

Confidentiality

The largest cause of complaint about how an attorney, or guardian is exercising the role has its root cause in poor communication; the main subgroup of which is the attorney or guardian not telling a family member something which they wish to know, or believe they have a right to know, because the attorney or guardian believes its confidential.

This information sheet looks at what you should consider confidential, or what you can share with others.

Deciding what is confidential, or what may be shared, can be one of the hardest decisions you will have to make and, sadly, there is no easy answer. It's not a case of X information is confidential, so cannot be shared, whereas Y is not confidential and so can be shared.

The following offers some guidance to help you decide if you should share information, or not.

- Is the person whose affairs you are administering capable? If so, they themselves must make, or be supported to make, the decision about sharing of information requested. Remember that capacity is decision specific so even if the person is otherwise incapable they may be able to express a view on whether they would wish this information to be shared.
- If the person is not able to be supported to make this decision, then you have to think what would the person themselves have done / wanted? Is the information the sort of detail that the person would have shared with the person asking?
- You should use the principles of the Adults with Incapacity Act to assist your decision.
- You should consider if you have a legal obligation or duty?
- Does the other person have a duty of confidentiality? It may be easier for you to decide to give a higher level of information if the person to whom you are

giving it is obliged to keep that information confidential, for example, under their professional code or legal duty.

- Does the other person have a statutory authority? If the person asking you for information which you consider confidential has a legal right to this information, then you cannot use confidentiality as a reason for not disclosing this.

At some point, disclosing information, or not, will be a decision you have to make. It isn't an easy decision. You will need to, and should, give it careful consideration. Do not automatically take the easy route and claim 'its confidential' as this may place you in breach of your duty as an attorney or guardian. Use the guidance above to work through the thought process. Keep records of your thought process and conclusion. It is a case of balancing what is to be achieved by sharing and the harm that could result from not sharing.

Case Example

Background

- Martha has two children Peter and Christine. She treats them both equally, both were aware of what finances she had. She was happy to be open with this information, as both supported her, ordered things online for her and the like.
- About 5 years ago Peter (and his wife of some years, Irene) emigrated to Australia, so over time he became more removed from the current position but nothing fundamental changed. Martha granted financial PoA to Christine, as this was easier as she still lived locally. Peter knew this and supported this decision.
- About a year ago Christine started managing her mother's finances under the PoA.

Scenario 1

At the outset, Christine told Peter she was going to have to start managing things for Mum, she had regular contact with him about what she was doing, for why. Peter was quite happy as he felt fully informed.

Scenario 2

Christine forgot to tell Peter that she was now doing managing things for Mum, he found out somewhat by chance and wondered if Christine was doing things she shouldn't, he thought she was acting unusually underhand and was suspicious of her motives. He complained to her, she apologised, it has been a simple oversight on her part, she was so busy supporting Mum these days she forgot, she brought him fully up to date, he was happy.

Scenario 3

As above, but when Peter challenged Christine she said he was not the attorney so he was not entitled to the information. This increased Peter's suspicions but Christine remained adamant that he could not have the information, it was confidential. But was it confidential from Peter?

The history is one of openness between Martha, Peter and Christine. Had Martha been asked the question it is likely she would not have had any issue with updating Peter, so there was no reason for Christine to feel this was confidential.

Scenario 4

Peter's wife Irene rang Christine, on Peter's behalf, when they found out Christine was now acting as attorney, to get an up-to-date financial position. Christine would not offer her any information.

There is no indication that Martha shared her financial position with Irene – although Peter may well have done, but this is irrelevant. Christine should treat this information as confidential.

Christine could consider if there is information she can share which would fall short of sharing confidential information. For example, Christine said she could not update Irene in detail but could tell her that Mum had the same accounts as previously, save for the one with ABC bank which she had had to close to release money to pay for Mum's care as she had been assessed as fully self-funding.

Christine felt that in the interests of cordial family relations she could offer this high-level information and that her mum would have been comfortable with Irene knowing this nonspecific detail about the current situation.

Scenario 5

Peter and Irene have a child, now aged 25, Mick. Christine received a call one day from Mick asking about this Gran's finances. Christine took the view that she would say nothing, this was confidential. She was not even going to offer high level information.

Christine was not aware that her mother and her grandson (Mick) had a relationship where any level of financial discussion would take place. She felt Mick could ask his parents for the information he wanted.

You will see from this series of examples that Christine took different decisions, with the same request, being guided by the best interpretation of her mother's views and respecting the AWI principles as the basis for her decisions.

Christine recorded the requests and her decisions on each occasion.