LEGAL ACTION CENTER
Breaking Barriers. Defending Dignity.

SAMPLE LETTER IN RESPONSE TO A SUBPOENA
WHEN A PATIENT IS BEING INVESTIGATED OR PROSECUTED FOR A CRIME

Dear _____:

We have received your subpoena requesting [any records]/[testimony from program personnel] concerning [name of patient].

Federal confidentiality law and regulations (see 42 U.S.C. § 290dd-2, 42 C.F.R. Part 2) 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 an special authorizing order in accordance with Subpart E of the federal regulations, Sections 2.61 - 2.67.

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 an opportunity to appear in person or file a responsive statement and to be represented by counsel independent of counsel for an applicant for the order who is performing a law enforcement function. 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 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 patient, 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, Section 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 no authorizing court order has been obtained under 42 C.F.R. Part 2, Subpart E, we are compelled by federal law not to release any information.

This decision was reached after a thorough review of the federal law and regulations governing the confidentiality of substance use disorder patient records, and is not intended in any way to impede justice.

Sincerely,

[Name and title]
[Program]