Release of HIV-related Health Department Data for Criminal Justice Purposes

NASTAD: HIV DATA PRIVACY AND CONFIDENTIALITY IN THE ERA OF DATA MODERNIZATION

MARCH 8, 2018

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Motivation – Ethical Considerations Consultation

**Recommendations**

- Conduct a survey of state and local health departments of existing policies and procedures for responding to subpoenas for cases regarding potential HIV exposure or HIV status non-disclosure, as well as recent history of such responses, including the provision of health data or records from public health actions and any compulsion of health department staff to testify in court.
- Assess the need for education of health departments’ legal counsel about MHS data and its use for public health action; and the potential for harm to people living with HIV from provision of sequence data to law enforcement.
- **Review existing protection laws and identify how they can be strengthened.**
- Develop model laws that offer strong protection of health department data against subpoenas as well as model policies and procedures on how health departments can protect data from requests for subpoenas. Develop educational material to disseminate model laws, policies and procedures.
- Strengthen national and local advocacy for modernizing HIV criminalization laws.
HIV CRIMINALIZATION IN THE UNITED STATES

AN OVERVIEW OF BOTH THE VARIETY AND PREVALENCE OF LAWS USED TO PROSECUTE AND PUNISH PEOPLE LIVING WITH HIV IN THE US.

LEARN MORE AT HIVLAWANDPOLICY.ORG

303 PEOPLE LIVING WITH HIV HAVE BEEN ARRESTED OR CHARGED UNDER THESE LAWS SINCE 2008

(this number represents reported cases; the actual number is likely higher)

6 STATES REQUIRE REGISTRATION AS A SEX OFFENDER AS PART OF THE PUNISHMENT UNDER HIV-SPECIFIC LAWS

34 STATES WITH HIV-SPECIFIC LAWS (including sex, spitting/blood exposure, needle-sharing, organ/blood/organ donation, sex work, laws for HIV-specific sentence enhancement, and STI laws with HIV)

22 STATES WITH GENERAL FELONY LAWS (laws that have been used to prosecute people living with HIV)

23 STATES WITH COMMUNICABLE DISEASE LAWS THAT MAY INCLUDE HIV (but only those that impose "criminal punishment" for STI exposure or transmission, as opposed to isolation or quarantine)

➢ 39 states with laws that criminalize HIV
What we looked at

Health department data confidentiality provisions
- related to the release of data
- for purposes of investigation or prosecution
- of criminal charges related to HIV exposure
A note on our statute review

Many states have used traditional criminal laws to prosecute criminal HIV exposure cases. For a variety of reasons, even prosecutors in states that have enacted HIV-specific criminal exposure laws have chosen to prosecute under traditional laws instead. We examine confidentiality provisions that would apply in cases prosecuted under HIV-specific or general criminal laws. For the purposes of this project, we do not address HIV-related sentence enhancements.
Key questions for coding

- **Who requests the data?** (e.g. prosecutor, police)
- **How are the data requested?** (e.g. subpoena, subpoena with documentation of need)
- **Is release obligatory, discretionary, or prohibited?** (e.g. the health department shall release, may release, are prohibited from releasing)
- **Who releases the data?** (e.g. Director of the state health department, representative of county or city health department)
- **What information is released?** (surveillance record/case report, other health department data)
- **What is the purpose of the release?** (e.g. grand jury investigation, criminal prosecution)
- **What are conditions of release?** (Restrictions on release such as reviewed in camera)
- **To whom are data released?** (e.g. judge, prosecutor, police, etc.)
Alabama Example (1)

- Who requests the data?
  - Grand jury investigation or criminal trial
  - State of Alabama or the defendant in a criminal trial

- How are the data requested?
  - In response to a subpoena from a grand jury convened in any judicial circuit in the state, when such a subpoena is accompanied by a letter from the Attorney General or an Alabama District Attorney attesting that the information is necessary to the grand jury proceedings

- Is release obligatory, discretionary, or prohibited?
  - Shall release

http://www.hivlawandpolicy.org/sites/default/files/Alabama%20Excerpt%20from%20CHLP%27s%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S..pdf
Alabama Example (2)

- **Who releases the data?**
  - State health officer

- **What information is released?**
  - Information to establish: that an individual is seropositive for HIV infection, confirmed by appropriate methodology as determined by the Board of Health; that the individual has been notified of the fact of his or her HIV infection; and that the individual has been counseled about appropriate methods to avoid infecting others with the disease

- **What is the purpose of the release?**
  - Grand jury proceedings in connection with an individual who has been charged with or who is being investigated for murder, attempted murder, or felony assault as a result of having intentionally or recklessly exposed another to HIV infection where the exposed person is later demonstrated to be HIV infected
What are conditions of release?
- Reviewed in camera by a court of competent jurisdiction to determine its probative value, and the court shall fashion a protective order to prevent disclosure of the evidence except as shall be necessary for the grand jury proceedings.

To whom are data released?
- District attorney or attorney general responsible for the grand jury who will provide to the judge who will release them to the grand jury.
Indiana Example (1)

- **Who requests the data?**
  - Prosecuting attorney

- **How are the data requested?**
  - Petition from a prosecuting attorney authorized by the court of jurisdiction

- **Is release obligatory, discretionary, or prohibited?**
  - Not defined

https://www.hivlawandpolicy.org/sites/default/files/Indiana%20Excerpt%20from%20CHLP%20Sourcebook%20on%20HIV%20Criminalization%20in%20the%20U.S._0.pdf
Indiana Example (2)

- **Who releases the data?**
  - Medical provider

- **What information is released?**
  - Medical record information

- **What is the purpose of the release?**
  - Information that may be relevant to the prosecution or defense of a person who has been charged with a potentially disease transmitting offense
What are conditions of release?

- The court shall examine the person's medical information in camera. If, after examining the medical information in camera and considering the evidence presented at the hearing, the court finds probable cause to believe that the medical information is relevant to the prosecution or defense of a person who has been charged with a potentially disease transmitting offense, the court may order the release of a person's medical information to the petitioner.

To whom are data released?

- Judge
Discussion: Other key questions to consider?

- **Who requests the data?** (e.g. prosecutor, police)
- **How are the data requested?** (e.g. subpoena, subpoena with documentation of need)
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- **Who releases the data?** (e.g. Director of the state health department, representative of county or city health department)
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- **What are conditions of release?** (Restrictions on release such as reviewed in camera)
- **To whom are data released?** (e.g. judge, prosecutor, police, etc.)