



British Columbia

MENTAL HEALTH REVIEW BOARD

Effective Date: 2018/11/30

Title: Practice Direction – Guidelines for Disclosure

This Practice Direction describes the administrative procedures that must be followed with respect to disclosure. The purpose of these procedures is to ensure that a patient is given a procedurally fair hearing that also proceeds expeditiously.

Summary:

Parties appearing before the Board have document disclosure obligations pursuant to the *Rules of Practice and Procedure* and the Board has the authority to order the production of documents under the *Mental Health Act* (the “Act”). These guidelines on disclosure apply primarily to facilities given that they create, compile, and/or retain patient medical and health information records that are relevant to Board proceedings. Disclosure of relevant records held by facilities allows the patient to know the case they have to meet and effectively prepare for the hearing.

Disclosure by facilities step-by-step:

1. Facilities have a duty to disclose relevant records in their possession or control.
2. Facilities can meet their disclosure obligations two ways:
 - a. By providing a copy of relevant documents, or
 - b. By providing an opportunity to review relevant documents.
3. Disclosure is triggered by request.
4. A patient representative must make a written request for disclosure to the facility no later than three business days before the scheduled review panel hearing.
5. A self-represented patient will not be held to the same timelines, and may make an oral request for disclosure. Facilities must not require patients to make a freedom of information request when seeking disclosure for the purpose of a review panel hearing.
6. The request should state whether it is a request for a copy of the relevant documents or an opportunity to review them.
7. Consent from a patient authorizing the release of treatment records for the purposes of a review panel hearing is sufficient for the release of the entire treatment record in the possession or control of the facility, including any part of the record that may relate to earlier treatment at another facility.

8. If a Patient opts for representation by the Mental Health Law Program (MHLP) on the Form 7 *Application for Review Panel Hearing*, they consent to the release of their records to the MHLP.
9. If the request is to review documents, the facility must provide access to the documents for the purpose of preparing for the hearing (i.e. adequate time and an appropriate location for the document review prior to the hearing). In the case of self-represented patients, this may mean supervised access at a mutually agreed upon time.
10. If the request is for a copy of documents, the facility must provide a copy of all documents in its possession or control that are relevant to the application within two business days of receiving the request, at their own expense. If a self-represented patient makes a late request for a copy of documents, the facility must make every effort to disclose promptly before the commencement of the hearing.

Direction:

What to disclose

Facilities have a duty to disclose all relevant records in their possession or control.

A document is relevant if it contains evidence that goes to any fact or issue considered at a review panel hearing including hospitalization and treatment history.

Examples of relevant documents include, but are not limited to:

- Forms and certificates (e.g. Forms 4, 6, 11, 12 and 21)
- Medical reports, including attending physician reports
- Past admission /discharge notes and summaries
- Progress reports
- Mental Health Team assessments
- Attending physician notes
- Physician/nursing/social work/occupational therapy notes
- Police reports
- Interviews with family members, friends, and neighbours
- Any document that will be referred to or relied on in the case note and presentation

Facilities that are unclear what records to disclose or what time period of records to disclose should consult with the patient representative or patient who sent the disclosure request.

Disclosure is an ongoing obligation

Disclosure obligations are ongoing and relevant records that are acquired or generated between the time of initial disclosure and the hearing must also be disclosed promptly before the hearing where reasonably practicable.

Documents obtained through the disclosure process are confidential

A party must not use a document obtained through the disclosure process for any purpose other than the application process in which they were disclosed, except with the consent of the other party, or by order of the Board.

Reasonable Limits on Disclosure

A basic starting point for meeting the duty of procedural fairness is putting the patient and their representative in a position to know the case they must meet. Not allowing access to medical records may serve to undermine that principle and interfere with a just result. Justice is best served when the patient and their representative have complete information of the case to be met.

Balanced against these procedural fairness rights is the recognition that there may be appropriate exceptions to the disclosure of records. The threshold is high. It would require an exceptional set of circumstances where records arguably relevant to an application would not be disclosed. For example:

- Information that was obtained on a confidential basis which if disclosed, would likely endanger the life or safety of the patient or another person, or would likely seriously impair the care or treatment of the patient.
- Information contained in a medical record that would identify a person who has made a report under the *Adult Guardianship Act*.

If a facility has decided to limit disclosure, it must notify and explain to the patient or their representative the exceptional circumstances that apply to any severed or redacted document.

Because a review panel is a legal proceeding, the *Freedom of Information and Protection of Privacy Act (FIPPA)* does not, on its own, justify limits on disclosure.¹ However, there may be situations where the exceptions set out in *FIPPA* meet this high threshold.

The parties are expected to resolve these issues on consent.

Orders for disclosure

If the disclosure issue cannot be resolved on consent, a party may apply to the Board for an order for disclosure of documents. The application must state why the application is fair and reasonable in the circumstances and the efforts to obtain a copy of the document. A patient is not required to apply for disclosure that is already required under the *Rules* and this Practice Direction. Facilities are responsible for complying with the *Rules* and this Practice Direction regarding prompt disclosure of relevant documents without being ordered to do so.

¹ Section 3(2) of *FIPPA* states that *FIPPA* does not limit the information available by law to a party to a proceeding.

A party seeking an order for disclosure must seek the position of the opposing party and include that information in the application. A copy of the application must be provided to the opposing party at the same time it is filed with the Board. Where appropriate, the Board will seek a response from the opposing party before making a decision on the application.

The opposing party may respond to the application for an order of disclosure with a request to limit disclosure. The request to limit disclosure must be promptly communicated to the Board with an explanation of why limiting disclosure is fair and reasonable in the circumstances. The Board's chair or designate will make any order they consider just, fair and reasonable in the circumstances.

It would require an exceptional set of circumstances where records arguably relevant to an application would not be ordered disclosed. For example, material that was obtained on a confidential basis which if disclosed, would likely endanger the life or safety of the patient or another person, or would likely seriously impair the care or treatment of the patient. A facility seeking to limit disclosure must satisfy the Board that such exceptional circumstances exist to justify the non-disclosure of otherwise relevant records.

Any order or decision of the Board regarding disclosure will be made in writing.

Consequences of Failure to Disclose

If a facility fails to disclose as required by the *Rules* and this Practice Direction, or by a decision, order, or direction of the Board:

- It may not introduce the document as evidence at the hearing without permission of the panel;
- If the panel grants permission to introduce a document which was not disclosed as required, the panel will permit participants a reasonable recess to review the evidence; and
- The Board or panel may make any decision or order it considers appropriate in the circumstances.

**Diana Juricevic
Chair, Mental Health Review Board**

SAMPLE REQUEST FOR DISCLOSURE:

I (Name of Patient) request that (Name of Facility) disclose to me all relevant records for the purpose of preparing for a review panel hearing scheduled for (date of hearing) .

I request that the disclosure be in the form of:

Copy of documents

Opportunity to review documents

I understand that I may not use any documents obtained through the disclosure process for any other purpose.

Signature of Patient

Date