

THE LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Intro. to Information Sharing and Resources for OFRs

NYS Overdose Fatality Review Meet and Greet - Part 2

November 15, 2023

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Legislative Analysis and Public Policy Association (LAPPA)

About LAPPA



501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

ONDCP's Model Acts Program Grant recipient for 2019-21, 2021-23, and 2023-25.

www.legislativeanalysis.org

What does LAPPA do?

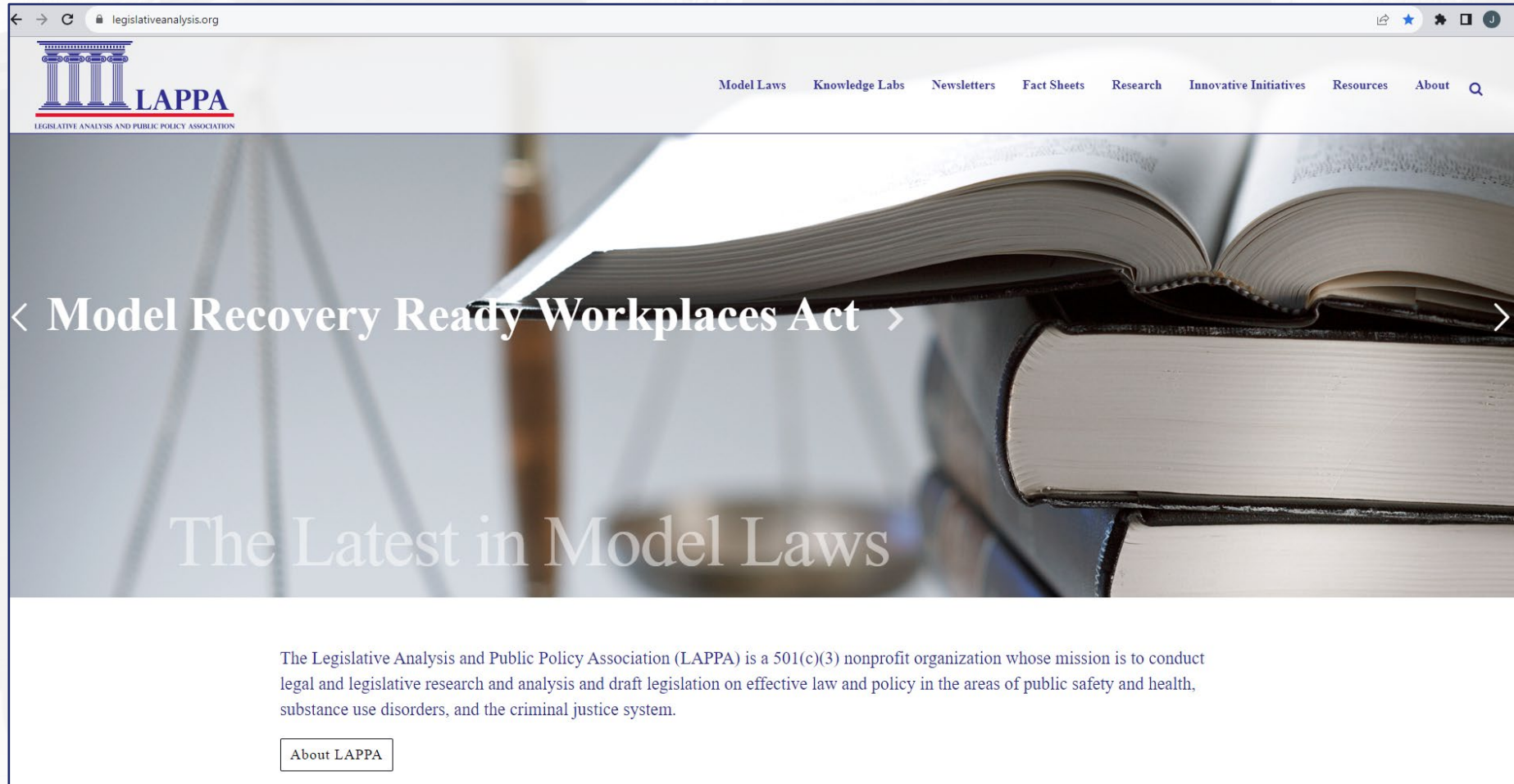
- Model Acts grant
 - ❖ [Model laws](#) (17 published)
 - ❖ [50-state Summary of Laws](#) (17 published)
 - ❖ [Fact sheets](#) (39 published)
 - ❖ [Case Law Monitor](#) (six per year)
 - ❖ [News Bites](#) (six per year)
 - ❖ [Knowledge Labs](#) (six in 2023-2H)
 - ❖ Technical assistance (TA)
- COSSUP grant subaward
 - ❖ [Information sharing scenarios](#) (COSSUP website)
 - ❖ TA

Information Sharing Scenarios

The Legislative Analysis and Public Policy Association (LAPPA), in partnership with IIR, developed information sharing fact sheets to provide guidance for overdose fatality review (OFR) teams, public safety and public health agencies utilizing the Overdose Detection Mapping Application Program (ODMAP), and law enforcement deflection partnership efforts on what can and cannot be legally shared regarding federal law (such as 42 Code of Federal Regulations [CFR] Part 2 and the Health Insurance Portability and Accountability Act [HIPAA]).

- Overdose Fatality Review (OFR)**
OFR multidisciplinary teams share information about a decedent's life experiences to identify overdose prevention and intervention strategies.
- Overdose Detection Mapping Application Program (ODMAP)**
ODMAP is a tool that supports the collection and surveillance of near real-time fatal and nonfatal overdose data that can help public safety and public health agencies mobilize prevention and intervention responses.
- Deflection**
Pre-arrest or post-arrest deflection programs focus on connecting individuals to community-based substance use disorder and behavioral health services.

What does LAPPA do?

A screenshot of the LAPPA website homepage. The browser address bar shows 'legislativeanalysis.org'. The LAPPA logo is in the top left, and a navigation menu with links like 'Model Laws', 'Knowledge Labs', 'Newsletters', 'Fact Sheets', 'Research', 'Innovative Initiatives', 'Resources', and 'About' is in the top right. The main content area features a background image of a stack of books and a scale of justice. A large heading reads '< Model Recovery Ready Workplaces Act >'. Below it, the text says 'The Latest in Model Laws'. A paragraph describes LAPPA as a 501(c)(3) nonprofit organization. An 'About LAPPA' button is at the bottom.

legislativeanalysis.org

Model Laws Knowledge Labs Newsletters Fact Sheets Research Innovative Initiatives Resources About

< Model Recovery Ready Workplaces Act >

The Latest in Model Laws

The Legislative Analysis and Public Policy Association (LAPPA) is a 501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

About LAPPA

Types of information sharing laws

 **r/ABoringDystopia**
Posted by u/Maurens • 11h • i.redd.it

  3 Awards

Remember to disable the hospital spy before discussing sensitive information



 35.9k   981  Share  Award

Types of information sharing laws

Federal laws and regulations

State (specific) laws and regulations

Federal information sharing laws/regulations

HIPAA Privacy Rule

42 C.F.R. Part 2

28 C.F.R. Part 23

FERPA

CAPTA

Resources online

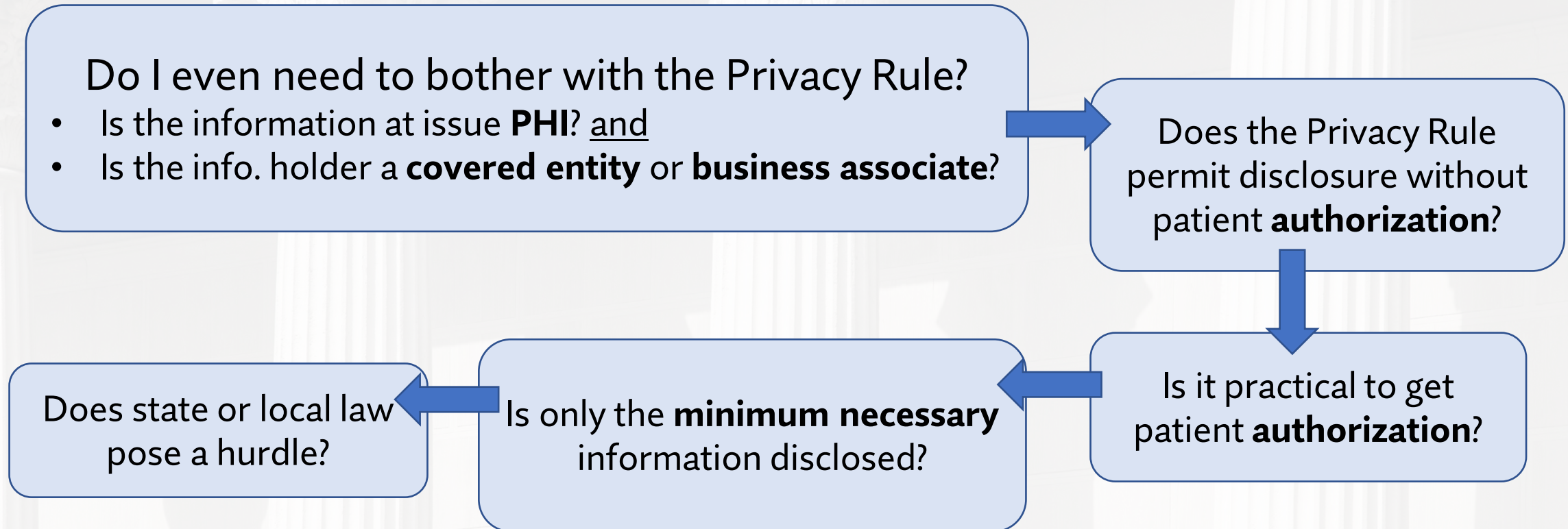
Federal information sharing laws/regulations

HIPAA Privacy Rule

- Title II to the Health Insurance Portability and Accountability Act (Section 264)
- Privacy Rule regulations → 45 C.F.R. Parts 160 and 164 (A and E)
- **Covered entity** or **business associate** may not use or disclose **protected health information (PHI)**, except as permitted or required
- Patient **authorization** is necessary for uses and disclosures of PHI not otherwise allowed
- More avenues for sharing under Privacy Rule than 42 C.F.R. Part 2

Federal information sharing laws/regulations

HIPAA Privacy Rule – Scenario analysis



Federal information sharing laws/regulations

HIPAA Privacy Rule – Individ. identifiable health info. (IIHI)

- IIHI = subset of health information that is
 - ❖ Created or received by a **health care provider, health plan, employer, or health care clearinghouse**
 - ❖ Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual and
 - ❖ Either
 - Identifies the individual or
 - For which there is reasonable basis to believe could be used to identify individual

Federal information sharing laws/regulations

HIPAA Privacy Rule – Protected health information (PHI)

- PHI = individually identifiable health information (IIHI) that is
 - ❖ Transmitted by or maintained in any form or medium and
 - ❖ Not one of the following:
 - In records covered by FERPA
 - Certain physician, psychiatrist, psychologist records pertaining to student over 18
 - In employment records held by **covered entity** employer
 - Regarding person who died 50+ years ago

Federal information sharing laws/regulations

HIPAA Privacy Rule – Protected health information (PHI)

- De-identified health information is not **PHI**
- How can information be de-identified?
 - ❖ Remove 18 identifiers listed in [45 C.F.R. § 164.514\(b\)\(2\)\(i\)\(A\)-\(R\)](#) or
 - ❖ Have a person with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods conclude info is de-identified

Federal information sharing laws/regulations

HIPAA Privacy Rule – Covered entity

- Covered entity = one of the following
 - ❖ Health plan
 - ❖ Health care clearinghouse or
 - ❖ Health care provider who transmits any health information in electronic form in connection with a transaction covered by HIPAA
- Hybrid **covered entity**

Federal information sharing laws/regulations

HIPAA Privacy Rule – Business associate

- Business associate = Person or entity that performs certain activities or services involving the use or disclosure of **PHI** either on behalf of, or to, a **covered entity** (but not the covered entity's employees).
- **Covered entity** can be business associate of another **covered entity**

SERVICES

Legal; actuarial; accounting; consulting; data aggregation; management; administrative; accreditation; financial

ACTIVITIES

Claims processing; data analysis, processing, or administration; utilization review; quality assurance; billing; benefit management; practice management


Federal information sharing laws/regulations

HIPAA Privacy Rule – Business associate

- **Covered entity** must include certain protections for the information in a **business associate** agreement (BAA)
- BAA must impose specified written safeguards on **PHI** used or disclosed by its **business associates**
- **Covered entity** cannot use BAA to authorize a **business associate** to make disclosures not allowed under Privacy Rule


Federal information sharing laws/regulations

HIPAA Privacy Rule – Disclosures w/o authorization

- Six (6) permitted (but not required) disclosures
 - ❖ To the individual who is subject of the **PHI**
 - ❖ For treatment, payment, or healthcare operations
 - ❖ Where individual given opportunity to agree or object
 - ❖ Incident to an otherwise permitted use and disclosure
 - ❖ Limited data set for research, public health, or health care purposes
 - ❖ “Public interest and benefit activities” (12) 

Federal information sharing laws/regulations

HIPAA Privacy Rule – Disclosures w/o authorization

- Public interest and benefit activities (“Uses and disclosures for which an authorization or opportunity to agree or object is not required”)
 - **Required by law** 
 - **Public health activities**
 - About victims of abuse, neglect, or domestic violence
 - Health oversight activities
 - Judicial and administrative proceedings
 - **Certain law enforcement purposes**
- Decedent information
- Cadaveric organ, eye or tissue donation purposes
- Research purposes
- **Avert a serious threat to health or safety**
- Specialized government functions
- Workers compensation compliance

Federal information sharing laws/regulations

HIPAA Privacy Rule – Patient authorization

- Valid authorization requires:
 - ❖ Six core elements
 - ❖ Three statements
 - ❖ Plain language
 - ❖ Copy to individual

ELEMENTS

Description of information; who is authorized to disclose/receive; purpose; expiration date; signature

STATEMENTS

Patient may revoke; potential for re-disclosure; ability/inability to condition treatment, payment, enrollment or eligibility for benefits on the authorization

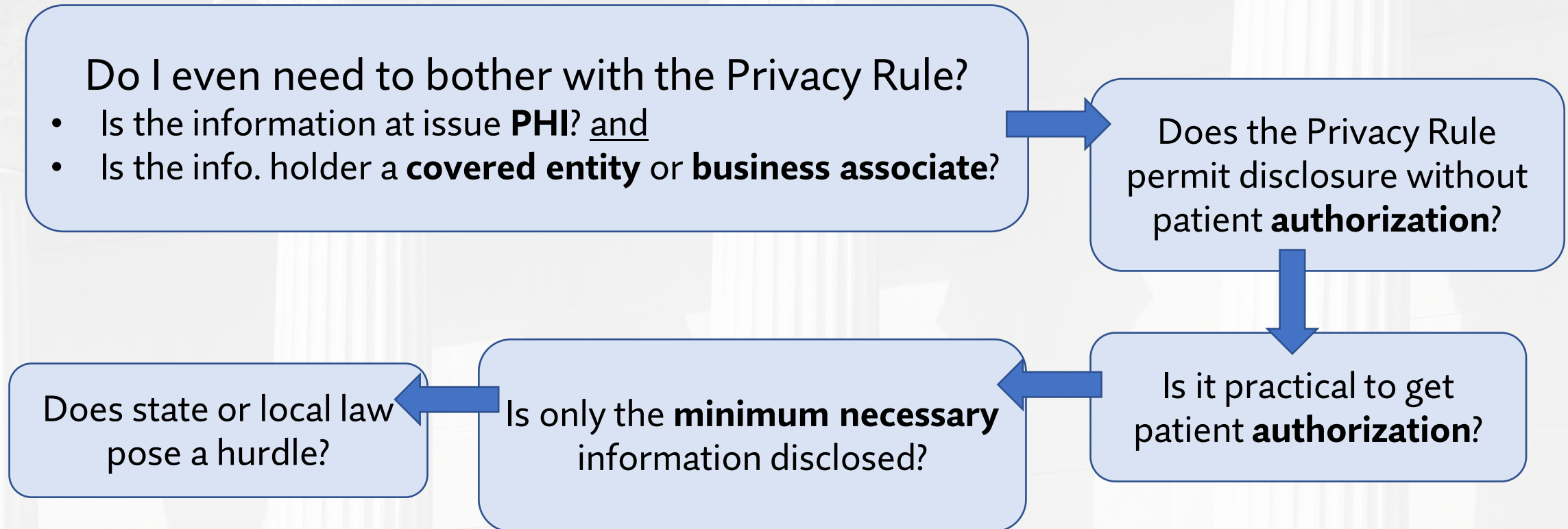
Federal information sharing laws/regulations

HIPAA Privacy Rule – Decedents' records

- **Covered entity** must treat **personal representative** the same as the individual with respect to uses and disclosures of **PHI**
- Personal representative = person with legal authority (based on state law) to act on behalf of the decedent or the decedent's estate

Federal information sharing laws/regulations

HIPAA Privacy Rule – Scenario analysis



Federal information sharing laws/regulations

HIPAA Privacy Rule – Overdose fatality review (OFR)

- How can an OFR team obtain medical records?
- Sharing information learned from family
- Non-member observers

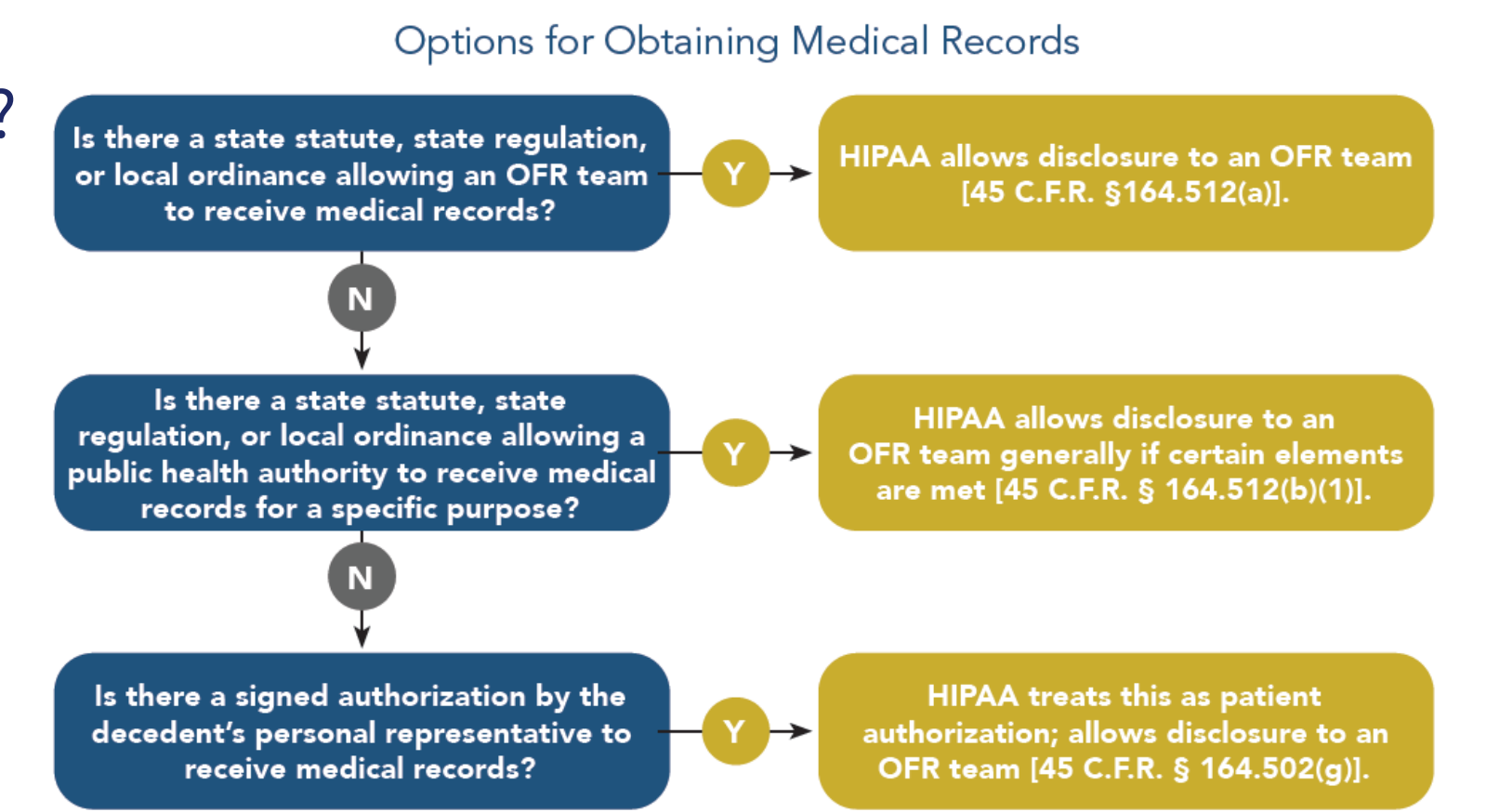


<https://www.ofrtools.org/>

Federal information sharing laws/regulations

HIPAA Privacy Rule – Overdose fatality review (OFR)

- How can an OFR team obtain medical records?



Federal information sharing laws/regulations

HIPAA Privacy Rule – Overdose fatality review (OFR)

- How can an OFR team obtain medical records?

(b) Standard: Uses and disclosures for public health activities—(1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;

Federal information sharing laws/regulations

HIPAA Privacy Rule – Overdose fatality review (OFR)

Overdose Fatality Review (OFR)

Information sharing can be a challenge for overdose fatality review (OFR) teams and their members. To assist teams in capturing as much information as possible about a decedent to make meaningful recommendations for prevention, Legislative Analysis and Public Policy Association (LAPPA), in partnership with IIR, developed information sharing fact sheets. These fact sheets provide OFR teams an understanding of what members legally can and cannot share regarding federal law (such as 42 CFR and HIPAA).

Obtaining Medical Records	▼	Obtaining Next of Kin Consent	▼
Obtaining Behavioral Health Records	▼	Allowing Nonmember Professional Observers	▼
Obtaining Educational Records	▼	Limiting Use of Shared Information	▼
Obtaining Child Services Records	▼	Freedom of Information Act Request	▼
Obtaining Prescription Drug Monitoring Program (PDMP) Records	▼	Sharing Overdose Detection Mapping Application Program (ODMAP) Data	▼

Federal information sharing laws/regulations

HIPAA Privacy Rule – Deflection initiatives

- Challenges vary depending type of initiative
- Post-overdose outreach program; mental health co-responder and a CRS
 - ❖ Is OD victim info covered by HIPAA or can it be shared with/between response team members?
 - ❖ Does it make a difference if referral is LE or EMS?
 - ❖ What if outreach team wants to share information with family members?
 - ❖ Do they need to obtain permission from the OD victim beforehand?



<https://ptaccollaborative.org/ptacc-suite/>

Federal information sharing laws/regulations

HIPAA Privacy Rule - Resources

- [Administrative Simplification Regulations](#) (HHS; as of 2013)
- [45 CFR Part 164 - SECURITY AND PRIVACY](#) (LII/Cornell Law School)
- [Summary of HIPAA Privacy Rule](#) (HHS; last reviewed October 2022)
- [HIPAA FAQs for Professionals](#) (HHS)
- [Information Sharing Scenarios](#) (COSSUP Resources)
- [Examples of Compliance Cases](#) (HHS)
- [ODMAP and PHI under HIPAA](#) (LAPPA)
- [Information Sharing in Criminal Justice – Mental Health Collaborations](#) (BJA)

Federal information sharing laws/regulations

42 C.F.R. Part 2 (42 C.F.R. §§ 2.1 to 2.67)

- Confidentiality of substance use disorder (SUD) treatment records
- Authority from 42 U.S.C. § 290dd-2
- Regulations first adopted in 1975 (prior to electronic records)
- Restricts the disclosure and use of SUD **patient records** which are maintained in connection with the performance of any **part 2 program**
- More straightforward and direct than HIPAA Privacy Rule
- Changes forthcoming in “near” future

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Scenario analysis

Do I even need to bother with Part 2?

- Does the **record** identify a **patient** as having or having had SUD either directly or by reference to other info. or person? and
- Does the **record** contain info. obtained by a **part 2 program** for purposes of SUD treatment, diagnosis, or referral?

Does Part 2 permit disclosure w/o **consent**?

Generally, no

Is it practical to get patient **consent**?

Does state or local law pose a hurdle?

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Patient, record, patient identifying info.

- Patient = individual who applies for or receives diagnosis, treatment, or referral for treatment for SUD at a **part 2 program**
- Record = any information, whether recorded or not, created by, received, or acquired by a **part 2 program** relating to a **patient** (e.g., diagnosis, treatment, and referral for treatment information, billing information, emails, voice mails, and texts)
- Patient identifying information (PII) = name, address, SSN, fingerprints, photo, or other information by which the identity of **patient** can be determined with reasonable accuracy

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Part 2 program

- Part 2 program = [federally assisted] [program]
- Federally assisted = defined in 45 C.F.R. § 2.12(b)
- Program = one of the following:
 - ❖ Individual or entity holding itself out as providing SUD diagnosis, treatment, or referral for treatment
 - ❖ Identified unit within a general medical facility doing the above
 - ❖ Medical personnel /other staff in a general medical facility whose primary function is providing SUD diagnosis, treatment, or referral for treatment and who are identified as providers

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Types of disclosures

- Disclosure without patient **consent**
- Disclosure with patient **consent**
- Court orders authorizing disclosure and use

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Disclosure without patient consent

- Disclosure of **PII** may occur in three (3) situations:
 - ❖ By medical personnel, during bona fide medical emergency
 - ❖ Scientific research, if researcher meets specific requirements
 - ❖ During the course of an audit or evaluation of the **Part 2 program** that provided the treatment

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Disclosure with patient consent

- Nine (9) required elements for **consent**, including:
 - ❖ How much, what kind, and explicit description of info.
 - ❖ Names/entities to which disclosure will be made
 - ❖ Purpose of disclosure
 - ❖ **Patient's** right to revoke
 - ❖ Date, event, or condition upon which **consent** expires
- Disclosure itself must be accompanied by notice to recipient that re-disclosure is prohibited, absent further consent by **patient**

Federal information sharing laws/regulations

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Federal information sharing laws/regulations

42 C.F.R. Part 2 – Changes forthcoming (2023?)

- Required by Section 3221 of CARES Act (2020)
- NPRM published 11/28/2022; comments due 1/31/2023
- More closely aligns Part 2 with Privacy Rule
 - ❖ Permits use and disclosure of **patient records** based on a single patient **consent** given once for all future uses and disclosures
 - ❖ Permits re-disclosure of **patient records** in any manner permitted by the HIPAA Privacy Rule, with certain exceptions
 - ❖ Expands prohibitions on the use and disclosure of **patient records** in civil, criminal, administrative, and legislative proceedings
 - ❖ New HHS enforcement authority

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Decedents' records

- No expiration on protection of decedents' **PII** (unlike Privacy Rule)
- **PII** disclosable in two (2) circumstances:
 - ❖ PII related to **patient's** cause of death under laws: (1) requiring the collection of death or other vital statistics or (2) permitting inquiry into the cause of death
 - ❖ After **consent** by personal representative
- Personal rep. =
 - (1) executor, administrator, or other personal representative
 - (2) spouse, if no (1);
 - (3) any responsible member of the patient's family, if no (1) or (2)

Federal information sharing laws/regulations

42 C.F.R. Part 2– Overdose fatality review (OFR)

- How can an OFR team obtain behavioral health records?



<https://www.ofrtools.org/>

Federal information sharing laws/regulations

42 C.F.R. Part 2 – Deflection initiatives

- Post-overdose outreach program; mental health co-responder and a CRS
 - ❖ Are there any challenges to sharing the OD victim info with regards to 42 CFR Part 2?



<https://ptaccollaborative.org/ptacc-suite/>

Federal information sharing laws/regulations

42 C.F.R. Part 2 - Resources

- [42 C.F.R. Part 2](#) (LII/Cornell Law School)
- [Proposed changes to 42 C.F.R. Part 2](#) (Federal Register)
- [Information Sharing Scenarios](#) (COSSUP Resources)
- [Information Sharing in Criminal Justice – Mental Health Collaborations](#) (BJA)

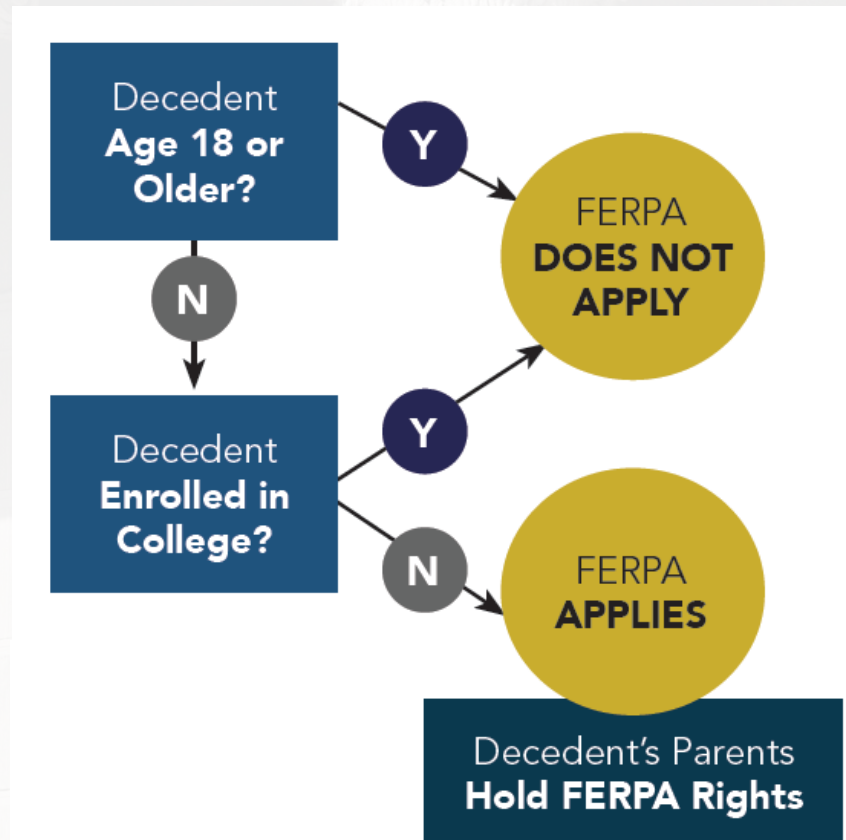
Federal information sharing laws/regulations

Family Educational Rights and Privacy Act (FERPA)

- Circumstances under which such records may be used and disclosed
- [20 U.S.C. § 1232g](#); [34 CFR Part 99](#)
- Privacy rights of an “eligible student” lapse upon death
- Did the decedent’s privacy rights in the records expire upon death?
- If not, does any individual hold the privacy rights from whom consent to disclose can be obtained?

Federal information sharing laws/regulations

Family Educational Rights and Privacy Act (FERPA)



Federal information sharing laws/regulations

Child Abuse Prevention and Treatment Act (CAPTA)

- [42 U.S.C. §§ 5101 to 5116i](#)
- State may share child services records only to:
 - ❖ Individuals who are the subject of the report
 - ❖ Federal, state, or local governmental entities, that have a need for such information in order to carry out their responsibilities
 - ❖ Child abuse citizen review panels and child fatality review panels
 - ❖ Grand jury or court, upon a finding of necessity
 - ❖ Other entities or classes of individuals statutorily authorized by the state
 - ❖ Public disclosure of the findings or information about cases that resulted in a child fatality or near-fatality

State (specific) laws/regulations

Key issues

- State privacy of health information provisions
- Open meeting and open records laws
- PDMP information
- Criminal justice information
- Access to death certificates
- Educational records (institution-specific)
- Persons to approach for more information

State (specific) laws/regulations

Key issues – State health information privacy laws

- https://www.health.ny.gov/regulations/hipaa/preemption_charts.htm
(last revised August 2011)
- N.Y. Public Health Law § 18 (“Access to patient information”)
- N.Y. Public Health Law § 18-a (“Disclosure of information”)
- N.Y. Public Health Law § 2782 (“Confidentiality and disclosure” of HIV and AIDS related information)

State (specific) laws/regulations

Key issues – Open meeting and open records laws

- N.Y. Public Officers Law §§ 100-111 (open meetings law)

Effective: April 9, 2022

McKinney's Public Officers Law § 103

§ 103. Open meetings and executive sessions

Currentness

(a) Every meeting of a **public body** shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with [section ninety-five](#)¹ of this article.

State (specific) laws/regulations

Key issues – Open meeting and open records laws

- N.Y. Public Officers Law §§ 100-111 (open meetings law)

2. “Public body” means **any entity, for which a quorum is required in order to conduct public business** and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in [section sixty-six of the general construction law](#), or committee or subcommittee or other similar body consisting of members of such public body, or an entity created or appointed to perform a necessary function in the decision-making process for which a quorum is required in order to conduct public business and which consists of two or more members. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation as defined in [section sixty-six of the general construction law](#).

State (specific) laws/regulations

Key issues – Open meeting and open records laws

- N.Y. Public Officers Law §§ 100-111 (open meetings law)

Not subject to OML. An advisory committee, task force or commission is not subject to the OML where it possesses no power and exists merely to provide advice and, therefore, is not a “public body” serving a governmental function. See *Matter of Hayes v. Chestertown Volunteer Fire Co., Inc.*, 93 A.D.3d 1117, 941 N.Y.S.2d 734 (3d Dep’t 2012) (private, not-for-profit corporation comprised of volunteer firefighters was not subject to OML); *Goodson Todman Enterprises Ltd. v. Milan Town Board*, 151 A.D.2d 642, 542 N.Y.S.2d 373 (2d Dep’t 1989) (town zoning revision committee’s function was purely advisory and did not involve exercise of sovereign power); *Poughkeepsie Newspaper Division of Gannett Satellite Information Network et al. v. Mayor’s Intergovernmental Task Force on New York City Water Supply Needs*, 145 A.D.2d 65, 537 N.Y.S.2d 582 (2d Dep’t 1989) (task force has no power on its own, and does not serve a governmental function); *NYPIRG v. Governor’s Advisory Commission*, 133 Misc.2d 613, 507 N.Y.S.2d 798 (Sup. Ct. New York Cty. 1986) (advisory commission is not subject to OML where it merely makes recommendations and was created by executive order); *Snyder v. Third Dep’t*

State (specific) laws/regulations

Key issues – Open meeting and open records laws

- N.Y. Public Officers Law §§ 84-90 (freedom of information act)

State (specific) laws/regulations

Key issues – Resources

- [Open Government Guide \(RCFP\)](#) – open records and open meetings

The screenshot shows the website for the Reporters Committee. The navigation bar includes: REPORTERS COMMITTEE, OUR WORK +, LEGAL RESOURCES +, FREE PRESS TOPICS +, WHO WE ARE +, and GET INVOLVED +. The left sidebar menu lists: 11. Fines, 12. Other penalties, 13. Settlement, pros and cons, F. Appealing initial court decisions (with sub-items: 1. Appeal routes, 2. Time limits for filing appeals, 3. Contact of interested amici), G. Addressing government suits against disclosure (with sub-items: Open Meetings, I. Statute - basic application (with sub-item: A. Who may attend?), B. What governments are subject to the law? (with sub-items: 1. State, 2. County, 3. Local or municipal)), and C. Open Meetings (with sub-items: 1. Appeal routes, 2. Time limits for filing appeals, 3. Contact of interested amici).

The main content area displays the following sections:

- G. Addressing government suits against disclosure**
COMPARE
- Open Meetings**
COMPARE
- I. Statute - basic application**
COMPARE
- A. Who may attend?**
All meetings shall be open to the public as provided in Va. Code Ann. § 2.2-3707.A., unless the topic of discussion at such meetings falls within one of the enumerated exemptions in Va. Code Ann. § 2.2-3711.A. [listing grounds for closed meetings] or Va. Code Ann. § 2.2-3707.01 (concerning meetings of the General Assembly and its committees). No closed meeting shall be held unless the public body proposing to convene such meeting has followed the procedures for closing a meeting. Va. Code Ann. § 2.2-3712.
COMPARE

State (specific) laws/regulations

Key issues – Resources

- [Open Government Guide](#) (RCFP) – open records and open meetings
- [OFR Resource Library](#) (COSSUP)
- [Deflection Library](#) (COSSUP)

QUESTIONS?

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