

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

- 1 RESOLVED, That the American Bar Association adopts the black letter *ABA Criminal Justice*
- 2 *Standards on Law Enforcement Access to Third Party Records*, dated February 2012.

1 **ABA CRIMINAL JUSTICE STANDARDS ON LAW ENFORCEMENT ACCESS**
2 **TO THIRD PARTY RECORDS**

3
4 **February 2012**

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PART I. DEFINITIONS

STANDARD 25-1.1. DEFINITIONS

For purposes of these standards:

(a) “Emergency aid” is government conduct intended to eliminate or mitigate what is reasonably believed to be imminent danger of death or serious physical injury.

(b) “Exigent circumstances” are circumstances in which there is probable cause to fear imminent destruction of evidence or imminent flight.

(c) The “focus of a record” is the person or persons to whom the information in a record principally relates.

(d) “Law enforcement” means any government officer, agent, or attorney seeking to acquire evidence to be used in the detection, investigation, or prevention of crime.

(e) An “institutional third party” is:

(i) any nongovernmental entity, including one that receives government funding or that acquires information from government sources; and

(ii) any government institution functioning in a comparable capacity, such as a public hospital or a public university.

(f) A “politically accountable official” is an upper-level law enforcement official or, in the case of a civil investigation, a civil equivalent, who is either elected or appointed by an elected official, or who is specifically designated for this purpose by an elected or appointed official.

(g) A “record” contains information, whether maintained in paper, electronic, or other form, that is linked, or is linkable through reasonable efforts, to an identifiable person. A “de-identified record” contains information that is not so linkable.

82 **PART II. SCOPE**

83

84 **STANDARD 25-2.1. SCOPE**

85

86 **These standards relate to law enforcement investigatory access to, and storage and**
87 **disclosure of, records maintained by institutional third parties. These standards do not**
88 **relate to:**

89

90 **(a) access to records for purposes of national security;**

91

92 **(b) access to records after the initiation and in the course of a criminal prosecution;**

93

94 **(c) access to records via a grand jury subpoena, or in jurisdictions where grand**
95 **juries are typically not used, a functionally equivalent prosecutorial subpoena;**

96

97 **(d) access to records from an individual not acting as an institutional third party;**

98

99 **(e) acquisition of information contemporaneous with its generation or transmission;**

100

101 **(f) an institutional third party:**

102

103 **(i) that is a victim of crime disclosing information that is evidence of that**
104 **crime or that is otherwise intended to protect its rights or property; or**

105

106 **(ii) deciding of its own initiative and volition to provide information to law**
107 **enforcement.**

108

109 **STANDARD 25-2.2. CONSTITUTIONAL FLOOR**

110

111 **A legislature or administrative agency may not authorize a protection less than that**
112 **required by the federal Constitution, nor less than that required by its respective state**
113 **Constitution.**

114

115 **PART III. GENERAL PRINCIPLES**

116

117 **STANDARD 25-3.1. RECORDS AVAILABLE**

118

119 **Institutional third parties maintain records ranging from the most mundane to those**
120 **chronicling the most personal aspects of people's lives, and when those records are stored**
121 **digitally, access and distribution costs are diminished. These records include such things as**
122 **the content of communications; medical diagnoses, treatments, and conditions; Internet**
123 **browsings; financial transactions; physical locations; bookstore and library purchases,**
124 **loans, and browsings; other store purchases and browsings; and media viewing**
125 **preferences.**

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127 STANDARD 25-3.2. NEED FOR RECORDS ACCESS

128
129 **Obtaining records maintained by institutional third parties can facilitate, and indeed be**
130 **essential to, the detection, investigation, prevention and deterrence of crime; the safety of**
131 **citizens and law enforcement officers; and the apprehension and prosecution of criminals;**
132 **and can be the least confrontational means of obtaining needed evidence.**

133 134 STANDARD 25-3.3. IMPLICATIONS OF RECORDS ACCESS

135
136 **Law enforcement acquisition of records maintained by institutional third parties can**
137 **infringe the privacy of those whose information is contained in the records; chill freedoms**
138 **of speech, association, and commerce; and deter individuals from seeking medical,**
139 **emotional, physical or other assistance for themselves or others.**

140 141 STANDARD 25-3.4. NEED FOR REGULATION

142
143 **Legislatures, courts that may act in a supervisory capacity, and administrative agencies**
144 **should therefore carefully consider regulations on law enforcement access to and use of**
145 **records maintained by institutional third parties. These standards provide a framework**
146 **for that consideration.**

147 148 PART IV. CATEGORIZATION OF INFORMATION AND PROTECTION

149 150 STANDARD 25-4.1. CATEGORIES OF INFORMATION

151
152 **Types of information maintained by institutional third parties should be classified as *highly***
153 ***private*, *moderately private*, *minimally private*, or *not private*. In making that determination,**
154 **a legislature, court, or administrative agency should consider present and developing**
155 **technology and the extent to which:**

156
157 **(a) the initial transfer of such information to an institutional third party is**
158 **reasonably necessary to participate meaningfully in society or in commerce, or is**
159 **socially beneficial, including to freedom of speech and association;**

160
161 **(b) such information is personal, including the extent to which it is intimate and**
162 **likely to cause embarrassment or stigma if disclosed, and whether outside of the**
163 **initial transfer to an institutional third party it is typically disclosed only within**
164 **one's close social network, if at all;**

165
166 **(c) such information is accessible to and accessed by non-government persons**
167 **outside the institutional third party; and**

168
169 **(d) existing law, including the law of privilege, restricts or allows access to and**
170 **dissemination of such information or of comparable information.**

171

172 STANDARD 25-4.2. CATEGORIES OF PROTECTION

173
174 (a) The type of authorization required for obtaining a record should depend upon
175 the privacy of the type of information in that record, such that: records containing
176 *highly private* information should be *highly protected*, records containing *moderately*
177 *private* information should be *moderately protected*, records containing *minimally*
178 *private* information should be *minimally protected*, and records containing
179 information *that is not private* should be *unprotected*. If a record contains different
180 types of information, it should be afforded the level of protection appropriate for the
181 most private type it contains.

182
183 (b) If the limitation imposed by subdivision (a) would render law enforcement
184 unable to solve or prevent an unacceptable amount of otherwise solvable or
185 preventable crime, such that the benefits of respecting privacy are outweighed by
186 this social cost, a legislature may consider reducing, to the limited extent necessary
187 to correct this imbalance, the level of protection for that type of information, so long
188 as doing so does not violate the federal or applicable state constitution.

189
190 **PART V. ACCESS TO RECORDS**191
192 STANDARD 25-5.1. CONSENT

193
194 Law enforcement should be permitted to access by particularized request any record
195 maintained by an institutional third party if:

196
197 (a) the focus of the record has knowingly and voluntarily consented to that specific
198 law enforcement access;

199
200 (b) the focus of the record has knowingly and voluntarily given generalized consent
201 to law enforcement access, and

202
203 (i) the information in the record is unprotected or minimally protected;

204
205 (ii) it was possible to decline the generalized consent and still obtain the
206 desired service from the provider requesting consent, and the focus of the
207 record had specifically acknowledged that it was possible; or

208
209 (iii) a legislature has decided that in a particular context, such as certain
210 government contracting, generalized consent should suffice for the
211 information contained in the record; or

212
213 (c) the record pertains to a joint account and any one joint account holder has given
214 consent as provided in subdivision (a) or (b).

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216 STANDARD 25-5.2. TYPES OF AUTHORIZATION

217
218 When authorization for accessing a record is required pursuant to Standard 25-5.3, it
219 should consist of one of the following, each of which must particularly describe the record
220 to be obtained:

221
222 (a) a *court order*, based upon:

223
224 (i) a judicial determination that there is probable cause to believe the
225 information in the record contains or will lead to evidence of crime;

226
227 (ii) a judicial determination that there is reasonable suspicion to believe the
228 information in the record contains or will lead to evidence of crime;

229
230 (iii) a judicial determination that the record is relevant to an investigation; or

231
232 (iv) a prosecutorial certification that the record is relevant to an
233 investigation.

234
235 (b) a *subpoena*, based upon a prosecutorial or agency determination that the record
236 is relevant to an investigation; or

237
238 (c) an *official certification*, based upon a written determination by a politically
239 accountable official that there is a reasonable possibility that the record is relevant
240 to initiating or pursuing an investigation.

241 242 STANDARD 25-5.3. REQUIREMENTS FOR ACCESS TO RECORDS

243
244 (a) Absent more demanding constitutional protection, consent pursuant to Standard
245 25-5.1, and emergency aid and exigent circumstances pursuant to Standard 25-5.4;
246 and consistent with the privilege requirements of Standard 5.3(c); law enforcement
247 should be permitted to access a record maintained by an institutional third party
248 pursuant to the following authorization:

249
250 (i) a court order under 5.2(a)(i) [5.2(a)(ii)] if the record contains highly
251 protected information;

252
253 (ii) a court order under 5.2(a)(ii) [5.2(a)(iii) or 5.2(a)(iv)] if the record
254 contains moderately protected information; or

255
256 (iii) a subpoena under 5.2(b) if the record contains minimally protected
257 information.

258
259 (b) If the record contains highly protected information, a legislature, a court acting
260 in its supervisory capacity, or an administrative agency could consider more

261 demanding restraints for access to the record, such as additional administrative
262 approval, additional disclosure, greater investigative need, or procedures for
263 avoiding access to irrelevant information.
264

265 (c) The protections afforded to privileged information contained in records
266 maintained by institutional third parties and the responsibilities of privilege holders
267 to assert those privileges are those provided by the law applicable in the jurisdiction
268 in which privilege is asserted. The jurisdiction in which law enforcement obtains
269 documents may impose obligations on both institutional third parties to protect
270 what might be privileged information and on law enforcement with respect to the
271 access to, and storage and disclosure of, such information.
272

273 (d) Law enforcement should be permitted to access unprotected information for any
274 legitimate law enforcement purpose.
275

276 (e) Law enforcement should be permitted to substitute a more demanding
277 authorization for a required lesser authorization.
278

279 STANDARD 25-5.4. EMERGENCY AID AND EXIGENT CIRCUMSTANCES

280

281 Law enforcement should be permitted to access a protected record for emergency aid or in
282 exigent circumstances pursuant to the request of a law enforcement officer or prosecutor.
283 As soon as reasonably practical, the officer or prosecutor should notify in writing the party
284 or entity whose authorization would otherwise have been required under Standard 25-5.3.
285

286 STANDARD 25-5.5. REDACTED ACCESS TO RECORDS

287

288 Legislatures, courts that may act in a supervisory capacity, and administrative agencies
289 should consider how best to regulate:
290

291 (a) law enforcement access when only some information in a record is subject to
292 disclosure; and
293

294 (b) the use and dissemination of information by law enforcement when a third party
295 provides more information, including more protected information, than was
296 requested.
297

298 STANDARD 25-5.6. DE-IDENTIFIED RECORDS

299

300 (a) Notwithstanding any other provision of this Part, law enforcement should be
301 permitted to access an appropriately inclusive body of de-identified records
302 maintained by an institutional third party pursuant to an official certification.
303

304 (b) A de-identified record should be linked to an identifiable person only if law
305 enforcement obtains the authorization required under Standard 25-5.3 for the type

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306 or types of information involved. The showing for this authorization may be based
307 on a profile or algorithm.

308
309 **STANDARD 25-5.7. NOTICE**

310
311 (a) If the accessed record is unprotected or minimally protected, law enforcement
312 should not be required to provide notice of the access.

313
314 (b) If the accessed record is highly or moderately protected, law enforcement should
315 provide notice of the access to the focus of the record, and this notice should
316 generally occur within thirty days after acquisition.

317
318 (c) The court that authorizes access to the record, or in the case of emergency aid or
319 exigent circumstances the court that would otherwise have been required to
320 authorize access to the record, may delay notice for a specified period, or for an
321 extension thereof, upon its determination that:

322
323 (i) there is a reasonable belief that notice would endanger life or physical
324 safety; would cause flight from prosecution, destruction of or tampering with
325 evidence, or intimidation of potential witnesses; or would otherwise
326 jeopardize an investigation; or

327
328 (ii) the delay is necessary to comply with other law.

329
330 (d) When a court authorizes delayed notice pursuant to Standard 5.7(c), the court
331 may also prohibit the third party from giving notice during that specified period. If
332 law enforcement obtains a record for emergency aid or in exigent circumstances, a
333 law enforcement officer or prosecutor may by written demand prohibit the third
334 party from giving notice for 48 hours.

335
336 (e) When protected de-identified records are accessed, notice should be provided to
337 the [general public] [legislature] and should generally occur [prior to] [after]
338 acquisition.

339
340 (f) Upon request, a court should be permitted to eliminate or limit the required
341 notice in a particular case where it would be unduly burdensome given the number
342 of persons who must otherwise be notified, taking into consideration, however, that
343 the greater number of persons indicates a greater intrusion into privacy.

344
345 **Part VI. Retention, Maintenance, and Disclosure of Records**

346
347 **STANDARD 25-6.1. RETENTION AND MAINTENANCE**

348
349 (a) Protected records lawfully obtained from an institutional third party in the
350 course of law enforcement investigation should be:

351
9

- 352 (i) reasonably secure from unauthorized access; and
353
354 (ii) other than as authorized under Standard 25-6.2, accessed only by
355 personnel who are involved in the investigation for which they were obtained
356 and only to the extent necessary to carry out that investigation.
357
- 358 (b) Moderately and highly protected records should in addition be:
359
- 360 (i) subject to audit logs recording all attempted and successful access; and
361
362 (ii) destroyed according to an established schedule.
363
- 364 (c) All de-identified records in the possession of law enforcement for which the
365 linkage described in Standard 5.5(b) is not obtained should be destroyed upon
366 conclusion of the investigation and any prosecution and appeals.
367
- 368 (d) If a law enforcement agency disseminates internal regulations pursuant to this
369 Standard, those regulations should be publicly distributed.
370

371 **STANDARD 25-6.2. DISCLOSURE AND DISSEMINATION**
372

373 Law enforcement should not disclose protected records to individuals and entities not
374 involved in the investigation for which they were obtained except in the following
375 circumstances:
376

- 377 (a) Disclosure in the case or cases investigated, pursuant to rules governing
378 investigation, discovery and trial;
379
- 380 (b) Disclosure for purposes of other government investigations, including parallel
381 civil investigations, unless prohibited by law, and except that such disclosure to
382 another government agency should require official certification or, in the case of
383 emergency aid or exigent circumstances, the request of a law enforcement officer or
384 prosecutor;
385
- 386 (c) Disclosure with appropriate redaction for purposes of training, auditing, and
387 other non-investigatory legitimate law enforcement purposes only upon a written
388 determination by a politically accountable law enforcement official that the access is
389 in furtherance of a legitimate law enforcement purpose;
390
- 391 (d) Disclosure of identification records of wanted or dangerous persons and stolen
392 items upon the request of a law enforcement officer or prosecutor; and
393
- 394 (e) Other disclosures only if permitted by statute or upon a finding of a court that
395 the public interest in such disclosure outweighs the privacy of the affected parties.
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397 **PART VII. ACCOUNTABILITY**

398

399 **STANDARD 25-7.1. APPROPRIATE SANCTIONS**

400

401 **The legislature should provide accountability for the provisions governing access to and**
402 **storage and disclosure of records maintained by institutional third parties via appropriate**
403 **criminal, civil, and/or evidentiary sanctions, and appropriate periodic review and public**
404 **reporting.**

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RESOLUTION

1 RESOLVED, That the American Bar Association adopts the black letter *ABA Criminal Justice*
2 *Standards on Law Enforcement Access to Third Party Records*, dated February 2012.

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5 **ABA CRIMINAL JUSTICE STANDARDS ON LAW ENFORCEMENT ACCESS TO THIRD PARTY**
6 **RECORDS**

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11 **PART V. ACCESS TO RECORDS**

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13 ...

14
15 **STANDARD 25-5.3. REQUIREMENTS FOR ACCESS TO RECORDS**

16
17 **(a) Absent more demanding constitutional protection, consent pursuant to Standard**
18 **25-5.1, and emergency aid and exigent circumstances pursuant to Standard 25-5.4;**
19 **and consistent with the privilege requirements of Standard 5.3(c); law enforcement**
20 **should be permitted to access a record maintained by an institutional third party**
21 **pursuant to the following authorization:**

22
23 **(i) a court order under 5.2(a)(i) ~~[5.2(a)(ii)] if the record contains highly~~**
24 **~~protected information;~~**

25
26 ...

DELETIONS STRUCK THROUGH; ADDITIONS UNDERLINED