

## NEW DISCUSSION POINT FOR NWT'S HSPL: DISCLOSURE

### I. SIGNIFICANCE OF TOPIC

The term disclosure has been referred to in the context of other discussion points, namely: authorized uses, *who* collect, uses, and discloses information, and (in contrast to) access rights and the concept of access.

In order for HSPL to operate with reference to its main information management terms (i.e. collection, use, disclosure, access and correction), the distinction of disclosure vis-à-vis the use is critical, and the distinction of vis-à-vis access is also fundamental.

### II. STARTING POINT

For clarity, it is useful to set out in operating definition of disclosure:

.... in relation to personal health information in the custody or control of a custodian or other person, means to make the information available or to release it but does not include a use of the information and "disclosure" has a corresponding meaning

For greater context, we can think of disclosure as the movement of health information between custodians (or 'octopus units') *and* the movement of health information outside the circle of care. When health information moves strictly between a custodian and its affiliates, it remains only a use, not a disclosure.

### III. STRUCTURE OF DISCLOSURE SCHEME

Disclosure obligation in Canadian HSPL commonly starts with the first general rule that health information can only be disclosed to the individual the information is about, or an individual who is acting with lawful authority for that individual. Next, a general exception

is set out which provides that health information can be disclosed with consent of the individual.

It is at this point, that the HSPL differs across Canada. In some cases, only express consent is acceptable. In other cases, implied and express consent can be relied upon. In the latter, implied consent serves to allow the disclosure of information within the circle of care - that is, among custodians - and express consent is required where a custodian discloses information outside the circle of care.

Finally in the scheme, if the general exception of consent is not applicable, an *exhaustive* list of specific situations that allow for disclosure without consent are set out.

Accordingly, two key issues are to be discussed:

- whether varying forms of consent should be considered; and
- what ought to constitute those specific situations which will allow health information to be disclosed without consent of the individual.

**IV. FORMS OF CONSENT**

The following chart summarizes the key advantages and disadvantages with the various approaches to consent:

	<b>Advantages</b>	<b>Disadvantages</b>
<b>Only Express Consent</b>	<ul style="list-style-type: none"> <li>• Only one form of consent, minimizes chance of confusion between forms of consent, and generally may improve understanding and implementation of HSPL given simplicity.</li> </ul>	<ul style="list-style-type: none"> <li>• Sends underlying message that consent is not required for disclosures between custodians, in this way adopts more paternalistic role on the part of custodians.</li> </ul>
<b>Implied Consent &amp; Express consent</b>	<ul style="list-style-type: none"> <li>• Supports principle and context that unless information is being disclosed to the individual (or an individual's lawful authority) consent, of some degree, is required - a less paternalistic approach.</li> </ul>	<ul style="list-style-type: none"> <li>• Creates risk of confusion between various forms of consent, and risk that implied consent will be utilized when express consent is required, thus exposing risks to privacy interests of individual.</li> </ul>

It is relevant to consider that Alberta's model adopts an approach where only express consent is contemplated. In the event NWT intends to maintain and increase relations with Alberta (with respect to health informatics and specially electronic health record systems) an approach that is consistent with operatives may be preferable.

The federal *Personal Information and Protection of Electronic Documents Act* ("PIPEDA") as well as Newfoundland's new each HSPL contemplate implied and express consent. In considering NWT's intention to have its HSPL be 'substantially similar', an approach that is consistent with the scheme in PIPEDA may be preferable.

## V. SITUATIONS EXCEPTING CONSENT REQUIREMENT

Below is a general summary of the common situations in Canadian HSPL where health information may be disclosed without the consent of the individual. It should be noted that even where such situations are set out, the basic principle is that health care professionals, whenever possible, should:

- (i) make every reasonable effort to obtain the patient's consent before disclosing the information;
- (ii) apply discretion judiciously; and
- (iii) only disclose the least amount of information to serve the purpose.

Also note, some pieces of HSPL require that health service providers document all activities (pertaining to disclosures of health information) in the patient's medical record and, when appropriate, advise the patient of the decision to have disclosed the relevant information.

- ***Disclosure for the Provision of Healthcare***

If the disclosure of personal health information is reasonably necessary for the provision of healthcare and it is not reasonably possible to obtain the patient's consent in a timely manner, a health service provider may disclose the relevant

information, unless the patient has expressly instructed the health service provider otherwise.

- ***Disclosure to a Family Member or Friend***

Situations may arise where health service providers are asked by a family member or friend about the condition of a patient. Discussions with friends and family ought to be limited to basic information about the patient's general state of health.

- ***Disclosure Related to Safety and Risks***

A health service provider may disclose personal health information about an individual if the health service provider believes, on reasonable grounds, that the disclosure is necessary to eliminate or reduce a significant risk of serious bodily harm to a person or group of persons. The disclosure may be made to police, and in some instances, to the intended victim(s).

- ***Mandatory Reporting***

Certain statutes have reporting provisions that may require the health service provider to provide information about a patient. Examples of legislation requiring mandatory reporting include NWT's child welfare legislation and public health legislation.

- ***Summonses, Subpoenas and Court Orders***

In the course of litigation or other legal processes, health service providers may be required by a summons, subpoena or a court order to disclose a patient's personal health information and patient records.

When personal health information is disclosed to the police, health service providers are encouraged to record the officer's name and badge number, the request for information, the information provided, and the authority for the disclosure (e.g. search warrant or summons).

- ***Disclosure with Respect to Incapacity***

When health service providers have reasonable grounds to believe that an individual does not have capacity in the disclosure would be the best interests, a disclosure may be permitted.

- ***Disclosure for Purpose of Regulating/Investigating Health Providers***

Disclosure of personal health information to the professional regulatory colleges may be permitted for the purposes of administering and enforcing the related legislation.