

**Frequently Asked Questions About Investigations
For Licensees of the Boards of Counseling, Psychology, and Social Work**

Q. What statute gives Department of Health Professions (DHP) the authority to investigate complaints about health care providers?

A. See Va. Code § 54.1-2506(A), which says “The Director and investigative personnel appointed by him shall be sworn to enforce the statutes and regulations pertaining to the Department, the Board, and the health regulatory boards and shall have the authority to investigate any violations of those statutes and regulations and to the extent otherwise authorized by law inspect any office or facility operated, owned or employing individuals regulated by any health regulatory board. The Director or his designee shall have the power to subpoena witnesses and to request and obtain patient records, business records, papers, and physical or other evidence in the course of any investigation or to issue subpoenas requiring the production of such evidence.” In addition, Va. Code § 54.1-2506.01 requires DHP to “investigate all complaints that are within the jurisdiction of the relevant health regulatory board”.

Q. Do all health care professionals licensed in Virginia have a legal obligation to file a report with DHP when they treat another licensed health care professional for a mental disorder, chemical dependency, or alcoholism?

A. Yes. See Va. Code § 54.1-2400.7, which requires licensed health care practitioners who provide treatment to other licensees to report to DHP “whenever any such health professional is treated for mental disorders, chemical dependency, or alcoholism, unless the attending practitioner has determined that there is a reasonable probability that the person being treated is competent to continue in practice or would not constitute danger to himself or to the health and welfare of his patients or the public.” This statute also provides those who report to DHP with immunity from civil liability, unless the report is made “in bad faith or with malicious intent.”

The only exception to this reporting requirement is: “Medical records or information learned or maintained in connection with an alcohol or drug abuse prevention function that is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall be exempt from the reporting requirements of this section to the extent that such reporting is in violation of 42 U.S.C. § 290dd-2 or regulations adopted thereunder.”

Q. Is it a Class 1 misdemeanor to willfully refuse to furnish to a DHP investigator information or records required or requested pursuant to statute or regulation?

A. Yes. See Va. Code § 54.1-111(A)(7), which says “It is unlawful for any person, partnership, corporation, or other entity to engage in any of the following acts . . . willfully refusing to furnish a regulatory board information or records required or requested pursuant to statute or regulation.”



Virginia Department of
Health Professions
Enforcement Division

Q. Do the Boards of Counseling, Psychology, and Social Work expect licensees to cooperate with DHP investigators and to comply with lawful subpoenas issued by DHP?

A. Yes. Furthermore, if the recipient of a lawful DHP subpoena refuses to comply with it, DHP may request assistance from the Office of the Attorney General in instituting proceedings in circuit court or general district court to compel compliance with the subpoena and possibly seeking civil penalties.

Q. Do Virginia's Health Records Privacy laws apply?

A. Va. Code § 32.1-127.1:03 recognizes an individual's right to privacy in their health records and specifies the circumstances when a health care entity may disclose such records. Va. Code § 32.1-127.1:03(D)(6) permits or requires disclosure to health oversight activities and specifically references statutes that are relevant to reporting to DHP.

Q. Does the Health Insurance Portability and Accountability Act (HIPAA) prohibit release of records to DHP?

A. No. The purpose of DHP investigations is to determine eligibility for licensure and compliance with Virginia's laws/regulations related to the practice of health professions, which are health oversight activities directly related to the provision of health care. HIPAA permits disclosure of records for this purpose. See 45 C.F.R. 164.512(d).

Q. Aren't communications between mental health professionals and clients privileged?

A. Va. Code § 8.01-400.2 protects certain mental health professionals from being forced to testify in civil actions. DHP investigations are administrative, not civil. Va. Code § 8.01-400.2 does not apply to DHP investigations.

Q. Does DHP keep the records confidential?

A. Yes. Va. Code § 54.1-2400.2 requires DHP to maintain the confidentiality of information collected during investigations and stipulates the specific circumstances in which DHP is allowed to disclose information. Even when disciplinary action requires public hearings, patient confidentiality is protected. However, please be aware that licensees have due process rights when their Board is contemplating disciplinary action against them. That includes the licensee's right to review the evidence collected, so that they can defend themselves. Therefore, if DHP requires you to produce treatment records for the licensee who is under investigation (i.e. the licensee was your patient), and you are concerned that if the licensee sees their own treatment records it potentially could harm their mental health, please include a note or memo to that effect when submitting the records to DHP, so that DHP's legal counsel is aware of the concern and if necessary can take appropriate steps to protect the licensee from harm.



Virginia Department of
Health Professions
Enforcement Division

Q. Is there an exception in statute or regulation that allows certain substance abuse treatment providers to withhold confidential patient medical/treatment records requested by DHP?

A. Yes. That exception is for records protected by 42 U.S.C. § 290dd-2 and associated federal regulations. The U.S. Substance Abuse and Mental Health Services Administration (SAMSA) has published a fact sheet that explains the Part 2 program and how healthcare providers can determine if it applies to them. That fact sheet may be found at: <https://www.samhsa.gov/sites/default/files/does-part2-apply.pdf>

Q. Do the patient confidentiality requirements at 12VAC35-115-80 prevent health care providers associated with Department of Behavioral Health and Developmental Services facilities/programs from disclosing patient records or psychotherapy notes to DHP?

A. No. See 12VAC35-115-80.B.8.m which states: “Providers shall obtain an individual’s authorization for any disclosure of psychotherapy notes, except when disclosure is made . . . (2) To defend the provider or its employees or staff against any accusation of wrongful conduct” or “(4) As required in the course of an investigation, audit, review, or proceeding regarding a provider’s conduct by a duly authorized law enforcement, licensure, accreditation, or professional review entity.” See also 12VAC35-115-80(B)(8)(c), which references administrative agencies and states: “The provider may also disclose any records if they are properly subpoenaed.” 12VAC35-115-80 also reminds providers to “consult 42 CFR Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records, if applicable, because these federal regulations may prohibit some of the disclosures addressed in this section.” Review 12VAC35-115-80 for all the exceptions and requirements for disclosure.

Q. Do the Boards of Counseling, Psychology, and Social Work have any additional regulations requiring its licensees to cooperate with DHP investigations?

A. Yes. Regulations give the board the authority to revoke, suspend, deny issuance or renewal of a license, or take disciplinary action for “[v]iolating or abetting another person in the violation of any provision of any statute” related to the practice of counseling, which includes refusal to furnish records to a DHP investigator as required in § 54.1-111(A)(7) of the Code of Virginia after being served a subpoena pursuant to § 54.1-2506 of the Code of Virginia.

Additionally, the Board of Psychology regulation 18VAC125-20-160, states the following: “Failing to cooperate with an employee of the Department of Health Professions in the conduct of an investigation” is grounds for disciplinary action or denial of licensure.