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To: Adult Family Homes  
Community-based Residential Facilities  
Facilities for the Developmentally Disabled  
Nursing Homes  
Residential Care Apartment Complexes

AFH  
CBRF  
FDD  
NH  
RCAC

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### **Electronic Video Monitoring and Filming in Regulated Facilities**

This memo presents guidance to providers on the issues of electronic video monitoring and filming within the Division of Quality Assurance (DQA) regulated facilities. It serves to address the circumstances and locations of permissible facility initiated use of electronic video monitoring or filming equipment under Wisconsin State Statutes and Administrative Rules.

#### **Background**

With the development of equipment and technology to monitor homes and businesses, privacy issues related to filming and monitoring were identified as an emerging concern for assisted living facilities and nursing homes in Wisconsin in 2007. The subject was discussed during the FOCUS 2007 ("Coming Together: Mapping The Journey To Excellence") Assisted Living Panel.

In response to issues raised during the FOCUS panel discussion, as well as questions that have arisen during compliance surveys, DQA, in consultation with the Department's Office of Legal Counsel (OLC), presents guidance on the use of electronic video monitoring and filming equipment in regulated facilities. The information presented in this memo represents the need to balance the use of emerging technologies with residents' rights to privacy in their homes.

## Definitions

**“Electronic video monitoring”** means the use of cameras or other equipment to transmit images of residents, visitors, or staff within or around an AFH, CBRF, FDD, Nursing Home, or RCAC for possible viewing at another location.

**“Filming”** means the use of cameras or other equipment to record images of residents, visitors, or staff within or around an AFH, CBRF, FDD, Nursing Home, or RCAC for possible viewing at another location at another time.

## Relevant administrative codes

The following presents relevant State Statute and Administrative Rule language related to privacy, electronic video monitoring, and filming across multiple facility types:

Wis. Stat. § 50.09, Rights of residents in certain facilities.

(1) RESIDENTS’ RIGHTS. Every resident in a nursing home or community-based residential facility shall, except as provided in sub. (5), have the right to:

- (a) Private and unrestricted communications with the resident’s family, physician, advanced practice nurse prescriber, attorney, and any other person, unless medically contraindicated as documented by the resident’s physician or advanced practice nurse prescriber in the resident’s medical record, except that communications with public officials or with the resident’s attorney shall not be restricted in any event. The right to private and unrestricted communications shall include, but is not limited to, the right to...
  2. Reasonable access to a telephone for private communications.
  3. Opportunity for private visits.

Wis. Stat. § 51.61, Patients Rights.

(1) ...each patient shall...

- (o) Except as otherwise provided, have a right not to be filmed or taped, unless the patient signs an informed and voluntary consent that specifically authorizes a named individual or group to film or tape the patient for a particular purpose or project during a specified time period. The patient may specify in the consent periods during which, or situations in which, the patient may not be filmed or taped. If a patient is adjudicated incompetent, the consent shall be granted on behalf of the patient by the patient’s guardian.

Wis. Admin. Code § HFS 94.18, Filming and taping.

- (1) No patient may be recorded, photographed, or filmed for any purpose except as allowed under s. 51.61 (1) (o), Stats., and this section.

(3) The informed consent document shall specify that the subject patient may view the photograph or film or hear the recording prior to any release and that the patient may withdraw informed consent after viewing or hearing the material.

The following presents relevant state statute and administrative rule language related to privacy, electronic video monitoring, and filming in specific types of facilities:

### ***Adult Family Homes***

Wis. Admin. Code § HFS 88.10, Resident rights.

(1) LEGAL RIGHTS. A licensee shall comply with all applicable statutes and rules relating to resident rights, including s. 51.61, Stats., chs. 54, 55, and 304, Stats., and chs. HFS 92 and 94.

Wis. Admin. Code § HFS 88.10, Resident rights.

- (3) RIGHTS OF RESIDENTS. A resident shall have all of the following rights...
- (b) *Privacy*. To have physical and emotional privacy in treatment, living arrangements and in caring for personal needs, including toileting, bathing and dressing.
  - (t) *Visits*. To have private visitors and have adequate time and private space for visits.

### ***Community Based Residential Facilities***

Wis. Admin. Code § HFS 83.21, Rights of residents.

- (4) RIGHTS OF RESIDENTS. ...each resident shall have all of the following rights...
- (d) *Visits*. To have private visitors and adequate time and private space for visits.
  - (h) *Privacy*. To have physical and emotional privacy in treatment, living arrangements and in care for personal needs. Persons not directly providing care and treatment or participating in group sessions shall not be present during such care and treatment except with the express spoken or written consent of the resident.

### ***Facilities for the Developmentally Disabled***

Wis. Admin. Code § HFS 134.31, Rights of residents.

- (3) RESIDENTS' RIGHTS. Every resident, except as provided in sub. (4), has the right to...
- (a) *Communications*. The right to private and unrestricted communications includes the right to...  
3. Have private visits, pursuant to a reasonable written visitation policy...
  - (f) *Privacy*. Have privacy in treatment, living arrangements and caring for personal needs, including...

2. Case discussion, consultation, examination and treatment shall be conducted discreetly. Persons not directly involved in the resident's care shall require the resident's permission to be present...

### ***Nursing Homes***

Wis. Stat. § 49.498, Requirements for skilled nursing facilities.

(3) RESIDENT'S RIGHTS; GENERAL RIGHTS.

(a) A nursing facility shall protect and promote the rights of each resident, including each of the following rights...

3. The right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits, and meetings of family and of resident groups, except that this subdivision may not be construed to require provision of a private room.

42 C.F.R. § 483.10. Resident rights.

A facility must protect and promote the rights of each resident, including each of the following rights...

(e) Privacy and Confidentiality. The resident has the right to personal privacy and confidentiality of his or her personal and clinical records.

(1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident;

### ***Residential Care Apartment Complexes***

Wis. Admin. Code § HFS 89.34, Rights of Tenants.

(2) PRIVACY. To have privacy in his or her independent apartment and when receiving supportive, personal or nursing services.

### **Analysis**

State statutes and administrative rules for all regulated long-term care settings, *i.e.*, Assisted Living Facilities, FDDs, and Nursing Homes, consistently address each resident's right to privacy in care and treatment, accommodations, and communication, namely visitors and phone calls. The use of electronic video monitoring or filming is not consistent with the provider's obligation to protect and promote each resident's right to privacy when engaged in any of these activities. Such equipment installed in living areas (space used for daily activities such as dining, recreation, sleeping, hosting visitors, etc.) is capable of transmitting images of residents receiving care and treatment, engaging in activities of daily living, or visiting with guests, staff,

or other residents. Whether done deliberately or inadvertently, transmitting images of residents engaging in these types of activities violates their right to privacy.

## **Conclusion**

State statutes and administrative rules, for all regulated long-term care providers, uniformly afford each resident the right to privacy. Accordingly, the following guidelines on the use of electronic video monitoring and filming are applicable in all regulated Assisted Living Facilities, FDDs, and Nursing Homes:

- Electronic video monitoring and filming are allowed in cooperation with law enforcement on a case by case basis specific to an investigation.
- Electronic video monitoring and filming are allowed in the following locations, provided the facility posts signs indicating that monitoring or filming is taking place:
  - Parking areas;
  - Locations where individuals may enter or exit the building;
  - Areas that are marked for employees only;
  - Storage areas; and
  - Personnel offices that are not accessible to residents.
- The Department interprets the provision of privacy as a resident right across all providers and prohibits the use of electronic video monitoring or filming in locations other than in those areas identified above. Consequently, electronic video monitoring and filming are *not allowed* in any of the following locations:
  - Resident bedrooms;
  - Facility or resident bathrooms or shower rooms;
  - Dining rooms;
  - Therapy rooms;
  - Visiting areas, lounges, multipurpose rooms, or activity rooms; or
  - Any other space where a resident may be seen meeting with visitors, engaging in an activity (including eating), sleeping, discussing their current condition, or receiving personal care, medical treatment or therapy.
- Mandatory consent to the use of electronic video monitoring and filming equipment is not an acceptable condition of admission to a facility. Facilities cannot prohibit admissions or require residents to give up their rights as part of any admission, service, or risk agreement agreement:

Wis. Admin. Code § HFS 94.06, Assistance in the exercise of rights.

- (1) Each service provider shall assist patients in the exercise of rights specified under ch. 51, Stats., and this chapter.
- (2) No patient may be required to waive any of his or her rights under ch. 51, Stats., or this chapter as a condition of admission or receipt of treatment and services.

Wis. Admin. Code § HFS 83.16, Admissions agreement.

- (3) RESTRICTIONS. No provision of any admissions agreement may...
  - (c) Purport to waive any right guaranteed to residents by law.

Resident rights are not subject to the waiver or variance procedures that allow exceptions from an administrative rule requirement. The Department recognizes that there may be unique situations in which an individual resident may benefit from or request the use of electronic video monitoring or filming equipment, *e.g.*, cases where the use is indicated by a therapeutic treatment plan or where a competent resident initiates a request; these types of exceptional circumstances are not covered by the guidelines in this memo, which is specific to facility initiatives. If you encounter a unique situation for a specific resident, please contact your Regional Director in the Bureau of Assisted Living or the Bureau of Nursing Home Resident Care for additional guidance before pursuing installation of electronic video monitoring or filming equipment on behalf of that individual.