



- Consent is implied for release of information for the purpose of providing health care or assisting in the provision of health care to an individual between health information custodians (including health care practitioners, laboratories, x-ray, long term care homes, community care access centres, hospitals, including psychiatric facilities, pharmacies, ambulance services, Ontario Agency for Health Protection and Promotion). However, health information custodians cannot rely on implied consent when disclosing personal health information to a person or organization that is not a health information custodian.

## 2. Express Consent

Express consent may be oral or written. If oral, this must be included in the client's records by the staff providing the service. This includes any disclosure that is not intended to provide health care, which includes disclosures to third parties. One exception to the express consent requirement is where a health care facility is disclosing personal health information about a client to a representative of a religious or other organization. If the individual has provided information about his or her religious or other organizational affiliation, consent may be implied for disclosing the individual's name and location in the facility to the representative. Before making this disclosure, the facility must provide the individual with an opportunity to withhold or withdraw the consent.

## 3. Basic Requirements for Valid Consent, Implied or Express

To be valid, consent must be:

- a) voluntarily given, without any misrepresentation or fraud;
- b) given by a person who is capable of making treatment decisions; and
- c) Informed, which means that the person has been given sufficient information about the service being proposed.

Note that compliance does not equal capacity. Review the capacity section to make sure you are comfortable that the client has the capacity to consent.

In general, consent to primary care will be recorded in the client record upon being rostered and additional consents for other services or referrals will be recorded in the client record. Clients who choose to participate in groups or other initiatives will be considered to provide implied consent, unless specific consent to participate is a requirement. In this case the written consent will be retained in the group or service file as per the KDCHC privacy policy.

### **Clients Participating in Group Services**

Staff leads for groups (personal development groups, advisory groups, community initiatives, etc.) are responsible for informing clients who participate in those groups that:

- Personal information or personal health information may be shared in this setting;
- All information shared by participants is to be kept confidential with the confines of the group; and
- Should KDCHC staff find out that personal or personal health information was used outside the group to harm the person disclosing, that the person who shared the information will be spoken to about the breach, removed from the group, and barred from participation for a period of time to be determined in consultation with the Privacy Officer.

## **Students and Clinical Observers**

While KDCHC considers approved Students and Clinical Observers to be part of the client service team, KDCHC respects client right to privacy. Therefore clients will be asked to consent to have students or clinical observers participate/observe in client appointments.

## **Procedures**

### 1. Who Obtains Informed Consent

The obligation to disclose the necessary information to a client and to obtain the informed consent of the client rests with the KDCHC staff person who is providing the service(s). This information should be recorded in the client record, or as part of the documentation for participation in a group.

### 2. Standards of Disclosure

For Clients receiving Primary Care:

The health care provider proposing the treatment must provide information that a reasonable person in the same circumstances would require in order to make a decision about the treatment. In particular, the health care provider must explain:

- a) The nature of the treatment;
- b) The expected benefits of the treatment;
- c) The material risks of the treatment;
- d) The material side effects of the treatment;
- e) Alternative courses of action;
- f) The likely consequences of not having the treatment.

In addition, the health care provider is required to work with the client to ensure that the client is capable, and must provide answers to all of the client's questions or requests for additional information about the treatment.

Where there is a language barrier, the obligation rests with the health care provider to take appropriate steps to address this (for example, by utilizing a trained interpreter).

**The client can waive disclosure.** The client has a right to decide that they do not want to be informed. Except in cases of minor treatment, the health care provider should always attempt to inform the client. A refusal to be informed should be noted in the client record.

**The client has the right to withdraw consent.** This withdrawal of consent to receive or to participate in services is to be documented in a client record.

3. Determining Capacity to Consent

In order for consent to be valid, it must be obtained from a client who is capable with respect to making decisions related to their treatment or participation in services.

- a) A person is capable of making a decision if he or she is:
  - i. Able to understand the information that is relevant to making the decision in question, and
  - ii. Able to demonstrate that they understand the potential or actual consequences of a decision or lack of decision. If the person is not capable of making decisions, consent must be obtained from the person's substitute decision-maker.
- b) A person's capacity depends on treatment and time. For example, people may be capable of making some treatment decisions but not others, and their capacity may fluctuate over time.
- c) A person has the right to make unreasonable decisions, including the right to make unhealthy decisions, so long as they have the capacity to make decisions.
- d) Clients are presumed to be capable of making decisions, and KDCHC staff can rely on this presumption, unless there are reasonable grounds to believe otherwise.

Where there are reasonable grounds to doubt a person's capacity to consent to primary care or referrals, the health care provider proposing the service or referral should take the following steps:

- i. Conduct a capacity assessment to determine if the client understands the information that is relevant to making the decision in question, and is able to appreciate the reasonably foreseeable consequences of a decision or lack of decision (i.e., the two-part test for capacity);
- ii. consult with other health care providers if assistance is required in determining a person's capacity; and
- iii. document the capacity assessment, consultations and conclusions in the client's record..

4. A Finding of Incapacity

Where a client is judged to be incapable to consent to medical treatment, the health care provider is obligated to discuss with the client the consequences of the finding of incapacity, identify the appropriate substitute decision-maker as set out in the hierarchical list in section 20(1) of the *Health Care Consent Act*, and advise the client and the substitute decision-maker that the finding can be appealed to the Consent and Capacity Board. Failing the availability of any of the appropriate substitute decision-makers, assistance and advice should be sought from the Office of the Public Trustee, Government of Ontario (telephone 1-416-314-2800).

Consent from a Substitute Decision Maker (SDM):

When a client has been judged incapable (as per above) staff may get consent from a Substitute Decision Maker (ranked in order as listed):

- a) Guardian (if guardian has authority to make such decisions)
- b) Attorney for personal care or attorney for property (if the attorney has authority)
- c) Representative (appointed by Capacity Board)
- d) Spouse or partner
- e) Child, custodial parent or children's aid society or other person legally entitled to give or withhold consent in the place of a parent
- f) Parent with access rights
- g) Brother or sister
- h) Any other relative (related by blood, marriage or adoption)
- i) The Public Guardian and Trustee (1-905-546-8311)

Staff can ask for the person to provide documentation verifying their identity if unknown to the staff person.

5. Minors

There is no "age of capacity". So long as a person meets the two-part test of capacity (see 3.a above) they are able to consent to treatment on their own behalf, regardless of their age. If the child or youth is not capable, the consent of the appropriate substitute decision-maker (usually the parent) must be sought. If such consent is refused and the health care provider believes that the child requires the medical treatment to cure, prevent or alleviate physical harm or suffering, the health care provider shall make a report to the local Children's Aid Society in accordance with the duty to report set out in section 72 of the *Child and Family Services Act*.

7. Refusing Care or Services

- a) The right to refuse primary care or other services against professional advice is inherent in the principles of consent.

- b) A client's informed refusal to primary care or other services should be treated non-judgmentally and with respect.
- c) The client's informed refusal, including information given to the client about the proposed care or service, the issues or risks related to refusal and reason, if any given by the client, should be carefully documented in the client's record by the KDCHC staff person

8. Emergencies

If it is not practical to obtain consent, health care providers may take reasonable and medically sound action without consent in situations where delay will endanger the client's life, limb, or vital organ; unless the client has refused such treatment (this should be documented in the client record)

**Reference Documents:**

Personal Health Information Protection Act 2004

A Guide to the Personal Health Information Protection Act, December 2004, Information and Privacy Commissioner/Ontario

“Circle of Care: Sharing Personal Health Information for Health Care Purposes” brochure. September 2009 Information and Privacy Commissioner/Ontario

**Approved by:** Eric Goldberg, Executive Director

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