



# Practice Direction Number 2 of 2020

## REQUESTS FOR A CONFIDENTIALITY ORDER

1. This practice direction replaces Practice Direction Number 2 of 2017.
2. The purpose of this practice direction is to provide guidance in circumstances where the Mental Health Review Tribunal (**Tribunal**) is to consider the making of a confidentiality order under section 722 of the *Mental Health Act 2016* (**Act**).

### **What may be the subject of a confidentiality order**

3. Section 722 of the Act provides that any of the following can be the subject of a confidentiality order:
  - a) information given before it;
  - b) matters contained in documents filed with, or received by it;
  - c) the reasons for its decision on the proceeding.
4. The Tribunal may make a confidentiality order over documents or oral information given at hearing.

### **Criteria for making a confidentiality order**

5. The Tribunal may make a confidentiality order only if the Tribunal is satisfied the disclosure would:
  - a) cause serious harm to the health of the person; or
  - b) put the safety of someone else at serious risk.
6. A confidentiality order keeps the information the subject of the order confidential only from the person the subject of the hearing.

### **Who may request a confidentiality order**

7. A confidentiality order can be requested by any person, however, in order to consider the criteria for making a confidentiality order in the Act, the person may be required to give evidence at the hearing.
8. The Tribunal requests that all requests for confidentiality order be made using the form available at its website.



### **Reasons for request for confidentiality order**

9. Persons requesting a confidentiality order must be prepared to provide reasons for the request that address the criteria in the Act.
10. If the person requesting the confidentiality order will not be in attendance at the hearing, liaison should occur with the member of the treating team who will be attending the hearing so that evidence can be provided to the Tribunal.
11. For example, where a confidentiality order is sought over all or part of a report from the Community Forensic Outreach Service (**CFOS**), the treating team should be prepared to speak to the reasons for the request such that the Tribunal can determine whether the criteria are met.
12. Where the request relates to a document, the request should clearly articulate whether the request applies to the whole document or only parts of the document. Consideration should be given to identifying content of the document that may be provided to the person the subject of the hearing and this should be specified on the request form.

### **Appointing a lawyer for the person the subject of the hearing**

13. Upon receipt of a request for confidentiality order, the Tribunal will appoint a lawyer for the person the subject of the hearing, if the person does not already have a lawyer.
14. The lawyer will have an opportunity to make submissions as to the making of the confidentiality order and, if a confidentiality order is made, regarding the content of the confidential material. Such submissions will be made in the absence of the person the subject of the hearing.
15. If a confidentiality order is made, the Tribunal will provide the legal representative for the person the subject of the hearing with written reasons for the order at the time it provides the decision in relation to the hearing of the proceeding.

### **The hearing**

16. The Tribunal may consider the need for a confidentiality order at the commencement of the hearing of the proceeding.
17. The Tribunal will determine who may appear at the portion of the hearing regarding consideration of the confidentiality order.
18. If the Tribunal makes a confidentiality order, the Tribunal may direct that the person the subject of the hearing not be present during the hearing of the proceeding while reference is made to, or submissions are made with respect to, the information or matters the subject of the confidentiality order. Attendees are not to refer to such information while the person the subject of the hearing is present.



**If a confidentiality order is not made**

19. If the Tribunal does not make the requested confidentiality order, the person requesting the confidentiality order may also request that the Tribunal allow the material to be withdrawn so that it is not put to the person the subject of the hearing and is not considered by the Tribunal in its decision-making.
20. Consideration of such a request is at the discretion of the Tribunal.
21. If the Tribunal approves the request, the information or document may be submitted in an amended form with the sensitive information excised or redacted from it. In an effort to avoid unnecessary adjournments, the person submitting the request for confidentiality should have such document prepared in advance of the hearing.



Ms Annette McMullan  
President  
1 December 2020