



Research Protocol: HIV Data Protection Landscape for EHE Jurisdictions

September 2020

Scope

To compile state laws and regulations relating to privacy of health department HIV data that meet the following inclusion criteria: (1) explicitly prohibit release of health department HIV data to law enforcement, prosecutors, or courts; (2) authorize release of health department HIV data to law enforcement, prosecutors, or courts.

Project Timeline

Legal research was conducted between March 1, 2020 and September 24, 2020.

Dates Covered in the Dataset

This dataset includes relevant laws in effect on September 24, 2020.

Data Collection Methods

Searches were conducted in the Westlaw state statute and regulation library using the following search terms: ("HIV or human immunodeficiency virus" or AIDS or "acquired immune deficiency syndrome" or disease) & ((record or information or data or report) /s (confidential or privacy or disclos! or privilege)) & (court or "law enforcement" or prosecut! or subpoena or attorney or crim! or "sexual offense"). Keyword searches were supplemented by examination of the table of contents of the public health sections of state codes, implementing regulations, relevant case law, and secondary source materials.

Inclusion Criteria

Statutes and regulations were included if they authorize disclosure to courts, law enforcement, or prosecutors: (1) HIV data privacy laws found in public health statutes and regulations; (2) HIV data privacy provisions within criminal laws criminalizing exposure to or transmission of HIV; or (3) HIV data privacy laws found in evidence or criminal procedure codes.

NOTE: Laws broadly applicable to communicable diseases were included if HIV is included within the scope of communicable diseases subject to the statute or regulation.

Exclusion Criteria

Statutes and regulations were excluded if they meet any of the following exclusion criteria: (1) laws of evidence or criminal procedure broadly addressing release or admission into evidence of health information or medical records; (2) laws authorizing release of HIV data held exclusively by non-health department entities; (3) laws broadly permitting release of health department HIV data to “any person authorized by law,” where the law does not specify that release may be made to courts, law enforcement; (4) laws addressing mandated court-order HIV testing or release of court-ordered test results; (5) laws authorizing release of health department HIV data in connection with violations of public health laws that do not criminalize exposure to or transmission of HIV (e.g., violations of quarantine or isolation orders); (6) laws authorizing release of health department HIV data in connection with crimes involving minors; (7) laws authorizing release of health department HIV data in connection with family court proceedings; (8) laws addressing legal or other enforcement proceedings involving HIV-positive medical providers, or release of data in connection with such matters; or (9) laws addressing release of health department HIV data for sentencing purposes only.

Coding

Below are coding rules, subject to the inclusion and exclusion criteria noted above, that apply to each coding question throughout the dataset:

Question 1: Does the state have a law criminalizing transmission of or exposure to HIV?

Yes: State statutes and/or regulations specifically criminalize exposure to or transmission of HIV (note that laws coded as “yes” may also apply to other infectious diseases in addition to HIV).

This does not include: (1) laws addressing consideration of HIV status as a sentencing factor; (2) laws criminalizing exposure of law enforcement, corrections officers, and peace officers to HIV; or (3) general criminal laws, such as assault or reckless endangerment statutes, that can be used to prosecute conduct that could expose another to HIV.

No: The state does not have statutes or regulations specifically criminalizing exposure to or transmission of HIV. However, general criminal statutes may still be used to prosecute conduct that could expose another to HIV.

Question 2: Does the law explicitly permit release of health department HIV data for law enforcement and/or prosecution purposes?

Yes: State statutes and/or regulations explicitly authorize disclosure of health department HIV data to courts, law enforcement, or prosecutors for any of the following purposes: (1) in connection with criminal matters (investigation or prosecution); (2) enforcement of public health laws (which may or may not include laws specifically creating criminal penalties for HIV transmission/exposure); or (3) adjudication of a legal matter (for example, upon a finding of compelling need).

No: The state does not have statutes or regulations explicitly authorizing disclosure of health department HIV data to courts, law enforcement, or prosecutors. This includes states with statutes and/or regulations that: (1) explicitly prohibit release of health department HIV data to courts, law enforcement, or prosecutors; (2) permit release of health department HIV data only in certain enumerated circumstances, not including disclosure to courts, law enforcement, or prosecutors; or (3) do not explicitly authorize or prohibit release of health department HIV data (i.e., the law is silent).

- *NOTE: States coded as “No” for Question 2 are also coded as “No” for Questions 3-5.*

Question 3: Does state law explicitly require a court order for release of health department HIV data in response to requests from courts, law enforcement, or prosecutors in all circumstances?

Yes: State statutes and/or regulations explicitly require a court order for release of health department HIV data to courts, law enforcement, or prosecutors in all circumstances.

No: State statutes and/or regulations either: (1) explicitly permit release of health department HIV data to courts, law enforcement, or prosecutors without a court order (i.e., pursuant to a subpoena, search warrant, or other type of request) in at least some circumstances; or (2) do not specify whether a court order or other type of request is required for release of health department HIV data (i.e., the law is silent).

- *NOTE: States coded as “No” for Question 2 are also coded as “No” for Question 3.*

Question 4: Does state law limit the type of HIV data the health department may release to courts, law enforcement, or prosecutors?

Yes: State statutes and/or regulations explicitly limit the types of health department HIV data that may be released to courts, law enforcement, or prosecutors in at least some circumstances.

No: State statutes and/or regulations do not limit the types of health department HIV data that may be released to courts, law enforcement, or prosecutors in any circumstances (e.g., laws permitting release of “all records and information” held by the health department).

- *NOTE: States coded as “No” for Question 2 are also coded as “No” for Question 4.*

Question 5: Does state law explicitly require that a defendant be charged with a crime before health department HIV data may be released in connection with criminal matters?

Yes: State statutes and/or regulations explicitly require the defendant to have been charged with a crime before health department HIV data may be released to courts, law enforcement, or prosecutors.

No: State statutes and/or regulations either: (1) explicitly permit release of health department HIV data to courts, law enforcement, or prosecutors before a defendant has been charged with a crime (i.e., during grand jury proceedings, prosecutorial investigation) in at least some circumstances; or (2) do not address whether a defendant must be charged with a crime prior to

release of health department HIV data to courts, law enforcement, or prosecutors (i.e., the law is silent).

- *NOTE: States coded as “No” for Question 2 are also coded as “No” for Question 5.*