

**Minor Consent, Confidentiality, and Child Abuse Reporting
in Title X Funded Family Planning Settings**

Hawai'i Law

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I. MINOR CONSENT

What is the age of majority/minority?

The age of majority in Hawaii is 18. Haw. Rev. Stat. § 577-1.

However, a minor “who has been married” is emancipated and has “all the rights, duties, privileges, and responsibilities provided...a person...of majority” with a few exceptions. For example, the emancipated minor cannot vote, purchase or possess alcohol, and still is treated as a minor for criminal law purposes. Haw. Rev. Stat. § 577-25.

A minor cannot marry in Hawaii without parental permission. If the minor is under 16, the minor needs both parental and court permission to marry. A minor under 15 cannot marry. Haw. Rev. Stat. § 572-1.

What is the age of consent for sexual activity?

While no statute specifically establishes an age at which a minor may legally consent to sexual activity, there are no criminal penalties for consensual sexual activity with a minor 16 years of age or older (as long as the minor’s partner is under 16 years of age). See Haw. Rev. Stat. §§ 707-730, 707-732.

Who generally consents for health care for minors?

Generally, a parent, guardian or other person *in loco parentis* must consent for health care for a minor.

What exceptions allow minors or others to consent for health care?

Emancipated Minors:

A minor “who has been married” is emancipated and has “all the rights, duties, privileges, and responsibilities provided...a person...of majority. Haw. Rev. Stat.. § 577-25.

Sexually Transmitted Diseases:

For minors ages 14 through 17, “[t]he consent to the provision of medical care and services by public and private hospitals or public and private clinics, when executed by ...a minor *who is or professes to be afflicted with a venereal disease*... shall be valid and binding as if the minor had achieved his or her majority...and the consent of no other person or persons ...shall be necessary in order to authorize such hospitals or such clinics or medical care and services provided by a physician licensed to practice medicine, to a minor.” Haw. Rev. Stat. § 577A-2.

Medical care and services includes the diagnosis, examination and administration of medication to a minor. It also shall include counseling. (See *Mental Health*.) This

provision does not allow a minor to consent to surgery or abortion. Haw. Rev. Stat. §§ 577A-1, 577A-4.

HIV Testing:

Providers must have the subject's informed written consent, or if the test is being performed at an anonymous testing site, oral informed consent, except in a few circumstances. For example, informed written consent is not required when the patient is unable to give consent and the treating physician determines that determining HIV status is necessary to make a diagnosis or to determine the best course of treatment. Informed written consent is not required when courts order a test of juveniles charged with or convicted of certain crimes. Haw. Rev. Stat. § 325-16.

Prenatal Care:

For minors ages 14 through 17, “[t]he consent to the provision of medical care and services by public and private hospitals or public and private clinics, when executed by a female minor *who is or professes to be pregnant*...shall be valid and binding as if the minor had achieved his or her majority...and the consent of no other person or persons ...shall be necessary in order to authorize such hospitals or such clinics or medical care and services provided by a physician licensed to practice medicine, to a minor.” Haw. Rev. Stat. § 577A-2.

Medical care and services includes the diagnosis, examination and administration of medication to a minor. It also shall include counseling. (See *Mental Health*.) This provision does not allow a minor to consent to surgery or abortion. Haw. Rev. Stat. §§ 577A-1, 577A-4.

Family Planning, including Pregnancy Testing/Contraception:

Federal regulations establish special access rules for family planning services funded through Title X. Providers delivering services funded in full or in part with Title X monies must comply with the federal regulations.

Federal law requires that Title X funded services be available to all adolescents, regardless of their age, without the need for parental consent. 42 C.F.R. § 59.5(a)(4)(services must be made available without regard to age); see *Does 1-4 v. Utah Dept. of Health*, 776 F.2d 253 (10th Cir. 1985).

For services funded through private dollars, only state law applies. Hawaii state law says that only minors ages 14 through 17 may consent to family planning services. For minors ages 14 through 17, “[t]he consent to the provision of medical care and services by public and private hospitals or public and private clinics, when executed by ...a minor seeking family planning services shall be valid and binding as if the minor had achieved his or her majority...and the consent of no other person or persons ...shall be necessary in order to authorize such hospitals or such clinics or medical care and services provided by a physician licensed to practice medicine, to a minor.” Haw. Rev. Stat. § 577A-2.

““Family Planning services” includes counseling and medical care designed to facilitate family planning.” Haw. Rev. Stat. § 577A-1. Medical care and services includes the diagnosis, examination and administration of medication to a minor. It also shall include counseling. (See *Mental Health*.) This provision does not allow a minor to consent to surgery or abortion. Haw. Rev. Stat. § 577A-1.

Abortion:

No statute or regulation requires parental consent or notification for abortion services.

Article I, Section 6 of the Hawaii Constitution grants the people of Hawaii a right to privacy. This section was included in the Hawaii Constitution in part to ensure freedom of choice. While it has never been tested in Hawaii, in other states, similar provisions have been interpreted to allow minors the right to make confidential independent decisions about abortion. See, e.g., *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307 (1997).

Drug and Alcohol Abuse:

For minors of any age, “[t]he consent to the provision of furnishing counseling services for alcohol or drug abuse by the counselor when executed by a minor *who is or professes to suffer from alcohol or drug abuse*, shall be valid and binding as if the minor had achieved his majority; that is, the minor who is or professes to suffer from alcohol or drug abuse, shall be deemed to have, and shall have the same legal capacity, the infancy of the minor and any contrary provisions of law notwithstanding, and such consent shall not be subject to later disaffirmance by reason of such minority; and the consent of no other person (including but not limited to a spouse, parent custodian, or guardian) shall be necessary in order to authorize such counseling services to such a minor.” Haw. Rev. Stat. § 577-26(e).

Mental Health:

For minors ages 14 through 17, when a minor seeks medical care and services for *venereal disease, pregnancy or family planning*, the medical care “shall include individual counseling for each minor patient by a physician licensed to practice medicine.” Haw. Rev. Stat. 577A-4. “Such counseling shall seek to open the lines of communication between parent and child.” Haw. Rev. Stat. § 577A-4(b).

Treatment of suspected abuse/violence:

“Any child health professional, physician, nurse, social worker...who has before the person a child whom the person reasonably believes has been harmed, shall make every good faith effort to take or cause to be taken color photographs of the areas of trauma visible on the child. If medically indicated, such person may take or cause to be taken x-rays of the child or cause a radiological or other diagnostic examination to be performed on the child.” Haw. Rev. Stat. § 587-23.

Who is financially liable for minor consent services?

“If a minor consents to receive medical care and services, the spouse, parent, custodian, or guardian of the minor patient shall not be liable for the legal obligations resulting from the furnishing of medical care and services. ... A minor who consents to the provision of medical care and services under this section shall assume financial responsibility for the costs of such medical care...” Haw. Rev. Stat. § 577A-4. See also Haw. Rev. Stat. § 577-26(b). However, no action to recover debt can commence against a minor until the minor has reached the age of majority. Haw. Rev. Stat. § 577A-5.

II. CONFIDENTIALITY

Who controls access to medical information?

Hawaii repealed its “Privacy of Health Care Information” Act in 2001, in part because the legislature felt there was “little support for a Hawaii Medical Privacy law in light of the adoption of federal rules and regulations on medical privacy by the United States Department of Health and Human Services.” Hawaii law does contain some limited confidentiality laws that apply in specific circumstances, but for a general rule, we look to federal law for guidance.

General Rule: The new federal HIPAA regulations establish that when a parent consents for an unemancipated minor’s health care, that parent generally has a right to control access to the minor’s medical information. Providers may not use or disclose health information without the parent’s consent, except for a few specific purposes, such as for treatment, payment or health care operations. 45 C.F.R. § 164.502(a)(1). In addition, health care providers must give the parent access to the minor’s medical information. 45 C.F.R. §§ 164.502(g)(3), (g)(1), (a)(2).

However, there are a few exceptions and different rules apply when minors consent for their own treatment.

What exceptions limit parent access to medical information about minors?

Risk of domestic violence/abuse/neglect:

Providers may refuse to provide parents access to a minor’s medical records if:

- (1) The providers have a “reasonable belief” that:
 - (A) The minor has been or may be subjected to domestic violence, abuse or neglect by the parent, guardian or other giving consent; or
 - (B) Treating such person as the personal representative could endanger the minor;

And:

- (2) The provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to give the parent, guardian or other such access.

45 C.F.R. § 164.502(g)(5).

Emancipation:

A minor who has been legally married is deemed emancipated. Emancipated minors have “all the rights, duties, privileges, and responsibilities provided...a person...of majority.” Haw. Rev. Stat. § 577-25.

HIV Testing:

Public and private medical providers are obligated to keep records indicating that a minor has HIV, AIDS-related complex, or AIDS strictly confidential. There are only a few

exceptions, which allow disclosure, for example, to the department of health, other medical providers, the patient's insurer, the patient's needle sharing or sexual contact, or, in cases involving child abuse, to the department of human services, with a variety of qualifications and limitations. Haw. Rev. Stat. §§ 325-101, 325-16.

Sexually Transmitted Diseases:

“Public and private hospitals, public and private clinics, and physicians may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor of the application for, or provision of medical care and services to the minor, or disclose any information pertaining to such care and services, after consulting with the minor patient to whom such care and services were provided.” Haw. Rev. Stat. § 577A-3.

Prenatal:

“Public and private hospitals, public and private clinics, and physicians may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor of the application for, or provision of medical care and services to the minor, or disclose any information pertaining to such care and services, after consulting with the minor patient to whom such care and services were provided.” Haw. Rev. Stat. § 577A-3.

Family Planning:

Federal regulations establish special protections for family planning information and records. Providers delivering services funded in full or in part with Title X monies must comply with the federal regulations.

For agencies delivering services funded by Title X, federal law mandates that “[a]ll information as to personal facts and circumstances obtained by the project staff about individuals receiving services must be held confidential and must not be disclosed without the individual's documented consent, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality.” 42 C.F.R. § 59.11.

For services funded through private dollars, state law applies. State law reads: “Public and private hospitals, public and private clinics, and physicians may, at the discretion of the treating physician, inform the spouse, parent, custodian or guardian of any minor of the application for, or provision of medical care and services to the minor, or disclose any information pertaining to such care and services, after consulting with the minor patient to whom such care and services were provided.” Haw. Rev. Stat. § 577A-3.

Abortion:

Under federal HIPAA regulations, where a minor may lawfully obtain such health care service without the consent of a parent, guardian, or other person acting *in loco parentis*, and the minor, a court, or another person authorized by law consent to such health care service, the minor controls access to the medical information.

However, if there is no applicable provision under state or other law, including case law, specifying whether or not a parent may have access to the information, a provider may provide or deny access to a parent, guardian or other *in loco parentis*, if consistent with state or local law, provided that such decision must be made by a licensed health care professional, in the exercise of professional judgment. 45 C.F.R. §§ 164.502(g)(3)(i)(B), (g)(3)(ii)(C).

Drug or Alcohol Abuse Treatment:

Federal regulations establish special protections for substance abuse treatment records. Providers that meet certain criteria must follow the federal rule. Providers that don't meet these criteria follow state law.

Federal confidentiality law applies to any individual, program, or facility that meets the following two criteria:

1. The individual, program, or facility is federally assisted. (Federally assisted means authorized, certified, licensed or funded in whole or in part by any department of the federal government. Examples include programs that are: tax exempt; receiving tax-deductible donations; receiving any federal operating funds; or registered with Medicare.) 42 C.F.R. § 2.12;

And

2. The individual or program:
 - i) Is an individual or program that holds itself out as providing alcohol or drug abuse diagnosis, treatment, or referral; OR
 - ii) Is a staff member at a general medical facility whose primary function is, and who is identified as, a provider of alcohol or drug abuse diagnosis, treatment or referral; OR
 - iii) Is a unit at a general medical facility that holds itself out as providing alcohol or drug abuse diagnosis, treatment or referral. 42 C.F.R. §§ 2.11, 2.12.

For individuals or programs meeting these criteria, federal law prohibits disclosing any information to parents without a minor's written consent if the minor acting alone under applicable state law has the legal capacity to apply for and obtain alcohol or drug abuse treatment. If state law requires parental consent for treatment, an individual or program may share with parents the fact of the minor's application for treatment if the individual or program director determines the following three conditions are met: (1) that the minor's situation poses a substantial threat to the life or physical well-being of the minor or another; (2) that this threat may be reduced by communicating relevant facts to the minor's parents; and (3) that the minor lacks the capacity because of extreme youth or a mental or physical condition to make a rational decision on whether to disclose to her parents. 42 C.F.R. § 2.14.

For programs that don't meet the above criteria, state law applies. State law allows a counselor to "inform the spouse, parent, custodian, or guardian of any minor who requests, is referred for, or received counseling services relating to alcohol or drug

abuse.” Haw. Rev. Stat. § 577-26(a). State law obligates counselors to “seek to open the lines of communication between the minor and the spouse, parent, custodian, or guardian” but only “provided such action is deemed beneficial in achieving the desired counseling objectives.” Haw. Rev. Stat. § 577-26(f).

What situations allow you to give others access to a minor’s medical information without requiring you to seek parent or minor consent?

Examples include:

Reporting wounds:

“Every physician and surgeon attending or treating a case of knife wound, bullet wound, gunshot, powder burn, or any injury that would seriously maim, produce death, or has rendered the injured person unconscious, caused by the use of violence or sustained in a suspicious or unusual manner, or whenever such case is treated in a hospital, clinic, or other institution, the manager, superintendent, or person in charge thereof, shall report such case to the chief of police of the county within which the person was attended or treated...” Haw. Rev. Stat. § 453-14.

Child abuse:

“Any [mandated reporter] shall, upon demand of the department or any police department, provide all information related to the alleged incident of child abuse or neglect, including , but not limited to, medical records and medical reports, which was not included in the written report...” Haw. Rev. Stat. § 350-1.1

Can individuals be held liable for revealing confidential information outside the exceptions specifically listed in federal or state law?

If no exception applies that would allow a provider to share information, providers who reveal confidential information may be held liable. The HIPAA regulations give the Department of Health and Human Services the authority to enforce HIPAA confidentiality regulations and to impose sanctions. See 45 C.F.R. § 160.

III. CHILD ABUSE REPORTING REQUIREMENTS

A. Am I a Mandated Reporter?

Who is a mandated reporter?

Health Professionals. Any licensed or registered professional of the healing arts or any health-related occupation who examines, attends, treats or provides other professional or specialized services. Includes, but is not limited to: physicians, physicians in training, psychologists, dentists, nurses, optometrists, chiropractors, podiatrists, pharmacists, and other health-related professionals.

- Employees or officers of any public or private school.
- Employees of public or private agencies providing social, medical, hospital, or mental health services, including financial assistance.
- Employees or officers of any law enforcement agency.
- Providers of child care, or employees or officers of any licensed or registered child care facility, foster home, or similar institution.
- Medical examiners or coroners.
- Employees of any public or private agency providing recreational or sports activities.

Haw. Rev. Stat. § 350-1.1(a).

Who is *not* a mandated reporter?

Parents and volunteers are not mandated reporters. Haw. Rev. Stat. § 350-1.3.

Can I report child abuse even if I am not a mandated reporter?

Yes. Anyone, even if not required, may report child abuse. Haw. Rev. Stat. § 350-1.3.

B. When is a Report Required from a Mandated Reporter?

When must you report abuse?

Reporters *must* make a report when in their professional or official capacity they have *reason to believe* that child abuse has occurred or that there *exists a substantial risk* that child abuse or neglect may occur in the reasonably foreseeable future. Haw. Rev. Stat. § 350-1.1(a).

What if I am not sure that abuse has occurred?

Confirmation of abuse is not required. Reporters must report whenever they have “reason to believe,” based on facts learned in their professional or official capacity, that child abuse has occurred.

C. Is This a Type of Activity That Must Be Reported?

What constitutes abuse or neglect?

Acts or omissions that:

- (1) Were caused by a person who (or legal entity which) is in any manner or degree related to the child, residing with the child, or otherwise responsible for the child's care; and
- (2) Have resulted in harm or any reasonably foreseeable, substantial risk of harm to the child's physical or psychological health or welfare. Haw. Rev. Stat. § 350-1.

What are some indications that such acts or omissions have occurred?

Haw. Rev. Stat. 350-1 provides a list of scenarios that should prompt a report. The list is illustrative rather than exhaustive and includes:

- (1) When the child exhibits such symptoms as substantial skin bruising or extreme mental distress and the symptoms are not justifiably explained or the explanation is at variance with the degree or type of injury; and
- (2) When the child has been "the victim of sexual conduct, including, but not limited to, sexual assault as defined in the penal code, molestation, sexual fondling, incest, or prostitution; obscene or pornographic photographing...; or other forms of sexual exploitation." Haw. Rev. Stat. § 350-1.

What if a child has received a wound that was sustained suspiciously or through violence?

You must report the wound to the chief of police if:

- (1) You are a physician or surgeon who attended to or treated the injury *or* you are the manager, superintendent, or person in charge of the hospital, clinic, or other institution that treated the patient;
- (2) The wound was caused by a knife, bullet, gunshot, powder burn, or was of a type that would seriously maim or produce death or has left the patient unconscious; and
- (3) The injury was caused by the use of violence or was sustained in a suspicious or unusual manner. Haw. Rev. Stat. § 453-14.

Should I report suspected abuse or neglect even if the child hasn't sustained a wound that requires reporting to the police?

Yes. If a mandated reporter in his/her professional capacity has reason to believe that child abuse or neglect has occurred, he/she is required to immediately report it to the department of social services or to the police department. Haw. Rev. Stat. § 350-1.1(a).

What if I believe child abuse or neglect may occur in the future?

You must immediately report your suspicion to the department of social services or the police if:

- (1) You are a mandated reporter;
- (2) You believe that there is a *substantial risk* that a child will suffer abuse or neglect in the *reasonably foreseeable future*; and
- (3) That belief was developed in your professional or official capacity. Haw. Rev. Stat. § 350-1.1(a).

D. What Sexual Activity am I Mandated to Report?

What sexual activity am I mandated to report?

Hawaii law says that mandated reporters are required to report acts or omissions caused by a person who (or legal entity which) is in any manner or degree related to the child, residing with the child or otherwise responsible for the child's care. Haw. Rev. Stat. § 350-1.

Hawaii law also states that indications that such acts or omissions have occurred include evidence that the child has been the victim of certain sexual crimes. Haw. Rev. Stat. 350-1.

Read together, these statutes can be interpreted to mandate a greater or lesser degree of reporting. On the one hand, because Haw. Rev. Stat. § 350-1 limits the definition of abuse to “the acts or omissions of any person who, or legal entity which, is in any manner or degree related to the child, is residing with the child, or is otherwise responsible for the child's care,” one interpretation is that reporting is limited to only those sexual acts committed by a caretaker.

However, Haw. Rev. Stat. § 350-1 states that any sexual crime is evidence of abuse -- without limiting the definition to those crimes committed by caretakers. This could be interpreted to mean that all sexual crimes must be reported.

A third interpretation is that all sexual crimes must be reported but reported as an “omission” by the caretaker. This interpretation suggests that the fact that such a crime ever occurred is always de facto evidence of an “omission” or neglect by the caretaker, i.e. that the caretaker failed to adequately protect the minor from sexual harm.

Because there is little guidance from the Hawaii Legislature on which interpretation they intended, it is critical that mandated reporters speak to legal counsel for clarification and advice on how to handle reporting.

Am I ever required to report a minor's consensual sexual activity as child abuse?

For the purposes of the following questions, we will assume that mandated reporters must report all instances of sexual assault. However, please see the discussion at “What sexual activity am I mandated to report?” above.

Assuming mandated reporters must report all instances of sexual assault, mandated reporters will have to report some instances of consensual sexual activity.

Consensual acts that would have to be reported as sexual abuse include:

- Knowingly engaging in sexual penetration with a person who is under 14 years old;
- Knowingly engaging in sexual contact with a minor under 14 years old or causing the minor to engage in sexual contact.
- Knowingly engaging in sexual penetration with a minor 14 or 15 years old unless the actor is less than five years older than the minor or is legally married to the minor.
- Knowingly engaging in sexual contact with a minor 14 or 15 years old unless the actor is less than five years older than the minor or is legally married to the minor.

See Haw. Rev. Stat. §§ 707-730, 707-732.

For the purpose of these statutes, sexual penetration includes vaginal intercourse, anal intercourse, fellatio, cunnilingus, anilingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body. Haw. Rev. Stat. § 707-700.

Sexual contact means "any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts." Haw. Rev. Stat. § 707-700

What types of non-consensual sexual activities must be reported?

Knowingly subjecting another person to sexual penetration by strong compulsion is a sexual assault in the first degree. Haw. Rev. Stat. § 707-730. Recklessly subjecting another person to sexual penetration by strong compulsion constitutes third degree sexual assault. Haw. Rev. Stat. § 707-732. Finally, either (1) knowingly subjecting another person to sexual contact by compulsion, or (2) knowingly exposing ones genitals to another person under circumstances in which the actor's conduct is likely to alarm the victim or put him/her in fear or bodily injury constitutes a sexual assault in the fourth degree. Haw. Rev. Stat. § 707-733.

What consensual sexual activity by a minor does not require reporting?

- Sexual penetration or sexual contact with a minor who is 14 and a partner who is at least 14 but under 19 years of age
- Sexual penetration or sexual contact with a minor who is 15 and a partner who is at least 14 but under 20 years of age
- Any sexual activity with a minor 16 or above

For the purposes of child abuse reporting, does a mandated reporter have a duty to try to ascertain the ages of the minor's partners?

No statute or case obligates providers to ask their minor patients about the age of the minors' sexual partners.

E. How Does Reporting Work?

Within a school, who should report?

If you are a member of a school staff, notify a person in charge or his/her delegate and that person shall report. Haw. Rev. Stat. § 350-1.1(b).

To whom should reports be made?

If the patient has received a serious wound that was sustained suspiciously or through violence, the reporter should inform the chief of police. Haw. Rev. Stat. § 453-14.

In other cases involving suspected child abuse or neglect, the reporter can inform the department of social services and/or the police. Haw. Rev. Stat. § 350-1.1(a).

How do I make a report?

You should immediately make an oral report to the police and/or the department of social services. As soon as possible afterward, you should send a written version of your report. Haw. Rev. Stat. § 350-1.1(a).

F. What Are the Consequences of My Reporting Decision?

What will the police or department of social services do after I make my report?

The police and Department of Social Services are required to inform each other of any reported child abuse. After receiving a report that a child has been harmed, has been threatened with harm, or faces imminent harm, the department of social services will order whatever investigation it deems appropriate. As part of its investigation, the department may involve law enforcement and may interview the child.

The department will then take what it believes to be the best course of action to resolve the situation. It will either: (1) resolve the matter in an informal manner appropriate to the circumstances; (2) seek to enter into a service plan without involving the court; or (3) assume temporary foster custody of the child and file a petition with the court. Haw. Rev. Stat. § 587-21.

Will my report be confidential?

Yes. All reports concerning child abuse are confidential, and any person who intentionally makes an unauthorized disclosure of a report or record of a report, shall be guilty of a misdemeanor. Haw. Rev. Stat. § 350-1.4

Can individuals be held liable for making child abuse reports?

Only rarely. Anyone who makes a report in good faith has immunity from civil or criminal liability that might otherwise be incurred or imposed as a result of the making of the report. Haw. Rev. Stat. § 350-3.

Can individuals be held liable for not making a child abuse report?

Yes. Any mandated reporter who knowingly fails to provide information in a written report or as requested, or who prevents others from reporting, is guilty of a petty misdemeanor. Haw. Rev. Stat. § 350-1.2.

Will my report be collected and stored?

Yes. The department of social services is required to maintain a central registry of reported child abuse or neglect cases. Haw. Rev. Stat. § 350-2.

G. Do Medical Records Remain Confidential in Cases of Alleged Abuse?

Is information in the medical chart & provider notes confidential?

Yes and No. Providers must share medical information related to a child abuse report with the police or DSS. “Any [mandated reporter] shall, upon demand of the department or any police department, provide all information related to the alleged incident of child abuse or neglect, including , but not limited to, medical records and medical reports, which was not included in the written report...” Haw. Rev. Stat. § 350-1.1.

However, the child abuse report itself is protected. “All reports concerning child abuse are confidential, and any person who intentionally makes an unauthorized disclosure of a report or record of a report, shall be guilty of a misdemeanor.” Haw. Rev. Stat. § 350-1.4.

How should a subpoena or other legal request for confidential information be handled?

Records relating to HIV or AIDS status of a patient “shall not be made public upon subpoena or any other method of discovery.” Haw. Rev. Stat. § 325-101.

For other records, federal privacy regulations provide guidance. The HIPAA regulations state that a provider may release confidential information:

- (1) In response to an order of a court or administrative tribunal, provided that the covered entity disclose only the protected health information expressly authorized by such order; or
- (2) In response to a subpoena, discovery request or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information has been given notice of the request; or (B) the covered entity receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order.

For the purposes of this section, the party seeking the information must provide a written statement and accompanying documentation demonstrating, among other things, that the patient had notice of this request, or the party tried to make a request, and that the time for the individual to raise objections has elapsed.

45 CFR § 164.512(e)(1).

H. Potential Criminal Charges Arising Out of Abuse Reports

In addition to being used as indicators of abuse or neglect for welfare purposes, is there a chance someone could be prosecuted for child abuse or neglect as a result of my report?

Yes. Upon receiving a report concerning child abuse, the department must inform the appropriate police department. If the police department or office of the prosecuting attorney decides to investigate or prosecute the case of child abuse or neglect, the department must also provide any information requested by the police or prosecutor. The police and prosecutor will decide how best to investigate and possibly prosecute criminal incidents.

In a case involving consensual sexual activity that meets the definition of sexual assault, who, if anyone, might be prosecuted?

The caretaker may be prosecuted for abuse or neglect for allowing the sexual activity to occur. In addition, the minor's partner may be prosecuted for the criminal act of sexual assault. In some cases, both minors may be prosecuted if they each can be charged with sexual assault against the other, although this is probably rare. The police and prosecutor's office will decide who to charge and with what. Because the prosecutor has

some discretion, if you have questions about how such charges are handled in your jurisdiction, it is best to speak to your local DSS, police and prosecutor's office.

In a case involving sexual conduct, will the offender be required to register as a sex offender?

Maybe. In cases involving sexual conduct against a minor, perpetrators who are investigated, prosecuted, and convicted are required to register as sex offenders. However, if the conduct was criminal only because of the age of the minor, and the perpetrator was 18 years of age or younger, no registration is necessary. Haw. Rev. Stat. § 846E-1.