



## OPERATIONAL CIRCULAR

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**Subject:**      **PATIENT CONFIDENTIALITY AND DIVULGING PATIENT  
INFORMATION TO THIRD PARTIES**

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On 1 March 2006, the *Children and Community Services Act 2004* (“**CCSA**”) came into operation resulting in the repeal of the *Child Welfare Act 1947* (“**CWA**”).

This document has been prepared to replace Operational Circular 1970/05 by removing the sections on the CWA. Its purpose is to provide a broad overview to public hospital/health service and Departmental staff of the:

- a. Common law duty of confidentiality owed by health professionals to patients. Except to the limited extent mentioned in paragraph 5, 6.4 and 8 below, a discussion of statutorily imposed duties of confidence is outside the scope of this document.
- b. The general circumstances in which confidential patient information may be disclosed to third parties under the common law.

A separate Operational Circular has been issued to cover key provisions under the CCSA including those dealing with disclosures of confidential information to the Department for Community Development.

This document is not intended to be, nor should it be relied upon as, a substitute for legal or other professional advice. Public hospital, health service and Departmental staff who are unsure of applicable legal obligations, should request legal advice tailored to the individual circumstances from Legal & Legislative Services. Royal Perth Hospital, Sir Charles Gairdner Hospital, Fremantle Hospital, King Edward Memorial Hospital and Princess Margaret Hospital may alternatively seek legal advice from the State Solicitor’s Office.

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**PATIENT CONFIDENTIALITY AND DIVULGING CONFIDENTIAL PATIENT  
INFORMATION TO THIRD PARTIES**

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## Definitions

1. Terms used in this document have the following meanings:

<b>Child or minor</b>	A person who is under the age of 18 years.
<b>CCSA</b>	<i>Children and Community Services Act 2004.</i>
<b>Health professional</b>	Medical practitioners, nurses and allied health professionals providing medical treatment and care to patients.
<b>Patient</b>	Is synonymous with 'client' and 'consumer'.
<b>Parental responsibility</b>	In relation to a child, means all the duties, powers, responsibilities and authority that, by law, parents have in relation to their children.
<b>Public health authority</b>	Department of Health or any area health service, public hospital or other agency within WA Health.
<b>Third party</b>	Is a person other than the person to whom the patient has disclosed or caused to be disclosed confidential information in the course of obtaining medical treatment and care.

## Duty of confidence

2. Health professionals (including public health authorities) are under a duty to maintain the confidentiality of all information that comes to them in the course of providing medical treatment and care to patients. The duty protects information created, disclosed or acquired (directly or indirectly) by health professionals in their professional capacity.
3. All persons including administrative staff, who come into contact with the information as part of the health care process, have a duty to maintain the confidentiality of that information.
4. The general principle is that the duty of confidence prevents the disclosure of the information to individuals and organisations not involved in the particular health care process. However, not all information obtained during the professional relationship is confidential. Information in the public domain is not confidential. Trivial or useless information will similarly not fall within the scope of the duty.
5. The duty of confidence can arise by statute, under the common law and in equity. The duty does not end when the professional relationship with the patient has ceased. Nor does it end with the death of the patient.

## Consequences of breach of confidentiality

6. A breach of the duty of confidence can have a number of potential consequences. For instance, it may lead to:
  - 6.1 Disciplinary action by the employer of the person who made the unauthorised disclosure.

- 6.2 An action for damages against the person who made the unauthorised disclosure and/or his or her employer.
- 6.3 A disciplinary proceeding under the health professional's regulatory statute.
- 6.4 The imposition of a fine where there is a contravention of a statutory duty of confidence.

### **Disclosure of patient information**

- 7. There are a number of exceptions to the duty of confidence where otherwise confidential information may be disclosed to third parties. Where the duty arises under the common law or in equity, these exceptions include:
  - 7.1 Where consent has been given by or on behalf of the patient.
  - 7.2 Where disclosure is required or permitted by operation of the law.
  - 7.3 Where an overriding public interest justifies disclosure of the information.
- 8. Where a statutory duty of confidence exists, it is necessary to look to the relevant statutory provision for the circumstances (if any) in which the confidential information may be disclosed to third parties.

### **Disclosure by consent**

#### **Generally**

- 9. Where a mentally competent adult patient expressly consents to the disclosure of his or her confidential information to a third party, it will not be a breach of the duty of confidence to disclose the information provided disclosure is consistent with the consent given. In other words:
  - 9.1 Only the persons or organisations to which the consent has been given may divulge the information to the third party.
  - 9.2 Only information falling within the scope of the consent given may be disclosed.
  - 9.3 The information may only be disclosed to those persons or organisations in respect of which consent has been given.
- 10. Consent to release confidential information need not be expressly given in each circumstance and may be implied in certain situations. The concept of 'implied' consent looks to the circumstances in which the information was provided to the health professional and asks whether they were such that the patient must be taken to have implicitly consented to a disclosure of the type being contemplated.
- 11. For example, individuals within a particular health care facility who have a legitimate therapeutic interest in the care of the patient may generally have access to the information they need to know in order to provide appropriate medical treatment and care. Consent to the sharing of information in these circumstances will generally be implied. Similarly, patients will generally be taken to have accepted impliedly the administrative procedures of the health care facility involved.

12. If a health professional wants advice, or simply wishes to talk over the patient's treatment with a colleague who is not involved with the patient's care but the patient has not expressly consented to the same, identifying information should not be given.
13. Where the information is required for emergency treatment at another health care facility, the information should be given but after verification of the requesting body or person, by taking their name and telephone number and ringing back. A note should be made of the information released, to whom it was released, and the reason for the request. Where the request is non-urgent, the patient's express consent should be obtained before the information is released.
14. Wherever there is doubt about whether a patient has consented to the release of his or her confidential information in a given circumstance, the express consent of the patient should be sought.

### **Consent on behalf of minors and mentally incompetent adult patients**

15. The parents of a patient who is a minor are usually the appropriate persons to give consent to the release of the minor's confidential information to third parties. In the case of a mentally incompetent adult patient, the patient's legal guardian (if any) should ordinarily give consent.
16. Parents have full parental responsibility for each of their children who are under 18 years. Parental responsibility is not affected by changes to relationships (i.e., if the parents separate, divorce or remarry).
17. This means either parent may in general give consent to the release of confidential information on behalf of their children who are minors. However, the consent of both parents is preferable where possible to avoid potential conflict.
18. Parental responsibility can be varied by court order in which case, consent to the release of confidential information pertaining to the child concerned will have to be obtained in accordance with the court order.
19. In a family breakdown situation (i.e., separation or divorce), parental responsibility may be varied where the court makes an order stipulating that one parent has certain responsibilities to the exclusion of the other parent. The court can make 4 types of parental orders: residence orders, contact orders, child maintenance orders and specific issues orders. The court may make any combination of these types of orders.
  - 19.1 A **residence order** or **specific issues order** may stipulate that one parent has sole responsibility for the child's day-to-day care, welfare and development. If this type of order has been made, that parent will be the only parent that can consent to the release of information pertaining to the child the subject of the court order.
  - 19.2 If there is an arrangement for the child to live with one parent for part of the time and the other for part of the time, this is a **residence order**. Both parents retain full parental responsibility for the child. The consent of either parent would be sufficient to authorise the release of confidential information pertaining to his or her child the subject of the court order.
  - 19.3 If a **specific issues order** is made granting one parent the sole responsibility for health care decisions, that parent will be the only parent that can consent to the release of health information pertaining to his or her child the subject of the court order.

- 19.4 A **maintenance order** provides for the financial support of the child. Both parents retain full parental responsibility for the child. The consent of either parent would be sufficient to authorise the release of confidential information pertaining to his or her child the subject of the court order.
20. Protection orders made under the *Children and Community Services Act 2004* (“**CCSA**”) can (depending on the type of protection order made) vary parental responsibility. While parental responsibility for children placed in or taken into provisional protection and care or subject to a Negotiated Placement Agreement under the CCSA generally remains with the parents, the Chief Executive Officer of the Department for Community Development (“**DCD**”) has statutory authority to make decisions on behalf of such children in specified circumstances.
21. As a general rule, it is reasonable to assume that either parent can consent (alone) to the release of confidential information relating to his or her child unless information is available to suggest different arrangements are in place (e.g., a court order varying parental responsibility or a child in provisional protection and care of DCD). In that event, further enquiries should be made to identify the appropriate person with authority to give consent on behalf of the child. In some cases, this will include obtaining a copy of any applicable court order.
22. If a parent asserts there are no court orders concerning the custody or care of the child but doubt remains it may be prudent to have the parent sign a fresh authority to release with an express declaration that his or her parental responsibility has not in any way been fettered by court order before releasing any information.

### **Mature minors**

23. Minors may consent to the release of confidential information on their own behalf provided they adequately understand and appreciate the reason for and consequences of the information to be released.
24. Whether a patient who is a minor is sufficiently mature to make decisions concerning the release of confidential information on his or own behalf, will vary from case to case. There is no fixed age rule. Consequently, it cannot be said with any certainty that a minor who has reached a certain age is capable of making a decision in respect of his/her own person. Equally, it cannot be said that below a certain age a minor is incapable of doing so.
25. Where a health professional has appropriately assessed a child patient to be a ‘mature minor’, it will be more difficult for the patient’s parents or other legal guardian to subsequently assert their parental rights have been interfered with in the event confidential patient information pertaining to that child is released to third parties as agreed to by the ‘mature minor’.
26. Health professionals who assess a patient as a ‘mature minor’ should make a note of the factors taken into account in reaching that conclusion.
27. If in any doubt as to the ‘maturity’ of the minor to consent to the release of his or her confidential information, it is prudent to obtain the consent of the minor’s parents or other persons vested with parental responsibility for the child, unless the minor objects.

### **Deceased patients**

28. In the case of a deceased adult patient, the deceased's personal representative (i.e., an executor under a Will or administrator where the deceased is intestate) is the relevant person to give consent to the release of confidential information.
29. However, the availability of the personal representative's consent will not obviate the need to follow the third party consultation process under section 32 of the *Freedom of Information Act 1992* where access to a deceased patient's confidential medical records are sought pursuant to that legislation unless, of course, the personal representative is also the deceased's 'closest relative' within the meaning of that provision.

### **Disclosure by operation of the law**

30. Disclosure of confidential information may be permitted or required by operation of the law. For example:

#### **Statutory disclosure**

31. A statute may impose a legal duty on health professionals and other individuals to disclose certain information. For example, Section 300 of the *Health Act 1911* requires medical practitioners to give notification to the Department of Health's Executive Director, Public Health of any person with a venereal disease in an infectious stage.
32. Alternatively, a statute may permit the disclosure of otherwise confidential information in specified circumstances without creating a legal obligation to do so. For example, sections 129(1)(a) and 23(3) of the CCSA which permit information to be divulged to DCD in specified circumstances.
33. Where confidential information is disclosed to the responsible body pursuant to a statutory authority there will be no actionable breach of confidence. However, information disclosed must be limited to that necessary to comply with the statutory requirement or to that permissible under the relevant statutory provision.

#### **Subpoenae and summonses**

34. A subpoena (sometimes called a summons) is an order of the court that requires the subpoenaed party to attend the court to either produce documents, give evidence or both.
35. A subpoena cannot compel the creation of a document that does not already exist. In other words, it cannot compel a health professional to prepare a medical report for use by a party to legal proceedings.
36. Failure to comply with a valid and properly served subpoena can amount to contempt of court.
37. Confidential communications between health professionals and patients are not privileged. Consequently, health professionals can in general be compelled at law to disclose clinical or other information concerning a patient in court by means of a subpoena to produce documents or a subpoena to give oral evidence. Where confidential patient information is divulged to a court in response to a valid subpoena no breach of confidence will arise.

38. Where a patient's medical records are subpoenaed, the patient should be informed of the subpoena where the patient is not a party to the proceedings. The patient should be advised of the date of compliance (return date) for the subpoena as well as the place, date (generally the same as the return date) and time of any court hearing that has been listed for the return of the documents. The patient should be provided with this information as soon as possible to allow sufficient time for the patient to arrange to attend the court should he/she wish to raise objections to the documents subpoenaed.
39. It is possible for a subpoenaed party to apply to the court for an order to set aside a subpoena or raise objections to production of documents the subject of a subpoena in certain circumstances. For example:
- 39.1 *Abuse of process* – It may be possible to have the subpoena set aside where a party to legal proceedings compels production and inspection of documents other than for a legitimate forensic purpose (for example, the subpoenaed documents are not relevant to the issues in dispute in the action).
- 39.2 *Oppression* – It may be possible to have the subpoena set aside where the terms of a subpoena are so wide and insufficiently precise as to make compliance (the collation and production of documents) onerous. Similarly, it may be possible to set aside the subpoena where it is used for the purpose of "fishing" for information that a party hopes but does not reasonably expect is in existence.
- 39.3 *Public interest immunity* – It may be possible to set aside a subpoena where the public interest that would be served by withholding certain documents is so strong that it overrides the public interest in following due process. For example, documents which may affect national security or some other extraordinary public interest.
- 39.4 *Legal professional privilege* – Communications between a solicitor and client, or between a solicitor and another person, created for the dominant purpose of the client being provided with legal advice or professional legal services relating to a pending or anticipated court proceeding may be protected from disclosure in court proceedings.
- 39.5 *Qualified privilege* - Qualified privilege applies to quality improvement committees that have been formally established pursuant to the provisions of the *Health Services (Quality Improvement) Act 1994*. Section 10 of that Act operates to prevent documents created by or at the request of an approved quality improvement committee (or solely for the performance of the committee's functions) being used in civil proceedings unless the document has been made available to the public or given to the Minister or the governing body of the Committee. Similarly, any person who acquires information solely as a result of an approved quality improvement committee performing its functions is neither competent nor compellable in civil proceedings to divulge or communicate that information to any court.
40. Depending on the complexity of the case, advice should be sought before lodging a challenge to a subpoena or before assuming that the confidentiality of a patient communication will be immune from court-ordered disclosure.
41. At the same time, officers within the WA Health should not freely or without question disclose to the court information that they have an ethical or legal duty to keep confidential. Courts are sensitive to legitimate claims to client confidentiality, will hear argument on them, and will act fairly to preserve them in appropriate circumstances.

## Public interest disclosure

42. As a general principle, the 'public interest' exception recognises that there may on occasion be a need to breach confidentiality because of an overriding public interest favouring disclosure of the information to a third party. In such circumstances, the disclosure of the information to a responsible authority may be justified.
43. The public interest exception to the duty of confidence is founded in public policy. It is the most important and controversial exception to a health professional's duty of confidence.
44. Where there are competing public interests, one favouring the preservation of confidentiality and one favouring disclosure, the more compelling public interest should prevail.
45. The notion of public interest is flexible but has no clearly defined rules governing when disclosure is permitted and when it is not. It can therefore sometimes be difficult to determine where the balance of public interest lies in a given case.
46. Disclosure of confidential information in the public interest will only be justified in exceptional circumstances. This usually arises in circumstances where there is a real and identifiable risk of danger to the public (which can include a single person) requiring immediate action. The risk must be sufficiently grave.
47. In these circumstances, confidential information may be disclosed to a responsible authority. Disclosure must only be made to a responsible authority with a proper interest in receiving the information. Disclosure must not be made to the world at large. Further, the risk to the public or an individual must be a 'real risk' and only the facts necessary to reduce or eliminate the risk concerned should be disclosed.
48. For example, a health professional in possession of confidential patient information that suggests there is an immediate and real danger posed by a patient to the life or health of a child requiring urgent action to avert the danger, may be justified in disclosing that information to the DCD or the police where that is the only means by which to address the particular risk concerned. Similarly, an overriding public interest may justify a disclosure to the DCD or the police where the person's whose life or health is in immediate and real danger is the patient who is a minor (i.e., a person under 18 years of age).
49. The law in the area of what constitutes a 'public interest' is complex and uncertain. Whether disclosure of otherwise confidential information is justified in the public interest is a question of fact to be determined in the circumstances of each individual case. This necessarily involves determining whether the public interest served in maintaining the confidence is outweighed by the public interest in disclosing it.
50. Any decisions as to whether information in relation to a patient should be provided to third parties on the basis of an overriding public interest should be made only at a senior level within the relevant public health authority's administration. Wherever practicable, it is recommended that there be consultation with the treating medical practitioner. The factors taken into account in reaching a decision to disclose confidential information in the public interest should be well documented.

51. It is recommended that legal advice be sought before a 'public interest disclosure' is made.

### Disclosing confidential information to the WA Police Service

52. In Western Australia, there is no general legal obligation on health professionals and other individuals to report the commission or suspected commission of an offence to the police. However, some statutes permit the reporting of certain offences (e.g., the *Firearms Act 1973*).
53. Health professionals and other WA Health officers are not legally required to assist the police with their enquiries by answering questions, providing witness statements or preparing medical reports or other documentation not already in existence. The police cannot compel compliance with such requests, which may be declined without any offence being committed.
54. However, where assistance is given to the police, the individual providing the assistance must not give false or misleading information. Any active steps taken to prevent or obstruct the discovery or investigation of an offence by the police will constitute an offence. Consequently, whilst it would be an offence to mislead the police, it would not in Western Australia be an offence to simply decline to volunteer information to the police.
55. However, the police do have the power to compel the production of pre-existing documentation by means of a valid search warrant or similar court order.
56. In the absence of a valid search warrant or similar court order, the circumstances in which confidential patient information may be disclosed to the police without a breach of confidence arising are:
- 56.1 Where the police provide the written consent of the patient (or other person with legal authority to consent on the patient's behalf such as the parents or other legal guardian of a patient who is a minor) and information is disclosed in accordance with the consent given.
- 56.2 Where disclosure is made pursuant to a statutory protection. For example, the *Firearms Act 1973*. Under that Act, if a medical practitioner is of the opinion that a person is seeking or has sought medical assistance for an injury in which the practitioner believes a firearm or ammunition has been involved, the medical practitioner may inform the Commissioner of Police of that opinion. The medical practitioner may inform the Commissioner notwithstanding any duty of confidentiality. Where the medical practitioner acts in good faith in this regard, no criminal or civil action or remedy will arise.
- 56.3 The disclosure can be justified on the basis of an overriding public interest.

In the absence of specific statutory protection or appropriate patient consent, health professionals wishing to report a suspected crime, will need to be satisfied the disclosure falls within the public interest exception to the duty of confidentiality.

It will be a question of judgment in each case whether the gravity of the offence or suspected offence, or the risks to the individual patient or to the public generally of non-disclosure, justifies information about a patient being revealed to relevant

authorities in the public interest. The disclosure of a non-trivial breach of the criminal law will be easier to justify in the public interest than less serious crimes.

It is recommended that advice be sought before a 'public interest disclosure' is made.

56.4 Disclosure of confidential patient information in response to a summons to produce documents or to give evidence must be made to the court and not the police.

### Disclosing confidential information to the Corruption and Crime Commission

57. The Corruption and Crime Commission ("**the CCC**") has powers that enable it to gain information from a public authority or public officer. There are a number of methods by which the CCC can request the information.
58. Request for a Statement of Information: A written notice pursuant to section 94 of the *Corruption and Crime Commission Act 2003* ("**the CCC Act**") may be served on a public authority or public officer which requires the authority or officer to produce a statement of information. The notice must specify or describe the information required, fix a time and date by which the statement of information must be produced and specify the person (being an officer of the CCC) to whom the production is to be made. The notice may allow another person acting on behalf of the public authority or public officer to produce the statement of information.
59. Request to produce a record or other thing: A written notice pursuant to section 95 of the CCC Act may be served on a person requiring that person to attend the CCC and produce to the person specified in the notice a record or other thing specified in the notice. Similarly to a section 94 notice, a section 95 notice may allow another person to satisfy the requirement.
60. Summons for witness to attend and produce things: The CCC may issue a summons (section 96 of the CCC Act). The summons needs to be signed and served on the person to whom it is addressed. The summons may require the person to attend before the CCC at an examination to give evidence, produce any record or other thing in the person's custody or control that is described in the summons, or do both of those things.
61. If a notice or summons is valid, it should be complied with. Failure to comply, without reasonable excuse, places a person in contempt of the CCC (section 158 of the CCC Act). The fact that disclosure may breach an obligation to keep information or documents confidential does not constitute a reasonable excuse under the CCC Act (section 157 of the CCC Act).
62. There is protection from civil or criminal liability for compliance or purported compliance in good faith with a requirement made under the CCC Act (section 221 of the CCC Act).
63. The CCC may include a notation on a section 94 or 95 notice or a summons to the effect that disclosure of information about the notice or summons, or about any investigation, examination or court proceedings relating to the notice or summons is prohibited (section 99 of the CCC Act). If there is a notation prohibiting disclosure it must be accompanied by a written statement describing the effect of section 167 of the CCC Act.

64. Even if there is a notation prohibiting disclosure there are certain circumstances in which disclosure can occur, for example, in accordance with any circumstances specified in the notation or to a legal practitioner for the purpose of obtaining legal advice or representation. If you think you need to disclose something prohibited in order to comply with a notice or summons please contact legal services before doing so.