

# Subpoenas for documents, search warrants, or other requests by police for information

## Chief Psychiatrist's Guideline

### Key message

This Guideline provides information to assist practitioners in responding to a **subpoena** or **search warrant**, or in other instances when police request information about a patient.

### Introduction

There are occasions when practitioners are requested through a formal process to provide patient information, which may include medical records. This may be through service of a search warrant or subpoena, or a request by the police for the information.

Legal issues concerning requests for patient files or patient information are complex. It is not necessary for practitioners to understand all the implications of a request for information. Rather, the practitioner should recognise the different types of requests for information and respond appropriately. An appropriate response will allow any claims to protect the information to be made at a later date.

### Disclaimer

This guideline is not intended to provide a comprehensive analysis of the relevant law. It should not replace the exercise of individual professional judgement, or the seeking of legal advice on a case-by-case basis when appropriate. Services should seek their own legal advice when developing local protocols and procedures relating to these matters.

### Subpoenas

A subpoena is a document issued by a court at the request of one of the parties to a court case. It has the effect of a court order. Parties to civil or criminal proceedings can obtain subpoenas.

There are three main types of subpoenas.

- The first type requires a named person to attend court to give evidence.
- The second type requires a person to produce documents named in the subpoena. *Document* is widely defined to include photographs, discs, tapes and film as well as written documents.
- The third type of subpoena is a combination of the first two. It requires a named person to attend court to give evidence and produce documents.

A subpoena issued by a lower court, such as the Magistrates Court, may be called a "Summons" rather than a subpoena. In all other respects it will conform to the requirements for a subpoena.

A subpoena has the effect of an order of the court. Accordingly, if the person named in the subpoena does not comply with the request in the subpoena, the court may issue a warrant to apprehend that person.

### Appropriate response to a subpoena

Set out below is a checklist to follow if served with a subpoena for the production of documents. A practitioner served with a subpoena requiring his or her attendance at court should seek legal advice in sufficient time to allow him or her to comply with the subpoena.

- Note the time and date the subpoena is received.
- Check the subpoena or summons to ensure it has been stamped by the appropriate court. If it has not been stamped, then it has not yet been issued. Contact the relevant court registry if there is any doubt concerning the validity of a subpoena.
- Determine the date the subpoena must be complied with and, if you are not the person named in the subpoena, ensure the person named is informed of the subpoena.
- Locate the documents named in the subpoena. All documents should be placed in sealed envelopes or boxes, and clearly labelled with details of where and to whom the court is to return the documents. If possible, keep copies of the subpoena and all documents to be sent to the court.
- Prepare a letter to accompany the documents to the court. This letter will alert the court that you, after seeking legal advice, may use legal processes to put forward grounds why you should not have to comply with the subpoena.

The court makes the final decision about whether a subpoena should be complied with. The grounds you may rely on are outlined below.

Address the letter to the Registrar of the court that issued the subpoena. It should include words to the effect of:

*“Please find enclosed the documents named in the subpoena dated [xxxx] addressed to [xxxx].*

*These documents are provided to the court to comply with the subpoena.*

*Production of these documents is not to be seen as a waiver of the right to claim privilege in respect of these documents.*

*Legal advice is currently being sought as to whether privilege can be claimed in respect of any of the documents listed in the subpoena.”*

- If any of the documents named in the subpoena cannot be found, the court should be advised of this in the letter sent in response to the subpoena.
- Keep a detailed list of all documents sent to the court to comply with the subpoena.
- It is important that the documents are delivered to the court and not to the party to the legal proceedings who requested the subpoena.
- Notify line management of the subpoena and your response. Request them to obtain legal advice if appropriate as to whether a claim of privilege can be made.

## Objecting to a subpoena

There are a number of grounds on which a person who has custody of a document may object to its production in accordance with a subpoena.

Public interest immunity, sometimes called public interest privilege, is one of these grounds, and applies in situations where the court finds that the production of a document would be injurious to the public interest.

Claims of public interest immunity may only be made before the court that issued the subpoena. Sometimes the party that requested the subpoena be issued will accept the claim and will not pursue the subpoena. If so, this must be confirmed in writing, and the court must be notified. However, often it is necessary for the claim of public interest immunity to be argued before the court. In such a case, the documents must be produced to the court to comply with the subpoena before the argument takes place.

Another ground for objection is where, in the context of psychiatric records, a court may find that the disclosure of confidentially obtained records in court may have significant adverse consequences for the person concerned and for the therapeutic relationship. The risk of harm to persons named in the records, and the risk of harm to the public interest by breaching the confidentiality of psychiatric records may outweigh the potential value of the information to the legal proceedings.

A specific ground for objection applies for information communicated confidentially to a clinician by a victim of a sexual offence. This is specifically addressed under the Victorian *Evidence Act 1958* (s.32 C) and, unless the court grants leave, this information is not to be used as evidence. This does not apply to information acquired at physical examination, including communications made during the examination.

## Search warrants

Generally, a search warrant is obtained by the police when investigating the commission of a criminal offence. A warrant is obtained by making an application to a magistrate. Evidence must be provided before the warrant is issued. The warrant may be issued to a named member of the police force or all members of the police force. If it is issued to all members of the police force, any member may execute the warrant.

The warrant should state clearly the address that may be searched and the items sought pursuant to the warrant. The warrant authorises the police to break, enter and search any premises named in the warrant and to arrest the person having custody of the things named in the warrant. It is necessary to cooperate with the police who are executing the warrant.

## Appropriate response to search warrants

- Cooperate with the police who are executing the warrant – be courteous and act professionally.
- Inform management as soon as possible that you have been presented with a warrant.
- Ensure the warrant has been issued by the court. Note the person to whom it has been issued and the items that may be seized pursuant to the warrant.
- If the warrant has been issued to the police generally, any member of the police force may execute it. Otherwise, the officer named in the warrant must execute it.

- Monitor that only material named in the warrant is taken during the search. Object politely if police attempt to remove material that you believe is outside the scope of the warrant.
- Keep a list of all material taken in the search. If possible, keep copies of the documents.
- Do not undertake any routine or other shredding of documents or erasing of information from computers while the search is being undertaken.
- Keep notes of all requests made of the police during the search and their responses.
- Obtain legal advice concerning the search and seizure of material as soon as possible.

### **Other requests for information by the police**

Occasionally requests not supported by formal court documents may be made by the police for information, such as the discharge date, whereabouts or destination of a patient. If such a request is received, the particular circumstances should be carefully considered. Situations where the public interest clearly outweighs the requirement for confidentiality should be considered on their merits. In many situations, however, the police should be advised that you are obliged by the *Mental Health Act 1986* to maintain confidentiality.

Exceptions that permit the disclosure of information that may be relevant to a police request for information, are section 120A(3)(ea) and section 120A(3)(b) of the *Mental Health Act*, which draw the Act into compliance with the *Health Records Act 2001*. *The Health Privacy Principles (HPP)* apply to information sought under this Act.

Under *HPP 2.2(h)*, information may be disclosed where the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent:

- (i) a serious and imminent threat to an individual's life, health, safety or welfare; or
- (ii) a serious threat to public health, public safety or public welfare.

Section 120A(3)(b) of the *Mental Health Act* allows the "giving of information to a court in the course of criminal proceedings". It should be noted that this exception applies to criminal proceedings that have already been commenced, and that such information is only to be provided if a subpoena is presented requesting it.

### **Self assessment tool**

The following indicators are provided to assist services in implementing and monitoring practices, which inform clinicians about their rights and responsibilities.

- Each service has local policy and procedures formalised to assist staff to respond to subpoenas, search warrants or requests for information in a timely and appropriate manner.
- Staff are informed of their legal and ethical rights and obligations in relation to the management of requests for information.

## About Chief Psychiatrist's Guidelines

The information provided in this guideline is intended as general information and not as legal advice. If mental health staff have queries about individual cases or their obligations under the *Mental Health Act 1986*, service providers should obtain independent legal advice.

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