

# SOCIAL SERVICES

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## CONFIDENTIALITY AND SOCIAL SERVICES (PART III): A PROCESS FOR ANALYZING ISSUES INVOLVING CONFIDENTIALITY

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It is common knowledge that much of the information contained in the records of state and county social services agencies is “confidential.” But what, exactly, does it mean to say that information is confidential?<sup>1</sup>

- Does confidentiality mean that information<sup>2</sup> may *never* be disclosed to or shared with other agencies, the media, or the public?
- Are there exceptions to confidentiality that allow or require the disclosure of confidential information?
- When can social services agencies<sup>3</sup> obtain confidential information from other agencies or individuals?
- What rules<sup>4</sup> govern the acquisition, use, protection, and disclosure of confidential information by social services agencies?
- Where do these rules come from?

This is the third in a series of *Social Services Bulletins* that will attempt to answer these and other questions regarding confidentiality and social services in North Carolina. *Social Services Bulletin No. 30* (February, 2001) discussed the general meaning, purposes, nature, scope, and limits of confidentiality. *Social Services Bulletin No. 31* (May, 2001) examined the legal and quasi-legal sources of rules governing the acquisition, use, protection, and disclosure of confidential information. This *Social Services Bulletin* will

- a. identify some of the questions that social services agencies should consider when they are dealing with situations involving the protection, use, disclosure, or acquisition of confidential information; and
- b. suggest a process for answering questions, analyzing issues, and solving problems involving the use, disclosure, or acquisition of confidential information.

Subsequent *Social Services Bulletins* in this series will

1. index and annotate state and federal statutes and regulations governing the acquisition, use, protection, and disclosure of confidential information by social services agencies;
2. summarize and discuss these legal rules in greater detail; and
3. answer some of the questions regarding confidentiality that social services employees, directors, and attorneys frequently ask.

## Confidentiality and the Law: A Brief Summary of the Basics

Before discussing a suggested process that social services agencies and employees can use to answer questions, analyze issues, and solve problems involving their acquisition, use, protection, and disclosure of confidential information, it may be worthwhile to review and summarize some of the “basics” about confidentiality and the law that were examined in the first two bulletins in this series.

### What Is Confidentiality?

The term *confidentiality* refers to a fundamental property or characteristic of confidential relationships, confidential communications, or confidential information.

A *confidential relationship* may be defined broadly as a relationship based on privacy, intimacy, trust, or confidence (as in the case of relationships between a patient and her doctor, between a client and his attorney, between spouses, or even more broadly between friends).

*Confidential communications* include oral or written communications that are made within, and are necessary to, the existence of a confidential relationship. But the term may extend more broadly to include any communication between two persons that is *made in confidence* (that is, with the expectation that the persons who are parties to the communication will not disclose its content to others).

Similarly, *confidential information* clearly includes information that is generated within a confidential relationship or is contained within confidential communications. But information also may be considered confidential even if it is not the product of a confidential relationship or derived from confidential communications. For example, information may be considered confidential if

- the person to whom the information pertains has the right or ability to withhold that information from others or prevent it from becoming publicly known;
- a person who obtains the information has some duty not to disclose the information to others; or
- the information is so personal, private, intimate, sensitive, or embarrassing that, balancing the public and private interests involved, it is generally considered a matter of private rather than public concern.

The confidentiality of certain relationships, communications, and information also appears to be

related to the concept of personal *privacy*, and especially to one’s right to *informational privacy*—the right to control others’ access to, use of, and disclosure of information about oneself, including both *what information* is known to others and *who* knows it.<sup>5</sup>

### Confidentiality and the Law: Legal Rules

In a *legal* sense, information is confidential if an applicable legal rule (for example, a constitutional provision, federal or state statute, regulation, the common law, or a contract) designates the information as confidential and establishes legal rights, obligations, requirements, and restrictions governing the acquisition, use, protection, and disclosure of that information.

The law, however, does not provide one general or universal definition of confidentiality or establish general rules for determining whether information is confidential or the scope or extent of confidentiality.

Instead, the precise meaning, nature, and scope of confidentiality varies from case to case and may be determined only by examining the specific language of particular legal rules that govern the acquisition, use, protection, and disclosure of specific types of information in particular situations.

Legal rules protecting the confidentiality of information serve a number of important individual and social interests:

- protecting the expectations and rights of individuals with respect to personal privacy;
- protecting individuals from harm resulting from the public disclosure or misuse of personal information;
- encouraging, facilitating, and protecting certain individual, professional, and social relationships;
- furthering other individual, governmental, or social interests.<sup>6</sup>

Individual rights involving confidentiality, however, are also affected, and may be limited, by competing individual, governmental, and public interests that are in tension with individuals’ rights or expectations regarding informational privacy. Legal rules regarding confidential information, therefore, must be interpreted and applied in light of their purposes in restricting the acquisition, use, or disclosure of information and in light of other interests, policies, and rules that may limit the scope of individual privacy and confidentiality.

Thus, like most legal rights and duties, legal rights and duties with respect to confidentiality are seldom, if ever, absolute. Confidentiality, therefore, generally does *not* mean that confidential information may *never*, under any circumstances, be disclosed.

## A Process for Analyzing Confidentiality Issues

The following sections of this bulletin present a suggested process that social services employees, officials, and attorneys can use to answer questions, analyze issues, and solve problems regarding their acquisition, use, protection, disclosure, and acquisition of confidential information.

The four basic steps in the suggested process are:

1. clearly defining the question, issue, or problem involving confidentiality;
2. identifying the legal rule that applies to the question, issue, or problem;
3. reading and thoroughly analyzing the rule; and
4. applying the applicable legal rule to the question, issue, problem, or situation.

### Step One: Define the Issue

Finding the right answer to questions involving confidentiality is often difficult. In some instances, there is no clear “black and white” answer to questions involving the use, protection, disclosure, or acquisition of confidential information. But the chances of finding the right answer are clearly better if one starts by asking the right questions and clearly identifying the nature of the issue or problem to be solved.

The first step, then, in analyzing issues involving confidentiality is to clearly articulate the question, issue, or problem. At the most basic level, social services employees should first determine whether the issue involves—

- the agency’s authority to *obtain* confidential information from other agencies or individuals;
- the agency’s authority to *use* confidential information in its possession for purposes other than that for which the information was obtained or generated;
- the agency’s obligation to *protect* confidential information from unauthorized use or disclosure;
- the agency’s authority or obligation to *disclose* confidential information to other agencies or individuals *without the consent* of the person to whom the information pertains or the permission of the person or agency from whom the information was obtained;
- the agency’s *disclosure* of confidential information to other agencies or individuals *with the consent* of the person to whom the information pertains or the permission of the

person or agency from whom the information was obtained;

- the right of an individual to *examine or obtain copies* of agency records that contain confidential information about that individual;
- the *liability* of the agency and its officials, employees, and agents for the unauthorized use or disclosure of confidential information.

Having identified the general issue, the next step is to more clearly define it by answering a number of additional questions:

- *What* information is at issue?
- In what *form* (unrecorded, written, electronic) is the information maintained?
- *Who* has the information?
- *Where* is the information located?
- To *whom* does the information pertain?
- From *whom* was the information obtained?
- Who could *consent* to use or disclosure of the information? Has consent been given? Can a valid consent be obtained?
- For what *purpose* was the information collected or obtained?
- *Who* is seeking the information?
- *Why* is the information being sought?
- For what *purpose* will the information be used?
- Is the information available from *other sources*?

### Step Two: Identify the Applicable Rule

Having clearly defined the issue, the next step is to identify the applicable legal rule (or rules).

This is, of course, easier said than done. There are hundreds, if not thousands, of legal rules governing the acquisition, use, protection, and disclosure of confidential information. Some of these rules apply specifically to the acquisition, use, protection, or disclosure of confidential information by social services agencies, and many more affect the authority of social services agencies to obtain, use, or disclose confidential information even though they do not specifically refer to social services agencies.

Employees of social services agencies are at least somewhat familiar with some of the legal rules governing the confidentiality of information in social services records. They know, for example, that state law prohibits the unauthorized use or disclosure of agency records concerning recipients of public assistance or social services,<sup>7</sup> and that all information received by county departments of social services in

connection with investigations of reported child abuse, neglect, or dependency must “be held in strictest confidence.”<sup>8</sup> But they generally do not have ready access to these legal rules; know all the requirements of, and exceptions to, these rules; or know about the dozens of other legal rules (including constitutional provisions, federal statutes and regulations, state laws, the common law, and court decisions) that also may affect the agency’s acquisition, use, or disclosure of confidential information.

Subsequent *Social Services Bulletins* will attempt to address this problem by indexing and summarizing

- state and federal statutes and regulations that govern the use, protection, and disclosure of confidential information by social services agencies;
- legal rules that authorize the acquisition and use of confidential information by social services agencies; and
- other legal rules that may limit the acquisition and use of confidential information by social services agencies.

It is important to remember, however, that in some instances more than one legal rule may apply with respect to the collection, use, protection, or disclosure of information. In these cases, social services employees should seek legal advice from their agency attorney to determine how the rules “fit together” or which rule governs the collection, use, protection, or disclosure of information in a particular situation. For example, state law (G.S. 122C-52 through 122C-56) and federal law and regulations (42 C.F.R. 2) both apply to information regarding the treatment of persons for alcohol or drug abuse. The federal law and regulations “trump” state law to the extent that state law authorizes or requires the disclosure of information when disclosure of the information is prohibited by the federal law and regulations, but federal law does not preempt state law if state law prohibits the disclosure of information when disclosure is allowed under the federal law.<sup>9</sup>

### Step Three: Analyze the Rule

Identifying the legal rule that applies with respect to an issue involving confidentiality (step two of the process), of course, requires some analysis of the rule. Step three of the process, however, requires a more detailed *legal analysis* of the applicable rule.

In most cases, this legal analysis requires a determination of

1. the *object* of the rule (the type, form, subject, and content of the information the rule seeks to protect);

2. the *respondents* who are subject to that rule (the class of persons or agencies that are subject to its requirements or restrictions with respect to the use, protection, or disclosure of confidential information);
3. the rule’s *subject* (the class of persons whose interests or rights are protected);
4. the rule’s *reason* or *purpose* (the individual, governmental, and social interests or public policies that are protected or promoted);
5. the rule’s *requirements* with respect to acquisition, use, and protection of confidential information;
6. the *exceptions* under which disclosure of confidential information is allowed or required;
7. the *legal authority* upon which the rule’s confidentiality requirements are based; and
8. the *remedies* or *sanctions* that are available for enforcing the rule’s requirements with respect to confidentiality.<sup>10</sup>

Analyzing and applying confidentiality rules is a relatively simple and straightforward task when the rules clearly identify *what* information is considered confidential, *why* the information is considered confidential, *who* is subject to their requirements with respect to confidentiality, the *scope* and *limits* of their confidentiality requirements, and the *remedies* available to enforce their provisions.

This task is much more difficult, however, when a legal rule is unclear or incomplete. A statute or regulation that provides that certain information is confidential, but does not specify *who* is required to protect the confidentiality of that information, *whose rights* are being protected, *why* the information is confidential, or under *what circumstances* the information may be used or disclosed, is virtually meaningless (unless one can read between the lines or look behind the rule to determine the answers to these questions).

The following sections explore in more detail some of the questions and issues that social services employees should consider as they analyze and apply confidentiality rules.

### What Type of Information Is Confidential?

In analyzing a legal rule involving confidentiality, one of the first questions one should ask is: *what type of information* is considered confidential or protected by the rule?

From a legal standpoint, information is *confidential* only to the extent that an applicable legal rule classifies the information as confidential. The fact that an agency or individual considers information to be confidential, private, sensitive, or personal is *not* determinative of its confidentiality.

Every legal rule involving confidentiality specifies, at least generally, the object of its confidentiality requirements or restrictions—that is, the type of information, communication, or record that is considered confidential under the rule. Unfortunately, though, some confidentiality rules do not identify their object as precisely or clearly as they might.

In determining the object of a confidentiality rule, social services employees may need to consider the type, subject, content, source, location, form, and format of information, records, or communications.

Most confidentiality rules apply to specific *types* of records (for example, personnel files) maintained by an agency or to information or communications related to a particular *subject* (for example, individually identifiable personal health information). In the context of some confidentiality rules, though, the *location, ownership, or possession* of a record or the *source* from which information was obtained, as well as the type, subject, or content of the record, communication, or information, may be relevant.

Some confidentiality rules apply only to information that is maintained in a specific *form or format* (for example, written records). Others, however, apply more broadly to particular types of information regardless of the form in which the information is maintained. For example, the rules adopted pursuant to G.S. 108A-80 make it clear that information obtained by county social services departments regarding individuals who apply for or receive public assistance or social services is confidential regardless of whether it is oral or written, unrecorded or recorded, contained in an agency record, or stored electronically in computer files or data banks.<sup>11</sup>

### Who Is Subject to the Rule?

Analyzing and applying confidentiality rules also involve determining *who* is subject to a rule's requirements or restrictions with respect to confidentiality (that is, the *respondents* who are subject to the rule).

In many cases, confidentiality rules clearly identify which particular agencies and individuals are subject to their requirements. For example, doctors (and their agents and employees) are clearly the *respondents* who are subject to state statutes and professional rules governing privileged communications between patients and doctors.<sup>12</sup>

In some cases, however, the identity of the respondents who are subject to a confidentiality rule is not so clear. Determining the agencies and individuals who are subject to confidentiality is particularly difficult when a confidentiality rule is written in the passive voice. For example, G.S. 7B-302 provides that

all information obtained by a county department of social services in connection with the investigation of reported child abuse, neglect, or dependency “shall be held in strictest confidence.” But *who*, specifically, is subject to the requirement to hold information “in strictest confidence.” It seems obvious, of course, that the requirement applies to social services employees who obtain information about children, parents, and families while they are investigating reported child abuse, neglect, or dependency. But it is less clear that the requirement extends to other agencies or individuals who may have information related to child abuse or neglect investigations.

In some cases, confidentiality rules apply to a broad range of respondents. G.S. 108A-80, for example, makes it unlawful for *any person* to obtain, use, or disclose confidential information regarding social services clients except as allowed by law. This rule, therefore, applies not only to the county department of social services, county social services employees, county social services board members, and employees of the state Division of Social Services, but also to other federal, state, or local government officials, employees, and agencies, the media, and the public.<sup>13</sup> The broad application of G.S. 108A-80 also makes it clear that its restrictions apply not only to the “first-level” use or disclosure of information by state or county social services agencies, but also to “second-level” uses and redisclosures of confidential information by other agencies or individuals that obtain information from state or county social services agencies.

In other instances, confidentiality rules apply less broadly to a *particular type of individual* or to a *specific agency*. In these cases, it is clear that the specified individuals or agencies (and their employees and agents) are respondents who are subject to the confidentiality requirements established by these rules. If a rule applies only to specific respondents, use or disclosure of confidential information by individuals or agencies who are not subject to the rule's requirements is not prohibited, even though the unauthorized use or disclosure of the same information by a respondent would be prohibited. Sometimes, though, it may not be entirely clear whether a rule applies *only* to the respondents expressly identified by a rule or whether, considering the rule's purpose, subjects, and other factors, the rule may *implicitly* apply to other respondents as well.

### Whose Confidentiality Is Protected?

In some cases, analyzing confidentiality rules involves identifying the subject of a confidentiality rule (the

individuals or agencies whose confidentiality or privacy is protected by the rule or who have legal rights under the rule).

In some instances, an agency or individual that holds (or “owns”) information may be the subject of a confidentiality rule in the sense that the individual or agency itself has some interest or right with respect to the confidentiality or privacy of the information it holds. For example, the federal rules governing confidentiality of information about patients who are treated for alcohol or substance abuse require that

- a. persons seeking court-ordered disclosure of this information notify the facility or provider that holds the information, as well as the patient to whom the information pertains, that it is seeking disclosure, and
- b. in determining whether to order disclosure, a court consider the impact of disclosure on the physician-patient relationship and treatment services, as well as the potential injury to the patient that might result from disclosure.<sup>14</sup>

This suggests that alcohol and substance abuse treatment professionals and facilities, as well as patients, may be the rule’s intended subjects.

In most cases, however, the *subjects* of confidentiality rules are

- individuals to whom the information held by the agency or individual pertains;
- individuals who have some relationship with an agency or individual (for example, the agency’s clients, customers, and employees); or
- individuals who provide information to an agency or individual.

While this statement may seem obvious, its importance should not be overlooked. Among other things, it means that a social services agency generally may not assert confidentiality *in its own right* to shield itself from public scrutiny, but instead must apply confidentiality rules primarily on behalf of the *individuals* whose confidentiality or privacy is protected.<sup>15</sup>

Identifying the *subject* of a confidentiality rule may not only shed light on *what* information is confidential but also be important in identifying the *reason* or *purpose* of confidentiality, determining the *scope* and *limits* of a confidentiality rule, determining *who* may give or withhold consent for disclosure of confidential information, and determining *who* may be able to enforce the rule’s requirements with respect to confidentiality.<sup>16</sup>

Because protecting the informational privacy rights of individuals is one of the primary purposes of confidentiality, most confidentiality rules identify, either explicitly or implicitly, the class of individuals whose confidentiality or privacy is

protected. For example, G.S. 108A-80 clearly suggests that the subjects of its confidentiality restrictions are individuals and families who apply for or receive public assistance or social services from state or county social services agencies. By contrast, the subjects of the confidentiality restrictions in G.S. 7B-302(a) are less clearly defined. The subjects of G.S. 7B-302(a) clearly include persons who report suspected child abuse, neglect, or dependency. And one may reasonably infer that its subjects include the children who are the subjects of these reports. But it is not entirely clear whether the parents or caretakers of these children or other individuals or agencies who are involved in the agency’s investigation of reported child abuse, neglect, or dependency are also subjects of this confidentiality rule.

### Why Is the Information Confidential?

When the scope of confidentiality under a legal rule is not entirely clear or when a rule allows, but does not mandate, the disclosure of confidential information, social services employees may find it helpful to identify the purpose of confidentiality under the applicable rule.

Sometimes, confidentiality rules not only require that information be treated as confidential but also contain express statements regarding their reason or purpose. The federal Privacy Act, for example, includes a detailed statement of its purposes, and is accompanied by extensive background information and legislative history regarding the reasons for its enactment.<sup>17</sup>

More often, though, confidentiality rules do not include any express statement regarding the underlying purpose of confidentiality. In some cases, of course, the purpose of a confidentiality rule may be obvious. And even in the absence of an express statement of purpose or other information that sheds light on a rule’s purpose, one may still make an educated guess with respect to the reason for confidentiality under a particular rule.

One should not assume, however, that there is only one, single, fundamental reason or purpose (for example, individual privacy) for every confidentiality rule. Although protecting individual privacy is the primary purpose of many (probably, most) confidentiality rules, the reason that a particular rule protects individual privacy and the extent to which it protects individual privacy may be determined by a wide range of individual, governmental, professional, public, and social interests. And in some instances, those interests have little or nothing to do with the privacy interests or rights of individuals.<sup>18</sup> For example, the reason that G.S. 7B-302(a) requires that the names of persons who

report suspected child abuse, neglect, or dependency to the department of social services be held “in strictest confidence” probably has more to do with the public policy that seeks to protect children by encouraging individuals to report suspected child abuse, neglect, and dependency than with protecting the privacy of people who report child abuse or neglect.

### When May Information Be Collected?

In the Supreme Court’s 1977 decision in *Whalen v. Roe*, Justice Stevens recognized that violations of individual rights with respect to informational privacy or confidentiality may occur when the government

- a. *collects*, maintains, or uses personal information about an individual, *or*
- b. *discloses* that information to others.<sup>19</sup>

Analyzing and applying confidentiality rules, therefore, may require social services employees to determine whether or when a social services agency may *obtain* confidential information from individuals or other agencies as well as the circumstances under which the agency may use or disclose confidential information.

Some confidentiality rules expressly limit the authority of government agencies to obtain personal information. The federal Privacy Act, for example, requires a federal agency that requests personal information from an individual to inform the individual of the agency’s legal authority for requesting the information, whether disclosure of the information to the agency is mandatory or voluntary, and the purposes for which the information may be used.<sup>20</sup> The Privacy Act also limits (but does not completely eliminate) the authority of state and local governments to require individuals to disclose their social security numbers to state or local agencies as a condition of exercising any legal right or privilege.<sup>21</sup> Similarly, North Carolina’s Financial Privacy Act limits (but does not absolutely prohibit) the disclosure of financial records of bank customers to government agencies.<sup>22</sup>

On the other hand, some legal rules expressly authorize social services agencies, other government agencies, or individuals to obtain confidential information from other agencies or individuals even if disclosure of the information is generally prohibited.<sup>23</sup>

### How May Information Be Used?

Analyzing problems related to confidentiality may involve determining whether a rule restricts the *use*, as well as the acquisition and disclosure, of confidential information.

The mere fact that an agency is authorized to collect and retain confidential information does not

necessarily mean that the agency may use that information for a purpose other than that for which it was obtained. The federal Privacy Act, for example, generally allows federal agencies to use personal information only for purposes that are compatible with the purpose for which the information was collected.<sup>24</sup> Similarly, G.S. 108A-80 allows social services agencies to use confidential information about social services clients in their administration of public assistance and social services programs, but expressly prohibits the use of lists of social services clients for political purposes.

*Misuse* of confidential information by an agency or agency employee, therefore, may violate confidentiality even if the information was properly obtained and is not disclosed.

### How Must Confidentiality Be Protected?

In some cases, legal rules not only require that agencies or individuals protect confidentiality but also impose specific requirements with respect to protecting confidential information.

The federal Privacy Act, for example, requires federal agencies to establish appropriate administrative, technical, and physical safeguards to ensure the security and confidentiality of personal information in agency records.<sup>25</sup> Similarly, rules adopted by North Carolina’s Social Services Commission expressly require social services agencies

- to provide a secure area for the storage of records regarding social services clients;
- to prohibit access to this storage area by unauthorized persons;
- to establish procedures to prevent the accidental disclosure of client information from automated data processing systems; and
- to develop written policies and provide training with respect to the use, protection, and disclosure of confidential client information.<sup>26</sup>

### Are There Exceptions to Confidentiality?

As noted above, confidentiality rules are seldom, if ever, absolute. In some instances, the scope of confidentiality under one legal rule is limited by another legal rule that allows or requires the disclosure of information whose confidentiality is protected by the first rule. In other cases, a rule provides that information is confidential but contains one or more exceptions allowing or requiring the disclosure of that information under certain circumstances.

One of the most important steps in analyzing and applying confidentiality rules, therefore, involves

determining the extent to which confidentiality is limited by exceptions that allow or require the disclosure. This, in turn, requires consideration of a number of related questions, including:

- May confidential information be disclosed with the *consent* of the individual to whom the information pertains (or the individual or agency from whom the information was obtained)?
- Under what circumstances may confidential information be disclosed *without consent* of the individual to whom the information pertains (or the individual or agency from whom the information was obtained)?
- To *whom* may confidential information be disclosed?
- For what *purposes* may confidential information be disclosed?
- Does a rule expressly *prohibit* the disclosure of confidential information in certain situations, for certain purposes, or to certain individuals or agencies?
- Does a rule *permit* confidential information to be withheld or *allow* confidential information to be disclosed?
- Does a rule *require* the disclosure of confidential information in certain situations?

The following sections explore some of these questions in greater detail.

### May the Information Be Disclosed With Consent?

In most cases, confidentiality rules either allow or require the disclosure of confidential information to others with the *consent* of the individual to whom the information pertains (or, sometimes, the consent of the individual or agency from whom the information was obtained).<sup>27</sup> In addition, some rules *require* agencies, upon request, to disclose information to the individual to whom the information pertains, to allow an individual to review and copy information to pertain to himself or herself, or to request correction of his or her record.<sup>28</sup>

In some cases, though, an individual's authority to consent to the release of information about himself or herself (or to examine that information himself or herself) is not absolute. For example, G.S. 122C-53(c) limits a mental health patient's access to confidential medical information about himself or herself when disclosure of the information would be injurious to his or her physical or mental well-being.

Analyzing and applying confidentiality rules, therefore, may require social services employees to determine

1. whether a rule allows the disclosure of confidential information with *consent*;
2. *who* can consent to the disclosure of information to or by the agency;
3. the *procedures* by which consent may be given;
4. *whether* valid consent has been given or can be obtained; and
5. whether the consent *limits* the *type of information* that may be disclosed, *how much* information may be disclosed, the *persons or agencies* to whom information may be disclosed, or the *purposes* for which information may be disclosed.

It is not always easy, however, to identify *who* has the authority to consent to the disclosure of confidential information.<sup>29</sup> Suppose, for example, that a rule allows disclosure of confidential information with the consent of the individual, client, patient, or employee to whom the information pertains. May the information be disclosed with the individual's consent if the individual is a minor child? May a parent of a minor child (or the child's caretaker or guardian) obtain or consent to the disclosure of confidential information regarding the child? May an agent, attorney, legal representative, spouse, or next-of-kin provide consent on behalf of a competent adult? Who may provide consent on behalf of a mentally incapacitated adult? May another person provide consent on behalf of a deceased individual?<sup>30</sup>

In some cases, confidentiality rules expressly or implicitly allow the disclosure of confidential information about an individual with the consent of another person acting on behalf of that individual (for example, the individual's parent if the individual is a minor child or the individual's guardian if the individual is a minor or incapacitated).<sup>31</sup> But in other cases, it is not entirely clear whether confidential information may be disclosed with the consent of someone other than the individual to whom the information pertains.

Analyzing and applying confidentiality rules often requires determining the *procedures* by which an individual may consent to the disclosure of confidential information.

Some confidentiality rules establish detailed procedures and requirements regarding consent to disclosure of confidential information. The federal medical privacy rules adopted pursuant to the Health Insurance Portability and Accountability Act (HIPAA), for example, require that an authorization for the disclosure of identifiable personal health information—

- be written in plain language;
- identify the information that may be disclosed in a "specific and meaningful fashion;"

- specifically identify the person or class of persons to whom disclosure may be made;
- state the date on which the authorization will expire (or the event that will terminate the authorization);
- include notice that the individual may revoke the authorization;
- include additional specified information; and
- be signed by the individual to whom the information pertains or by the individual's personal representative.<sup>32</sup>

Following the proper procedure for obtaining consent for the disclosure of confidential information, therefore, may be as important as obtaining consent for disclosure.

### May Information Be Disclosed Without Consent?

If valid consent for the disclosure of confidential information has not been given or cannot be obtained, social services employees may have to determine whether a rule allows (or requires) the disclosure of confidential information *without consent*.

As noted above, most confidentiality rules include one or more exceptions that allow confidential information to be disclosed without consent to *some* individuals or agencies, for *some* purposes, or under *some* circumstances.

In some cases, exceptions to confidentiality are phrased in terms of the *circumstances* under which information may (or must) be disclosed. For example, some confidentiality rules require the disclosure of confidential information in response to a court order requiring disclosure without limiting either the purpose for which disclosure may be ordered or the identity of the persons or agencies to whom information may be disclosed.

In other instances, confidentiality rules allow (or require) the disclosure of confidential information for specific *purposes*. The federal Family Educational Rights and Privacy Act (FERPA), for example, allows the disclosure information from student records for "directory" purposes, for legitimate educational purposes, or to protect the health or safety of students or others.<sup>33</sup>

Some confidentiality rules expressly allow or require the disclosure of confidential information *to* social services agencies for specific purposes. For example, G.S. 7B-310 and G.S. 8-53.3 provide that the psychologist-patient privilege may not be asserted as a basis for failing to report suspected child abuse or neglect to a county department of social services.

Other confidentiality rules allow or require social services agencies to disclose confidential information to other agencies or individuals for specific purposes or under certain circumstances. G.S. 7B-3100, for example, requires the Department of Juvenile Justice and Delinquency Prevention to promulgate rules requiring the sharing of confidential information related to abused, neglected, dependent, undisciplined, or delinquent juveniles among

- local mental health agencies,
- local health departments,
- local social services departments,
- local law enforcement agencies,
- local school administrative units, and
- other designated local agencies.<sup>34</sup>

Confidential information may be disclosed to these agencies, however, only for the *purpose* of protecting the juvenile or others or improving the educational opportunities of the juvenile.

Thus, before a social services agency discloses confidential information without consent, it must determine

- *whether* disclosure of the information is allowed or required;
- *under what circumstances* confidential information may be disclosed;
- *for what purposes* confidential information may be disclosed;
- *to whom* confidential information may be disclosed; and
- *how much* information may be disclosed.<sup>35</sup>

### Is Disclosure Prohibited, Allowed, or Required?

The "default setting" for confidentiality rules is usually a general prohibition with respect to the acquisition, use, or disclosure of confidential information. By their very nature, confidentiality rules either expressly or implicitly prohibit the disclosure of confidential information.

Many confidentiality rules, however, contain one or more exceptions that *allow* or *authorize* the disclosure of confidential information under certain circumstances. And some rules actually *require* disclosure in some situations. In order to properly analyze and apply confidentiality rules, social services employees must be able to distinguish among these types of rules and determine whether disclosure in a particular situation is *prohibited*, *allowed*, or *required*.

When a legal rule either *requires* (or absolutely *prohibits*) the disclosure of confidential information in a particular situation, the individual or agency that holds the information *must* disclose (or withhold) it

even if that individual or agency would prefer not to do so. Rules requiring the disclosure of information, of course, cut both ways. In some instances, a rule may require another agency or individual to disclose confidential information to a county social services agency.<sup>36</sup> But other rules *require* social services agencies to disclose confidential information to other agencies or individuals.<sup>37</sup>

When a rule *allows* the disclosure of confidential information in a particular situation, the agency or individual that holds the information *may* disclose, without liability, confidential information to the extent authorized by, and in accordance with the procedures established by, the rule.

The fact that one *may* disclose confidential information, however, does not necessarily mean that one *should* do so. Analyzing and applying this type of confidentiality rule, therefore, requires social services employees to determine

- whether an applicable rule *allows* the disclosure of confidential information in a particular situation, *and*
- whether, balancing the interests that would be served by releasing the information against the interests that would be served by protecting the information, the information *should* be disclosed.<sup>38</sup>

### How May Information Be Disclosed?

Even if a rule authorizes the disclosure of confidential information, respondents who are subject to the rule must comply with the rule's procedures and requirements regarding the *manner* in which information may be disclosed.

A confidentiality rule, for example, may require—

- that confidential information be disclosed only by a specified official or his or her designee;
- that the date and purpose of all disclosures and the identities of the persons or agencies to whom disclosures are made be documented and preserved; or
- that the disclosing agency restrict further use or redisclosure of information.<sup>39</sup>

### What Is the Legal Basis for Confidentiality?

As discussed in *Social Services Bulletin No. 31*, confidentiality rules are based on a number of different legal and quasi-legal sources, including federal and state constitutional provisions, federal and state statutes and regulations, the common law, contracts, court decisions, and professional standards of ethics.

In some instances, determining the legal basis for a particular confidentiality rule may be helpful in determining its scope, applicability, or effect.

Some confidentiality requirements in federal laws, for example, apply only to federal agencies and not to state or local governments, while others, based on Congress' broad authority to regulate interstate commerce, may apply to broad classes of individuals, businesses, or government agencies. Constitutional requirements regarding informational privacy, by contrast, generally apply to government agencies and employees but *not* to private individuals or businesses. Confidentiality requirements that are imposed by federal law as conditions of receiving federal funding usually may be enforced against grantees by the federal government's withholding of federal funding but sometimes do not create legal rights with respect to confidentiality that may be enforced directly by the subjects of those laws.<sup>40</sup> And state statutes regarding privileged communications may preclude the disclosure of confidential information in connection with legal proceedings but provide little protection for confidentiality outside the courtroom.

The legal basis for confidentiality rules also determines their hierarchy and applicability when two potentially applicable rules conflict with each other. Administrative rules and regulations regarding confidentiality, for example, must be legally authorized by statute and may not be inconsistent with the statutes upon which they are based. And while confidentiality requirements contained in federal laws may preempt or override state laws regarding confidentiality, federal law sometimes establishes a "floor" for confidentiality that state law may raise or supplement.

### What Are the Consequences of Unauthorized Use or Disclosure?

Finally, analyzing confidentiality problems may require consideration of the potential *legal liability*, or other possible *sanctions* and *consequences*, related to the collection, protection, use, or disclosure of confidential information.

In some instances, state or federal laws impose *criminal* sanctions for the unlawful disclosure or use of confidential information. G.S. 108A-80, for example, makes the unlawful use or disclosure of confidential information regarding social services clients a class 1 misdemeanor. And federal law imposes significant *criminal* and *civil* penalties for the unlawful disclosure of individual health information in violation of the federal HIPAA medical privacy rules.<sup>41</sup>

Employees of social services agencies also may be suspended, disciplined, or fired if they unlawfully use or disclose confidential information.<sup>42</sup> And in some instances, social services employees, officials, and agencies (as well as the county or perhaps the State) may be held liable in civil lawsuits for violating the legal rights of individuals with respect to informational privacy.<sup>43</sup>

Although social services employees should *consider* the potential legal consequences of collecting, using, or disclosing confidential information (and, in some situations, the potential legal consequences of failing to disclose information), this does not mean that decisions to disclose or not disclose information should be made solely on the basis of one's potential legal liability. Although social services agencies and their employees should be *aware* of the potential legal consequences of using or disclosing confidential information, decisions regarding the collection, use, protection, and disclosure of confidential information should be based, first and foremost, on whether the collection, use, or disclosure is prohibited, allowed, or required in a particular situation under a particular legal rule.

### Step Four: Apply the Rule

The final step in the process is to *apply* the correct confidentiality rule to the particular situation or facts of the question, issue, or problem.

Again, however, this is clearly easier said than done. But the task should be much easier, and the outcome more reliable, if one has already followed the first three steps: clearly defining the issue; identifying the applicable legal rule; and thoroughly analyzing the rule's *object, respondents, subject, reason, requirements, exceptions, legal basis, and remedies*. That done, application of the rule to the facts should be primarily a matter of determining whether the relevant characteristics of the information at issue; the identities of the agencies or individuals who hold the information, who have requested the information, or to whom the information pertains; and the circumstances surrounding the collection, protection, use, or disclosure of the information bring the situation within the rule's requirements with respect to confidentiality. In doing so, social services employees will need to consider some of the same questions and issues they considered in steps one and three of the process.

Application of confidentiality rules to particular problems, however, is not a completely mechanical, analytical, or legalistic process. Instead, it requires the exercise of sound judgment, discretion, and common sense as well as legal analysis.

For example, when a confidentiality rule allows, but does not require, a social services agency to disclose confidential information, social services employees may be called on to determine whether, balancing the interests regarding confidentiality against the interests in disclosure, the information *should* be disclosed. Social services employees also may have to make reasoned judgments when a confidentiality rule does not precisely define the type of information that is the object of the rule or clearly specify the circumstances under which the information may or must be disclosed. And when certain information in an agency record (or some parts of the record) is confidential but other information in the record is not confidential, social services employees may be required to redact (delete, "white out," or "black out") confidential information before disclosing nonconfidential parts of the record.<sup>44</sup>

### Conclusion

Analyzing questions, issues, and problems regarding the acquisition, use, protection, and disclosure of confidential information is a difficult, but not impossible, task.

This *Social Services Bulletin* has presented a four-step process that social services agencies and employees can use in analyzing, answering, and resolving issues, questions, and problems related to confidentiality. Using this suggested process, of course, does not guarantee that one will find the right answers to questions involving confidentiality or that finding the right answers will be easy. It may, however, make finding the right answers a little less difficult.

Social services agencies can also minimize some of the difficulties related to confidentiality by taking a proactive, rather than reactive, approach to the subject of confidentiality, attempting to identify and resolve potential problems regarding confidentiality before they arise. Some of the components of a proactive approach to confidentiality might include:

- conducting an inventory to identify all of the different types of records and information the agency maintains, where these records are located, how records and information are indexed, how records or information are used, who has access to records or information, and what types of records or information are considered confidential;
- reviewing the adequacy of the methods by which the agency protects the physical security of confidential records, the security of confidential information stored in computer data bases, and the security of confidential communications within the agency;

- conducting a review of the agency’s written policies regarding the collection, use, protection, and disclosure of confidential information, updating these policies if necessary, and ensuring that employees are familiar with these policies;
- identifying common problems or frequently asked questions with respect to the collection, use, protection, or disclosure of confidential information, attempting to find the right answers to these questions and good solutions to these problems, and sharing these answers and solutions within the agency;
- providing training to agency employees with respect to confidentiality;
- discussing questions, issues, and problems regarding confidentiality with the agency’s attorney;
- working with other public and private agencies, businesses, and individuals to resolve problems involving the agency’s acquisition of confidential information from other agencies or individuals, the disclosure of confidential information to other agencies or individuals, and the use of confidential information by other agencies or individuals.

Subsequent *Social Services Bulletins* will continue the examination of confidentiality and social services by indexing and summarizing federal and state statutes and regulations governing the collection, use, protection, and disclosure of confidential information by social services agencies and other confidentiality rules that may affect social services agencies.

## Notes

\* Mr. Saxon is a professor of public law and government at the Institute of Government, UNC Chapel Hill. His areas of responsibility include social services, child support, and elder law.

<sup>1</sup> While employees of state and county social services agencies understand that personal information in their agencies’ records is confidential, they too often have only a scanty or inaccurate knowledge of the legal and professional rules governing the confidentiality of social services records and may not fully appreciate the complex nature of confidentiality. Suanna J. Wilson, *Confidentiality in Social Work* (New York: Free Press, 1978), 202.

<sup>2</sup> This bulletin generally uses the term “information” to refer to any type of information, data, communication, or record, regardless of its form or content.

<sup>3</sup> This bulletin generally uses the term “social services agencies” to refer to state social services agencies (for example, the state Department of Health and Human Services and its Division of Social Services) and county social services agencies (for example, county departments of social services). Although this series of *Social Services Bulletins* will focus primarily on the confidentiality rules that apply to (or are commonly encountered by) county departments of social services, other public human services agencies may find it useful in analyzing questions, issues, and problems regarding the acquisition, use, and protection of confidential information.

<sup>4</sup> This bulletin generally uses the term “rule” to refer to any law, regulation, professional code, standard, requirement, or restriction regarding the acquisition, use, protection, or disclosure of confidential information.

<sup>5</sup> This definition of the right to informational privacy was proposed by Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 7. Legal rights to informational privacy are discussed in greater detail in John L. Saxon, “Confidentiality and Social Services (Part II): Where Do Confidentiality Rules Come From?” *Social Services Bulletin No. 31* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2001), and John L. Saxon, “Privacy and the Law” *Popular Government* Vol. 67: \_\_ (Spring, 2002) (Institute of Government, The University of North Carolina at Chapel Hill).

<sup>6</sup> The purposes of laws protecting the right to informational privacy are discussed in greater detail in John L. Saxon, “Confidentiality and Social Services (Part I): What is Confidentiality?” *Social Services Bulletin No. 30* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2001), and John L. Saxon, “Privacy and the Law” *Popular Government* Vol. 67: \_\_ (Spring, 2002) (Institute of Government, The University of North Carolina at Chapel Hill).

<sup>7</sup> See G.S. 108A-80.

<sup>8</sup> See G.S. 7B-302(a).

<sup>9</sup> 42 C.F.R. 2.20.

<sup>10</sup> The first four components of confidentiality rules (the rules’ object, respondents, subject, and reason) are derived from a suggested analytical framework suggested by Vincent J. Samar, *The Right to Privacy: Gays, Lesbians, and the Constitution* (Philadelphia: Temple Univ. Press, 1991), 14–18. Although the eight aspects of confidentiality rules suggested here are stated as if they might be completely separate components, they may overlap with each other to some extent. For example, a confidentiality rule’s object may be defined, at least in part, by reference to its subject, or its purpose may be determined indirectly by reference to its subject, requirements, or exceptions.

<sup>11</sup> 10 N.C.Admin.Code 24B.0102(3).

<sup>12</sup> G.S. 8-53.

<sup>13</sup> Although G.S. 108A-80 applies broadly to “any person,” its scope is limited by the requirement that the information be derived, directly or indirectly, from the records of a county social services department or the state DHHS or obtained by a state or county social services agency pursuant to its official duties in administering a public assistance or social services program.

<sup>14</sup> 42 C.F.R. 2.64.

<sup>15</sup> Some critics have charged that social services agencies hide their failings behind confidentiality rules. See “Critics say confidentiality laws shield agency,” The (Durham, N.C.) Herald-Sun, December 8, 1992, p. A3; “Panel Inquires Into Secrecy of Law in Child Abuse Cases,” The New York Times, December 1, 1995, p. B16; “Secrecy Laws May Have Muted Alarms About Child’s Anguish,” The Washington Post, December 6, 1995.

<sup>16</sup> Some confidentiality rules provide, explicitly or implicitly, that their subjects have a legal *right* to confidentiality or privacy that may be enforced against a respondent who improperly obtains, uses, or discloses confidential information. For example, the state Social Services Commission’s rules implementing G.S. 108A-80 say that the confidentiality of client information is a right of the client and recognizes the rights of clients to review information in their case files and to receive notice when information about themselves is disclosed without their consent (but does not explicitly give clients the right to bring a legal action against the agency to enforce their rights with respect to confidentiality. 10 N.C. Admin.Code 24B.0301 and 24B.0506. If confidentiality is viewed as a *personal* right of an individual, it may be unclear whether an individual’s right to confidentiality (and a respondent’s corresponding obligation to protect the individual’s confidentiality) survive the individual’s death and, if so, who may assert or waive confidentiality on behalf of a deceased individual.

<sup>17</sup> 5 U.S.C. 552a.

<sup>18</sup> See John L. Saxon, Confidentiality and Social Services (Part I): What is Confidentiality? *Social Services Bulletin No. 30* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 2001) 5–7.

<sup>19</sup> *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

<sup>20</sup> 5 U.S.C. 552a.

<sup>21</sup> 5 U.S.C. 552a (note). See David M. Lawrence, Local Government Requirements for and Use of Social Security Account Numbers, *Local Government Law Bulletin No. 55* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1994). The federal Privacy Act’s restrictions regarding acquisition and use of social security numbers do not apply to state or local social services agencies that are required, by other federal laws, to obtain individuals’ social security numbers in administering public assistance or social services programs (such as Medicaid and food stamps).

<sup>22</sup> G.S. 53B-1 through 53B-10.

<sup>23</sup> See, for example, G.S. 7B-302(e), 110-139(c), 110-139(d).

<sup>24</sup> 5 U.S.C. 552a.

<sup>25</sup> 5 U.S.C. 552a.

<sup>26</sup> 10 N.C.Admin.Code 24B.0204, 24B.0205.

<sup>27</sup> Some rules do not expressly allow the disclosure of confidential information with the consent of the individual to whom the information pertains. Nonetheless, it may be possible to *infer* an exception allowing disclosure with consent when the rule’s purpose is to protect the confidentiality of the individual who, by consenting to disclosure, has chosen to waive his or her interest in nondisclosure.

<sup>28</sup> 5 U.S.C. 552a (federal Privacy Act); 10 N.C.Admin. Code 24B.0301 through 24B.0305.

<sup>29</sup> Issues regarding who may consent to the disclosure of confidential information and what constitutes valid consent for the disclosure of confidential information will be discussed, along with other frequently asked questions involving confidentiality, in a subsequent *Social Services Bulletin*.

<sup>30</sup> It is not always clear whether confidentiality applies with respect to information regarding deceased persons. Some rules are silent with respect to the issues while others state or suggest that an individual’s rights with respect to confidentiality survive his or her death. See G.S. 8-53 (authorizing a decedent’s executor, administrator, or next of kin to consent to the release of confidential medical information regarding the decedent). This issue, along with other frequently asked questions involving confidentiality, will be discussed in a subsequent *Social Services Bulletin*.

<sup>31</sup> See G.S. 8-53; G.S. 122C-3(20), 122C-4, and 122C-53(a); 10 N.C.Admin.Code 24B.0403; 42 C.F.R. 2.14 and 2.15; 45 C.F.R. 164.508 (c)(1)(viii); 20 U.S.C. 1232g.

<sup>32</sup> 45 C.F.R. 164.508(c). See also 10 N.C.Admin.Code 24B.0402, 24B.0404, and 24B.0406 (procedures for releasing information with the consent of social services clients); 42 C.F.R. 2.31 (procedures for releasing alcohol and substance abuse treatment records with patient consent).

<sup>33</sup> 20 U.S.C. 1232g.

<sup>34</sup> As of April 24, 2002, the department had not published final rules under G.S. 7B-3100.

<sup>35</sup> Some confidentiality rules expressly provide that when disclosure of confidential information is authorized or required, an agency should disclose only the minimum amount of information that must be disclosed in order to carry out the purpose for disclosure. See 42 C.F.R. 2.13.

<sup>36</sup> See, for example, G.S. 7B-302(e); G.S. 108A-103; G.S. 110-139(c); G.S. 110-139(d).

<sup>37</sup> See, for example, G.S. 7B-307 (requiring social services directors to provide otherwise confidential information to local law enforcement agencies when they discover that a child may have been harmed in violation of a

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criminal statute); G.S. 7B-601(c) (authorizing guardians ad litem in juvenile cases to obtain confidential information from other agencies and individuals).

<sup>38</sup> Applying this type of confidentiality rule also may require social services employees to determine what restrictions may, or should, be placed on the further use or redisclosure of confidential information that is disclosed to others.

<sup>39</sup> See, for example, 10 N.C.Admin.Code 24B.0405, 24B.0406.

<sup>40</sup> See *Girardier v. Webster College*, 563 F.2d 1267 (8<sup>th</sup> Cir. 1977) and *Tarka v. Franklin*, 891 F.2d 102 (5<sup>th</sup> Cir. 1989) (no private right of action under FERPA); *Chapa v. Adams*, 168 F.3d 1036 (7<sup>th</sup> Cir. 1999) (no private right of action under federal law regarding confidentiality of information regarding patients who are treated for alcohol or substance abuse); *Troutt Brothers, Inc. v. Emison*, 841 S.W.2d 604 (Ark. 1992). Cf. *Fay v. South Colonie Central School Dist.*, 802 F.2d 21 (2<sup>nd</sup> Cir. 1986) (holding that FERPA's confidentiality requirements may be enforced by individuals via 42 U.S.C. 1983).

<sup>41</sup> 42 U.S.C. 1320d-5 and 1320d-6.

<sup>42</sup> See 10 NCAC 24B.0206(a).

<sup>43</sup> A civil action against a county social services agency or employee *might* be based on the disclosure of personal information in violation of an individual's federal or state constitutional rights to informational privacy, a right to informational privacy established by federal or state confidentiality rules, or individual rights under the common law or contracts. In some instances, the county (or perhaps the State) might also be held liable for the unlawful disclosure of confidential information by local social services agencies or employees. Not every confidentiality rule, however, creates legal rights that may be enforced against local social services agencies or employees. In addition, social services agencies, employees, and officials may be able to assert legal defenses that will minimize or preclude their potential civil liability in these lawsuits. Issues related to legal liability for the unlawful disclosure of confidential information will be discussed in more detail in a subsequent *Social Services Bulletin*.

<sup>44</sup> See G.S. 132-6(c).

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