SOCIAL SERVICES

Number 30 February, 2001 **Janet Mason, Editor**

CONFIDENTIALITY AND SOCIAL SERVICES (PART I): WHAT IS CONFIDENTIALITY?

■ John L. Saxon*

It is common knowledge that much of the information contained in the records of state and county social services agencies is "confidential."[1]

But what, exactly, does it mean to say that information[2] is confidential?

- What types of information are considered confidential? *Why* is certain information confidential?
- Does confidentiality mean that information 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[3] obtain confidential information from other agencies or individuals?
- What rules[4] govern the acquisition, use, protection, and disclosure of confidential information by social services agencies? Where do these rules come from? What individual, governmental, public, and social interests influence the nature and scope of confidentiality?

This is the first in a series of *Social Services Law Bulletins* that will attempt to answer these questions. This bulletin examines the general meaning, purposes, nature, scope, and limits of confidentiality. Subsequent *Social Services Law Bulletins* will—

1. examine in greater detail the federal and state constitutional provisions, federal and state statutes and regulations, professional standards, and other rules that are the sources of confidentiality;
2. list and summarize many of the state and federal laws that govern the use, protection, disclosure, and acquisition of confidential information by social services agencies;
3. answer some of the questions that social services employees, directors, and attorneys frequently ask regarding confidentiality; and
4. provide an analytical framework that social services agencies can use to address and resolve problems involving confidentiality.

What Is Confidentiality?

Any discussion of the subject of confidentiality is meaningless without some common understanding of what it means to say that information is confidential. The first task, therefore, is to define the term *confidentiality*.

Confidentiality: An Intuitive Approach

One way to answer the question "What is confidentiality?" is to examine a number of situations involving the communication, use, protection, or disclosure of information and then determine, intuitively, whether the information might be considered confidential.

Is the information in the following examples confidential?

- X tells Y that X is planning a surprise party for Z.
- X tells Y that X is thinking about accepting a job offer with another company and asks Y to "keep it quiet for now."
- X tells Y (a friend) that X is having an affair; Y promises not to tell anyone.
- X tells Z (X's attorney) that X is having an affair.
- X is a candidate for the local school board. A reporter from the local newspaper asks the public library and a local video store to give her a list of the books and movies that X has borrowed or rented during the past year.
- X has applied for a job with the ABC Company. ABC requests information from X's school records, juvenile record, criminal record, medical records, and employment or personnel records.
- Local school officials want to know which of their students receive public assistance, have been found delinquent, or are HIV positive.
- X calls the county social services department to report that the children who live next door may have been abused or neglected. DSS wants the medical records of the children and the parents' financial, employment, and mental health records and the children's parents want to know who called DSS.
- Another public agency asks the county social services department for a list of all parents who have been investigated for possible child abuse or neglect.
- University researchers ask a state child welfare agency for statistical information about cases involving reported child abuse or neglect.

An intuitive approach to confidentiality may be of some use in ascertaining the meaning and scope of confidentiality. But the subjectively and particularly of such an approach limit its value in discerning what confidentiality means in any general sense.

Confidentiality: An Analytical Approach

A more analytical approach to the subject of confidentiality examines in greater detail those instances in which there is general agreement that information is confidential and attempts to identify the common factors or circumstances that make information confidential.

What is it that makes information confidential?

- Is it the personal, private, sensitive, or potentially embarrassing *nature* of information?
- Is it the circumstances under which information is *communicated* or *obtained*?
- Is it the *form* in which information is communicated or retained?
- Is it the *source* from which information is obtained or the *identity* of the person who provides information?
- Is it the *identity* of the person to whom information *pertains*?
- Is it the *consequences* of disclosing information to others?
- Is it the *identity* of the person or agency to whom information is *provided* or by whom the information is *obtained*?
- Is it the *relationship* between the individuals or agencies with respect to information?
- Is it the *purpose* for which information is provided, needed, or used?
- Is it the existence of a moral, professional, or legal *obligation* or *right* with respect to the use, disclosure, or protection of information?

In some instances, confidentiality seems to be based on the nature of the information or the consequences of disclosing the information to others. In others, however, it seems that the relationship between the parties is a fundamental element of confidentiality or that the purpose for which the information is needed or will be used affects its confidentiality.

It appears, therefore, that while the personal, private, or sensitive nature of information; the source of information; the identity of the person to whom information pertains; the identity of the person to whom information is provided; the form in which information is communicated or preserved; the relationship between the parties with respect to information; and the purpose for which information will be used *all* may be *relevant* in determining whether information is confidential, *none* of these factors, standing alone, is *necessarily required* in order for information to be considered confidential.

An analytical approach to confidentiality therefore may not provide a completely satisfactory answer to the question: What does confidentiality mean?

Confidentiality: A Definitional Approach

A third way to answer the question "What is confidentiality?" is to examine one or more common definitions of confidentiality, identify the essential characteristics of confidentiality under those definitions, and assess their adequacy in light of our understanding of and experience with the concept of confidentiality.

As a starting point, one common definition of confidentiality states that information is confidential if it is communicated by one person to another "in confidence"—that is, with the expectation that the individual to whom the information is entrusted will not disclose it to others.[5]

Under this definition, confidentiality is primarily a function of the *relationship* between two parties—the individual who communicates information to another and the individual to whom the information is communicated. Moreover, under this definition confidentiality involves, at least implicitly, some *expectation or right* on the part of the individual who provides information to another individual and a corresponding *obligation or duty* on the part of the individual to whom the information is disclosed with respect to the use, protection, or nondisclosure of information that has been communicated in confidence.

It is important to note, however, that this definition does *not* focus at all on the *nature* of the information that is communicated in confidence. Thus, although we generally equate confidentiality with private or personal information that is so intimate, sensitive, or secret that its disclosure would be highly embarrassing or prejudicial, confidentiality is not necessarily determined by the nature of the information itself.

It is also important to note that, by focusing exclusively on the relationship between the individuals who are involved in the communication or exchange of information, this definition does not necessarily take into account the interests, expectations, or rights of others with respect to that information. For example: A provides information "in confidence" to B; the information relates to C, not A; D demands that B disclose the information to D. Is the confidentiality of this information determined exclusively by the relationship, rights, and duties between A and B? Or does confidentiality also depend, at least in part, on the rights of C and D with respect to the information? If so, the common definition of confidentiality may capture one important aspect of confidentiality but, at the same time, be too narrow or incomplete.

Confidentiality: An Approach Based on Individual Privacy

The failure of this common definition of confidentiality to take into account the interests, expectations, and rights of the person to whom information pertains (when he or she is not the person who has communicated the information in confidence to another) suggests a fourth approach to the subject of confidentiality based on individual privacy.

Confidentiality appears to be related to, though not necessarily synonymous with, individual privacy. If so, determining the nature and scope of an individual's interests, expectations, and rights with respect to informational privacy may shed some light on the meaning of confidentiality.

Individual privacy, in its broadest sense, refers to the right of an individual to be free from unwarranted public scrutiny.[6] Similarly, an individual's right to informational privacy can be defined broadly as the right of an individual to determine for himself or herself whether, when, how, to what extent, and for what purpose "personal" information about himself or herself may be obtained, used, or disclosed by others.[7]

Focusing on individual interests, expectations, and rights with respect to the privacy of personal information clearly broadens a definition of confidentiality that focuses primarily on the relationship between one who provides information (about herself or another person) "in confidence" to another. A definition of confidentiality that is based on broad, absolute concepts of individual privacy is, intuitively, inadequate because, in the "real world," confidentiality does not depend solely on each individual's decisions, interests, or expectations with respect to individual privacy.

Instead, the nature and extent of individual privacy are defined in part and limited by the interests, expectations, and rights of other individuals, the government, the public, and society. One simply cannot successfully assert the right to *absolute or unilateral* individual privacy, confidentiality, or anonymity. The disclosure of personal information to others—friends, doctors, government agencies, and others—is part of the price that we pay for living in society,[8] and we are not always free to choose whether we will disclose personal information to others[9] or to control the extent to which personal information is used, shared, disclosed, or obtained by others.

Confidentiality: A Rule-Oriented Approach

This, in turn, suggests a fifth way through which confidentiality may be understood. Under a rule-oriented approach to confidentiality, the meaning,

nature, scope, and limits of confidentiality are determined on a case-by-case basis by specific moral, professional, or legal rules that designate particular types of information as confidential and create specific requirements, restrictions, rights, and duties with respect to the acquisition, use, protection, or disclosure of confidential information.

Using this approach, information is confidential if an applicable[10] rule

- allows or requires an individual (or agency) to refuse to disclose the information to others;
- restricts an individual's (or agency's) ability to obtain the information from other individuals (or agencies);
- provides that the information may be used by an individual (or agency) only for certain purposes; or
- requires that the information be protected against inappropriate or unlawful use or disclosure.[11]

The *precise* meaning, nature, and scope of confidentiality in any particular situation, therefore, *always* requires a detailed examination and analysis of

1. the rules that designate particular types of information as confidential;
2. their applicability to particular types of information, communications, and records; to specific persons or agencies; and to particular situations; and
3. the specific requirements, restrictions, and duties with respect to the acquisition, use, protection, and disclosure of information that are imposed by these rules.

Thus, it is not the mere *expectation* of confidentiality that makes information confidential, but rather a moral, professional, or legal *rule* that recognizes an individual's interest, expectation, or right with respect to confidentiality or privacy with respect to certain information and imposes a corresponding *duty or obligation* on others with respect to the confidentiality of that information.

Similarly, although confidentiality is generally associated with the private, personal, or sensitive *nature* of information, the mere fact that a particular type of information may be considered private, personal, or sensitive is insufficient to make the information confidential in the absence of an applicable *rule* that makes that information confidential.

Although confidentiality rules often protect information that is sensitive, intimate, or potentially embarrassing, they also protect a broad range of personal or private information that not necessarily sensitive, intimate, or potentially embarrassing.

For example, the federal Privacy Act applies to *any* information about an individual that is maintained by a federal agency in a system of records and can be retrieved or accessed by using the individual's name or an identifying number, symbol, or other particular characteristic assigned to the individual.[12] The Privacy Act, therefore, protects *all* personal information—both highly private or sensitive information about an individual's medical history and financial transactions as well as personal, but more publicly-accessible and perhaps less private or less sensitive, information concerning his or her education, employment history, criminal history, or other personal characteristics.

Likewise, the *form* of information—whether it is contained in an oral communication, a computer database, an audio or video recording, written notes, or an official, written record—does not necessarily determine whether information is confidential. Instead, the determinative factor is whether a particular confidentiality *rule* applies with respect to information in a particular form.

Most confidentiality rules apply broadly to *any* information regarding a particular subject regardless of the *form* in which the information is maintained.

For example, the federal regulations governing the confidentiality of alcohol or drug abuse treatment records apply to *any* patient information regardless of the form in which it is maintained—unrecorded impressions, recollections, and knowledge of the facility's staff or employees, unrecorded communications between patients and the facility's staff or employees, written notes and records, and information maintained in the facility's computer system.[13] Other confidentiality rules, however, may apply more narrowly only to information that is preserved in a particular form (such as information contained in written records).

Finally, the *source* or *location* of information does not, in and of itself, determine whether information is confidential. The issue, instead, is whether a particular confidentiality *rule* applies with respect to information that is obtained from a particular source or is located in a particular place.

Some confidentiality rules apply only with respect to information that has been obtained from a particular source or is held by specific individuals or agencies, while others make certain types of information confidential regardless of the source or location of the information. For example, state law provides that *all* information and records, whether publicly or privately maintained, identifying individuals with HIV or AIDS are confidential.[14]

Thus, it is not merely the nature, form, or source of information nor the expectations of individuals with respect to information that makes it confidential.

Instead, what makes information confidential is the existence of an applicable *rule* that says that the information is confidential.

And while confidentiality rules necessarily must define confidential information in terms of the nature, form, or source of the information, it is the *rule* that makes the information confidential—*not* some intrinsic characteristic of the information itself.

Moreover, since the meaning, nature, and scope of confidentiality are determined on a case-by-case basis and depend on the specific provisions of particular rules, there is, in a sense, no *general* definition of confidentiality. And because there are hundreds (if not thousands) of rules that define the meaning, nature, and scope of confidentiality, it is difficult, at best, to discuss the meaning of confidentiality in the abstract and dangerous to assume that confidentiality has some fixed, universal meaning.

Confidentiality: A Proposed Definition

Of the five approaches to confidentiality discussed above, the rule-oriented approach may be the most useful to public social services agencies and employees whose authority and responsibilities are defined primarily by rules (federal and state laws and regulations and, to a lesser extent, professional rules).[15]

If so, confidential information may be defined generally as any information that is designated as confidential by an applicable rule governing the acquisition, use, protection, or disclosure of that information.

Thus, confidentiality means, at a minimum, that there are *some* circumstances under which *some* individuals or agencies may be subject to *some* requirements or restrictions regarding the acquisition, use, protection, or disclosure of *some* information.

A confidentiality rule that merely states that certain information is confidential without specifying the circumstances under which the information may or may not be disclosed or who is subject to its requirements and restrictions, however, is virtually meaningless.

Instead, the meaning, nature, and scope of confidentiality in a particular situation may be determined only by identifying a specific confidentiality rule that applies to that particular situation and carefully examining the rule to determine

- *what information* is considered confidential;
- *what specific requirements or restrictions* are imposed with respect to the acquisition, use, protection, and disclosure of that information; and
- *who is subject* to these requirements and restrictions.

But it is also important to remember that confidentiality rules are not created in, and do not exist in, a vacuum. They are, instead, created, defined, limited, interpreted, and applied by individuals, agencies, professional associations, lawmakers, and courts in the context of a wide variety of individual, governmental, professional, public, and social interests and needs regarding the acquisition, protection, use, and disclosure of information.

Therefore, in order to understand what confidentiality means, it is important to know not only *what* a rule says with respect to confidentiality, but also *why* it makes certain information confidential, *why* it restricts the acquisition, use, or disclosure of that information, and *why* it requires or allows the disclosure of confidential information to specific individuals or agencies under particular circumstances. And this, in turn, requires an examination of the *purposes* of confidentiality and the competing *interests* that sometimes limit confidentiality.

What Is the Purpose of Confidentiality?

In some instances, a confidentiality rule not only requires that information be treated as confidential but also contains an express statement regarding the rule's purpose in restricting the acquisition, use, or disclosure of that information.[16]

More often, though, confidentiality rules do not say what their purpose is or why information is considered confidential, and one therefore must make an educated guess with respect to their purpose.

One cannot assume, however, that there is only one, single, fundamental purpose (for example, individual privacy) that forms the basis for every confidentiality rule.

To the contrary, confidentiality rules are based not only upon the interests, expectations, and rights of individuals with respect to informational privacy but also on a wide range of other individual, governmental, professional, public, and social interests regarding the acquisition, use, protection, and disclosure of information.

Protecting Individual Privacy

Many confidentiality rules recognize, either explicitly or implicitly, that individuals have a some interest, expectation, or right with respect informational privacy and that the purpose of confidentiality is to protect individual privacy by ensuring that personal information is obtained, used, and disclosed only for legitimate purposes and only to the extent it is necessary to do so.[17]

Thus, in enacting the federal Privacy Act in 1974, Congress expressly recognized that

- individuals have a fundamental right to privacy under the United States Constitution;
- individual privacy is directly affected by the collection, maintenance, use, and dissemination of information by federal government agencies;
- the increasing use of computers and sophisticated information technology has magnified the potential harm to individual privacy;[18] and
- in order to protect individuals against the unwarranted invasion of personal privacy, federal agencies should be subject to certain requirements and restrictions with respect to their collection, use, maintenance, protection, and disclosure of personal information.[19]

To some extent, rules protecting the confidentiality of information regarding individuals who are served by public social services agencies recognize and protect the individual privacy of social services clients by ensuring that social services agencies obtain, use, and disclose personal information about these individuals only when necessary.[20]

Protecting Individuals from Harm

A second purpose of confidentiality rules is to protect specific individuals from the tangible harm they might suffer from the unwarranted public disclosure of potentially embarrassing, sensitive, intimate, or negative information.

For example, the federal Privacy Act expressly recognizes that an individual's legal rights and opportunities with respect to employment, insurance, and credit may be endangered by the misuse of information systems.[21]

Confidentiality rules, therefore, sometimes restrict the disclosure of information regarding an individual's mental illness, medical problems, physical or sexual abuse, alcoholism, or drug use because of the likelihood that the public disclosure of such information will harm the individual's reputation, subject the individual to discrimination by others, jeopardize his or her personal safety, or adversely affect his or her legal rights and opportunities with respect to employment, education, or medical care.[22]

For example, the purpose of confidentiality rules prohibiting the public disclosure of information regarding persons with HIV or AIDS is to protect these individuals from the discrimination and unfair treatment with respect to employment, education, and medical care that they might suffer if their HIV/AIDS status was publicly known. And other confidentiality rules restrict the disclosure of personal information (such as an individual's home address) in order to protect individuals from domestic violence or physical injury.[23]

Similarly, the apparent purpose of some rules protecting the confidentiality of information regarding individuals who are served by public social services agencies is to protect them from the public stigma, discrimination, or embarrassment that might result from publicly disclosing the fact that they receive assistance or services or releasing the often sensitive information they are required to provide in order to receive assistance or services.

Protecting Individual, Professional, and Social Relationships

A third purpose of confidentiality is to encourage, facilitate, and protect important individual, professional, and social relationships by ensuring that information disclosed within those relationships is not disclosed to others outside those relationships.

Confidentiality often is considered an essential condition for the formation, preservation, and success of individual, professional, and social relationships.

For example, social workers "have long argued that absolute trust is essential between [a] client and [the] helping professional if the treatment process is to be effective" and that "trust cannot be fully achieved unless all personal information shared [by the client] during the counseling process is kept 'confidential.'"[24] The confidentiality of communications between clients and social workers, therefore, has been a "cardinal principle of social work from the earliest years of the profession"[25] and continues to be considered a "fundamental and essential element in the relationship between a client and a social worker."[26]

Because confidence and trust lie at the heart of relationships between spouses,[27] between clients and social workers,[28] between patients and their doctors,[29] between patients and their psychiatrists or psychologists,[30] and between clients and their attorneys,[31] confidentiality rules protect the information that is communicated, shared, or obtained during these relationships.[32]

Other Governmental, Public, or Social Interests Regarding Confidentiality

In some instances, the purpose of confidentiality is to further or protect important governmental, public, or social interests that are unrelated to, or go beyond, protecting individual privacy, protecting individuals

from harm, or protecting important individual, professional, or social relationships.

For example, confidentiality rules protecting information about persons who receive treatment for alcohol or drug abuse serve a broad public or social interest—minimizing the social problems related to alcohol and drug abuse by encouraging people with drug or alcohol problems to seek and accept treatment for these problems—as well as protecting the individual privacy of these persons, protecting them from the stigma and harm that might result from disclosure of their alcohol or drug abuse of alcohol or drugs, and protecting the confidence and trust between these individuals and professionals that is required for successful treatment.[33]

Similarly, governmental, public, and social interests—rather than, or in addition to, individual interests with respect to informational privacy—may be the basis for confidentiality rules that protect the identity of persons who provide information to government agencies. For example, the apparent purpose of laws making the identity of an individual who reports suspected child abuse and neglect confidential is to encourage individuals to report suspected child abuse or neglect to county social services departments.[34]

Is Confidentiality Absolute?

Does confidentiality mean that information may *never* be disclosed to or shared with other individuals, agencies, the media, or the public? Are there exceptions to confidentiality that allow or require the disclosure of confidential information?

The answer is that confidentiality is seldom, if ever, absolute. Confidentiality does *not* mean that confidential information may *never*, under *any* circumstances, be disclosed. Instead, virtually every confidentiality rule has at least one express or implied exception under which confidential information may, or must, be disclosed to others.

Confidentiality is not, and cannot be, absolute because confidentiality and individual privacy do not exist in a vacuum.

The nature and scope of confidentiality are determined not only by individual, governmental, professional, public, and social interests with respect to confidentiality and individual privacy but also by "opposing" or "competing" interests, policies, and rules that sometimes outweigh or limit confidentiality.

Confidentiality rules, therefore, often reflect a balance between confidentiality and other interests, policies, or rules regarding the acquisition, use, or disclosure of information.[35]

Disclosure: The Public's "Right to Know" and Government Accountability

One of the competing interests that may limit confidentiality is the general public interest in governmental accountability—the public's "right to know" how government agencies are discharging their powers and duties.

For example, both the federal Freedom of Information Act[36] and North Carolina's Public Records Law[37] are based on the principles that the public has "a right to know about [the] basic workings of its government;"[38] that government accountability to its citizens is enhanced when the public has free and full access to the public records that the public needs to make an informed assessment of whether government agencies are properly discharging their public functions; and that government agencies should not be allowed to withhold information in order to avoid public scrutiny of their operations or "cover up" their mistakes or failures.

When the public's "right to know" conflicts with individual, governmental, professional, public, or social interests with respect to confidentiality, the conflict can be resolved only by balancing the public's right to know against confidentiality, determining which of these competing interests is more important in a particular situation, and creating a rule that attempts to accommodate both of these interests, limits the public's right to know, or limits confidentiality.

For example, although the public's right to know is a basic principle of the Freedom of Information Act, the Act reflects a determination that, in some instances, confidentiality may outweigh the public's right to know. Thus, the Act does not require federal agencies to disclose information if it is confidential and protected from public disclosure under a federal law (other than the federal Privacy Act) or if disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.[39]

Similarly, although North Carolina's Public Records Law generally requires state and local government agencies to disclose information in public records to any person upon request, this general requirement does not apply if another state law provides that information in the record is confidential and exempts that information from the Public Records Law's disclosure requirements.[40]

On the other hand, some confidentiality rules allow or require the disclosure of otherwise confidential information when the disclosure is necessary to ensure that government agencies are accountable to the public.

For example, in response to several highly-publicized cases in which children were killed by their caretakers despite the fact that social services agencies had previously been notified that the children were being abused or neglected, federal and state confidentiality rules regarding abused and neglected children were amended to require social services agencies to publicly disclose otherwise confidential information about children who have died from suspected abuse, neglect, or maltreatment.[41]

Disclosure: Public Necessity and Government Efficiency

Writing for the Supreme Court in its 1977 decision in *Whalen v. Roe,* Justice Stevens noted that "the collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed."[42]

This need to obtain, use, share, and disclose information in order to effectively and efficiently carry out governmental authority and responsibilities—and the related public interest with respect to government efficiency—may, in some instances, be balanced against individual, professional, and social interests with respect to confidentiality and outweigh or limit confidentiality.

For example, the Supreme Court concluded in *Whalen* that the public and governmental interest in controlling the distribution of dangerous drugs and minimizing their misuse and the government's legitimate need to obtain information regarding patients to whom legal, but controlled and potentially addictive, drugs are prescribed outweighed the privacy and confidentiality interests of these patients when the government's authority to obtain and use the information was accompanied by statutory provisions limiting it use and redisclosure of the information.[43]

Similarly, public social services agencies need to obtain and use personal, intimate, or otherwise confidential information about the individuals, children, and families they serve in order to determine eligibility for public assistance or social services, to prevent fraud and abuse, to develop appropriate service plans, to protect children and disabled adults from abuse and neglect, or to provide assistance and services. And in some instances, this need to obtain, use, share, or disclose information may outweigh or limit individual privacy or confidentiality.

For example, North Carolina's Juvenile Code requires individuals and agencies to disclose to a county social services department information that is relevant to the department's investigation of child abuse or neglect even if the information is considered confidential under another law.[44] Similarly, state law allows state and local child support enforcement agencies to obtain from employers, banks, public utilities, cable television companies, and others certain information about parents who owe child support even if another law provides that the information is confidential.[45]

In addition, public social services agencies sometimes need to share confidential information with other public agencies in order to serve their clients effectively and efficiently.

In a fragmented public human services system, an individual or family may receive assistance or services (or need assistance or services) from several different human services agencies (or separate programs within a single agency). All of these agencies—as well as the individuals and families they serve—have a shared interest in ensuring that the individuals and families they serve receive all of the assistance and services they need and that assistance and services are provided in an effective, efficient, coordinated, integrated, and holistic manner. Inter-agency collaboration and information sharing allow agencies to provide family-focused services, to assess individual and family needs comprehensively and holistically, to coordinate case planning and service delivery, and to avoid duplication of services.[46]

Some confidentiality rules, therefore, expressly allow the limited inter-agency sharing of otherwise confidential information in order to facilitate the efficient administration of government programs or enhance the services provided to clients of public human services agencies. For example, North Carolina's Juvenile Code expressly allows inter-agency sharing of confidential information for the purpose of protecting or treating abused or neglected children.[47]

Other Individual and Social Interests Regarding the Disclosure of Information

Other individual and social interests with respect to the acquisition, use, and disclosure of information also may limit the scope of confidentiality.

One example is society's general interest in protecting individuals from serious physical harm, injury, or death. Thus, some confidentiality rules—or other rules limiting confidentiality—either allow or require a social worker, psychologist, doctor, attorney, or agency to disclose otherwise confidential

information when the disclosure is necessary to prevent serious harm to an individual.[48]

Similarly, the public's interest in prosecuting and convicting individuals who have committed crimes—and the right of individuals who are accused of crimes to receive a fair trial—may, in some cases, outweigh other individual, professional, social, or public interests with respect to confidentiality.[49]

Conclusion

This *Social Services Law Bulletin* has attempted to answer two fundamental questions regarding confidentiality:

1. What is confidentiality; what does it mean to say that information is confidential?
2. What is the purpose of confidentiality and what interests, principles, or policies limit the scope of confidentiality?

Although there are a number of ways in which one can approach the subject of confidentiality, this bulletin suggests that the meaning, nature, and scope of confidentiality must be determined on a case-by-case basis based on the provisions, requirements, and restrictions of specific confidentiality rules governing the acquisition, use, protection, and disclosure of information.

Confidentiality does not depend on the intrinsic nature, form, or source of information. Instead, information is confidential only to the extent that an applicable *rule* provides that it is confidential and imposes requirements or restrictions regarding its acquisition, use, protection, or disclosure.

Confidentiality rules may serve one or more purposes. In some cases, the purpose of confidentiality is to protect individual privacy or to protect individuals from the harm that might result from the disclosure of sensitive personal information. In other instances, confidentiality is necessary to encourage and protect important individual, professional, or social relationships or to serve other individual, governmental, or public interests.

Confidentiality, however, is seldom, if ever, absolute. Instead, confidentiality rules generally allow or require the disclosure of confidential information to *some* individuals or agencies for *some* purposes under *some* circumstances. Confidentiality is often limited by competing interests, principles, policies, and rules regarding the acquisition, use, and disclosure of information.

Although answering these general questions about confidentiality will not provide social services agencies with any definitive answers to specific questions, issues, and problems involving confidentiality, it should provide social services agencies with a better understanding of the concept of confidentiality in general and provide a useful starting point for a more detailed discussion of confidentiality and social services.

But before discussing the specific questions, issues, and problems that social services agencies encounter with respect to confidentiality, one must examine the source or basis of confidentiality rules. The next *Social Services Law Bulletin* in this series will therefore focus on the question: "Where do confidentiality rules come from?"

Notes

[*] Mr. Saxon is a professor of public law and government at the Institute of Government, UNC-CH. His areas of responsibility include social services, child support, and elder law.

[1] 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.

[2] This bulletin generally uses the term "information" to refer to any type of information, data, communication, or record that may be considered confidential, regardless of its form or content.

[3] 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 Law Bulletins* will focus primarily on the confidentiality rules that apply to county departments of social services, other public human services agencies may find the general discussion of confidentiality useful in analyzing questions, issues, and problems that they encounter with respect to the acquisition, use, and protection of confidential information.

[4] 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. The sources, basis, authority, nature, and scope of confidentiality rules will be discussed in more detail in the next *Social Services Law Bulletin* on confidentiality and social services.

[5] This definition of confidentiality is similar to that proposed by Donald T. Dickson. Confidentiality, he writes, is "generally understood to mean that one is not to reveal [information] to another unless the individual [who provided the information] agrees that it can be disclosed." Dickson, *Confidentiality and Privacy in Social Work* (New York: Free Press, 1998), 28. It is also similar to the definition of confidential information under Rule 1.6 of the North Carolina State Bar's Rules of Professional Conduct: confidential information refers to any information that is gained in the attorney-client relationship that the client has requested be held inviolate.

[6] The right to privacy encompasses a number of different individual rights and interests including the right to decisional autonomy, the right to be secure in one's person and home from unreasonable searches and seizures, and the right to freely associate with others. This series of *Social Services Law Bulletins* on confidentiality and social services will focus only on the individual right to *informational* privacy—the right to be free from the unwarranted or unreasonable acquisition, use, or disclosure of personal information.

[7] This definition of informational privacy is based on Alan F. Westin, *Privacy and Freedom* (New York: Atheneum 1967), 7.

[8] Writing for the U.S. Supreme Court in 1977, Justice Stevens noted that "the collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed" and that modern medical practice often requires "unpleasant invasions of privacy" by doctors, hospitals, insurance companies, and public health agencies. Whalen v. Roe, 429 U.S. 589, 602, 605–06 (1977). Taking this a step further, Alan F. Westin suggests that some exchange of information between an individual and others is necessary for the well-being of both society and the individual, and that a more limited right to individual privacy or confidentiality may be necessary in order to facilitate and protect one's relationship with others and society. *See* Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1968), 32–39.

[9] In a technical sense, one might be "free" to refuse to disclose the amount of his or her income to the Internal Revenue Service in response to its requirement that individuals report their income for the purpose of determining their federal income taxes. The IRS, of course, may take legal action to force an individual (or employers, banks, accountants, or others who have access to this information) to disclose the information.

[10] In order for a confidentiality rule to apply to a particular situation, it must (a) apply to the *information* at issue and to the *individuals or agencies* who are involved in the acquisition, use, protection, or disclosure of that information; (b) be *binding* or enforceable as between the relevant parties; and (c) *govern* the confidentiality that information *vis a vis* other rules that purport to apply with respect to the acquisition, use, protection, or disclosure of the information.

[11] Conversely, information is not confidential if no applicable rule restricts the acquisition, use, or disclosure of the information or requires that it be protected from inappropriate use or disclosure.

[12] 5 U.S.C. 552a(a)(1), (a)(2), (a)(4), (a)(5).

[13] 42 C.F.R. 2.11. Legal Action Center, *Confidentiality and Communication: A Guide to the Federal Drug & Alcohol Confidentiality Law* (New York: Legal Action Center, 2000), 11–12.

[14] *See* G.S. 130A-143.

[15] This is particularly true because, as public agencies, state and county social services agencies are generally required by freedom of information, public access, or public records laws to disclose, upon request, information from their public records to any citizen. This means that public social services employees may not refuse to disclose information from their agencies' records simply because they feel, based on their own personal beliefs about confidentiality, that information is confidential and should not be disclosed, but instead must base their refusal to disclose confidential information on an applicable statute, regulation, or other binding rule that protects the confidentiality of that information.

[16] The federal Privacy Act, 5 U.S.C. 552, is an example of a confidentiality rule that includes an express statement of its purpose and is accompanied by extensive background information and legislative history regarding the reasons for its adoption.

[17] It has been suggested that society at large, as well as individuals, has an important *social* interest in individual privacy that is, or should be, protected by confidentiality rules. "Privacy is important not only because of its protection of the individual *as an individual* but also because individuals share common perceptions about the importance and meaning of privacy, because it serves as a restraint on how organizations use their power, and because privacy—or the lack of privacy—is built into systems and organizational practices and procedures. These … dimensions give privacy broader social, not only individual, significance." Priscilla M. Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (Chapel Hill, N.C.: The University of North Carolina Press, 1995), 23, 213 (emphasis added). Privacy, Regan argues, "serves not just individual interests but also *common, public, and collective purposes*. … Even if the individual interests in privacy [were] less compelling, *social* interests in privacy [would] remain" because privacy is a common value, a public value, and a collective value, as well as an individual value. Regan, *Legislating Privacy*, 221 (emphasis added).

[18] Although the collection and use by government agencies of information about individuals is not a modern phenomenon, two factors have coalesced since the 1960s to make informational privacy an important public issue. The first is the exponential increase in government record-keeping activities (and a qualitative difference with respect to the content of records that included information of a more personal and sensitive nature); the second is the computerization of information processing. Regan, *Legislating Privacy*, 69.

[19] 5 U.S.C. 552a.

[20] Mark I. Soler and Clark M. Peters, "Who Should Know What?: Confidentiality and Information Sharing in Service Integration," Resource Brief 3 (National Center for Service Integration, 1993), 6.

It is important to recognize that the privacy rights of individuals who receive assistance or services from social services agencies are not necessarily inferior to those enjoyed by other individuals, and that one does not automatically forfeit his or her legal rights merely by applying for or receiving government assistance. *See* Parrish v. Civil Service Commission, 425 P.2d 223 (Cal. 1967); *cf.* Wyman v. James, 400 U.S. 309, 91 S.Ct. 381 (1971).

[21] 5 U.S.C. 552a.

[22] *See* Mark I. Soler and Clark M. Peters, "Who Should Know What?: Confidentiality and Information Sharing in Service Integration," Resource Brief 3 (National Center for Service Integration, 1993); Mark I. Soler, Alice C. Shottton, and James R. Bell, *Glass Walls: Confidentiality Provisions and Interagency Collaborations* (San Francisco: Youth Law Center, 1993).

[23] For example, the federal law establishing federal and state case registries for child support orders prohibits the disclosure of the address of a custodial parent when nondisclosure is necessary to protect the parent or child from domestic violence. Similarly, federal Driver's Privacy Protection Act's restrictions on disclosure by state motor vehicles agencies of personal information (names and addresses) of licensed drivers was prompted in part by the murder of actress Rebecca Shaeffer, who was stalked and killed by a man who obtained her home address from the state motor vehicles agency.

[24] Suanna J. Wilson, *Confidentiality in Social Work: Issues and Principles* (New York: The Free Press, 1978), 1.

[25] National Association of Social Workers Policy on Information Utilization and Confidentiality, reprinted in Wilson, *Confidentiality in Social Work*, 215.

[26] National Conference of Lawyers and Social Workers, reprinted in Wilson, *Confidentiality in Social Work*, 233.

[27] The state law (G.S. 8-56) establishing an evidentiary privilege in civil actions with respect to testimony regarding confidential communications between spouses is based on public policy and society's interests with respect to family relationships. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

[28] *See* G.S. 8-53.7; *see also* Jaffe v. Redmond, 518 U.S. 1, 116 S.Ct. 1923 (1996).

[29] One of the purposes of the state law (G.S. 8-53) protecting privileged communications between patients and their physicians is to encourage the free and open communication and disclosure between patients and their doctors that is necessary for proper diagnosis and treatment. *See* Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998).

[30] *See* Boynton v. Burglass, 590 So.2d 446, 450–51 (Fla. Dist.Ct.App. 1991) (disclosure of information would wreak havoc with the psychiatrist-patient relationship by destroying the trust and confidence that is crucial to the treatment of mental illness).

[31] N.C. State Bar Revised Rules of Professional Conduct, Rule 1.6 (comment) (a fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation; the client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter).

[32] The federal regulations governing the confidentiality of information regarding persons who receive treatment for alcohol or substance abuse expressly require a court to consider the potential injury to an alcohol or drug abuse treatment program from the disclosure of confidential information when it is deciding whether to order disclosure of such information. 42 C.F.R. 2.64(d).

[33] 42 C.F.R. 2.3(b)(2); 1972 U.S. Code, Congr., & Admin. News 2072; Legal Action Center, *Confidentiality and Communication* (New York: Legal Action Center, 2000), 4.

[34] G.S. 7B-302(a).

[35] It has been suggested that to the extent that privacy and confidentiality are viewed as primarily individual, rather than social, interests, they will almost invariably "lose out" in a direct head-to-head competition with countervailing governmental, social, or public interests such as government efficiency, public accountability, or law enforcement. Regan, *Legislating Privacy*, 181–190. This may be particularly true when the individual interest in privacy or confidentiality is further weakened by its characterization as a "negative" value—the right to be left alone or live in relative isolation from society without social or governmental intrusion—making it possible for opponents to argue that privacy protects only "those who have something to hide" and should not shield such individuals from legitimate public or governmental scrutiny. *See* Regan, *Legislating Privacy*, 215, 217.

[36] 5 U.S.C. 552.

[37] G.S. Chapter 132. North Carolina's Public Records Law is discussed in more detail in David M. Lawrence, *Public Records Law for North Carolina Local Governments* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997).

[38] David M. O'Brien, *Privacy, Law, and Public Policy* (New York: Praeger Publishers, 1979), 214.

[39] 5 U.S.C. 552.

[40] *See* Lawrence, *Public Records Law for North Carolina Local Governments*, 67–203.

[41] *See* 42 U.S.C. 5106a(b)(2)(A)(vi) (federal Child Abuse Prevention and Treatment Act); G.S. 7B-2902.

[42] Whalen v. Roe, 429 U.S. 589, 605–06 (1977).

[43] It is important to note that the interest of government agencies in obtaining, retaining, and using personal information does not always outweigh an individual's interest with respect to privacy or confidentiality. *See* Hodge v. Carroll County Department of Social Services, 812 F.Supp. 593 (D.Md. 1992) (holding that parents' privacy rights were violated when state and local social services agencies retained information regarding an unsubstantiated report alleging that they had abused their child).

[44] G.S. 7B-302(e).

[45] G.S. 110-139(c), (d).

[46] Mark I. Soler and Clark M. Peters, "Who Should Know What?: Confidentiality and Information Sharing in Service Integration," Resource Brief 3 (National Center for Service Integration, 1993); Mark I. Soler, Alice C. Shottton, and James R. Bell, *Glass Walls: Confidentiality Provisions*

and Interagency Collaborations (San Francisco: Youth Law Center, 1993).

[47] G.S. 7B-3100.

[48] *See* Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976); Peck v. Counseling Service of Addison County, 449 A.2d 422 (Vt. 1985). In *Tarasoff*, the California Supreme Court held that therapists have a legal *duty* to breach a confidential relationship and take steps to protect an identifiable third party from foreseeable harm threatened by a patient or client, and in failing to do this, could be liable for damages. Courts in at least two states, however, have rejected the "duty to warn" principle. *See* Shaw v. Glickman, 415 A.2d 625 (1980); Boynton v. Burglass, 590 So.2d 446 (Fla. Dist.Ct.App. 1991).

See also Dickson, *Confidentiality and Privacy in Social Work*, 147; McIntosh v. Milano, 403 A.2d 500 (N.J. Super.Ct. 1979) (confidentiality of medical information may be outweighed by protection of public welfare); G.S. 122C-55(d) (allowing the disclosure of confidential information regarding persons receiving treatment for mental illness when there is an imminent danger to the health or safety of the client or others); 21 N.C. Admin. Code 63.0507 (allowing licensed clinical social workers to disclose confidential information when there is an imminent danger to their clients or others); N.C. State Bar Revised Rules of Professional Conduct, Rule 1.6(d) (allowing a lawyer to reveal confidential information when necessary to prevent client from committing a crime).

[49] *See* Krauskopf v. Giannelli, 467 N.Y.S.2d 542 (1983) (disclosure of confidential information to grand jury); G.S. 7B-307 (disclosure of information regarding child abuse to law enforcement agencies and prosecutors); In re Albemarle Mental Health Center, 42 N.C.App. 292, 256 S.E.2d 818 (1979) (disclosure of confidential information necessary for investigation or prosecution of criminal charges). *See also* Pennsylvania v. Ritchie, 480 U.S. 39 (1987); State v. Gagne, 612 A.2d 899 (N.H. 1992); State v. Bailey, 89 N.C.App. 212, 365 S.E.2d 651 (1988); State v. McGill, ___ N.C.App. ___, ___ S.E.2d ___ (2000) (court must review confidential child welfare records of social services agency *in camera* and disclose potentially exculpatory information to defendant in a criminal prosecution for child abuse).

Social Services Law Bulletin is published on an occasional basis by the Institute of Government to address issues of special interest to county and state social services employees and officials. It is distributed to a variety of local and state social services and other human services officials. (Corrections to mailing lists should be sent to the editor.)

Comments, suggestions for topics to be addressed, and offers to contribute articles or information to be included in the *Bulletin* are welcome and should be sent to the editor.

To order copies of the *Bulletin*, to request inclusion on the distribution list, or to request a catalog of other Institute of Government publications, write to the Publications Office, Institute of Government, CB# 3330 Knapp Building, UNC–CH, Chapel Hill, NC 27599-3330, call (919) 966–4119, or email khunt@iogmail.iog.unc.edu.

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 404 copies of this public document at a cost of $228.01 or $0.56 each. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs. To order copies of the Bulletin or to request a catalog of other Institute of Government publications, write to the Publications Marketing and Sales Office, CB# 3330 Knapp Building, UNC-CH, Chapel Hill, NC 27599-3330, or call (919) 966-4119 for price information.