

BERKELEY POLICE DEPARTMENT

DATE ISSUED: September 1, 1988

GENERAL ORDER R-2

SUBJECT: ACCESS TO PATIENT RECORDS OF ALCOHOL AND DRUG ABUSE PREVENTION PROGRAM

PURPOSE

- 1 - This Order sets forth special policies and procedures which Federal law requires to be followed in obtaining information contained in patient records maintained by drug and alcohol abuse prevention programs when the information is to be used to aid in the investigation of a crime in which the patient is a suspect. These procedures are in addition to the procedures normally followed in obtaining search warrants.

POLICY

- 2 - Under Federal law officers must obtain either the express written consent of the patient or a court order whenever patient records maintained by a drug or alcohol abuse program are to be obtained to aid in the investigation of a crime in which the patient is a suspect.
- 3 - Under these provisions of Federal law, a court order to obtain such patient records may not be issued unless all the following criteria are met:
 - (a) The crime is extremely serious such as one involving kidnapping, homicide, assault with a deadly weapon, armed robbery, rape or other acts causing or directly threatening loss of life or serious bodily injury, or was believed to have been committed on the premises of the program or against personnel of the program; and
 - (b) There is a reasonable likelihood that the records in question will disclose material, information or evidence of substantial value in connection with the investigation or prosecution; and
 - (c) There is no other practicable way of obtaining the information; and
 - (d) The actual or potential injury to the physician-patient relationship in the program affected and in other programs similarly situated, and the actual or potential harm to the ability of such programs to attract and retain patients, is outweighed by the public interest in authorizing the disclosure sought.

PROCEDURES

- 4 - If records are to be obtained with the patient's written consent, a specialized consent form is required which may be obtained from the program and must be signed by the patient.
- 5 - If a court order is to be obtained, the officer must:

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- (a) Prepare an affidavit in support of a search warrant which sets forth **the** facts establishing that the criteria specified in Federal law (see 3(a) (b) (c) and (d) have been met.
 - (b) Seek only those records which contain objective data (e.g., dates of enrollment, attendance, identity, physical description).
 - (c) The application for the warrant should be taken to the District Attorney for review and to initiate the filing.
 - (d) Advance notice of the date and time and place at which the application for the court order will be made must be given to the program and/or the patient (if known), and a reasonable opportunity for the program/patient to appear at the hearing or submit a responsive statement must be afforded.
 - (e) If the program is operated by any department or agency of the Federal, state or local government, counsel for the program must in fact be present to represent the program. Such counsel must be independent of any attorney appearing in support of the issuance of the court order. If the program is operated by the City of Berkeley, a representative of the City Attorney's Office must also be notified of the time, date and place of the hearing and must be present at the hearing.
 - (f) The judge must make explicit findings (preferably on the record) that the above criteria for issuance of the court order have been satisfied and that the requirement for appearance of counsel for the program has been satisfied.
 - (g) Such records shall remain confidential and shall be disclosed only as expressly authorized by the court order.
 - (h) It is recommended that at the hearing copies of the Federal statute and rules be provided to the judge for reference.
- 6 - California law also requires the appointment of a "special master" by the court prior to issuance of a search warrant when documentary evidence in the possession or under the control of any person who is a lawyer, physician, psychotherapist or **member of the clergy** and who is not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence. The "special master" is a lawyer who will accompany officers on the search. See Training and Information Bulletin No. 122 for additional information.

References: California Penal Code Section 1525
21 U.S.C. 1175 et. seq.; 45 CFR 2.31-2.31-1, 2.61-2.65.1
Training and Information Bulletin No. 122)