



Government of **Western Australia**
Department of **Health**

Patient Confidentiality Policy

Title: Patient Confidentiality Policy

1. Background

The WA Health System collects health information in the course of delivering health services to patients on behalf of the State of Western Australia (the State). Health information is personal and sensitive in nature and patients have a right to expect that it will be treated in confidence by those who come into contact with it. Obligations of confidentiality fall on all health professionals involved in a patient's care, and on any person who comes into contact with a patient's health information in the course of their work with or for a Health Service Provider, a Contracted Health Entity or the Department of Health. Limited exceptions exist, as explained in this policy.

2. Scope

This policy is part of the Information Management Policy Framework and is binding upon every Health Service Provider and its staff members. The policy also applies to Contracted Health Entities (to the extent that the Contracted Health Entities provide health services to the State) and the Department of Health.

The policy applies to health professionals and any other clinical and non-clinical workers who come into contact with a patient's health information in the course of providing health (and support) services to the patient. This includes persons working in a permanent, temporary, casual, contracted, termed appointment or honorary capacity.

3. Policy statement

The *Patient Confidentiality Policy* provides a broad overview of:

- the common law duty of confidentiality that is owed to patients
- exceptions to the common law duty of confidentiality
- the statutory duty of confidentiality and permissible disclosures introduced by the *Health Services Act 2016*.

Other than a limited reference to the Health Services Act, it is beyond the scope of this policy to discuss statutory duties of confidentiality and disclosures of patient information authorised by statute.

Further information regarding the release of confidential information to a range of specific agencies is available on the [Legal and Legislative Services](#)' intranet site.

This document is not intended to be, nor should it be relied upon as, a substitute for legal advice. If legal advice is required it may be sought from Legal and Legislative Services.

3.1 Duty of Patient Confidentiality

Health professionals have a duty to maintain the confidentiality of all information that is directly or indirectly acquired, created or disclosed to them in the course of providing treatment or care to patients. This duty arises under common law, statute, and in equity, and it underpins the therapeutic relationship between the health professional and patient.

This duty extends to other persons who come into contact with the information as part of the delivery of health care to the patient, including workers performing non-clinical duties.

The duty of patient confidentiality continues beyond the delivery of care, beyond the end of the professional/clinical relationship, and beyond the death of the patient.

3.2 Breach of Patient Confidentiality

A breach of the duty of patient confidentiality may lead to:

- disciplinary action by the employer of the person who made the unauthorised disclosure
- disciplinary action by the health professional's regulatory body
- an action for damages against the person who made the unauthorised disclosure and/or his or her employer
- penalties, including fines, as specified in the Health Services Act or other legislation as relevant.

3.3 Disclosure of Patient Information

There are a number of exceptions to the duty of patient confidentiality. Where an exception applies, information that is otherwise confidential may or must, as relevant, be disclosed to third parties. Exceptions include where:

- the patient (or a person authorised to make decisions on their behalf) has given their consent to the proposed disclosure
- the law requires disclosure
- the law permits disclosure
- there is an overriding 'public interest' which justifies disclosure to an appropriate person or authority.

3.3.1 Disclosure by Consent

- Confidential patient information may be disclosed to a third party if the patient has given his or her consent to that disclosure and the disclosure is made in accordance with the terms of that consent. For example, consent should clearly cover what information may be disclosed to whom.

- Consent may be either express (explicit) or implied. Boundaries of implied consent can be unclear. Doubt about what information may or may not be disclosed can be eliminated by obtaining express written consent. It is often preferable to obtain express written consent.
- Where a patient does not have the capacity to consent to the disclosure of their confidential information, another person may be able to make the decision on their behalf.
- If the patient who does not have the capacity to consent is an adult, generally speaking the appropriate person to consent to the disclosure of their confidential information will be either their Guardian or their Enduring Guardian.
- In the case of a deceased patient, consent for disclosure can be sought from the patient's personal representative (such as their executor or the administrator of their estate).
- If the patient who does not have the capacity to consent is a child, generally speaking the appropriate person to consent to the disclosure of their confidential information will be either of the child's parents.
- Parental responsibility is not affected by changes to relationships (for example, separation or divorce), although it may be varied by Court order. In that case, copies of the Court orders should be requested and, if necessary, legal advice obtained.
- While parents have parental responsibility until the child reaches 18 years of age, a child may themselves have the capacity to consent to the disclosure of their own confidential information. A child with this capacity is referred to as a "mature minor".
- A child will be a mature minor if they have the capacity to adequately understand and appreciate the reason for, and the consequences of, their confidential information being disclosed.
- There is no fixed age at which a child will become a mature minor and the child's capacity to make decisions may vary in different circumstances. A child's capacity must be assessed in respect of the circumstances relevant to the decision that is to be made.
- The Health Services Act specifies that personal information may be disclosed with the consent of the person to whom it relates (s.220(1)(h)).

3.3.2 Disclosure by Operation of the Law

Disclosure of confidential information may be authorised because the law either permits or requires the disclosure. In either case, disclosures can be made in the absence of patient consent.

An example of where the law authorises disclosure of information is in section 220 of the Health Services Act. Disclosures are authorised in circumstances including (but not limited to):

- for the purpose of, or in connection with, performing a function under (i) the Health Services Act or (ii) another written law
- in response to orders issued by a court or tribunal
- for the purpose of investigating a suspected offence or disciplinary matter
- where the patient has consented to disclosure (in respect of personal information, which includes health information).

Apart from the Health Services Act, there are many other statutory provisions that either permit or require the disclosure of confidential information.

Further information about the release of confidential information to specific agencies is available on the Legal and Legislative Services intranet site.

3.3.3 Disclosure in the Public Interest

- The 'public interest exception' to the duty of patient confidentiality may, in some very limited circumstances, authorise the disclosure of confidential information to a third party.
- This exception to the duty of confidentiality is founded in public policy. It is recognised that the public interest in preserving the confidentiality is, on rare occasions, overridden by a public interest which justifies breaking the confidence.
- While the exception is well recognised, the law in the area of what constitutes a public interest is complex and uncertain.
- Generally speaking, the exception will authorise the release of confidential information if the information relates to a serious wrongdoing which is in the public interest to disclose, or if disclosure of information is required to avert threatened serious harm to particular individuals or to the public.
- It is a question of judgment in each case whether the situation justifies disclosure. If the gravity of the wrongdoing or the risks to the safety of individual(s) warrants disclosure, that disclosure must be (i) made to an appropriate authority and (ii) limited to information that must be shared in order to avert the risk or bring attention to the wrongdoing.
- It is recommended that legal advice be sought before making a public interest disclosure.

4. Definitions

Common Law	Law developed in courts over time; case law. Principles that emerge from case law can be binding on courts when they determine (decide) subsequent cases with similar circumstances.
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Consent	Voluntary agreement to some act, practice or purpose.
Consent - express	Explicit permission for a specified activity to proceed. Express consent may be communicated verbally or in writing.
Consent - implied	Assumed or inferred permission for an activity to proceed based on a person's actions or inactions.
Data Steward	A position with delegated responsibility from the Director General of the Department to manage a data collection. The Data Steward's primary responsibility is to protect the privacy, security and confidentiality of information within data collections. Data Stewards also approve the conditions for appropriate use and disclosure of information for clearly defined purposes that comply with WA Health's statutory obligations and Information Management Policy Framework.
Duty of Confidentiality	Obligation imposed on persons by common law, statute and /or equity which requires that information of a certain character (e.g. personal or otherwise sensitive information) be treated in confidence by those to whom it is made known or becomes known.
Equity	The body of law which supplements the common law; it may apply where there is no relief available under common law.
Guardian	A person who has the legal authority (and the corresponding duty) to make certain decisions in relation to another person's personal and or financial affairs, where that latter person has become incapable of making such decisions themselves.
Enduring Guardian	A person formally appointed to make lifestyle, health and medical decisions for another person in circumstances where that latter person is not capable of making such decisions for themselves.
Health Information	Means : (a) information, or an opinion, that is also personal information, about: (i) the health (at any time) of an individual; or (ii) a disability (at any time) of an individual; or (iii) an individual's expressed wishes about the future provision of health services to the individual; or (iv) a health service provided, or to be provided, to an individual; or (b) other personal information collected to provide, or in providing, a health service.

	(Refer to section 213 of the <i>Health Services Act 2016</i>).
Health Service Provider	Health Service Provider means a health service provider established under clause 32 of the <i>Health Services Act</i> and may include North Metropolitan Health Service (NMHS), South Metropolitan Health Service (SMHS), Child and Adolescent Health Service (CAHS), WA Country Health Service (WACHS), East Metropolitan Health Service (EMHS), Quadriplegic Centre and Health Support Services (HSS).
Information Policy Framework	Means a policy framework issued under section 26(2)(k) relating to information Under s.214 of the Health Services Act, the Department (of Health) CEO is required to establish and maintain systems for the collection, receipt, storage and disclosure of, and access to, health information. The health information management system is to be controlled in accordance with an information policy framework.
Mature Minor	A person under the age of 18 who has been assessed as possessing sufficient maturity and capacity to make a particular health care decision on their own behalf. Assessment must relate to the decision(s) to be made and cover capacity to understand the consequences of the proposed action(s). A mature minor can consent to disclosure of their own health information to others.
Personal information	Has the meaning given in the <i>Freedom of Information Act 1992</i> in the Glossary clause 1: Means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead — (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.
Public Interest Disclosure	Disclosure of confidential information in circumstances where obligations of confidentiality are outweighed by real and identifiable serious risks to the safety of an individual or individuals, where disclosure to an appropriate authority is necessary to avert the threat. Disclosures under this 'exception' to confidentiality should be made with caution. See notes above.
Statute	A formal written law (Act) passed by the Parliament of Western Australia or other legislature.
Statutory Duty	Formal duties or obligations imposed on persons or bodies by legislation (statute).

5. Roles and responsibilities

Health professionals and other clinical and non-clinical workers

Health professionals and any other clinical and non-clinical workers are responsible for maintaining the confidentiality of all information that is directly or indirectly acquired, created or disclosed to them in the course of providing treatment or care to patients or performing their duties under the terms of their employment.

Data Stewards

Data Stewards are responsible for ensuring that relevant guidelines, policies, standards and legal advice are considered before approving the disclosure of health information from data collections and systems.

6. Compliance

Failure to comply with this policy may amount to a breach of duties of confidentiality imposed by common law, equity, statute and/ or professional codes of conduct. A breach may result in any or all of the following:

- disciplinary action by the employer of the person who made the unauthorised disclosure
- disciplinary action by the health professional's regulatory body
- an action for damages against the person who made the unauthorised disclosure and/or his or her employer
- penalties, including fines, as specified in the Health Services Act or other legislation as relevant.

7. Evaluation

The policy will be reviewed by Legal and Legislative Services at least every three years to account for new legislation, policy frameworks and processes.

8. References

Legal and Legislative Services intranet site:
<http://intranet.health.wa.gov.au/LLSD/home/index.cfm>

9. Relevant legislation

Health Services Act 2016

Health Services (Information Sharing) Regulations 2016

Health Practitioner Regulation National Law (WA) 2010

Commonwealth Privacy Act 1988 (Australian Privacy Principles)

Corruption and Crime Commission Act 2003

Criminal Code Act 1913

Freedom of Information Act 1992

Freedom of Information Regulations 1993

Mental Health Act 2014

Privacy Act 1988 (Cth)

Public Sector Management Act 1994

State Records Act 2000

10. Related documents

[Data Stewardship and Custodianship Policy \(OD 0487/14\)](#)

[Guidelines for the Release of Data \(IC 0208/14\)](#)

[Information Use and Disclosure Policy \(OD 0539/14\)](#)

[Information and Communications Technology \(ICT\) Physical and Environmental Security \(OD 0506/14\)](#)

[Information Security Policy \(OD 0389/12\)](#)

[Information Storage and Disposal Policy \(OD 0559/14\)](#)

[Information Use Policy \(OD 0572/14\)](#)

[Mobile Computing Devices Policy and Guidelines Policy \(OD 0336/11\)](#)

[Practice Code for the Use of Personal Health Information Provided by the Department of Health \(IC 0177/14\)](#)

11. Authority

Title:	Patient Confidentiality Policy
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Contact:	Legal and Legislative Services		
Directorate:	System and Corporate Governance		
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