

## 12 Patient access and amendment (HPPs 6, 7 & 8)

### 12.1 Access to personal health information (HPPs 6 & 7)

The *HRIP Act* allows a person to apply for access to information a health service holds about them.

- **HPP 6** requires a health service to take reasonable steps to allow a person to ascertain if the service holds information about them.
- **HPP 7** establishes a right to apply for access to that information.

Health services are required to inform patients of these options at the time information is collected (see Section 7 Collecting personal health information (HPPs 1-4)).

### 12.2 Interaction of *HRIP Act* and *Government Information (Public Access) Act 2009 (GIPA Act)*

The general principle under both privacy and *GIPA Act* laws is that **a person will be presumed to have a right to access the information an organisation holds about them**. This also reflects NSW Health policy since at least 1989.

The *GIPA Act* provides any person with a right to apply for access to information held by NSW government agencies, including personal and health information. Access to personal health information is through “formal access”. The Act establishes four ways for the public to access government information:

#### 1. **Mandatory Disclosure**

NSW Health agencies must disclose certain information, known as open access information, unless there is an overriding public interest against disclosure. It is unlikely that mandatory disclosure would include personal health information. In most cases, open access information must be available on the agency’s website.

#### 2. **Informal Release**

Agencies are encouraged to release information without the need for a formal application, unless there are good reasons to require one.

#### 3. **Proactive Release**

Agencies are encouraged to release as much information as possible free of charge or at the lowest reasonable cost.

#### 4. **Formal Access**

If information cannot be accessed as above, a formal access application may be necessary.

In practice, NSW Health agencies generally process applications for health information under the *HRIP Act* as this is a less onerous process for both the agency and the applicant. Where an individual specifically asks for their application for access to health information under the *GIPA Act*, this can and should be done.

Refer to local Health Information Service for advice on local processes for access under the *HRIP* and *GIPA Acts*. See Section 4.2.2 *Government Information (Public Access) Act 2009*

## 12.3 Where access is refused

The *HRIP Act* recognises that sometimes circumstances will arise where access may be refused. This is most often likely to arise where access may place the person seeking their information, or another person, at risk of harm. HPP 7 therefore allows refusal of access if a refusal “is authorised or allowed under a law”.

This provision is designed to recognise circumstances where access could be refused under the *GIPA Act*. If access can be refused on this basis under the *GIPA Act*, the health service will be “lawfully authorised” to refuse access under the *HRIP Act*. However, in such circumstances, decision making should be clearly documented, including in which circumstances access will not be granted, which considerations were made to determine whether to disclose or not disclose certain information, and the professional status of the person who has made that decision.

There may also be other grounds for refusal in the *GIPA Act*. Staff should refer any enquiries to their local GIPAA Right to Information Co-ordinator.

Prior to refusing access to personal health information, staff should consult with the Privacy Contact Officer for their agency.

### 12.3.1 Reasons for refusing access

The *HRIP Act* access provisions focus on individuals accessing their own medical and health information. As such, it will be rare to refuse access.

Whilst a person is presumed to have the right to access information about them (or the person they represent), the *GIPA Act* requires an agency to consider whether it is in the public interest to disclose the information.

The most common circumstances where access may be refused for public interest reasons under the *GIPA Act*, and therefore also under the *HRIP Act*, are set out in the *GIPA Act* (see section 14, Table 3 of the Act), and are provided below.

#### ***12.3.1.1 The disclosure of information could reasonably be expected to reveal another individual's personal information***

Prior to providing access to a record, care must be taken to assess the record and identify any personal or personal health information which does not relate to the patient. This is sometimes referred to as ‘third party’ information.

In some circumstances, it will be reasonable to provide access to third party information, such as:

- where this information is already known to the patient,
- where the third party has provided their consent,
- where there is no reason for the health service to believe that disclosure of the third party information would unreasonably reveal another individual's personal information.

In other circumstances, it will be necessary to withhold either all of the third party information, or part thereof.

Consideration must be given as to whether it would be unreasonable to disclose all or part of the third party information, given certain factors including:

- whether disclosure of the third party information could endanger the life or physical safety of any person,
- whether disclosure of the third party information may reveal the personal health information of any person (including details such as Hepatitis C or HIV status),

- whether disclosure of the third party information relates to views, events or circumstances which the patient, or the person seeking access, may not be aware of, and it would be unreasonable in the circumstances to disclose this information.

### **Carer details**

Health records may contain details about the patient's carer, particularly records relating to children and young people in out-of-home-care, people with a disability and the elderly. Care must be taken not to disclose carer details where it is not evident that this information is already known to the patient, or person acting on behalf of the patient.

### **Staff details**

The names of staff included in a health record is generally not considered 'personal information' and can be disclosed, unless:

- disclosure could reasonably be expected to expose the staff member to a risk of harm,
- other privileges apply, such as in the case of a report to Family and Community Services (FACS), where all references to the staff 'reporter' are to be removed, including previous or subsequent entries made in the health record of their name or designation. Other notations of a report being made should also be removed.

Some examples of where third party information contained within a record may be withheld (redacted) are provided below.

*Example 1: A health record about a young person contains personal health information about their parent's mental health at the time of their birth about which the young person may not be aware. As the young person's health record contains third party information, this may only be provided with the parent's consent, even though it is part of the young person's health record. An alternative would be if consent is absent, all references to third party information must be blacked out (redacted) prior to access being provided to the young person.*

*Example 2: A patient of a sexual health service gives a detailed history about his exposure to HIV which includes details about his partner's sexual health and HIV positive status. As this patient's health record contains third party information, subject to additional protections under the Public Health Act, care must be taken around its release. In circumstances where the third party, (in this case, the partner) has not consented to the release of their personal health information in relation to their HIV status or other sexual history, all references to third party information must be blacked out (redacted) prior to any access being provided to the health record.*

### **12.3.1.2 The disclosure of information could reasonably be expected to expose a person to a risk of harm**

Care must be taken to identify whether the release of information may have an adverse impact on the physical or mental health of the applicant, or any other person, including a child, staff members, etc.

In rare circumstances where the treating health practitioner considers access could be prejudicial to the physical or mental health of the patient or to another person, the health record may be referred to a third party such as an independent health practitioner for assessment. If this occurs, the health record plus the assessment should then be referred to the Department Head or Director of Medical Services for review and a decision made as to whether the applicant should be granted access to all or part of the health record. In some cases it may be necessary for access to be provided via a health practitioner nominated by the applicant.

Where it is determined that access provides no risk or minimal risk to the physical or mental health of an individual, but there remains a concern as to the impact the information may have on the applicant, a written explanation to this effect should be given to the applicant encouraging them to seek advice from a health practitioner if they have any concerns or questions. A copy of this should be retained on the health record.

Where it is determined that access will not be granted under the *HRIP Act*, then reference should be made to section 14 of the *GIPA Act* (see Section 12.4 Providing access). Consideration should then be given to the public interest considerations against disclosure and/or whether conditions should be placed on the release of the health information.

### **12.3.1.3 The disclosure of personal information about a child would not be in the best interests of the child**

When access is sought to information relating to a child and there are concerns that disclosure may adversely affect the child, a senior health practitioner should carefully review the health record to determine whether disclosure is in the best interests of the child.

*Example: The child's parents are separated. The child lives with her mother but sees her father on alternate weekends. There are no parenting orders in place and each parent is entitled to seek access to the child's health record. The child's relationship with her father has been strained but is improving and to this end she has been seeing a community social worker. Her father has sought access to these counselling records and the clinicians are concerned that the child's progress (and her relationship with her father) will deteriorate if he has access to these health records. The clinicians may rely upon the public interest considerations against disclosure in the *GIPA Act*, section 14, to refuse the father's access to these health records, namely, that the disclosure of personal information about the child would not be in the best interests of the child (see the *GIPA Act*, Table at 3(g)). The clinicians will also need to provide the father with a reason for this decision, as it is not sufficient to only quote the legislation. Guidance can be sought from the Legal & Regulatory Services Branch.*

### **12.3.1.4 The disclosure of information could reasonably be expected to contravene an Information Protection Principle under the Privacy and Personal Information Protection Act 1998, or a Health Privacy Principle under the Health Records and Information Privacy Act 2002**

When providing access to information, care must be taken not to breach the privacy principles. Important principles to be mindful of when processing a request for access are:

- Take reasonable steps to maintain the **security** of health records, and protect health records from unauthorised access, use, modification and loss. For example, an applicant should not be left alone with the original health record during access.
- Take reasonable steps to maintain the accuracy and completeness of health records, ensuring that information is relevant, accurate, up-to-date, complete and not misleading. For example, if an individual's health record is stored in different formats (electronic and paper) and/or different locations, ensure the applicant is provided with access to all relevant information, following assessment.
- Be mindful that access to health information can only be provided with the **consent** of the individual to whom it relates, or their authorised representative.

**Note: Personal health information may also be released in accordance with Health Privacy Principles 10 and 11** (see Section 11 Using & disclosing personal health information (HPPs 10 & 11)).

## **12.4 Providing access**

Where access is granted, it can be provided in the following manner:

- electronic or paper copy
- direct access, by supervised viewing of the health record on the health service's premises. A health practitioner or health information manager must always supervise access to health records. Patients may request the assistance of a health practitioner in interpreting the health record.
- a copy sent to a health practitioner nominated by the applicant as allowed for in the *GIPA Act*, Section 73(3), which states:

*A condition may be imposed that access to medical or psychiatric information will only be provided to a health practitioner nominated by the applicant and not to the applicant personally."*

It is at the discretion of the health service to determine whether this is necessary, for example:

- i. where there is a risk of harm to the applicant or any other person or child, which could be avoided if access is provided via a health practitioner
  - ii. where the applicant has requested access via a health practitioner.
- copies sent to a third party, such as an insurance company, solicitor, or legal representative. This should only occur where the third party clearly acts for the applicant or has made the application on his or her behalf and has provided a written consent from the patient.

In all cases, care must be taken to only release the information which is requested. In the case of a subpoena, this will be listed in the Schedule. See Section 11.3.6 Search warrants and subpoenas.

The requirements for application imposed on access by patients mirror the requirements imposed on other third party access. See Section 11.2.2.1 Where a third party seeks access.

Copies of health records may also be provided to family members on compassionate grounds. See Section 11.2.9 Disclosure on compassionate grounds.

## 12.5 Other conditions of access

### 12.5.1 Parenting orders

Where a request is made from a parent in circumstances of divorce or separation, consideration should be given to the terms of any parenting order issued by the Family Court. Parenting orders set out the responsibilities and role of each parent.

Where there is no parenting order, both parents will retain parental responsibility for the children, and therefore have a right of access to the health record.

One parent's request for the other parent not to access the child's health record cannot of itself be a basis to refuse access, unless there are reasonable grounds to believe that this access would put the child, or another person, at risk of harm. See Section 11.3.2. Child protection.

### 12.5.2 Apprehended Violence Order

Where there is an Apprehended Violence Order (AVO)\* against a parent, this does not affect their right to **apply** for access to health information relating to their child. As with all applications, care should be taken not to disclose personal details, such as address details, personal or health information about a third party which may be included in the child's health records.

*\*This includes both an Apprehended Domestic Violence Order (ADVO) and an Apprehended Personal Violence Order (APVO).*

### 12.5.3 Reports to Family and Community Services (FACS)

The *Children and Young Persons (Care and Protection) Act 1998*, section 29 provides for the protection of persons who make reports or provide certain information to Family and Community Services (FACS).

Where access is being requested to reports made to FACS, the identity of the staff member who made the report, or information from which the identity of that person could be deduced, is privileged and must not be disclosed, except with:

- the consent of the person who made the report,
- the leave of a court or other body before which proceedings relating to the report are conducted.

Where consideration is being made for the disclosure of the identity of a staff member who has provided information to FACS, advice should be sought from a health information manager, Privacy Contact Officer or legal officer at the health service or Ministry of Health.



#### Further guidance

- Section 11.3.2 Child protection

### 12.5.4 Access by staff responding to a complaint, claim or investigation

When a staff member, including Visiting Medical Officer or Medical Officer, seeks access to health records to respond to a complaint made about them or the care they provided, it is appropriate in most cases that they be provided with access to relevant health records to enable them to respond to the complaint, claim or investigation, without the need to seek consent from the patient.

This is usually achieved by providing the staff member with supervised access to the health records at the relevant health care facility. However, in some cases the staff member may need to spend more time reviewing the health record and it is reasonable that they are provided with a copy of the relevant parts of the health record. Access may normally also be provided where the staff member is no longer involved in providing treatment to the patient.

Alternatively, relevant health records may be provided to the staff member's solicitor, and this may be required where the staff member is no longer employed by the organisation. Before releasing health records to a solicitor, the health service should first obtain written confirmation from the solicitor that they act on behalf of the staff member.

In releasing any of this material to either a solicitor or a VMO/MO, health services should reiterate their privacy obligations with respect to the health records. For example, health services should include wording to the effect of:

*"Information relating to [XXX patient] is provided to you to assist you in responding to a [complaint/claim/investigation] regarding your conduct. You are required, in accordance with privacy laws, to keep this information confidential and to only use it for the purpose of responding to the current [complaint/claim/investigation]."*

In the case where a staff member is responding to a claim of professional misconduct, where appropriate, a staff member may be permitted to view relevant medical records. This would most likely occur under supervision and at the discretion of the investigator.

In rare circumstances, it may be inappropriate to provide a staff member with access to health records, for example, where there are reasonable grounds to believe that providing access may present a risk of harm to any person(s), or where access could compromise legal proceedings. Legal advice should be sought in such instances.



#### Further guidance

- Section 11.2.1 Directly related purpose
- Section 11.2.2 Consent
- Section 15.6 Legal claims and insurance

## 12.6 Obtain proof of identity

When seeking access to personal health information, as a minimum an applicant must provide proof of identity in the form of a certified copy of any one of the following documents:

- Current Australian driver's licence
- Current Australian passport

- Other proof of signature and current address details (2 proofs of identity may be required in this case).

In addition to the above minimum requirement, a health service may require further proof(s) of identity at their discretion.

If applying by mail, certified photocopies of identification can be accepted.

A certified copy requires the signature and authorisation by a Justice of the Peace (JP) or solicitor to certify that it is a true copy of the original document.

## 12.7 Fees and charges

**HPP 7** requires that a health service provides access to health information without excessive expense.

For guidance on fees and charges for access to health information, health services should refer to the NSW Health policy on fees and charges for access to health records.



### Further guidance

- PD2006\_050: Health Records and Medical/ Clinical Reports – Charging Policy

## 12.8 Additions and corrections (HPP 8)

**HPP 8** allows individuals to request a health service to make appropriate amendments to their personal health information.

**HPP 8** provides that an amendment can be requested to ensure:

- the information is accurate
- the information is relevant, up to date, complete and not misleading, taking into account the purpose for which the information is collected and used.

Health services should not alter a health record unless of the view that it is necessary to do so in line with the above criteria.

The request for amendment should be retained in the patient's health record.

Patients should be notified of the outcome of their request for amendment, and if amendment is refused, the reason for the refusal.

### 12.8.1 Where an alteration is included

Untraceable alterations or deletions to clinical information held in the health record should not be made. Original incorrect entries should not be erased but lined through, or otherwise appropriately amended to reflect the correct information, so the original entry remains retrievable and readable.

Electronic record systems will automatically record a history of alterations and deletion, including meta data relating to date, time, and user details.

The reason for the amendment should be noted in the health record, dated and signed.

Nothing in these provisions should be taken to prevent the routine updating of demographic information, such as address, contact details and patient's general practitioner details.

### 12.8.2 Where an alteration is refused

If the changes requested by the patient (or other authorised party) do not meet the requirements of accuracy, completeness, etc. as set out in **HPP 8(1)**, the health service is required in **HPP 8(2)** to **take such steps as are reasonable** to attach additional information as an addendum to the health record. In addition, the patient's own comments should be attached as an addendum to the health record on request, along with an explanation of the circumstances.

