

QUALITY ASSURANCE COMMITTEE INFORMATION & ITS PRIVILEGED STATUS

This information is intended as a guide for facilities and surveyors in determining whether information should be released to others. It does not constitute nor serve as a substitute for legal advice. If you have questions about whether records are releasable to others upon their request, before releasing the documents, facility staff are advised to consult with the facility's administrator and attorney and state survey agency staff are advised to consult with WI-DHFS legal counsel.

- **What is a "privilege" with regard to written and oral communication?**

When communication (verbal or written) is "privileged" under the law, it is generally protected from release to others, unless the person or party holding the privilege consents to its release. The public policy behind legal privileges is to encourage full disclosure and frank discussions between the parties so the person(s) providing professional advice or direction has relevant and pertinent information upon which to base the advice. For example, legal privileges protect the private communications occurring between lawyers and clients; physicians (and registered nurses) and patients, domestic abuse or sexual assault advocates and victims; husbands and wives, psychologists and patients. Under the attorney-client privilege, if the client wishes to disclose the content of the communication to another, the client may do so. Once the client discloses the content of the communication to another, the privilege is considered "waived".

In the nursing home context, federal and state law recognizes that certain Quality Assurance and Assessment (QAA) activity is privileged, meaning the state cannot compel the production of materials and other records of the activities that are the work of a facility's QAA Committee or subcommittee(s).

There is a related privilege recognized under state law that protects certain "health service review" activities and related materials. Under Wis. Stats. § 146.38 and case law, certain activities conducted by a health care facility are also privileged or protected from release to others outside of those involved in the communication. These activities include certain work by a facility's QAA Committee provided that it is structured so as to also meet the expectations of a health services review committee under state law. Again, the public policy behind the privilege or protection is to encourage facilities to critically examine and evaluate the trends, patterns and incidents occurring in the facility to seek ways to improve the way the facility provides care, treatment and services to its clients, patients or residents. The discussions and conclusions of a QAA/Health Services Review Committee are, for the most part, protected from release to others. However, as

explained further below, other documents considered or obtained by the QAA/Health Services Review Committee are not.

- **QAA Privilege: General Rule**

If a facility is engaged in quality improvement activity, documents generated by such activity are privileged, and therefore surveyors cannot compel the production of such documents with the following caveats:

1. In order to be covered by the QAA privilege, documents must be generated as part of a formal quality improvement activity process.
 - a. QAA formalities must be adhered to for the privilege to exist.
 - b. Documents generated outside of the formal QA process will not fall within the privilege if such are reviewed/labeled after the fact.
2. To be privileged, documents must be generated by the QAA committee or at the direction of the committee by subcommittees or specifically enumerated individuals or entities, e.g. consultants.
 - a. If subcommittees are utilized, the QAA committee shall formally designate their creation and assign duties of the subcommittee to be reported back to the QAA committee.
 - b. Ad hoc individuals or committees are permissible provided the QAA committee has designated such positions or individuals along with their anticipated responsibilities.
3. Any document that is specifically required to be produced or completed by state or federal law will not receive privilege status by being produced, completed or reviewed during the quality improvement process.

- **What written records of a health care facility are privileged?**

The chart below outlines whether information generally available to or created by a health care facility's QAA Committee or sub-committee is protected by the privilege from discovery or disclosure to state or DHHS officials.

- **Questions?**

If you have any questions about whether a facility's data, documents or other communications are privileged from disclosure to others:

- Facility Staff: Consult with the facility's attorney.
- State Surveyors: Consult with the Wisconsin DHFS Office of Legal Counsel.

Must Facility Documents and Other Records Be Released To Surveyors and Investigators Upon Their Request?

The information on this chart is intended as a guide for facilities and surveyors in determining whether information should be released to others. It does not constitute nor serve as a substitute for legal advice. If you have questions about whether records are releasable to surveyors or complaint investigators or others upon their request, before releasing the documents, facility staff are advised to consult with the facility's administrator and attorney and state survey agency staff are advised to consult with WI-DHFS legal counsel.

Data or Document Type	Release to Surveyors ?	Comment
<p>A. Documents, records and other reports presented to the QA Committee, e.g.,</p> <ul style="list-style-type: none"> ▪ reports, such as open and closed record audits; ▪ facility logs and tracking forms; e.g., infection control logs ▪ complaints; ▪ quality indicator profiles; ▪ consultants' reports¹; and ▪ other reports acquired as part of the QA function. 	<p>Yes</p>	<p>Documents and other records presented to the QA committee during the review or evaluation may be subject to release to surveyors or complaint investigators. The critical question in determining whether the documents and other records must be released is whether the facility is specifically <i>required</i> under Federal regulation or state law to obtain, retain or create the document or record or whether the documents or records were <i>created independently</i> of the QA function. If so, surveyors and investigators are entitled to examine the documents, reports or records.</p> <p>Rationale: The protection from release of information considered by the QA Committee extends to the analysis by or conclusions of the QA committee. However, it does not extend to the underlying data, documents or activities that surveyors would rely on to determine whether the facility was in compliance with Federal or State law.</p>

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- ¹ However, be aware that consultants' (or evaluators') reports that are the result of investigations, inquiries, proceedings, and conclusions of consultants or evaluators engaged by the facility's QA committee to review or evaluate the health care provider are privileged (under the QA privilege) or otherwise protected from discovery under Wis. Stat. § 146.38. *Phelps v. Physicians Insurance Company of Wisconsin, Inc.*, 2004 WI App 91, 681 N.W.2d 571 (Ct. App. 2004), App. No. 03-0580. Therefore, in such circumstances where the QA committee engages the services of outside consultants, the materials produced are not required to be released to surveyors or investigators.

B. Knowledge a QA Committee member brings to the Committee	Yes	Information that an individual QA Committee member has that was obtained independent of the discussions or conclusions drawn by the QA Committee is subject to release to surveyors and complaint investigators.
C. Caregiver Misconduct Investigation Results	Yes	<p>Facilities are required to promptly conduct a thorough investigation into all allegations of resident mistreatment (including abuse, neglect, financial exploitation) and injuries of unknown origin. Facilities are required to submit a report with the results of their investigation to the State Survey Agency for review and follow-up.</p> <p>Wisconsin's licensed health care facilities are required to retain for review by the surveyors or complaint investigators the last 30 reported allegations of resident mistreatment determined by the facility to be "unsubstantiated".</p>
D. The QA Committee's investigation, analysis, and conclusions (including meeting minutes and any records of its investigations)	No	If generated by or obtained at the request of a <i>bona fide</i> QA committee, all conclusions, analysis and review of a quality assurance committee are not subject to release to surveyors or investigators, regardless of whether the investigation was conducted proactively or reactively.
E. Compilations, studies or comparisons of statistical data derived from multiple records created by or at the Committee 's request	No	Federal regulations prohibit access by surveyors to records generally including "any reports generated by or at the behest of a quality assurance committee for quality assurance purposes". See, 42 CFR § 483.75(o)(4). Therefore, such documents or reports are not subject to disclosure or release.
F. Quality Assurance investigation conducted by a third party	No	Unless it falls within one of the categories discussed above, information obtained as the result of an investigation conducted by a third party at the QA Committee's request is not subject to release to surveyors or investigators.

G. Communications from the QA Committee to a third party	No	When related to the work and purpose of the QA Committee, communications to a third party are not required to be disclosed to others.
H. Knowledge a QA Committee member acquires solely in the Committee	No	<p>The information or knowledge learned by a Committee or Sub-committee member during the QAAC meetings is protected from disclosure if the information or knowledge gained is related to discussions, findings or conclusions of the QAAC and is not otherwise or independently available.</p> <p>Before responding to questions from a surveyor or complaint investigator, QA Committee and Sub-committee members should ask themselves, "What do I know? How do I know it?"</p>
I. Findings of a QA sub committee (e.g., Infection Control Committee)	Yes & No	<p>The findings or conclusions of a QA sub-committee are not required to be disclosed if the findings are the result of QA Committee directions or involve an inquiry on an issue related to the function of improving the quality of the facility's care and services.</p> <p>However, while the conclusions are not required to be disclosed, if the underlying data or information obtained by the sub-committee is also information that is collected or is activity that is required in compliance with Federal regulations or State law, the underlying data or information must be released upon request by a surveyor or an investigator even though it was obtained in connection with the activities of a sub-committee.</p>

NOTE: This handout was prepared for the "Quality Assurance Privilege" web cast presented on October 26, 2006. The information contained in the oral presentation and handouts is current as of October, 2006 and is subject to change.