

Peer Support Team Confidentiality Information Model Peer Support Team Confidentiality Statute

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Peer support has become an important stress management and wellness component of many law enforcement agencies. Formally established law enforcement peer support teams are now the rule rather than the exception. These teams are created by policy and operate under department operational guidelines. They are comprised of employees that have been officially appointed and specially trained in the fundamentals of peer support.

Peer support team confidentiality

In an effort to provide peer support team members with a degree of confidentiality, many police departments have included a confidentiality statement within their peer support team policy. This statement generally outlines peer support team member confidentiality and prohibits disclosure of information discussed during peer support interactions without the consent of the recipient of peer support.

While necessary, a department peer support team confidentiality statement is insufficient to meet the best-practices standard of modern law enforcement peer support. This is because department policy cannot prevent compelled peer support team member disclosure of peer support information in state and federal court proceedings. In order to protect peer support interactions from compelled disclosure in state courts, a state statute is needed. In recognition of this, several states have enacted legislation that provides some degree of confidentiality for police and other peer support team members during peer support interactions.

Peer support team confidentiality in the Federal court system

In November, 2021, qualified *federal* law enforcement peer support teams were granted specified confidentiality privileges in federal courts with the passage of the U.S. *Confidentiality Opportunities for Peer Support Counseling Act* also referred to as the *COPS Counseling Act* (U.S. Public Law 117-60). Similar to existing state statutes, "an admission of criminal conduct" is exempt from the confidentiality privilege. The COPS Counseling Act does not provide a confidentiality privilege to *non-federal* peer support teams in the federal court system.

Presently (2023), there is no U.S. Constitutional provision, federal statute, or U.S. Supreme Court ruling that provides confidentiality privileges within the federal court system for non-federal peer support teams.

In states with a peer support team confidentiality statute, the confidentiality privilege established by state statute may or may not apply in *civil* cases within the federal court system. Whether the state confidentiality privilege applies in a federal civil case depends upon the "rule of decision" as specified in the Federal Rules of Evidence –

"The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision" (Federal Rules of Evidence, 2023, Rule 501, *Privilege in General*).

Why a state statute?

The need for peer support team confidentiality statutes has become clear over the past several years. Without some peer support confidentiality in state courts, the potential effectiveness of peer support is limited. This limitation stems largely from officers' fears that peer support team members may be compelled to testify in a court proceeding about information discussed during a peer support interaction.

But peer support confidentiality statutes do more than define the confidentiality privilege of peer support team members. They also specify qualifying provisions. In this way, peer support confidentiality statutes improve the quality and delivery of peer support services.

The less desirable alternative to a peer support confidentiality statute is waiting for court cases involving peer support confidentiality to develop. Within this alternative, individual case rulings will determine peer support confidentiality. This is not to say that case law cannot or will not be developed around a state peer support confidentiality statute. Only that it is best to shape the parameters of peer support confidentiality in statute prior to any potential litigation.

Take the initiative

Officers and others desiring a peer support confidentiality statute are encouraged to contact their state representatives. Discuss the issues surrounding peer support confidentiality and present them with the *Model Peer Support Team Confidentiality Statute*. Ask for their support in crafting a bill for the legislature to consider.

It is not difficult to edit the model statute to create a draft that meets the approval of informed legislative sponsors. Enlist the support of your department's administration, law enforcement professional associations, police unions, and qualified mental health professionals.

Anticipate questions and prepare yourself. Many legislators and some police administrators know little about peer support. Educate them. Discuss the facts:

1. The concept of police peer support is no longer "experimental." Peer support has a proven track record in law enforcement and across many other work and non-work environments.
2. Peer support fills a support niche that employee assistance programs and community counseling services cannot. This is due to the "power of the peer."
3. Law enforcement agencies have utilized structured peer support teams for decades. Peer support teams have become integral to many police agencies.
4. Peer support team confidentiality statutes do not impede internal or criminal investigations. Peer support team confidentiality statutes do not protect "bad" cops.
5. The states that have enacted peer support confidentiality statutes have not experienced any "confidentiality" difficulties within and outside of internal or criminal investigations, and this has been the case for decades.

Scope of peer support confidentiality statutes

The most effective peer support confidentiality statutes do not restrict the privilege to individual interactions only, group interactions only, work-related issues only, or to peer support interactions solely in response to an identifiable occupational critical incident. These and similar restrictions

inhibit the range and potential effectiveness of peer support and are not recommended for inclusion in a peer support team confidentiality statute.

Peer support confidentiality statutes

The several states that have passed legislation providing peer support team members with a confidentiality privilege have utilized some version of five fundamental topic areas:

1. Purpose statement
2. Privilege identification and declaration
3. Definitions
4. Provisions
5. Exemptions

(Optional: penalty for violation)

Included within the various areas or “sections” are elements specifying appointment to the peer support team, peer support team member training, acting in the peer support role, acting within the parameters of written peer support guidelines, and limits to peer support team member confidentiality.

1. Purpose statement

In the purpose statement, the reason for the statute is identified. In Colorado, this is specified as, “There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person shall not be examined as a witness in the following cases:” (CRS 13-90-107).

2. Privilege identification and declaration

In this section, those that qualify for the privilege are identified and the privilege is specified. In Mississippi, this is accomplished by the following paragraph, “A certified peer support member shall not be compelled, without the consent of the emergency responder making the communication, to testify or in any way disclose the contents of any communication made to the certified peer support member by the emergency responder while engaged in a peer support event. This privilege only applies when the communication was made to the certified peer support member during the course of an actual peer support event.” (Miss. Code Ann. § 13-1-22.1(2)).

3. Definitions

The Definitions section operationally defines significant terms used within the statute. For example, in Colorado, “For purposes of this paragraph (m): ‘Communication’ means an oral statement, written statement, note, record, report, or document, made during, or arising out of, a meeting with a peer support team member,” (CRS 13-90-107(m)(II)(A)) and in Washington, “For purposes of this section, ‘peer support group counselor’ means a: (i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity...” (RCW 5.60.060(6)(b)).

4. Provisions

Additional information or requirements may be stated in this section of the statute. In Colorado, “This subsection (1)(m) applies only to communications made during interactions conducted by a peer support team member: (A) Acting in the person’s official capacity as a law enforcement or firefighter peer support team member, emergency medical service provider or rescue unit peer support team member, or district attorney or public defender peer support team member; and (B) Functioning within the written peer support guidelines that are in effect for the person’s respective law enforcement agency, fire department, emergency medical service agency” (CRS 13-90-107(m)(III)).

5. Exemptions

All states with a peer support team confidentiality statute have exemptions to the privilege. This is necessary because of the professional standards of the emergency services and mandatory reporting statutes. Hawaii has enacted the following exemptions, “This section does not apply to: (1) Any threat of suicide or homicide made by a participant in a peer support counseling session or any information conveyed in a peer support counseling session relating to a threat of suicide or homicide; (2) Any information relating to abuse of spouses, children, or the elderly, or other information that is required to be reported by law; or (3) Any admission of criminal conduct” (HSS 78-52(h)).

Optional: Penalty for violation

The State of Mississippi has chosen to include a violation and penalty section within their peer support confidentiality statute, “Any certified peer support member who reveals the contents of a privileged communication, or any person who threatens, intimidates, or in any way attempts to compel a certified peer support member to disclose the contents of a privileged communication, shall be guilty of a misdemeanor and shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment” (Miss. Code Ann. § 13-1-22.1(4)).

Model Peer Support Confidentiality Statute

The *Model Peer Support Confidentiality Statute* includes text and conceptual elements of several existing peer support confidentiality statutes. Special acknowledgement and gratitude are extended to those persons that contributed to the development, writing, and passage of the peer support confidentiality statutes of the states of Colorado, Hawaii, Mississippi, Oregon, and Washington.

States differ in preferred statutory format and writing style. For these reasons, the model statute must be edited and formatted to meet existing state standards of statutory text. During the editing process, existing state statutes must be considered to avoid statutory conflict.

For simplicity, the model statute is presented in terms of law enforcement peer support teams. It can easily be edited to add firefighters, emergency medical service providers, and others, as desired.

Model Peer Support Confidentiality Statute

- (1) There are particular relations in which it is the policy of law to encourage confidence, privacy, and confidentiality.
- (2) A peer support team member shall not be examined, compelled to testify, or otherwise disclose any communication made to the peer support team member by a recipient of peer support services under the circumstances described in section (4) without the consent of the recipient of peer support; nor shall a recipient of peer support services be examined, compelled to testify, or otherwise disclose any communication without the recipient's consent; recipients of group peer support shall not be examined, compelled to testify, or otherwise disclose any communication or knowledge gained from other recipients of group peer support without the consent of the person to whom the communication or knowledge relates.
- (3) For purposes of section (2):
 - (a) "Peer support team member" means a peace officer, civilian employee, or volunteer member of a law enforcement agency who has been trained in peer support and who is officially designated by a police chief, the chief of the state patrol, a sheriff, or head administrator of a government law enforcement agency as a member of the law enforcement agency's peer support team.
 - (b) "Communication" means an oral statement, written statement, note, record, report, or document, made during, or arising out of, a meeting with a peer support team member.
 - (c) "Recipient of peer support" means a person who is receives peer support services for the benefit of peer support and interacting with a peer support team member.
 - (d) "Group peer support" means a peer support interaction that includes at least one peer support team member and more than one recipient of peer support.
- (4) The provisions of section (2) shall apply only to communications made during interactions conducted by a peer support team member:
 - (a) Acting in the person's official capacity as a peer support team member; and
 - (b) Functioning within the written peer support guidelines that are in effect for the person's respective law enforcement agency.
- (5) The provisions of section (2) shall not apply when:
 - (a) A peer support team member was a witness or a party to an incident which prompted the delivery of peer support services;
 - (b) There is information indicative of actual or suspected abuse, neglect, or exploitation of spouses, children, or the elderly; or there is any information subject to mandatory disclosure, reporting, or action.
 - (c) Due to alcohol or other substance intoxication or abuse, the person receiving peer support is a clear and immediate danger to himself, herself, or others;
 - (d) There is information relating to a threat of suicide, homicide, or other violence; or there is reasonable cause to believe that the person receiving peer support has a mental illness and due to the mental illness, is an imminent threat to self or others, or is gravely disabled;
 - (e) There is an admission of, or any information related to, criminal conduct.

Clinical oversight and clinical supervision of law enforcement peer support teams

While it is not required by statute, law enforcement (and other) peer support teams function best under some form of clinical oversight. Clinical oversight of peer support teams is established by department policy and team operational guidelines. (see *Model Peer Support Team Policy* and *Model Peer Support Team Operational Guidelines*).

Appropriately structured peer support team clinical oversight assures 24/7 consultation availability, “support for the supporters,” and a “ladder of escalation” for peer support team members. It also provides for peer support team in-service professional training.

For more information about peer support team clinical oversight and the Clinical Supervisor and Clinical Advisor Models of peer support see *Police Peer Support Teams: Questions and Answers* in the “Information, Articles, and Outlines” section of www.jackdigliani.com.