

Guide to Judiciary Policy

Vol. 8: Probation and Pretrial Services
Pt. A: Pretrial Services Investigation and Report

Ch. 2: Legal Framework and Principles

§ 240 Confidentiality

§ 240.10 Purpose

- (a) The confidentiality of pretrial services information is preserved primarily to promote a candid and truthful relationship between a defendant being interviewed and the interviewing officer in an effort to obtain the most complete and accurate information, and to encourage the defendant's participation in the investigation and report process. **See:** H. Conf. Rep. 97-792, 97th Cong., 2d Sess. 8.
- (b) The disclosure of pretrial services information for purposes other than determining pretrial release, particularly for prosecution purposes, would deter a person from cooperating with an officer and deprive the court of necessary information.

§ 240.20 Confidentiality Regulations

§ 240.20.10 Statutory Provisions

- (a) Authority of the AO Director

Under [18 U.S.C. § 3153\(c\)\(2\)](#), the AO Director is authorized to issue regulations governing the release of information made confidential by [18 U.S.C. § 3153\(c\)\(1\)](#).
- (b) Confidentiality of Pretrial Services Information
 - (1) As stated in 18 U.S.C. § 3153(c)(1):

“Except as provided in [[§ 3153\(c\)\(2\)](#)], information obtained in the course of performing pretrial services functions in relation to a particular accused shall be used only for the purposes of bail determination and shall otherwise be confidential. Each pretrial

services report shall be made available to the attorney for the accused and the attorney for the Government.”

See: AO Office of the General Counsel Opinion, Sept. 23, 1997, Post-Release Verification.

- (2) Under § 3153(c)(2), exceptions to the confidentiality of such information must be made to permit access:
 - (A) by qualified persons for purposes of research related to the administration of criminal justice;
 - (B) by persons under contract under [18 U.S.C. § 3154\(4\)](#);
 - (C) by United States probation officers for the purpose of compiling presentence reports;
 - (D) to the attorney for the accused and the attorney for the government, to the extent that such information is a pretrial diversion report; and
 - (E) in certain limited cases, to law enforcement agencies for law enforcement purposes.

Note: As the regulations are mandated by Congress, they are entitled to the full force and effect of the law.

§ 240.20.20 Disclosure of Pretrial Services Information

- (a) Unless authorized by confidentiality regulations or directed by a judge for good cause shown, officers are not authorized to disclose or release pretrial services information, including the file and report. The prohibition on unauthorized disclosure applies regardless of whether such disclosure is sought through an officer’s direct testimony or by means of subpoena, subpoena duces tecum, or other form of judicial process.
- (b) Confidentiality regulations do not apply to pretrial services information that normally appears in the court public records, such as demographic or biographical information.

§ 240.20.30 Authorized Disclosures

Any disclosure of pretrial services information permitted under the provisions of the confidentiality regulations or ordered by the judge must be limited to the minimum information necessary to carry out the purpose of the disclosure.

- (a) Resolving Disputed Facts

Disclosure prohibition does not apply when an officer's testimony is necessary to resolve a disputed factual issue that is relevant to a release or detention determination when there is no practical way to resolve that issue, other than by reference to the information, file, or record.

See: [Guide, Vol. 20, Ch. 8 \(Testimony and Production of Records\)](#).

(b) Exceptions in 18 U.S.C. § 3153(c)(2)

Other than for the purpose of bail determination, pretrial services information should not be disclosed, except in the limited circumstances provided in [18 U.S.C. § 3153\(c\)\(2\)](#).

(1) Research, Reviews, and Audits

- (A) Pretrial services information, including national electronic pretrial services information, must be available to AO staff for technical assistance, assessments, or other reviews of a pretrial services office or a probation office that performs pretrial services or for other research related to the administration of justice.
- (B) Upon written application to the chief pretrial services officer or the chief probation officer who supervises pretrial services, and with written notice to the chief of the AO's Probation and Pretrial Services Office (PPSO), the district's pretrial services information must be available to qualified persons for research related to the administration of justice.
- (C) Upon written application to the PPSO chief, national electronic pretrial services information must be available to qualified persons for research related to the administration of justice.
 - (i) Under [28 U.S.C. § 602\(d\)](#), the Director may "delegate any of [his or her] functions, powers, duties, and authority . . . to such officers and employees of the judicial branch of Government as the Director may designate[.]"
 - (ii) The Director authorizes the PPSO chief to implement and enforce these regulations.
 - (iii) In response to a request for data covered by these regulations, the PPSO chief must consider the following factors:

- (a) Whether the disclosure is in the best interests of the federal judiciary;
 - (b) Whether the disclosure would promote efficient operation of the federal pretrial services system and the enforcement of pretrial services laws in all United States courts;
 - (c) Whether the requested data can be obtained from other sources more efficiently and effectively;
 - (d) Whether honoring the request will be excessively costly or unduly onerous to AO staff;
 - (e) Whether the request meets the requirements of these regulations;
 - (f) Whether the disclosure of data would violate a statute, regulation, or ethical rule;
 - (g) Whether the disclosure of data would disclose information regarding the exercise of judicial or quasi-judicial responsibilities by federal judicial personnel in the decisional or deliberative process or disclose judge-identifying information;
 - (h) The sensitivity of the information requested; and
 - (i) Any other consideration the PPSO chief may consider germane to the decision.
- (iv) The PPSO chief may consult with the Chiefs Advisory Group or convene a panel of subject-matter experts to assist in the determination of whether to grant a data request under these regulations.
- (D) “Qualified Persons”
- (i) “Qualified persons” are persons or organizations:

- (a) whose training and experience are appropriate to the nature of the research in which they propose to engage; and
 - (b) who perform such research with adequate administrative safeguards against the unauthorized disclosure of confidential information.
 - (ii) Any person or organization to whom pretrial services information is disclosed under this subsection must, before the disclosure of any pretrial services information, execute a nondisclosure agreement—affirming the continued confidentiality of information received. Such agreement must require that any such person or organization protect pretrial services information against unauthorized disclosure and maintain the anonymity of persons to whom information disclosed under this section pertains.
- (2) Contract Agencies
 - (A) Pretrial services information is available to individuals or organizations that have contracted with pretrial services to provide supportive services for the custody or care of persons who are released under [18 U.S.C. § 3154\(4\)](#).
 - (B) Contracts with such persons or organizations must include a nondisclosure agreement that recites the obligation of the persons or organizations to adhere to the confidentiality provisions of [18 U.S.C. § 3153\(c\)](#) and these confidentiality regulations.
 - (C) Family Members and Third-Party Custodians

If defendants have been released to the custody of the family, family member, or third-party custodian under [18 U.S.C. § 3142\(c\)\(1\)\(B\)\(i\)](#), the chief pretrial services officer or chief probation officer who supervises pretrial services may authorize the disclosure of pretrial services information to defendants' family members or a third-party custodian. In any other case, such officer must authorize disclosure of pretrial services information to family members or third-party custodians if:

- (i) in the officer's opinion, such information would be beneficial to the ongoing supervision or treatment of the defendant; and
- (ii) the defendant authorizes the disclosure in writing.

Such officer must not authorize any disclosure to family members or third-party custodians under this section if, in the officer's opinion, the disclosure of such information:

- (a) would violate a promise of confidentiality to the source of the information;
- (b) would result in harm to any person; or
- (c) would compromise the objective of confidentiality as set out in the confidentiality regulations.

(3) United States Probation Officers

Pretrial services information must be made available to United States probation officers for preparing a presentence report on the defendant or a codefendant, including any amendments or supplements to such report. The probation officer must not disclose pretrial services information, except when:

- (A) such information is used in the presentence report; or
- (B) the probation officer determines that the information is relevant in connection with a proceeding under F.R.Crim.P. 32.1.

(4) Attorney for the Defendant and Attorney for the Government

Pretrial services information may be disclosed to the attorney for the defendant and the attorney for the government to the degree that such information is a pretrial diversion report.

(5) Law Enforcement

After giving due consideration to any promises of confidentiality to sources of pretrial services information and any harm to any person that might result from disclosure of pretrial services information, the

judge may order disclosure of such information to law enforcement agencies for the following purposes:

- (A) Investigation of a crime committed in the course of obtaining or maintaining pretrial release;
 - (B) Investigation of a failure to appear for the criminal judicial proceeding with respect to which pretrial services were provided;
 - (C) Investigation of a violation of a condition of pretrial release;
 - (D) Investigation of an instance of child abuse or neglect; or
 - (E) Protection of the accused, law enforcement personnel, prison officials, or other care providers when:
 - (i) an arrest is contemplated;
 - (ii) the defendant is to be confined;
 - (iii) the defendant has escaped; or
 - (iv) there are other circumstances in which information must be disclosed to:
 - (a) protect such persons or the public against any risk of harm the defendant presents; or
 - (b) protect or provide necessary care to the defendant.
- (c) **Violations of Conditions of Release**
- Under [18 U.S.C. § 3154\(5\)](#), officers must inform the judge and the U.S. attorney's office of all apparent violations of pretrial release conditions and arrests of persons who are released under supervision.
- (d) **Risk of Harm**
- (1) Under [18 U.S.C. § 3154\(5\)](#), officers must inform the judge and the U.S. attorney of any danger that any such person may come to pose to any other person or the community. In compliance with this section, pretrial services officers:

- (A) must provide such pretrial services information as is necessary to fully advise the judge and the U.S. attorney of the nature and source of the danger; and
- (B) may request authorization to provide a warning to a party at risk or recommend any appropriate modification of release conditions.

Note: With the judge's approval, pretrial services officers may disclose such pretrial services information as is necessary to permit a party at risk to take appropriate protective action.

- (2) If a juvenile or a defendant poses an imminent danger to another person or the community and delaying disclosure pending the judge's approval would place another person or persons in danger of physical harm, the chief pretrial services officer or the chief probation officer, or his or her or designee(s) supervising pretrial services may authorize the officer to disclose such pretrial services information as is necessary to permit a party at risk to take appropriate protective action before informing the judge and the U.S. attorney and before obtaining the judge's approval. As soon as possible after such disclosure, the officer must provide the judge and the U.S. attorney with:
 - (A) notice of the danger;
 - (B) a description of the reasons for making immediate disclosure; and
 - (C) the information disclosed.

(e) Exculpatory Information

- (1) The judge may order the disclosure of pretrial services information if he or she finds that there is a substantial likelihood that the information is:
 - (A) material;
 - (B) exonerating on the issue of guilt; or
 - (C) germane to the issue of truth in an administrative, legislative, or judicial proceeding involving the individual charged or a third party; and
 - (D) would not otherwise be available in such a proceeding.

- (2) An officer may disclose any pretrial services information to the judge in camera when:
 - (A) the officer believes that pretrial services information contains material that might be disclosed under subparagraph (1) of this section; or
 - (B) when the person charged or a third party alleges that pretrial services information contains such material.

(f) Diagnostic or Treatment Information

The chief pretrial services officer or the chief probation officer who supervises pretrial services may authorize the disclosure of pretrial services information to a physician, psychologist, psychiatrist, or other health care professional or treatment provider:

- (1) to assist that person in providing diagnostic information in connection with the pretrial services report or pretrial supervision; or
- (2) to provide drug or mental health treatment to the defendant.

(g) Information of Benefit to the Individual Charged with an Offense

- (1) Upon the defendant's written request, the chief pretrial services officer or chief probation officer who supervises pretrial services may authorize the disclosure of pretrial services information about the person charged with an offense to aid the defendant in:
 - obtaining a social services benefit;
 - securing employment; or
 - providing information to a treatment center or health care provider.
- (2) Disclosure in these circumstances may be authorized if, in such officer's opinion:
 - (A) the disclosure of such information would not violate a promise of confidentiality to the source of the information;
 - (B) the disclosure would not result in harm to any person;
 - (C) the disclosure would not compromise the objective of confidentiality, as stated in the confidentiality regulations; and

- (D) the defendant is informed that the information disclosed may not be favorable.

(h) Status Information

The chief pretrial services officer or chief probation officer who supervises pretrial services may authorize the disclosure of pretrial services information consisting of “status” information regarding the defendant, such as current residence, telephone number, and current employer if, in the officer’s opinion, the disclosure of such information:

- (1) would not violate a promise of confidentiality to the source of the information;
- (2) would not result in harm to any person; and
- (3) would not compromise the objective of confidentiality as stated in the confidentiality regulations.

(i) Good Cause

The judge may order the disclosure of pretrial services information if such officer finds that there is good cause for such disclosure after considering:

- (1) any promise of confidentiality to the source of the information;
- (2) any harm that such disclosure might cause to any person;
- (3) the objective of confidentiality, as stated in the confidentiality regulations; and
- (4) the purpose of the disclosure.

(j) Use of Pretrial Services Information in Prosecution

Under [18 U.S.C. § 3153\(c\)\(3\)](#), pretrial services information is not admissible on the issue of guilt in a criminal judicial proceeding, unless the proceeding is:

- (1) a prosecution for a crime committed in the course of obtaining pretrial release; or
- (2) a prosecution for failure to appear for the criminal judicial proceeding with respect to which pretrial services were provided.

(k) Use of Pretrial Services Information in Cases Other Than Those for Which It Was Obtained

An officer may use pretrial services information obtained in one case to:

- (1) prepare a pretrial services report in another case; or
- (2) supervise a defendant in another case.

§ 240.20.40 The Pretrial Services Report

(a) Notation of Pretrial Services Information

In preparing the pretrial services report, the officer must note only information that is pertinent to the determination of release or detention and release supervision. The officer must not solicit, record, or indicate, in any form, information regarding the offense alleged, unless such information has been obtained from the public record. When such information is obtained from the public record, the source of information must be identified in the report.

(b) Deletion of Information from the Pretrial Services Report

Officers may ask the judge for whom the pretrial services report is prepared to delete information from the report before the report is made available to the attorney for the defendant and the attorney for the government. Information may be deleted when, after an in camera review, the judge determines that it:

- (1) would violate the promise of confidentiality by which it was obtained from the defendant or a third party; or
- (2) might result in harm to the defendant or a third party.

(c) Limitation on Making Pretrial Services Information Part of the Record

Pretrial services information must be made available to the judge consistent with [18 U.S.C. § 3154](#). But pretrial services information must not be made part of the public record. Only information that the judge specifically relies upon in making a release or detention decision and that is otherwise unavailable should appear in the public record. Consistent with this limitation, officers should not be called to testify regarding pretrial services information, unless such testimony is necessary to resolve a material fact.

(d) Disclosure of the Pretrial Services Report

- (1) The pretrial services report must be made available to the defendant, the defendant's attorney, and the attorney for the

government under the district court's practice and procedure in connection with:

- (A) a pretrial release or detention hearing;
- (B) a pretrial release revocation proceeding; or
- (C) any judicial proceeding to modify the conditions of release.

Note: Any copies of the pretrial services report disclosed under this provision must be returned to the officer at the hearing's conclusion.

- (2) The chief pretrial services officer or the chief probation officer supervising pretrial services may make the pretrial services report available to new or additional counsel for the defendant if such counsel:
 - (A) commenced representation of the defendant after the initial disclosure of the pretrial services report; and
 - (B) requests review of the report in writing.

Note: The request must stipulate that the purpose of the review is to prepare for a scheduled or contemplated pretrial release or detention proceeding. Any copies of the pretrial services report disclosed under this provision must be returned to the officer after inspection by counsel.

- (3) The pretrial services report should not be re-disclosed to other parties by defense counsel or the attorney for the government.