

Berkshire Safeguarding Adults Boards' Information Sharing Protocol

April 2015

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This Protocol has been adopted by the Safeguarding Adults Boards for the West of Berkshire, Bracknell Forest, Royal Borough of Windsor and Maidenhead and Slough. It covers all of the agencies that form the West of Berkshire Board in the three unitary authority areas of Reading, Wokingham and West Berkshire. It provides a framework for making decisions about sharing information in order to help protect vulnerable adults who may be at risk of abuse or neglect.

The Protocol offers guidance to front-line staff in assessing possible risk to adults, and in balancing the risk against the rights to confidentiality and privacy of those who may be a source of risk.

The key stages in the procedure set out in the Protocol are to:

- assess the risk a person is thought to pose;
- decide which (if any) agencies or individuals need to be told, and what they need to know;
- consult the person causing concern; and (if appropriate)
- share the information, subject to a rider of confidentiality.

1 INTRODUCTION

PARTIES **1.1** This protocol is adopted by the Safeguarding Adults Boards for the West of Berkshire and the Boards covering Slough, Bracknell Forest and the Royal Borough of Windsor & Maidenhead. The composition of each Board is slightly different depending on local need.

PURPOSE **1.2 The purposes of this protocol are:-**

- a) **to promote** the safeguarding of adults by the carefully considered sharing of information about identified risks, and
- b) **to help** front-line staff fairly and consistently to balance the risks of non-disclosure against the infringement of individuals' rights to privacy and confidentiality.

STATUS

1.3 This protocol comprises local policy and procedure for inter-agency work to safeguard vulnerable adults within the national framework provided by the law, and Departmental and other guidance – see sections 42 to 45 of the Care Act 2014 and, in the Care and Support Statutory Guidance ¹ paras. 3.47 – 3.48 and chapter 14 on pages 189 – 224.

1.4 This protocol should be read together with any individual agency procedure governing information sharing to safeguard vulnerable adults. Any conflict between local procedures and this protocol should be discussed with a senior manager within the agency concerned and a legal adviser; it should also be reported for information to the Safeguarding Adults Board.

SCOPE

1.5 This Protocol only covers inter-agency sharing of information for purposes of safeguarding adults. In particular, it does not cover information-sharing or disclosure which is addressed in the following:-

- a) for disclosure between Social Care, Police and Crown Prosecution Service, the Thames Valley Disclosure Protocol ²;
- b) for patient- or service-user access to records, the Access to Records policy of the Agency concerned;
- c) for information-sharing or disclosure in connection with the Multi-Agency Public Protection Panel, the Panel's information-sharing or disclosure arrangements under MAPPa Guidance issued by the Ministry of Justice ³;
- d) for information-sharing in connection with a Multi-Agency Risk Assessment Conference (MARAC), any protocol adopted by member agencies.

PRINCIPLES

1.6 The principles underpinning this protocol are as follows:-

- a) selective disclosure of information is crucial to the inter-agency and inter-disciplinary processes of assessing and addressing risks to adults;
- b) confidential information will not be shared unless there is a clearly articulated case for doing so, based on the individual case and situation;

¹ Department of Health June 2014 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315993/Care-Act-Guidance.pdf

² Copies obtainable from the Joint Legal Team, 0118 937 2986. See also the (national) 2013 [Protocol](#) and Good Practice Model - Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (October 2013).

³ <http://www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf>

- c) confidential information will not be shared without informed consent, unless there are exceptional circumstances which justify disclosure despite an absence or refusal of consent;
- d) information-sharing is not an end in itself, but can be a crucial component of a successful, comprehensive safeguarding plan.

GUIDANCE FROM KEY PROFESSIONAL BODIES ON INFORMATION-SHARING

- NHS England’s [Confidentiality Policy](#)
- [Codes of Practice for Social Work](#)
- [Nursing and Midwifery Council Code of Professional Conduct](#)
- [CQC Code of Practice on confidential personal information](#)

2 OVERVIEW OF THE LAW

This is an outline of the law governing the sharing of confidential information. It is important to seek specific advice in the context of individual situations.

| | |
|--------------------------------|--|
| CONFIDENTIALITY AND PRIVACY | <p>2.1 Organisations holding personal information are under a common law duty of confidentiality which governs the way the information may be stored and disseminated. In addition, individuals have rights under the Data Protection Act 1998 and the Human Rights Act 1998 and European Convention on Human Rights.</p> |
| DATA PROTECTION ACT 1998 | <p>2.2 The Data Protection Act (DPA) covers the storage and dissemination of manually-recorded as well as electronic data. The DPA enables such information to be shared where this is “necessary” for a range of reasons. These include the legal duties of the person or body sharing or receiving the information; and where disclosure is necessary to protect the vital interests of another person (see schedules 2 and 3 DPA).</p> <p>2.3 This means that where disclosure is reasonably necessary to fulfil a statutory duty it is permitted. This includes the sharing of information about risk to an adult in the context of assessment under the Mental Health Act 1983 or the Care Act 2014.</p> |

CONSENT TO
DISCLOSURE

2.4 Consent should be sought to disclose personal information unless the person lacks capacity to give informed consent (Care and Support Statutory Guidance para. 14.55)

- “Informed consent” is consent based on a reasonable understanding of the implications of both disclosure and non-disclosure
- With an adult who lacks capacity to give informed consent, no-one can consent on their behalf, and the criteria in para. 2.5 below should be applied.

DISCLOSURE
WITHOUT
CONSENT

2.5 Where consent to disclose has been refused, or the person has not responded when asked to consent or lacks capacity to give informed consent, an assessment has to be made as to whether disclosure is “reasonable in all the circumstances”. This assessment should take into account:-

- a) any duty of confidentiality owed to the third party;
- b) the steps taken to obtain consent;
- c) whether the third party is capable of giving consent; and
- d) any express refusal of consent.

(See section 7 DPA ⁴). Any reasons given for refusing consent should be recorded and carefully considered in deciding whether or not to disclose the information.

CRIME AND
DISORDER ACT

2.6 Section 115 of the Crime and Disorder Act 1998

contains a general power for anyone to disclose information to Social Services, Probation, the Police or Health. Such disclosure has to be “necessary or expedient” for one of the purposes set out in the Crime and Disorder Act, which include “preventing or reducing crime”. This power goes in tandem with the duty under the Data Protection Act to seek consent to disclosure if possible.

CASE LAW

2.7 The courts have also made clear that disclosure based on sufficient evidence and a specific risk assessment is permitted. In the North Wales case⁵, the Court of Appeal held that it was lawful for the police to disclose information about a person’s convictions and history where they were assessed as posing a considerable risk to children and vulnerable adults. Disclosure should however only be made where there was a “**pressing need**” for it. The Court also considered that it would be important to forewarn people of the gist of the

⁴ Section 7 relates particularly to requests by individuals for access to information held about them. However its principles should also be applied when disclosing information for safeguarding purposes.

⁵ R v Chief Constable of North Wales Police ex parte Thorpe [1998] 2 FLR 571.

information held about them, and to give them the opportunity to comment before any information is shared.

2.8 On the other hand, in R (A) v National Probation Service (2003)⁶ the High Court held that the Probation Service were not entitled to inform the landlord of someone about to be released from prison (Mr A) that he had been convicted six years before of murdering his wife. Instead of addressing risk posed by Mr A to others and deciding if this warranted the exceptional step of disclosure, the Probation Service had assumed that the conviction should be disclosed unless there were reason not to.

2.9 The case of A Local Authority v SK & HK⁷ concerned proposed information-sharing with a care home for older people, one of whose staff had been found to have seriously and repeatedly assaulted her 8-year-old daughter. The mother denied responsibility and even forged a confession from a friend, whom the judge found did not exist. The court gave permission for this information to be disclosed to the care home and the local authority for the area. The judge stressed the links between abuse of adults and of children:-

“ ... the standards to be expected of those looking after children may be no less than those looking after vulnerable adults.”

HUMAN RIGHTS

2.10 In addition to rights to have information about them treated confidentially, individuals have the right to respect for their private and family life under Article 8 of the European Convention on Human Rights. Any disclosure of personal information is required to be “proportionate” to the risk involved and “necessary ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. The “rights and freedoms of others” would include the rights of others, including children and vulnerable adults under Article 3 of the Convention not to “be subjected to inhuman or degrading treatment ...”, which is likely to include most if not all forms of abuse and neglect.

2.11 Potential victims and those giving rise to concern also have the right under Article 6 to be given a “fair hearing”. This includes being kept informed, having their views recorded and considered, and being given a reasoned explanation of any decision about disclosure.

KEY LEGAL POINTS 1. The **disclosure** of personal information should be “the **exception not the rule**”

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⁶ [2003] EWHC 2910 (Admin)

⁷ [2007] EWHC 1250 (Fam) Sumner J.

⁸ Ex parte LM [2000] 1 FLR 612 at 622C.

2. **Informed consent** to disclosure should be sought **unless** the person lacks capacity to give informed consent, or seeking consent would place a child or vulnerable adult at risk of significant harm.
3. **Personal information should only be disclosed where there is a “pressing need” to do so.** Deciding whether there is a pressing need to disclose will depend on properly balancing the infringement of the individual’s rights to privacy and confidentiality against the assessed risk and the extent to which disclosure is likely to help reduce that risk.

3 DISCLOSURE OF INFORMATION IN INDIVIDUAL CASES

APPROACH TO
DISCLOSURE

3.1 The process of deciding whether to disclose confidential information will involve the following steps:-

- a) deciding the likely nature and degree of risk posed;
- b) deciding if this risk (and / or a duty on the part of the holder of the information or the proposed recipient) suggests a need to disclose;
- c) deciding if there is sufficient reason not to seek consent, and seeking any that is considered necessary; and
- d) if consent is refused or no response is received, deciding whether disclosure should be made in the absence of consent.

3.2 These decisions will be made in accordance with the principles set out at para. 1.6 above.

3.3 Decisions will be recorded by the agency holding the information, with reasons.

DISCLOSURE
WITH
CONSENT

3.4 Generally, the informed consent to disclosure of all those affected (whether they have provided the information, or are its subject) – will be sufficient authority to disclose, even when no considerations of risk arise. Consent should be recorded in writing if possible. **The holder of the information should ascertain that the disclosure is lawful and necessary to the stated purpose, irrespective of any consent.**

DISCLOSURE
WITHOUT

3.5 There are many types of information which should not be disclosed without consent in any event. Disclosure will only be

CONSENT

made **without** the consent of the person causing concern where it is assessed that:

EITHER a) the person lacks the capacity to give an informed consent,
OR b) the person has failed to respond despite reasonable attempts to obtain their consent,
AND
EITHER c) disclosure is necessary because of a legal duty on the part of the holder or recipient of the information,
OR d) the risk to an adult is such that the infringement of the person's rights to privacy and confidentiality is outweighed by the harm which would be caused by withholding the information.

FACTORS IN RISK ASSESSMENT

3.6 The source, degree and type of risk should be spelled out using the following risk factors:-

- a) Any convictions or cautions against adults or children, particularly for violence
- b) Any civil court findings that the person (may have) perpetrated abuse in the past and / or posed an unacceptable degree of risk⁹
- c) The professional view (at the time, or since) of the plausibility of any serious allegations which did not result in convictions or court findings
- d) The passage of time since any convictions, findings or plausible incidents
- e) Any therapy undergone, and outcome if known
- f) The level of risk indicated by any risk assessment carried out in the past
- g) The subject's attitude towards past convictions, findings and plausible incidents – degree of insight, empathy towards victims, awareness of triggers to abuse
- h) Extent of contact the subject is likely to have with vulnerable adults, unsupervised in particular, and
- i) The capacity of carers or others to protect adults who may be at risk.

⁹ It is important to note that the findings of courts sitting in private should not be disclosed to non-parties without the court's permission: see Re V & L [1999] 1 FLR 267.

DISCLOSURE
AFTER
CONSULTING

3.7 The person giving rise to the concern should usually be forewarned of the substance of the allegations against them and invited to comment before disclosure takes place. Such consultation should only be omitted in cases of serious, urgent risk where delay (or forewarning) will cause unacceptable risk. In such cases, the person should be informed after disclosure unless (very exceptionally) there is evidence that informing them even after the event will cause unacceptable risk.

EXPLAINING
DECISIONS

3.8 The reasons underlying any decision to disclose or not to disclose information under this protocol should be carefully recorded, and communicated to those who have been consulted prior to disclosure. Lay recipients should be reminded that the information is confidential and should be informed of the reasons for disclosure to themselves. Decisions to refuse disclosure requests should also be explained.

3.9 The range of decisions on disclosure is illustrated in the table below.

| <u>Disclosure decision</u> | <u>Rationale for disclosing (or not)</u> | <u>Rationale in relation to consultation / consent</u> |
|--|---|--|
| No disclosure even with consent | Disclosure not considered necessary for assessment of needs and risks to adults | Consultation and consent do not arise |
| Disclosure only with consent | Disclosure likely to be helpful in assessing needs and risks BUT ... → | Risks do not justify overriding confidentiality |
| Disclosure on notice | Disclosure necessary to safeguard adults | Subject has opportunity to a) comment on concerns and b) take advice prior to disclosure |
| Disclosure followed by informing the subject | Disclosure urgently needed to avert risk to adults | Urgency precludes consultation |
| Disclosure without informing the subject at any point | Disclosure urgently needed to avert risk to adults, AND ... → | Informing the subject is likely to cause unacceptable risk |