

**SAMPLE LETTER IN RESPONSE TO A SUBPOENA – CRIMINAL CASE OR  
INVESTIGATION**

Dear

We have received your subpoena requesting [any records] [testimony from program personnel] concerning [name of patient]. As you may know, our program is governed by state and federal statutes and regulations, which govern how we are permitted to release confidential client records or any other client-identifying information. 42 U.S.C. § 290dd-2; 42 C.F.R. Part 2. Upon reviewing your subpoena, it appears the requirements in the laws and regulations have not been met. The confidentiality laws and regulations therefore prohibit this program and its personnel from complying with your request or even acknowledging whether or not this individual is or ever was a patient in our program unless the court issues an order authorizing disclosure in accordance with Subpart E of the federal confidentiality regulations. (42 C.F.R. § 2.13.)

The federal confidentiality law and regulations prohibit a program from disclosing information in response to a subpoena (even a judicial subpoena) when the information is sought as part of a criminal investigation or prosecution of a patient or former patient unless a court issues a special authorizing order in accordance with Subpart E of the federal regulations, 42 C.F.R. § 2.61 – 2.67, or unless the client consents by signing a particular form specified in the regulations, 42 C.F.R. § 2.31. A general medical release is not sufficient. We enclose a sample consent form for your review and use.

Subpart E of the regulations provides that before the court may issue an order authorizing a program to release patient information sought in a criminal investigation or prosecution, the program must be notified that a hearing will be held to decide whether an authorizing court order will be issued. The program must be given the opportunity to appear in person or file a responsive statement and to be represented by counsel independent of counsel for an applicant for the court order. (42 C.F.R. § 2.65(b).)

In order to issue an authorizing order at the required hearing, the court must find that:

- (1) The crime involved is extremely serious, such as one which causes or directly threatens loss of life or serious bodily injury including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and [criminal] child abuse and neglect;
- (2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution;
- (3) Other ways of obtaining the information are not available or would not be effective;

- (4) The potential injury to the patients, to the physician-patient relationship and to the ability of the program to provide services to other patients is outweighed by the public interest and need for the disclosure; and
- (5) If the applicant for the order is a person performing a law enforcement function, the person holding the records has been given the opportunity to be represented by independent counsel (if the person holding the records is within a government entity, he or she must actually, be represented by independent counsel). 42 C.F.R. § 2.65(d).

In addition, § 2.65(e) provides that an order must: (1) “limit disclosure and use to those parts of the patient’s record which are essential to fulfill the objective of the order”; (2) “limit disclosure to those law enforcement and prosecutorial officials who are responsible for, or are conducting, the investigation or prosecution, and limit their use of the records to investigation and prosecution of [the] extremely serious crime or suspected crime specified in the application”; and (3) “include such other measures as are necessary to limit disclosure and use to the fulfillment of only that public interest and need found by the court.” 42 C.F.R. § 2.65(e).

Since this program has not yet received a proper written consent form from the individual about whom [records/testimony] [is/are] sought, or an authorizing court order that was obtained under 42 C.F.R. Part 2, Subpart E, federal law prohibits us from releasing any information.

This letter is a result of thorough review of the federal law and regulations governing the confidentiality of alcohol and drug abuse patient records. Please understand that we do not intend to impede justice.

Sincerely,

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Program Director

Enclosure (sample consent form)