

LEGAL AND ETHICAL CONSIDERATIONS IN RELATION TO REQUESTS FOR PATIENT INFORMATION

Promotion of Access to Information Act, 2000 (Act 2 of 2000)

Chapter 1: Definitions and Interpretation

1. Definitions

"personal information"

Means information about an identifiable individual, including, but not limited to-

- a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
- b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
- c) any identifying number, symbol or other particular assigned to the individual;
- d) the address, fingerprints or blood type of the individual;
- e) the personal opinions, views or preferences of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;
- f) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- g) the views or opinions of another individual about the individual;
- h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and
- i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,
but excludes information about an individual who has been dead for more than 20 years;

"record"

of, or in relation to, a public or private body, means any recorded information--

- a) regardless of form or medium;
- b) in the possession or under the control of that public or private body, respectively; and
- c) whether or not it was created by that public or private body, respectively;

"request for access"

in relation to--

- a) a public body, means a request for access to a record of a public body in terms of section 11; or
- b) a private body, means a request for access to a record of a private body in terms of section 50;

"third party"

in relation to a request for access to--

- a) a record of a public body, means any person (including, but not limited to, the government of a foreign state, an international organisation or an organ of that government or organisation) other than--
 - i) the requester concerned; and
 - ii) a public body; or
- b) a record of a private body, means any person (including, but not limited to, a public body) other than the requester,

but, for the purposes of sections 34 and 63, the reference to "person" in paragraphs (a) and (b) must be construed as a reference to "natural person";

"individual's next of kin"

means--

- a) an individual to whom the individual was married immediately before the individual's death;
- b) an individual with whom the individual lived as if they were married immediately before the individual's death;
- c) a parent, child, brother or sister of the individual; or
- d) if--
 - i) there is no next of kin referred to in paragraphs (a), (b) and (c); or
 - ii) the requester concerned took all reasonable steps to locate such next of kin, but was unsuccessful,an individual who is related to the individual in the second degree of affinity or consanguinity

Chapter 1: Right of Access, and Specific Application Provisions

11. Right of access to records of public bodies

- 1) A requester must be given access to a record of a public body if--

- a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
 - b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- 2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
- 3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by--
 - a) any reasons the requester gives for requesting access; or
 - b) the information officer's belief as to what the requester's reasons are for requesting access.

Chapter 3: Manner of Access

30. Access to health or other records

- 1) If the information officer who grants, in terms of section 11, a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being--
 - a) of the requester; or
 - b) if the request has been made on behalf of the person to whom the record I relates, of that person,

(in this section, the requester and person referred to paragraphs (a) and (b), respectively, are referred to as the "relevant person"), is of the opinion that the disclosure of the record to the relevant person might cause serious harm to his or her physical or mental health, or well-being, the information officer may, before giving access in terms of section 29, consult with a health practitioner who, subject to subsection (2), has been nominated by the relevant person.
- 2) If the relevant person is--
 - a) under the age of 16 years, a person having parental responsibilities for the relevant person must make the nomination contemplated in subsection (1); or
 - b) incapable of managing his or her affairs, a person appointed by the court to manage those affairs must make that nomination.
- 3)
 - a) If, after being given access to the record concerned, the health practitioner consulted in terms of subsection (1) is of the opinion that the disclosure of the record to the relevant person would be likely to cause serious harm to his or her physical or mental health, or well-being, the information officer may only give access to the record if the requester proves to the satisfaction of the information officer that adequate provision is made for such counselling or arrangements as are reasonably practicable before, during or after the disclosure of the record to limit, alleviate or avoid such harm to the relevant person.

- b) Before access to the record is so given to the requester, the person responsible for such counselling or arrangements must be given access to the record.

31. Language of access

A requester whose request for access to a record of a public body has been granted must, if the record--

- a) exists in the language that the requester prefers, be given access in that language; or
- b) does not exist in the language so preferred or the requester has no preference or has not indicated a preference, be given access in any language the record exists in.

Chapter 4: Grounds for Refusal of Access to Records

34. Mandatory protection of privacy of third party who is natural person

- 1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.
- 2) A record may not be refused in terms of subsection (1) insofar as it consists of information--
 - a) about an individual who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned;
 - b) that was given to the public body by the individual to whom it relates and the individual was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;
 - c) already publicly available;
 - d) about an individual's physical or mental health, or well-being, who is under the care of the requester and who is--
 - i) under the age of 18 years; or
 - ii) incapable of understanding the nature of the request, and if giving access would be in the individual's best interests;
 - e) about an individual who is deceased and the requester is--
 - i) the individual's next of kin; or
 - ii) making the request with the written consent of the individual's next of kin;
or
 - f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to--
 - i) the fact that the individual is or was an official of that public body;

- ii) the title, work address, work phone number and other similar particulars of the individual;
- iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual; and
- iv) the name of the individual on a record prepared by the individual in the course of employment.

Chapter 5: Third Party Notification and Intervention

47. Notice to third parties

- 1) The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1) must take all reasonable steps to inform a third party to whom or which the record relates of the request.
- 2) The information officer must inform a third party in terms of subsection (1)--
 - a) as soon as reasonably possible, but in any event, within 21 days after that request is received or transferred; and
 - b) by the fastest means reasonably possible.
- 3) When informing a third party in terms of subsection (1), the information officer must--
 - a) state that he or she is considering a request for access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be, and describe the content of the record;
 - b) furnish the name of the requester;
 - c) describe the provisions of section 34(1), 35(1), 36(1), 37(1) or 43(1), as the case may be;
 - d) in any case where the information officer believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46(a) in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 46 might apply; and
 - e) state that the third party may, within 21 days after the third party is informed--
 - i) make written or oral representations to the information officer why the request for access should be refused; or
 - ii) give written consent for the disclosure of the record to the requester.
- 4) If a third party is not informed orally of a request for access in terms of subsection (1), the information officer must give a written notice stating the matters referred to in subsection (3) to the third party.

A patient has the right to obtain copies of all information held on them. The next-of-kin of a deceased patient may also request information on the deceased, but it may be that certain information is too sensitive to reveal to the family.

Where third parties, such as insurance companies, medical aid funds, etc. request patient information, the medical practitioner may refuse on the basis of his/her ethical and legal duty to guarantee the patient's right to privacy/confidentiality. In these cases, the third party may be requested to provide proof of the informed consent of the patient that such information may be provided to such third party, or the law in terms of which the third party has the right to obtain the patient information. The information may only be disclosed if the doctor is satisfied that this is done in terms of relevant legislation or the patients consent.

The principle of severability is also found in the Promotion of Access to Information Act. This means that only information that the third party or patient is entitled to, may be disclosed. For example, only the medical information relevant to a motor-vehicle accident should be disclosed, or where families are concerned, only the information relating to the specific member of the family requesting his/her own information.

Health Professions Act 56 of 1974

Chapter 1: Professional Competence

Section 13: Professional confidentiality

- (1) A practitioner shall divulge verbally or in writing information regarding a patient which he or she ought to divulge only –
 - (a) In terms of a statutory provision;
 - (b) At the instruction of a court of law; or
 - (c) Where justified in the public interest.

- (2) Any information other than the information referred to in sub rule (1) shall be divulged by a practitioner only –
 - (a) With the express consent of the patient
 - (b) In the case of a minor under the age of 12 years, with the written consent of his or her parent or guardian; or

- (c) In the case of a deceased patient, with the written consent of his or her next-of-kin or the executor of such deceased patient's estate.

Section 27A: Main responsibilities of health practitioners

A practitioner shall at all times –

- (a) Act in the best interests of his or her patients;
- (b) Respect patient confidentiality, privacy, choices and dignity;
- (c)
- (d) Provide adequate information about the patient's diagnosis, treatment options and alternatives, costs associated with each such alternative and any other pertinent information to enable the patient to exercise a choice in terms of treatment and informed decision-making pertaining to his or her health and that of others;
- (e) ...
- (f) Maintain proper and effective communication with his or her patients and other professionals;
- (g) Except in an emergency, obtain informed consent from a patient or, in the event that the patient is unable to provide consent for treatment himself or herself, from his or her next of kin; and
- (h) Keep accurate patient records.

HPCSA POLICY DOCUMENT: UNDESIRABLE BUSINESS PRACTICES

4. Specific Issues

4.1 Access to confidential information

Access to confidential health care information about a patient by a third party requires the informed consent of a patient, his/her parent/guardian, executor of the estate/next of kin or curator as required by law.

One should guard against the rights of individuals being eroded by the possibility of payment being withheld on the basis of non-disclosure. Also blanket permission for disclosure by the member on behalf of dependants is questionable. The Medical

Schemes Act currently only requires schemes to take “reasonable” steps to protect confidentiality – this is considered to be inadequate protection for patients.

HPCSA GUIDELINES FOR GOOD PRACTICE

General Ethical guidelines for the healthcare Professions (Booklet 1)

5.4 Patient confidentiality

Health care practitioners should:

- 5.4.1 Recognise the right of patients to expect that health care practitioners will not disclose any personal and confidential information they acquire in the course of their professional duties, unless they agree to such disclosure, or unless health care practitioners have good and overriding reason for doing so (for example, if disclosure is not made, there is the likelihood of serious harm to an identifiable third party, or there is a public health emergency, or any overriding and ethically justified legal requirement).
- 5.4.2 not breach confidentiality without sound reason and without the knowledge of their patients
- 5.4.3 When claiming from medical schemes explain to patients the significance of ICD10 coding and get the permission of patients to breach confidentiality when making a medical scheme claim.

The information held on children over 14 years of age is also confidential and parents may not request their children’s files. A doctor, who fears that access to the file or information may cause the specific patient harm, must ask the patient to nominate a health care worker to whom the information is disclosed and who can then support the patient in the process of disclosure.

SHORT SUMMARY IN RELATION TO THE KEEPING OF INFORMATION

There are many opinions as to the length of time for which documents have to be stored. It has been suggested that 6 – 9 years may suffice, and that the records of minor children

should be kept until they reach majority (HPCSA Guidelines for good Practice: Booklet 14, regulation 9).

Take note that in terms of the Occupational Health and Safety Act no 85 of 1993, health records must be kept for a period of 20 years after treatment.

In terms of the Promotion of Access to Information Act, where a record is not available because it has been destroyed, the keeper of that record or patient file must make a sworn statement to that effect. The policy in terms of which that was done has to be attached to the affidavit.

In general, all records should be kept as safely as possible, so as to safeguard patient confidentiality. Patient records may also be stored on CD so as to save space, with appropriate controls on access, etc. (HPCSA Guidelines on Good Practice, Booklet 14, regulation 12).

All employees and co-health care workers are bound by the same rules of confidentiality.