whereby records or information related to alcoholism or drug abuse are not covered by the provisions of 1.460 through 1.499 of this part:

- (i) A patient with alcoholic delirium tremens is admitted for detoxification, treated and released with no counseling or treatment for the underlying condition of alcoholism.
- (ii) While undergoing treatment for an unrelated medical condition, a patient informs the physician of a history of drug abuse fifteen years earlier with no ingestion of drugs since. The history and diagnosis drug abuse is documented in the hospital

summary and no treatment is sought by the patient or offered or provided by VA during the current period of treatment.

(iii) While undergoing treatment for injuries sustained in an accident, a patient's medical record is documented to support the judgment of the physician to prescribe certain alternate medications in order to avoid possible drug interactions in view of the patient's enrollment and treatment in a non-VA methadone maintenance program. The patient states that continued treatment and follow-up will be obtained from private physicians and VA treatment for the drug abuse is not sought by the patient nor provided or offered by the staff.

(1) Third party payer. The term "third party payer" means a person who pays or agrees to pay, for diagnosis or treatment furnished to a patient on the basis of a contractual relationship with the patient or a member of his or her family or on the basis of the patient's eligibility for Federal, State, or local governmental benefits.

(m) Treatment. The term "treatment" means the management and care of a patient for drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, or sickle cell anemia, or a condition which is identified as having been caused by one or more of these conditions, in order to reduce or eliminate the adverse effects upon the patient. The term includes testing for the human immunodeficiency virus or sickle cell anemia.

(n) Undercover agent. The term "undercover agent" means an officer of any Federal, State, or local law enforcement agency who becomes a patient or employee for the purpose of investigating a suspected violation of law or who pursues that purpose after becoming a patient or becoming employed for other purposes.

(Authority: 38 U.S.C. 7334)

1.461 Applicability.

(a) General (1) Restrictions on disclosure. The restrictions on disclosure in these regulations apply to any information whether or not recorded, which:

(i) Would identify a patient as an alcohol or drug abuser, an individual tested for or infected with the human immunodeficiency virus (HIV), hereafter referred to as HIV, or an individual with sickle cell anemia, either directly, by reference to other publicly available information, or through verification of such an identification by another person; and

(ii) Is provided or obtained for the purpose of treating alcohol or drug abuse, infection with the HIV or sickle cell anemia, making a diagnosis for that treatment, or making a referral for that treatment as well as for education, training, evaluation, rehabilitation and research program or activity purposes.

(2) Restriction on use. The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any information, whether or not recorded, which is maintained for the purpose of treating drug abuse, alcoholism or

alcohol abuse, infection with the HIV, or sickle cell anemia, making a diagnosis for that treatment, or making a referral for that treatment as well as for education, training, evaluation, rehabilitation, and research pro am or activity purposes

(b) Period covered as affecting applicability. The provisions of 1.460 through 1.499 of this part apply to records of identity, diagnosis, prognosis, or treatment pertaining to any given individual maintained over any period of time which, irrespective of when it begins, does not end before March 21, 1972, in the case of diagnosis or treatment for drug abuse; or before May 14, 1974, in the case of diagnosis or treatment for alcoholism or alcohol abuse; or before September 1, 1973, in the case of testing, diagnosis or treatment of sickle cell anemia; or before May 20, 1988, in the case of testing, diagnosis or treatment for an infection with the HIV.

(c) Exceptions. (1) Department of Veterans Affairs and Armed Forces. The restrictions on disclosure in 1.460 through 1.499 of this part do not apply to communications of information between or among those components of VA who have a need for the information in connection with their duties in the provision of health care, adjudication of benefits, or in carrying out administrative responsibilities related to those functions, including personnel of the Office of the Inspector General who are conducting audits or evaluations, or between such components and the Armed Forces, of records pertaining to a person relating to a period when such person is or was subject to the Uniform Code of Military Justice. Similarly, the restrictions on disclosure in 1.460 through 1.499 of this part do not apply to communications of information to the Department of Justice or U.S. Attorneys who are providing support in litigation or possible litigation involving VA

(2) Contractor. The restrictions on disclosure in 1.460 through 1.499 of this part do not apply to communications between VA and a contractor of information needed by the contractor to provide his or her services.

(3) Crimes on VA premises or against VA personnel. The restrictions on disclosure and use in 1.480 through 1.499 of this part do not apply to communications from VA personnel to law enforcement officers which-

(i) Are directly related to a patient's commission of a crime on the premises of the facility or against personnel of VA or to a threat to commit such a crime; and

(ii) Are limited to the circumstances of the incident, including the patient status of the individual committing or threatening to commit the crime, that individual's name and address to the extent authorized by 38 U.S.C 5701(f)(2), and that individual's last known whereabouts.

(4) Undercover agents and informants. (i) Except as specifically authorized by a court order granted under 1.495 of this part, VA may not knowingly employ, or admit as a patient, any undercover agent or informant in any VA drug abuse, alcoholism or alcohol abuse, HIV infection, or sickle cell anemia treatment program.

(ii) No information obtained by an undercover agent or informant, whether or not that undercover agent or informant is

placed in a VA drug abuse, alcoholism or alcohol abuse, HIV infection, or sickle cell anemia treatment program pursuant to an authorizing court order, may be used to criminally investigate or prosecute any patient unless authorized pursuant to the provisions of 1.493 of this part,

(iii) The enrollment of an undercover agent or informant in a treatment unit shall not be deemed a violation of this section. If the enrollment is solely for the purpose of enabling the individual to obtain treatment for drug or alcohol abuse, HIV infection, or sickle cell anemia

(d) Applicability to recipients of information.--(1) Restriction on use of information. In the absence of a proper 1.493 court order, the restriction on the use of any information subject to 1.460 through 1A99 of this part to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any person who obtains that information from VA, regardless of the status of the person obtaining the information or of whether the information was obtained in accordance with 1.460 through 1.499 of this part. This restriction on use bars, among other things, the introduction of that information as evidence in a criminal proceeding and any other use of this information to investigate or prosecute a patient with respect to a suspected crime. Information obtained by undercover agents or informants (see paragraph (c) of this section) or through patient access (see 1.469 of this part) is subject to the restriction on use.

(2) Restrictions on disclosure-- third party payers and others. The restrictions on disclosure in 1.460 through 1.499 of this part apply to third-party payers and persons who, pursuant to a consent, receive patient records directly from VA and who are notified of the restrictions on redisclosure of the records in accordance with 1.476 of this part (Authority: 38 U.S.C. 7332(e) and 7334)

1.462 Confidentiality restrictions

(a) General. The patient records to which 1.460 through 1.499 of this part apply may be disclosed or used only as permitted by these regulations and may not otherwise be disclosed or used in any civil, criminal administrative, or legislative proceedings conducted by any Federal, State, or local authority. Any disclosure made under these regulations must be limited to that information which is necessary to carry out the purpose of the disclosure.

(b) Unconditional compliance required. The restrictions on disclosure and use in 1.460 through 1.499 of this part apply whether the person seeking the information already has it, has other means of obtaining it, is a law enforcement or other official, has obtained a subpoena, or asserts any other justification for a disclosure or use which is not permitted by 1.460 through 1.499 of this part. These provisions do not prohibit VA from acting accordingly when there is no disclosure of information.

(c) Acknowledging the presence of patients: responding to requests. (1) The presence of an identified-patient in a VA facility for the treatment or other VA program activity relating

to drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia may be acknowledged only if the patient's written consent is obtained in accordance with 1.475 of this part or if an authorizing court order is entered in accordance with 1.490 through 1.499 of this part.

Acknowledgement of the presence of an identified patient in a facility is permitted if the acknowledgement does not reveal that the patient is being treated for or is otherwise involving a VA program or activity concerning drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia.

(2) Any answer to a request for a disclosure of patient records which is not permissible under 1.480 through 1.499 of this part must be made in a way that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for drug abuse, alcoholism or alcohol abuse, infection with the HIV, or sickle cell anemia. These regulations do not restrict a disclosure that an identified individual is not and never has been a patient,
(Authority: 38 U.S.C. 7334)

1.463 Criminal penalties for violations.

Under 38 U.S.C. 7332(g), any person who violates any provision of this statute or 1.460 through 1.499 of this part shall be fined not more than \$5,000 in the case of a first offense, and not more than \$20,000 for a subsequent offense.

(Authority: 38 U.S.C. 7332(g)).