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## **Confidentiality Guidelines**

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## 1. Scope of the guidelines

These guidelines apply to:

- those in full time or part time employment within the Council on fixed term or permanent contracts
- probationers
- those staff on secondment into or from the Council (subject to terms and conditions of the secondment arrangement)
- agency and casual staff

For the purpose of the guidelines all of the above are referred to as “staff”. However this term is not intended to determine employee status.

These guidelines do not apply directly to schools or to consultants, contractors and third party suppliers as these organisations are expected to have in place their own arrangements for dealing with confidentiality.

## 2. Purpose

To provide staff with guidelines on identifying and handling confidential information.

## 3. Definitions

Term	Definition
Confidential information	Information of a non-trivial nature that is not already in the public domain or readily available from another public source and that has been shared in circumstances where the person giving the information could reasonably expect that it would not be shared with others
Protective marking	The process of applying a label to a document to indicate its sensitivity
Discloser	A person providing information
Receiver	A person receiving information
Personal data	Data relating to a living, identifiable individual
Sensitive personal data	Data relating to an individual’s: <ul style="list-style-type: none"> <li>• Racial or ethnic origin</li> <li>• Political opinions</li> <li>• Religious or similar beliefs</li> <li>• Trade union membership</li> <li>• Physical or mental health or condition</li> <li>• Sexual life</li> <li>• Commission or alleged commission of offences</li> <li>• Proceedings for any offences committed or alleged to have been committed and the disposal of any proceedings or the sentence of any court in such proceedings</li> </ul>

Service user	Any person receiving services from Darlington Borough Council
Service user information	Information from which a service user can be identified, including, but not limited to: <ul style="list-style-type: none"> <li>• Service user's name, address, date of birth</li> <li>• Pictures, videos or other images of service users</li> <li>• Unique identifiers, such as system-generated reference numbers</li> </ul> This term also includes any other information that can be used to directly or indirectly identify a service user. For example, statistics that have very small numbers from small populations that may allow an individual to be identified.
Explicit consent	The articulated voluntary agreement of a service user to a specific course of action in circumstances where the options and consequences have been made clear to them. Will usually be given orally or in writing and must be given freely.
Implied consent	Where a service user's agreement is signalled by their informed behaviour
Disclosure	The divulging or provision of access to information.
Capacity	In this context, a person's ability to make a particular decision

## 4. Guidelines

### 4.1. Identifying confidential information

A duty of confidence arises when one person discloses information to another in circumstances where it is reasonable for the discloser to expect that it will be held in confidence by the receiver. It is:

- Information that is non-trivial;
- Information that is not already in the public domain or readily available from another public source; and
- Information that has been shared in circumstances where the discloser could reasonably expect that the receiver will not share it with others.

#### 4.1.1. Explicit requests for confidentiality

##### ***Protective Marking***

Protectively marking a document helps ensure that everyone is aware of the sensitivity of the information contained within it. When we deal with people external to the Council, for example, contractors and members of the public, you will often find that they will mark documents 'confidential' or 'private'. This is a clear indication that they expect the information to be kept confidential.

Many public authorities use the Government Security Classification (GSC), which includes the classes 'official – sensitive [personal]' or 'official – sensitive [business]' to indicate when

personal data and/or confidential information is present in a document. You might also come across the term 'RESTRICTED'; this term is from the old GSC (known as the Government Protection Marking Scheme at that time) which covers sensitive personal data and confidential information.

Whilst protectively marking a document is a clear indication that the discloser expects the information contained within it to be kept confidential by the receiver, it does not necessarily mean that it meets the criteria outlined in section 4.1. If a document is protectively marked but you do not believe that the information is confidential and you need to share it with a third party, you should speak to the discloser and explain how you propose to handle the information.

You should also be aware that a document may contain confidential information but not be protectively marked. In such a case, you may find it helpful to speak to the discloser to verify that the information is indeed confidential and to discuss how it should be handled.

### ***Contract terms***

You will find that many contracts have a section on confidentiality and there may also be a schedule of confidential documents attached to it. You should make sure that you review these sections and understand the expectations and seek advice from Legal Services where necessary. In particular, you should be aware that the Council is subject to the requirements of the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, both of which require us to make information available to the public upon request. Each piece of legislation contains exemptions from the duty to disclose, e.g. where information is commercially sensitive, provided in confidence or contains personal data, but these exemptions can only be applied if the public interest lies in withholding the information. There is usually a strong public interest in the disclosure of anything that involves the spending of public money so we should be very careful about signing contracts with strict confidentiality clauses.

### ***Verbal requests***

Many people (particularly service users) will verbally request that information be kept confidential. You should record this request for confidentiality in any written records. If at the time the individual provides the information you know that you are unable to keep it confidential because, for example, you have a legal responsibility to pass it on to someone else, you should explain this to the individual.

#### **4.1.2. Implied requests for confidentiality**

### ***Confidential relationships***

There are a number of relationships that automatically carry an expectation of confidence, for example:

- Between a patient and doctor (sometimes called the Hippocratic Oath); and

- Between a client and lawyer (known as legal professional privilege)

It is also likely that the relationship between a service user and their social worker, care coordinator or similar professional will carry an expectation of confidence. This relationship is, however, likely to be more complex due to the fact that such social care services are often delivered in a multi-agency environment (for example, working alongside health professionals and the police). For this reason, we need to make sure that we are very clear with service users regarding the types of information we are able to keep confidential and those that have to be shared with others. It is also important that you record any discussions that you have with service users around confidentiality so that other professionals that access the information are aware of the expectations.

#### **4.2. Breach of confidence**

Confidence is only breached when information is disclosed to a third party and the person who provided the information has not consented to its disclosure.

Information is confidential to the agency as a whole, and not to individual practitioners. You should, however, only share confidential information with other practitioners in the same agency or team for genuine purposes, such as supervision, to ensure cover for work whilst on leave or for the seeking of legal advice. This should be explained to the discloser at the start of our relationship with them.

#### **4.3. Disclosing and using confidential information**

It is important that people are made aware of the ways in which the information they provide will be used at the start of our involvement with them. In particular, we must make them aware of some of the less obvious ways in which the information they provide will be used, for example, case reviews and audits.

If you are working as part of a shared team or in circumstances where you need to share information with other internal or external parties in order to provide services, this should also be made clear to the individuals involved at the start of your involvement. Where possible, this should be in the form of explicit consent.

##### **4.3.1. Consent**

Consent is the process whereby a person gives their permission to a course of action. Where confidentiality is concerned, consent is the process whereby the discloser of confidential information gives their permission for the information to be disclosed by the receiver to a third party.

##### ***Valid consent***

For consent to be valid it must be given voluntarily by an informed person who has the capacity to consent. Consent is not valid if:

- The person was pressurised by someone else to make the decision;
- The person does not have the capacity to give consent; or
- The person was not given sufficient information to make the decision, for example, they were not given information about alternative courses of action.

### **Capacity**

The Mental Capacity Act 2005 (MCA) defines a person who lacks capacity as a person who is unable to make a decision for themselves because of an impairment or disturbance in the functioning of their mind or brain. The impairment may be permanent or temporary. A person lacks capacity if:

- they have an impairment or disturbance that affects the way their mind or brain works (for example, a disability, condition or trauma or the effects of drugs or alcohol); and
- that impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made.

An assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made, and not their ability to make decisions in general. A person is unable to make a decision if they cannot do one or more of the following things:

- understand information relevant to the decision;
- remember that information long enough to be able to make the decision;
- use or weigh up the information as part of a decision-making process; or
- communicate their decision by talking, using sign language or by any other means.

People may have capacity to consent to some things but not to others, or may have capacity at some times but not at others. Under the MCA, a person must be assumed to have capacity unless established otherwise. If there is any doubt, professionals (i.e. those working with the individual) should assess the ability of the person to make the decision in question. In the context of this code of practice, it will be the ability of the person to make decisions about the way in which any information they provide to us will be used. Capacity assessments and decisions should be clearly recorded.

A person's capacity to consent may be temporarily affected by factors such as confusion, panic, shock, fatigue, pain or medication. Unless the decision has to be made in an emergency, the seeking of consent should be delayed until the person's capacity returns.

Capacity should not be confused with someone else's assessment of the reasonableness of the person's decision. Under the MCA a person is not to be treated as unable to make a decision merely because they make an unwise decision. A person is entitled to make a decision which may be perceived by others to be unwise or irrational, as long as they have the capacity to do so.



### ***Seeking consent***

The MCA requires us to take all practical and reasonable steps to help someone make a decision themselves by, for example:

- Providing relevant information;
- Communicating in an appropriate way, for example, using simpler language, providing a translation, etc;
- Making the person feel at ease, for example, by asking a trusted professional to discuss the matter with the individual; or
- Supporting the person (this must not be confused with influencing the person).

The professional working with the individual is generally responsible for gaining consent from them. The professional must be able to provide enough information to the individual for them to be able to make an informed decision about the way in which the information they provide will be used.

### ***Form of consent***

The validity of consent does not depend on the form in which it is given. Written consent serves as evidence of consent but if the elements of voluntariness, appropriate information provision and capacity have not been satisfied, a signature on a form will not make the consent valid.

The use of consent forms is good practice when recording (valid) consent to the sharing of information. Where there are concerns about capacity, you should not ask the person to sign the form until an assessment of their capacity has been undertaken.

If a person is unable to sign their name, they may be able to mark a form to indicate consent. It would be good practice to ask someone other than the professional seeking consent to witness the marking of the form. Similarly, if the person has capacity but is physically unable to mark the form, you should record this in the service user's notes.

An individual can also give consent verbally or non-verbally (i.e. where their actions indicate their consent) and will be valid as long as an informed person who has capacity gives it voluntarily and signals it through their actions.

### ***Duration of consent***

When an individual gives consent to the sharing of the information it generally remains valid for an indefinite duration, unless it is withdrawn. It is, however, good practice to refresh consent regularly with people, particularly where significant events occur. For example, if a service user consents to their information being shared with third parties for the purposes of providing them with services, and a new service provider starts working with the Council, it is good practice to explain this to the service user and ask them whether they are still happy for us to share the information.

### ***Refusal of consent***

If an adult with capacity makes a voluntary and appropriately informed decision to refuse permission for the Council to share the confidential information they provide, we must respect that decision, even if we think it unwise.

There are circumstances where we do not have consent and we can over-ride a duty of confidence in the public interest. This is looked at in more detail in section 4.3.2.

### ***Withdrawal of consent***

A person with capacity can withdraw consent at any time. The same principles regarding capacity apply when someone withdraws consent as when they provide it. A withdrawal of consent should be clearly recorded in the individual's records.

### ***Consent in relation to children***

A child (i.e. anyone under the age of 18), who has the capacity to understand and make their own decisions, may give or refuse consent to sharing of confidential information about or provided by them. Children aged 12 or over are generally expected to have sufficient understanding. There is a statutory basis for this assumption for children aged 16 and over. When assessing a child's ability to make decisions, you should explain the issues to the child in a way that is suitable for their age, language and likely understanding. Where possible, you should also use their preferred method of communication, which you may find is different from adults (for example, they may have a preference for electronic communication rather than letters or meetings).

The following criteria should be considered in assessing whether a child, on a particular occasion in relation to a specific consent episode, has sufficient understanding for that consent to be valid:

- Can the child understand what is being asked of them?
- Do they have a reasonable understanding of:
  - What information may be shared;
  - The main reason or reasons for sharing the information; and
  - The implications of sharing or not sharing the information.
- Can they:
  - Appreciate and consider the alternative courses of action open to them;
  - Weigh up one aspect of the situation against another;
  - Express a clear personal view on the matter, as distinct from repeating what someone else thinks they should do; and
  - Be reasonably consistent in their view on the matter, or are they constantly changing their mind?

Considerations about whether a child has sufficient understanding are often referred to as Fraser Guidelines, although these were formulated with reference to contraception and contain specific considerations not included above.

In most cases, where a child cannot consent or where you have judged that they do not have sufficient understanding to provide valid consent, a person with parental responsibility should be asked to consent on the child's behalf. If a child is judged not to have the capacity to make decisions, their views should still be sought as far as possible.

Where parental consent is required, the consent of one person is sufficient. In situations where family members are in conflict you will need to consider carefully whose consent should be sought. If the parents are separated, consent should normally be sought from the parent with whom the child usually resides. If a care order is in place, a local authority will share parental responsibility with parent(s) and other practitioners and should liaise with them about questions of consent.

If a child is deemed to have the capacity to consent, their views should take precedent over those of a parent or carer, even if those views are in direct conflict. Where parental consent is not required, the child should be encouraged to discuss the issues with their parents or carers. However, we should not withhold the service on the condition that they do so.

Dealing with consent issues in relation to children can be very difficult. If appropriate, you should try and reach an agreement or understanding with everyone involved with the child. You must always act in accordance with your professional code of practice where there is one and consider the safety and well-being of the child, even if this means overriding refusal to consent. If you are unsure, you should seek advice from your line manager in the first instance.

### ***When consent should not be sought***

There are some circumstances where you should not seek consent for the disclosure of information, even if it is confidential. For example:

- If seeking consent would place someone (either the service user, a family member, yourself or some other person) at increased risk of significant harm if a child or serious harm if an adult;
- If seeking consent would prejudice the prevention, detection or prosecution of a serious crime; or
- If the process of seeking consent would lead to an unjustified delay in making enquiries about allegations of significant harm to a child or serious harm to an adult.

You do not need to seek consent to share confidential information if you are required by law to do so, through a statutory duty or court order.

### **4.3.2. Public interest**

Even where you do not have consent to share confidential information, you may lawfully share it if it can be justified in the public interest. Seeking consent should be the first option,

however, when consent cannot be obtained or it is refused, or where seeking consent is inappropriate or unsafe, you can make a judgement about disclosure in the public interest, which must be based on the facts of each individual case.

A public interest can arise in a range of circumstances, for example:

- To protect children from significant harm;
- To protect adults from serious harm;
- To promote the welfare of children;
- To prevent crime and disorder; or
- To apprehend and prosecute offenders.

The key factors in deciding whether or not to share confidential information are necessity and proportionality.

### ***Necessity***

You should start by considering whether it is truly necessary to share the confidential information or whether it is possible to achieve your goals without breaching the confidence, for example, by anonymising the information.

### ***Proportionality***

A useful starting point for deciding whether the sharing of confidential information is proportionate is to weigh up the consequences of disclosing the information against the consequences of failing to disclose it, based on your professional judgment. The nature of the information to be shared is a factor in this decision. For example, if the information is very sensitive and will have a significant impact on the provider or the individual to whom it relates, then it may lead you to decide that the consequences of disclosure outweigh the public interest in disclosure. On the other hand, if the information will have little impact, then it may lead you to decide that the consequences of failing to disclose outweigh those in maintaining confidentiality.

Unfortunately, it is not possible to provide a list of all of the circumstances in which it will be acceptable to override confidentiality in the public interest because you must always make your decision in light of all of the relevant information using your professional judgement. Having said that, where failing to disclose confidential information could put someone at risk of significant harm (if a child) or serious harm (if an adult), then the public interest test will almost always be satisfied.

Where you are unsure whether the public interest test is met, you should seek the advice of your line manager in the first instance. Seek advice without disclosing the identity of the person(s) to whom the duty of confidence is owed where possible.

If you decide to share confidential information without consent, you should make a record of your decision so that you can refer back to it if challenged.

#### **4.4. Methods of sharing confidential information**

Once you have made the decision to share confidential information, you must ensure that the transfer of it is secure. You must follow the Council's information security policies, standards, processes, procedures and guidelines, which can be found on the Information Management intranet pages.

#### **5. Guidelines review**

This policy will be reviewed by the Information Management Team at least annually, or when significant changes occur that may affect records management activities.