

New York State Office of Mental Health HIPAA Preemption Analysis

NYS Statute	HIPAA Regulation (45 CFR Parts 160, 164)	Preemption Analysis
Criminal Procedure Law		
<p>CPL §330.20 Procedure following verdict or plea of not responsible by reason of mental disease or defect</p> <p>2. Examination order; psychiatric examiners. Upon entry of a verdict of not responsible by reason of mental disease or defect, or upon the acceptance of a plea of not responsible by reason of mental disease or defect, the court must immediately issue an examination order. Upon receipt of such order, the commissioner must designate 2 qualified psychiatric examiners to conduct the examination to examine the defendant. In conducting their examination, the psychiatric examiners may employ any method which is accepted by the medical profession for the examination of persons alleged to be suffering from a dangerous mental disorder or to be mentally ill or retarded. The court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination. The clerk of the court must promptly forward a copy of such examination order to the mental hygiene legal service and such service may thereafter participate in all</p>	<p>§164.501: Correctional institution means any penal or correctional facility....for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other person held in lawful custody. Other persons held in lawful custody includes...persons committed to mental institutions through the criminal justice system.</p> <p>§160.501: Law enforcement official means an officer or employee of any agency or authority, of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, who is empowered by law to: (1) investigate or conduct an official inquiry into a potential violation of law; or (2) prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law.</p> <p>§164.512(a)</p> <p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may use or disclose protected health information to the</p>	<p>No Preemption: HIPAA and State law are consistent; State law applies.</p> <ol style="list-style-type: none"> The disclosures of information by the commissioner to qualified psychiatrists, and by the qualified psychiatrists to the commissioner of OMH/OPWDD and court, and by the commissioner to the court, are permitted by HIPAA because they are required by law and are necessary in the course of a judicial proceeding. All disclosures in this section of law made by the court to MHLS are not impacted by HIPAA, since the court is not a covered entity under HIPAA. Disclosures by a covered entity (OMH/OPWDD) to the district attorney and to the counsel for the defendant in the context of (as applicable) applications for first retention orders, second & subsequent retention orders, discharge orders, and recommitment orders, are all permitted by HIPAA as they are required by law and/or are necessary disclosures in the course of a judicial proceeding. Disclosures made by a covered entity (OMH/OPWDD) prior to

<p>subsequent proceedings under this section.</p> <p>5. Examination order; reports. After he has completed his examination of the defendant, each psychiatric examiner must promptly prepare a report of his findings and evaluation concerning the defendant's mental condition and submits such report to the commissioner. If the psychiatric examiners differ in their opinion as to whether the defendant is mentally ill/is suffering from a dangerous mental disorder, the commissioner must designate another psychiatric examiner to examine the defendant. Upon receipt of the examination reports, the commissioner must submit them to the court that issued the examination order. If the court is not satisfied with the findings of these psychiatric examiners, the court may designate one or more additional psychiatric examiners pursuant to subdivision fifteen of this section. The court must furnish a copy of the reports to the district attorney, counsel for the defendant, and the mental hygiene legal service.</p> <p>6. Initial hearing, commitment order....If the court finds that the defendant has a dangerous mental disorder, it must issue a commitment order.</p> <p>8. First retention order. When a defendant is in the custody of the commissioner pursuant to a commitment order.....</p>	<p>extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p> <p>§164.512(e): PHI can be released w/out patient consent in the course of any judicial or administrative proceeding(1)in response to an order of a court or administrative tribunal, provided release is limited to that PHI expressly authorized in the order; or(2) in response to a subpoena, discovery request, or other lawful process if the covered entity has received satisfactory assurances from the party making the request that reasonable efforts have been made to give the patient notice of the request or the covered entity is assured that reasonable efforts have been made to secure a qualified protective order.</p> <p>§164.512(j):A covered entity may use/disclose PHI (consistent with law & professional conduct) if it</p>	<p>the discharge or release of a person committed to the custody of the commissioner pursuant to a criminal court order are permitted under HIPAA because they are required by law.</p> <p>5. Disclosures made by a covered entity (OMH/OPWDD) pursuant to the escape of a person committed to the custody of the commissioner pursuant to a criminal court order are permitted under HIPAA because they are required by law, because the disclosures are about an inmate and are necessary for the health and safety of the inmate and others, and because they are being made to avert a threat to public health and safety.</p>
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<p>The commissioner must give written notice of the application to the district attorney , the defendant, counsel for the defendant, and the mental hygiene legal service...</p> <p>9. Second and subsequent retention orders. When a defendant is in the custody of the commissioner pursuant to a first retention order..... The commissioner must give written notice of the application to the district attorney , the defendant, counsel for the defendant, and the mental hygiene legal service...</p> <p>10. Furlough order. The commissioner may apply for a furlough order....The commissioner must give ... written notice of the application to the district attorney , the defendant, counsel for the defendant, and the mental hygiene legal service...</p> <p>11. Transfer order. The commissioner may apply for a transfer order....The commissioner must give ... written notice of the application to the district attorney , the defendant, counsel for the defendant, and the mental hygiene legal service...</p> <p>12. Release order and order of conditions. The commissioner may apply for a release order....The commissioner must give ... written notice of the application to the district attorney , the defendant, counsel for the defendant, and the</p>	<p>believes in good faith that the disclosure is necessary to prevent or lessen a serious & imminent threat to the health or safety of a person (per preamble, consistent with Tarasoff) or the public and is being made to a person or persons reasonably able to prevent or lessen the threat or is necessary for law enforcement authorities to identify/apprehend an individual. If disclosure is to be made to one other than the target, the information cannot have been obtained in the course of treatment to affect the propensity to commit the criminal conduct or through a request by the person to initiate or be referred to treatment. disclosures are about an inmate and are necessary for the health and safety of the inmate and others, and because they are being made to law enforcement officials to avert a threat to public health and safety.</p> <p>§164.512(k)(5) Correctional institutions and other law enforcement custodial situations.(i) A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual PHI about such inmate or individual, if the correctional institution or such law enforcement official represents that such PHI is necessary for: (A) the provision of health care to such individuals; (B) the health and safety of such individual/other inmates; (C) the health/safety of the officers or employees of or others at the correctional institution; (D) the</p>	
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<p>mental hygiene legal service...</p> <p>13. Discharge order. The commissioner may apply for a discharge order....The commissioner must give ... written notice of the application to the district attorney , the defendant, counsel for the defendant, and the mental hygiene legal service...</p> <p>14. Recommitment order. At any time.. an application may be made by the commissioner or the district attorney for a recommitment order....The applicant must give written notice of the application to the defendant, counsel for the defendant, and the mental hygiene legal service and if the applicant is the commissioner he must give such notice to the district attorney and if the applicant is the district attorney he must give such notice to the commissioner....</p> <p>15. Designation of psychiatric examiners...If at any hearing.....the court may direct the commissioner to designate one or more psychiatric examiners to conduct an examination of the defendant and submit a report of their findings. In addition, the court may...designate one or more psychiatric examiners to examine the defendant and submit a report of their findings.</p> <p>18. Notwithstanding any other provision of law, no person confined by reason of commitment order,</p>	<p>health/safety of such individuals/officers/other persons responsible for the transporting of inmates or their transfer form one institution, facility, or setting to another; (E) law enforcement on the premises of the correctional institution; and (F) the administration and maintenance of the safety, security & good order of the correctional institution.</p>	
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<p>recommitment order or retention order to a secure facility may be discharged/released unless the commissioner shall deliver written notice...in advance of such discharge/release to all of the following: (a) the district attorney; (b) the police department having jurisdiction of the area to which the defendant is to be discharged or released; (c) any other person the court may designate.</p> <p>19. Escape from custody, notice requirements. If a defendant is in the custody of the commissioner pursuant to an order issued under this section, and the defendant escapes from custody, immediate notice of such escape shall be given to: (a) the district attorney; (b) the superintendent of state police; (c) the sheriff of the county where the escape occurred; (d) the police department having jurisdiction of the area where the escape occurred; (e) any person the facility staff believes to be in danger; and (f) any law enforcement agency and any person the facility staff believes would be able to apprise such endangered person that the defendant has escaped from the facility...</p> <p><i>(Also see OMH Official Policy Manual QA-520)</i></p>		
<p>CPL §730.20 Fitness to proceed; generally. 1. The appropriate director (of a state OMH/OMRDD hospital) to whom a criminal court issues an order of examination must be</p>	<p>§164.512(a)</p> <p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may</p>	<p>No Preemption: HIPAA and State law are consistent; State law applies.</p> <p>1. The disclosures of information by the director to qualified</p>

<p>determined....Upon receipt of the examination order, the director may designate 2 qualified psychiatric examiners, of whom he may be one, to examine the defendant to determine if he is an incapacitated person. In conducting their examination, the psychiatric examiners may employ any method which is accepted by the medical profession for the examination of persons alleged to be mentally ill or mentally defective. The court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination.</p> <p>5. Each psychiatric examiner, after he has completed his examination of the defendant, must promptly prepare an examination report and submit it to the director...Upon receipt of the examination reports, the director must submit them to the court that issued the order of examination. The court must furnish a copy of the reports to counsel for the defendant and to the district attorney.</p>	<p>use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p> <p>§164.512(e): PHI can be released w/out patient consent in the course of any judicial or administrative proceeding(1)in response to an order of a court or administrative tribunal, provided release is limited to that PHI expressly authorized in the order; or(2) in response to a subpoena, discovery request, or other lawful process if the covered entity has received satisfactory assurances from the party making the request that reasonable efforts have been made to give the patient notice of the request or the covered entity is assured that reasonable efforts have been made to secure a qualified protective order.</p>	<p>psychiatrists, and then by qualified psychiatrists back to the director and court, are permitted by HIPAA because they are required by law and are necessary in the course of a judicial proceeding.</p> <p>2. Disclosures to the court by the director are permitted by HIPAA as they are required by law and/or are necessary disclosures in the course of a judicial proceeding.</p>
<p>CPL §730.40 Fitness to proceed;</p>	<p>§164.512(a)</p>	<p>No Preemption: HIPAA and State</p>

<p>local criminal court accusatory instrument. 4.....If the director has submitted the examination reports to the local criminal court, such court must forward them to the superior court in which the indictment was filed. If the director has not submitted such reports to the local criminal court, he must submit them to the superior court in which the indictment was filed.</p>	<p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p> <p>§164.512(e): PHI can be released w/out patient consent in the course of any judicial or administrative proceeding(1)in response to an order of a court or administrative tribunal, provided release is limited to that PHI expressly authorized in the order; or(2) in response to a subpoena, discovery request, or other lawful process if the covered entity has received satisfactory assurances from the party making the request that reasonable efforts have been made to give the patient notice of the request or the covered entity is assured that reasonable efforts have been made to secure a qualified protective order.</p>	<p>law are consistent; State law applies.</p> <p>1. Disclosures of information by the local criminal court to the superior court are not impacted by HIPAA as neither are covered entities.</p> <p>2. Disclosures to the court by the director are permitted by HIPAA as they are required by law and/or are necessary disclosures in the course of a judicial proceeding.</p>
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CPL §730.50 Fitness to proceed;

indictment. 2. When a defendant is in the custody of the commissioner (of OMH/OMRDD) immediately prior to the expiration of the period prescribed in a temporary order of commitment and the superintendent of the institution wherein the defendant is confined is of the opinion that the defendant continues to be an incapacitated person, such superintendent must apply to the court that issued the order for an order of retention....The superintendent must give written notice of the application to the defendant and to the mental hygiene legal service....

4. When a defendant is in the custody of the commissioner at the expiration of the authorized period prescribed in the last order of retention....and the commissioner must promptly certify to such court and to the appropriate district attorney that the defendant was in his custody on such expiration date...

5. When...any defendant remains in the custody of the commissioner pursuant to an order.....the superintendent or director of the institution where the defendant is confined shall, if he believes that the defendant continues

§164.512(a)

(a) Standard: Uses and disclosures required by law.

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law

§164.512(e): PHI can be released w/out patient consent in the course of any judicial or administrative proceeding(1)in response to an order of a court or administrative tribunal, provided release is limited to that PHI expressly authorized in the order; or(2) in response to a subpoena, discovery request, or other lawful process if the covered entity has received satisfactory assurances from the party making the request that reasonable efforts have been made to give the patient notice of the request or the covered entity is assured that reasonable efforts have been

No Preemption: Disclosures to the court by the commissioner are permitted by HIPAA as they are required by law and/or are necessary disclosures in the course of a judicial proceeding. HIPAA and State law are consistent; State law applies

<p>to be an incapacitated person, apply forthwith to a court....for an order of retention.</p>	<p>made to secure a qualified protective order.</p>	
<p>CPL §730.60 Fitness to proceed; procedure following custody by commissioner. 1. When a local criminal court issues a final or temporary order of observation or order of commitment.....Upon receipt thereof, the commissioner must designate an appropriate institution operated by the department of mental hygiene in which the defendant is to be placed.</p> <p>2. Except as otherwise provided....such order is suspended until the superintendent of the institution in which the defendant is confined determines that he is no longer an incapacitated person. In that event, the court that issued such order and the appropriate district attorney must be notified, in writing, by the superintendent of his determination....</p> <p>6. (a) Notwithstanding any other provision of law, no person committed to the custody of the commissioner pursuant to this article, or continuously retained thereafter in such custody, may be discharged/released on condition or placed in any less secure facility or on any less restrictive status, including but not limited to vacations, furloughs, or temporary passes, until the commissioner shall deliver written notice...in advance</p>	<p>§164.501: Correctional institution means any penal or correctional facility....for the confinement or rehabilitation of persons charged with or convicted of a criminal offense or other person held in lawful custody. Other persons held in lawful custody includes...persons committed to mental institutions through the criminal justice system.</p> <p>§160.501: Law enforcement official means an officer or employee of any agency or authority, of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, who is empowered by law to: (1) investigate or conduct an official inquiry into a potential violation of law; or (2) prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law.</p> <p>§164.512(a)</p> <p>(a) Standard: Uses and disclosures required by law.</p> <p>(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the</p>	<p>No Preemption: HIPAA and State law are consistent; State law applies.</p> <p>1. The disclosures of information by the superintendent to the court are permitted by HIPAA because they are required by law and are necessary in the course of a judicial proceeding.</p> <p>2. Disclosures by a covered entity (OMH/OPWDD) to the district attorney are permitted by HIPAA as they are required by law and/or are necessary disclosures in the course of a judicial proceeding.</p> <p>3. Disclosures made by a covered entity (OMH/OPWDD) prior to the discharge or release of a person committed to the custody of the commissioner pursuant to a criminal court order are permitted under HIPAA because they are required by law, because the disclosures are about an inmate and are necessary for the health and safety of the inmate and others, and because they are being made to law enforcement officials to avert a threat to public health and safety.</p>

<p>of the change to all of the following: (a) the district attorney of the county from which such person was committed; (b) the superintendent of state police, (c) the sheriff of the county where the facility is located; (d) the police department having jurisdiction of the area where the facility is located; (e) any person who may reasonably be expected to be the victim of any assault or any violent felony offense...; and (f) any other person the court may designate....</p> <p>(b) The notice ...shall also be given immediately upon the departure of such committed person from the commissioner's actual custody, without proper authorization...</p>	<p>relevant requirements of such law.</p> <p>(2) A covered entity must meet the requirements described in paragraph(c) (Disclosures about victims of abuse, neglect or domestic violence); (e) (Disclosures for judicial or administrative proceedings); or (f) (Disclosures for law enforcement purposes) of Section 164.512 for uses or disclosures required by law</p> <p>§164.512(e): PHI can be released w/out patient consent in the course of any judicial or administrative proceeding(1)in response to an order of a court or administrative tribunal, provided release is limited to that PHI expressly authorized in the order; or(2) in response to a subpoena, discovery request, or other lawful process if the covered entity has received satisfactory assurances from the party making the request that reasonable efforts have been made to give the patient notice of the request or the covered entity is assured that reasonable efforts have been made to secure a qualified protective order.</p> <p>§164.512(j):A covered entity may use/disclose PHI (consistent with law & professional conduct) if it believes in good faith that the disclosure is necessary to prevent or lessen a serious & imminent threat to the health or safety of a person (per preamble, consistent with Tarasoff) or the public and is being made to a person or</p>	
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persons reasonably able to prevent or lessen the threat or is necessary for law enforcement authorities to identify/apprehend an individual. If disclosure is

to be made to one other than the target, the information cannot have been obtained in the course of treatment to affect the propensity to commit the criminal conduct or through a request by the person to initiate or be referred to treatment.

§164.512(k)(5) Correctional institutions and other law enforcement custodial situations.(i)

A covered entity may disclose to a correctional institution or a law enforcement official having lawful custody of an inmate or other individual PHI about such inmate or individual, if the correctional institution or such law enforcement official represents that such PHI is necessary for: (A) the provision of health care to such individuals; (B) the health and safety of such individual/other inmates; (C) the health/safety of the officers or employees of or others at the correctional institution; (D) the health/safety of such individuals/officers/other persons responsible for the transporting of inmates or their transfer from one institution, facility, or setting to another; (E) law enforcement on the premises of the correctional institution; and (F) the administration and maintenance of the safety, security & good order of the correctional institution.