Guidance for Access to Health Records Requests

February 2010

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Guidance for Access to Health Records Requests

February 2010

Prepared by DH Policy and Planning Directorate
(first edition)

Contents

Executive summary

This guidance aims to assists NHS organisations in England, through the process of dealing with an access request in accordance with the relevant legislation and any subsequent considerations.

The guidance covers legislation pertinent to accessing health records, such as:

- Data Protection Act 1998
- Access to Health Records Act 1990
- Freedom of Information Act 2000
- Access to Medical Reports Acts 1988

Introduction

1. Individuals have a right to apply for access to health information held about them and, in some cases, information held about other people. NHS organisations should ensure they have adequate procedures in place to enable patients to exercise this right.

2. The following guidance assists NHS organisations in England, through the process of dealing with an access request in accordance with the relevant legislation and any subsequent considerations. This supersedes previous guidance issued by the Department of Health in July 2002 and June 2003 titled 'Access to Health Records'.

3. The main legislative measures that give rights of access to health records include:

- **The Data Protection Act 1998** - rights for living individuals to access their own records. The right can also be exercised by an authorised representative on the individual's behalf.

- **The Access to Health Records Act 1990** - rights of access to deceased patient health records by specified persons.

- **The Medical Reports Act 1988** - right for individuals to have access to reports, relating to themselves, provided by medical practitioners for employment or insurance purposes.

Living Patients' Health Records

The Data Protection Act 1998 and health records

4. The Data Protection Act 1998 regulates the processing, including the disclosure, of information about identifiable living individuals. Subject to specified exemptions the Act requires data controllers (including NHS organisations) to comply with the eight 'data protection principles' set out in Schedule 1, Part 1 to the Act.

5. The Information Commissioners Office (ICO) is the UK's independent public body that is responsible for governing Data Protection compliance**:** www.ico.gov.uk/

6. The Data Protection Act gives individuals (known as data subjects), or their authorised representative, the right to apply to see certain personal data held about them, including health records. These rights are known as "subject access rights", and are contained in sections 7, 8 and 9 of the Act.

7. Data Protection legislation defines a health record as a record consisting of information about the physical or mental health or condition of an identifiable individual made by or on behalf of a health professional in connection with the care of that individual.

8. A health record can be recorded in computerised or manual form or in a mixture of both. It may include such things as; hand-written clinical notes, letters to and from other health professionals, laboratory reports, radiographs and other imaging records e.g. X-rays and not just X-ray reports, printouts from monitoring equipment, photographs, videos and tape-recordings of telephone conversations.

9. Data Protection legislation is not confined to health records held for National Health Service purposes. It applies equally to all relevant records relating to living individuals; this includes the private health sector and health professionals' private practice records.

10. Responsibility for dealing with an access to health record request lies with the **"data controller".** The data controller is the legal entity that determines the purposes for which and the manner in which personal NHS Trust.

Receiving an access request under the DPA

11. The following paragraphs cover the considerations and processes an NHS organisation should be aware of when handling a subject access request for a patient's health records. Included in **appendix 1 is a suggested template for NHS organisations to use/adapt to assist in data subject access requests.**

12. A request for access to health records in accordance with the DPA (The DPA refers to these as a subject access request) should be made in writing, which includes by email, to the data controller. However, where an individual is unable to make a written request it is the Department of Health view that in serving the interest of patients it can be made verbally, with the details recorded on the individual's file.

13. The requester should provide enough proof to satisfy the data controller of their identity and to enable the data controller to locate the information required. If this information is not contained in the original request the data controller should seek proof as required. Where requests are made on behalf of the individual patient the data controller should be satisfied that the individual has given consent to the release of their information.

14. As good practice the data controller may check with the applicant whether all or just some of the information contained in the health record is required before processing the request. This may decrease the cost for the applicant and eliminate unnecessary work by NHS staff. However, there is no requirement under the Act for the applicant to inform the data controller of which parts of their health record they require.

15. Where an access request has previously been met the Act permits that a subsequent identical or similar request does not have to be fulfilled unless a reasonable time interval has elapsed between.

Recording the access request

16. When the necessary information and the fee (where relevant) are obtained, the request should be recorded on internal systems and complied with within 21 days*. In exceptional circumstances where it is not possible to comply within this period the applicant should be informed.

**Although the DPA states 40 days to comply, a Government commitment requires that for health records requests should normally be handled within 21 days. This commitment reflected the time period for compliance in existing legislation replaced by the DPA.*

Fees to access and copy health records under DPA

17. The DPA states that fees for a subject access should be paid in advance, but in the interest of providing a helpful service to patients, NHS organisations may request the fee at the release stage of the access request.

18. The Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000 sets out the fees a patient may be charged to view their records or to be provided with a copy of them. These are summarised below:

    To provide **copies** of patient health records the **maximum** costs are:

    Health records held electronically: up to a maximum £10 charge.

    Health records held in part electronically and in part on other media (paper, x-ray film): up to a maximum £50 charge.

    Health records held totally on other media: up to a maximum £50 charge.

    All these maximum charges include postage and packaging costs. Any charges for access requests should not be made in order to make a financial gain.

    To allow patients to **view** their health records (where no copy is required) the maximum costs are:

    Health records held electronically: a maximum of £10

    Health records held in part on computer and in part on other media: a maximum of £10

    Health records held entirely on other media: up to a maximum £10 charge, **unless the records have been added to in the last 40 days in which case there should be no charge.**

    Note: if a person wishes to view their health records and then wants to be provided with copies this would still come under the one access request. The £10 maximum fee for viewing would be included within the £50 maximum fee for copies of health records, held in part on computer and in part manually.

Appropriate health professional to consult

19. The Data Protection (Subject Access Modification) (Health) Order 2000 sets out the appropriate health professional to be consulted to assist with subject access requests as the following:
    - the health professional who is currently, or was most recently, responsible for the clinical care of the data subject in connection with the information which is the subject of the request; or
    - where there is more than one such health professional, the health professional who is the most suitable to advise on the information which is the subject of the request.

Situations where health information may be limited or denied

20. The Data Protection (Subject Access Modification) (Health) Order 2000 enables the data controller to limit or deny access to an individual's health record where:
    - the information released may cause serious harm to the physical or mental health or condition of the patient, or any other person, or
    - access would disclose information relating to or provided by a third person who has not consented to that disclosure **unless**:
        - The third party is a health professional who has compiled or contributed to the health records or who has been involved in the care of the patient.
        - The third party, who is not a health professional, gives their consent to the disclosure of that information.
        - It is reasonable to disclose without that third party's consent.

Patients living abroad requiring access to their health records

21. Former patients living outside of the UK who had treatment in the UK have the same rights under the DPA to apply for access to their UK health records. An NHS organisation should treat these requests the same as someone making an access request from within the UK.
22. Original health records should not be given to patients to keep/take to a new GP outside the UK. In instances when a patient moves abroad a GP may be prepared to provide the patient with a summary of the patient's treatment. Alternatively, the patient is entitled to make a request for access to their health record under the DPA to obtain a copy.

Parental access to their child's health record

23. Normally a person with parental responsibility will have the right to apply for access to their child's health record. However, in exercising this right a health professional should give careful consideration to the duty of confidentiality owed to the child before disclosure is given.
24. The law regards young people aged 16 or 17 to be adults in respect of their rights confidentiality. Children under the age of 16 who have the capacity and understanding[1] to take decisions about their own treatment are also entitled to decide whether personal information may be passed on and generally to have their confidence respected. However, good practice dictates that the child should be encouraged to involve parents or other legal guardians in their healthcare.

The release stage

25. Once the relevant fee has been paid copies of the relevant parts of the health record should be provided to the patient or their representative. Alternatively, a date should be set for the relevant records to be viewed.

26. If information has been denied or restricted by the data controller an explanation for this does not have to be given to the data subject. However, the data controller should record their justification for restricting access.

27. Where the information is not readily intelligible to the patient, an explanation (e.g. of abbreviations or medical terminology) must be given.

Viewing health records

28. If it is agreed that the patient or their representative may directly inspect their health records, it should be considered whether access should be supervised by a health professional or a lay administrator. A lay administrator is a neutral person who can oversee the viewing and ensure that the record remains safe. In these circumstances the lay administrator must not comment or advise on the content of the record. If the applicant raises queries an appointment with a health professional should be offered.

Amendments to health records

29. Credible records are an important aid in providing safe healthcare to patients. Records should reflect the observations, judgements and factual information collected by the contributing health professional. The DPA fourth principle requires that information should be accurate and kept up-to-date. This provides the legal basis for enforcing correction of factual inaccuracies. An opinion or judgement recorded by a health professional, whether accurate or not, should not be deleted. Retaining relevant

[1] Generally referred to as 'Gillick Competent' or sometimes as 'Fraser Competent' after the legal case that established this position.

information is essential for understanding the clinical decisions that were made and to audit the quality of care.

30. If a patient feels that information recorded on their health record is incorrect, they should first make an informal approach to the health professional concerned to discuss the situation in an attempt to have the records amended. Where both parties agree that information is factually inaccurate it should be amended to clearly display the correction whilst ensuring that the original information is still legible. An explanation for the correction should also be added.

31. Where the health professional and patient disagree about the accuracy of the entry, the Department of Health recommends that the data controller should allow the patient to include a statement within their record to the effect that they disagree with the content.

32. If the patient is unhappy with the outcomes outlined in paragraphs 29 to 31, there is the option of taking this more formally (See 'Complaints' at paragraph 66).

Deceased Patients' Health Records

Access to deceased patients' health records

33. The Access to Health Records Act 1990 (AHRA) provides a small cohort of people with a statutory right of to apply for access to information contained within a deceased person's health record, paragraphs 37 – 42 provide more detail.

34. There may be circumstances where individuals who do not have a statutory right of access under AHRA request access to a deceased patient's record. Current legal advice is that the Courts would accept that confidentiality obligations owed by health professionals continue after death. The Department of Health, General Medical Council and other clinical professional bodies have long accepted that the duty of confidentiality continues beyond death and this is reflected in the guidance they produce.

35. In these circumstances the general rules that apply to the disclosure of confidential patient information should have effect to determine whether a disclosure is appropriate and lawful. Requests should be considered on a case-by-case basis and not simply rejected. Paragraphs 43 - 48 provide more detail on the considerations that apply where there is no statutory right of access.

36. There are also a range of public bodies that have lawful authority to require the disclosure of health information. These include the Courts, legally constituted Public Inquiries and various Regulators and Commissions e.g. the Audit Commission and the Care Quality Commission. [2] In these cases the common law obligation to confidentiality is overridden.

[2] The publication 'Confidentiality: NHS Code of Practice (DH 2003)' provides more examples

Access to Health Records Act 1990

37. The Access to Health Records Act (AHRA) 1990 provides certain individuals with a right of access to the health records of a deceased individual. These individuals are defined under Section 3(1)(f) of that Act as, 'the patient's personal representative and any person who may have a claim arising out of the patient's death'. A personal representative is the executor or administrator of the deceased person's estate.

38. The personal representative is the only person who has an unqualified right of access to a deceased patient's record and need give no reason for applying for access to a record. Individuals other than the personal representative have a legal right of access under the Act only where they can establish a claim arising from a patient's death.

39. There is less clarity regarding which individuals may have a claim arising out of the patient's death. Whilst this is accepted to encompass those with a financial claim, determining who these individuals are and whether there are any other types of claim is not straightforward. The decision as to whether a claim actually exists lies with the record holder. In cases where it is not clear whether a claim arises the record holder should seek legal advice.

40. Record holders must satisfy themselves as to the identity of applicants who should provide as much information to identify themselves as possible. Where an application is being made on the basis of a claim arising from the deceased's death, applicants must provide evidence to support their claim. Personal representatives will also need to provide evidence of identity.

Applying for access under AHRA

41. A request for access should be made in writing to the record holder ensuring that it contains sufficient information to enable the correct records to be identified. Applicants may wish to specify particular dates or parts of records which they wish to access. This may help reduce the fee that is payable for copies provided. The request should also give details of the applicant's right to access the records.

42. Once the data controller has the relevant information and fee, they should comply with the request promptly and within 21 days where the record has been added to in the last 40 days, and within 40 days otherwise.

Disclosure in the absence of a statutory basis

43. Disclosures in the absence of a statutory basis should be in the public interest, be proportionate, and judged on a case-by-case basis. The public good that would be served by disclosure must outweigh both the obligation of confidentiality owed to the deceased individual, any other individuals referenced in a record, and the overall importance placed in the health service providing a confidential service. Key issues for consideration include any preference expressed by the deceased prior to death, the

distress or detriment that any living individual might suffer following the disclosure, and any loss of privacy that might result and the impact upon the reputation of the deceased. The views of surviving family and the length of time after death are also important considerations. The obligation of confidentiality to the deceased is likely to be less than that owed to living patients and will diminish over time.

44. Another important consideration is the extent of the disclosure. Disclosing a complete health record is likely to require a stronger justification than a partial disclosure of information abstracted from the record. If the point of interest is the latest clinical episode or cause of death, then disclosure, where this is judged appropriate, should be limited to the pertinent details.

45. This guidance is not intended to support or facilitate open access to the health records of the deceased. Individual(s) requesting access to deceased patient health information should be able to demonstrate a legitimate purpose, generally a strong public interest justification and in many cases a legitimate relationship with the deceased patient. On making a request for information, the requestor should be asked to provide authenticating details to prove their identity and their relationship with the deceased individual. They should also provide a reason for the request and where possible, specify the parts of the deceased health record they require.

46. Relatives, friends and carers may have a range of important reasons for requesting information about deceased patients. For example, helping a relative understand the cause of death and actions taken to ease suffering of the patient at the time may help aid the bereavement process, or providing living relatives with genetic information about a hereditary condition may improve health outcomes for the surviving relatives of the deceased.

47. In some cases the decision about disclosure may not be simple or straightforward and a senior lead on patient confidentiality, for example the organisation's Caldicott Guardian or Information Governance lead, should be consulted. In the most complex cases it may be necessary to seek advice from lawyers.

48. A further range of issues and specific examples of circumstances where disclosure of information about deceased patients may be justifiable are considered in the 'Frequently asked Questions' provided in Appendix 2.

Fees for access to deceased patients' health records

49. The fee structure under the AHRA is:

- **Records held manually** - where an applicant is permitted to view a record which is held manually and has been added to in the forty days preceding the application, access is free of charge. Where the record has not been added to in the preceding forty days a charge of £10 may be charged to view the record.

- **Records held wholly or partially on computer** - where an applicant is permitted to view a record which is held wholly or partially on computer a fee of £10 may be charged.

- **Hard copies of information** - If an applicant wishes to obtain a copy of the record, they may be charged a fee. There is no limit on this charge, but it should not result in a profit for the record holder. This fee is over and above the £10 for the initial access.

50. Where health information is to be disclosed for the deceased in the absence of a statutory basis, any fees charged should be reasonable and proportionate to cover the cost of satisfying a request. It is recommended NHS organisations follow the fees structure established for the AHRA above.

Exemptions to disclosures of information relating to deceased patients

51. If the deceased person had indicated that they did not wish information to be disclosed, or the record contains information that the deceased person expected to remain confidential, then it should remain so unless there is an overriding public interest in disclosing.

52. In addition, the record holder has the right to deny or restrict access to the record if it is felt that:

    - disclosure would cause serious harm to the physical or mental health of any other person;
    - or would identify a third person, who has not consented to the release of that information.

Freedom Of Information

53. The Freedom of Information Act 2000 (FOI) is an Act to make provision for the disclosure of information which is held by public authorities and those who provide services to public authorities.

FOI and Access to Health Records

54. The FOI is not intended to allow people to gain access to private sensitive information about themselves or others, such as information held in health records. Those wishing to access personal information about themselves should apply under the DPA. The Information Commissioner has provided guidance to the effect that health records of the deceased are exempt from the provisions of FOI due to their sensitive and confidential content.

55. There are specific exemptions in the FOI Act to stop disclosure of personal health information. The following two sections of the FOI Act are the most relevant:

    Section 40 – Information which constitutes ‘personal information’ under the Data Protection Act 1998 (DPA) is exempt from the provisions of FOI if its disclosure would contravene any of the DPA principles. The DPA only applies to living individuals,

however there are some cases where information about a deceased patient is also personal information relating to or identifying a living individual.

Section 41 – Information that has been provided in confidence is exempt from the provisions of the FOI. There is a general agreement that information provided for the purpose of receiving healthcare is held under a duty of confidence. This exemption applies with regards to access to deceased patient records.

Medical Reports

Access to Medical Reports Act 1988

56. The Access to Medical Reports Act 1988 governs access to medical reports made by a medical practitioner who is, or has been responsible for the clinical care of the patient, for insurance or employment purposes. Reports prepared by other medical practitioners, such as those contracted by the employer or insurance company, are not covered by the Act. Reports prepared by such medical practitioners are covered by the Data Protection Act 1998.

57. A person cannot ask a patient's medical practitioner for a medical report on him/her for insurance or employment reasons without the patient's knowledge and consent. Patients have the option of declining to give consent for a report about them to be written.

58. The patient can apply for access to the report at any time before it is supplied to the employer/insurer, subject to certain exemptions (in paragraph 66 below). The medical practitioner should not supply the report until this access has been given, unless 21 days have passed since the patient has communicated with the doctor about making arrangements to see the report. Access incorporates enabling the patient to attend to view the report or providing the patient with a copy of the report.

59. Once the patient has had access to the report, it should not be supplied to the employer/insurer until the patient has given their consent. Before giving consent, the patient can ask for any part of the report that they think is incorrect to be amended. If an amendment is requested, the medical practitioner should either amend the report accordingly, or, at the patient's request, attach to the report a note of the patient's views on the part of the report which the doctor is declining to amend. Patients should request amendments in writing. If no agreement can be reached, patients also have the right to refuse supply of the report.

60. A medical practitioner may make a reasonable charge for supplying the patient with a copy of the report.

61. Medical practitioners must retain a copy of the report for at least 6 months following its supply to the employer/insurer. During this period patients continue to have a right of access for which the medical practitioner may charge a reasonable fee for a copy.

62. The medical practitioner is not obliged to give access to any part of a medical report whose disclosure would in the opinion of the practitioner:

- cause serious harm to the physical or mental health of the individual or others, or;
- indicate the intentions of the medical practitioner towards the individual, or;
- identify a third person, who has not consented to the release of that information or who is not a health professional involved in the individual's care.

Complaints

63. NHS organisations should have procedures in place to enable complaints about access to health records requests to be addressed. It is recommended that such complaints are taken through the following channels:

- In the first instance, the health professional involved should arrange to have an informal meeting with the individual to try to resolve the complaint locally.
- If the issue remains unresolved, the patient should be informed that they have a right to make a complaint through the NHS complaints procedure. Further information is available at:

  www.dh.gov.uk/en/Managingyourorganisation/Legalandcontractual/Complaintspolicy/index.htm

- Ultimately, the patient may not wish to make a complaint through the NHS Complaints Procedure and take their complaint direct to the Information Commissioner's Office, it they believe the NHS is not complying with their request in accordance with the **Data Protection Act.**
- Alternatively, if the patient wishes to do so, they may wish to seek legal independent advice.

64. Patients may also apply to NHS organisations for the correction or deletion of their information under section 10 of the DPA where the processing of the information is causing substantial and unwarranted damage or distress. NHS bodies should respond within 21 days to such requests, confirming compliance, or non-compliance and reasons which they believe the request is unjustified.

65. Where a patient is unsatisfied at an organisation's decision to reject a section 10 request they may apply to the courts to have their request upheld.

Useful Reading Resources

Department of Health: Records Management: NHS Code of Practice:

The two-part Records Management: NHS Code of Practice is a guide to the required standards of practice in the management of records for those who work within or under contract to NHS organisations in England.

www.dh.gov.uk/en/Managingyourorganisation/Informationpolicy/Recordsmanagement/index.htm

Department of Health: Confidentiality NHS Code of Practice:

The NHS Confidentiality Code of Practice is a guide to required practice for those who work within or under contract to NHS organisations concerning confidentiality and patients' consent to use their health records.

www.dh.gov.uk/en/Managingyourorganisation/Informationpolicy/Patientconfidentialityandcaldicottguardians/DH_4100550

Department of Health Informatics Directorate - Information Governance:

Information Governance ensures the necessary safeguards for, and appropriate use of patient and personal information.

www.connectingforhealth.nhs.uk/systemsandservices/infogov

NHS complaints procedure:

www.nhs.uk/aboutNHSChoices/pages/Howtocomplaincompliment.aspx

Useful Contact Websites

Information Commissioner's Office: www.ico.gov.uk/

National Information Governance Board: www.nigb.nhs.uk

General Medical Council: www.gmc-uk.org/

The British Medical Association: www.bma.org.uk/

The Royal College of Physicians: www.rcplondon.ac.uk

Appendix 1

Patient Authority Consent Form (Example)

Access to Health Records under the Data Protection Act 1998

Below is background information regarding your rights under the Data Protection Act 1998 in relation to requesting access to your health records, along with a form to assist you to make your request.

The Data Protection Act 1998 gives every living person, or an authorised representative, the right to apply for access to health records. A request should be made in writing (this includes email) to the data controller at the NHS organisation where your records are held. Please contact your local NHS organisation for alternative methods of obtaining access if you are unable to make a request in writing.

Under the Data Protection Act 1998 (Fees and Miscellaneous Provisions) Regulations 2000, you may be charged a fee to view your health records or to be provided with a copy of them. The maximum permitted charges are set out in the tables below.

To provide you with a copy of your health record the costs are:

- Health records held totally on computer: up to a maximum of £10.
- Health records held in part on computer and in part manually: up to a maximum of £50
- Health records held totally manually: up to a maximum of £50

To allow you to view your health record (where no copy is required) the costs are:

- Health records held totally on computer: up to a maximum of £10.
- Health records held in part on computer and in part manually: a maximum of £10.
- Health records held manually: up to a maximum of £10 unless the records have been added to in the last 40 days in which case viewing should be free.

All these maximum charges include postage and packaging costs.

The data controller is not obliged to comply with your access request unless they have sufficient information to identify you and to locate the information held about you. You may also be required to pay a fee as described above.

Once the data controller has all the required information, and fee, where relevant, your request should be complied within 21 days, in exceptional circumstances where it is not possible to comply within this period you will be informed of the delay and given a timescale for when your request is likely to be met.

In some circumstances, the Act permits the data controller to withhold information held in your health record. These rare cases are:

- where it has been judged that supplying you with the information is likely to cause serious harm to the physical or mental health or condition of you, or any other person, or;
- where providing you with access would disclose information relating to or provided by a third person who had not consented to the disclosure, this exemption does not apply where that third person is a health professional involved in your care.

When making your request for access, it would be helpful if you could provide details of the periods and parts of your health record you require. Although this is optional, it will help save NHS time and resources, and may reduce the costs of your access request.

If you are using an authorised representative, you need to be aware that in doing so they may gain access to all health records concerning you, which may not be relevant. If this is a concern, you should inform your representative of what information you wish them to specifically request when they are applying for access.

If you have any complaints about any aspect of your application to obtain access to your health records, you should first discuss this with the health professional concerned. If this proves unsuccessful, you can make a complaint through the NHS Complaints Procedure by contacting the NHS organisation formally. Further information about the NHS Complaints Procedure is available on the NHS Choices website at:
www.nhs.uk/aboutNHSChoices/pages/Howtocomplaincompliment.aspx

Alternatively you can contact the Information Commissioners Office (responsible for governing Data Protection compliance). Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. Tel 01625 545700 or www.ico.gov.uk/

Access to Health Records under the Data Protection

Act 1998 (Subject Access Request)

Patient's authority consent form for release of health records (Manual or Computerised Health Records)

(please print all details and use dark ink)

To: (Please provide GP name and address or consultant name and hospital Department here)

Identity of individual about whom information is requested

Full Name	Former name(s)
Current address	Former address (with dates of change)
Date of birth	NHS number (if known)
Contact phone number (including area code)	E-mail address: (optional)

What is being applied for (tick as applicable). In doing so you understand you may have to pay a fee for access or copies of your records.

I am applying for access to view my health records	
I am applying for copies of my health record	

You do not have to give a reason for applying for access to your health records. However, to help the NHS save time and resources, it would be helpful if you could provide details below, informing us of periods and parts of your health records you require, along with details which you may feel have relevance i.e. consultant name, location, written diagnosis and reports etc. Please use the space below to document and continue on another page if necessary:

Dates and types of records:

Please tick the appropriate box identifying whether you or a representative on your behalf is applying for access.

I am applying to access my health records	
I have instructed my authorised representative to apply on my behalf	

If you are the patients' representative please give details here

Name and address of representative
Contact number and E-mail
Signature

Signature of applicant ……

Print name……

Date……...

(Office use only) Date of application received …….

Received by …….

Signed: …….. Date: ……

Appendix 2

Frequently Asked Questions

Q. Do I have to use an Act to apply for access to my health information?

A. Although Acts such as the DPA and AHRA provide a statutory right of access to information, NHS organisations can chose to disclose information to individuals outside of the provisions of these Acts, subject to confidentiality considerations.

Q. Can information about third parties be disclosed within a health record?

A. Careful consideration should be made before disclosing third party information, and consent should normally be sought before disclosure. Where it can be demonstrated that consent is not practicable, the NHS organisation should weigh up whether the third party information should be fully released or removed. All disclosures of information about third parties need to be considered on a case-by-case basis, and decisions about disclosure should be fully documented.

Q. Can information within a health record which identifies health professionals be disclosed to a patient?

A. Information about health professionals is not normally considered as 'third party' information, and as such should normally be disclosed as part of a request unless disclosure would put any person at risk of harm.

Q. Should individuals be informed if information is withheld from a request?

A. NHS bodies should normally inform patients if information is withheld from them during an access request unless doing so would put any person at risk, or would disclose information or inappropriately identify a third party.

Q. Do researchers have a right to access information from patient health records when they are unable to gain patient consent?

A. Research using health information can provide many potential benefits. Researchers wishing to access information should follow NHS Research Governance processes and in most cases where access to identifiable information is sought they should obtain approval from the Ethics and Confidentiality Committee of the statutory National Information Governance Advisory Board.

Q. Can MPs have access to health information about their constituents?

A. The term 'elected representative' covers Members of Parliament (UK, Scotland, Wales, Northern Ireland and EU), local authority councillors and mayors (and their equivalents in the devolved countries). Specific legislation under the Statutory Instrument, 2002, No. 2905, The Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002 enables information to be disclosed to elected representatives without contravening the Data Protection Act 1998. However, it does

not remove the constraints of the common law duty of confidentiality and as such the common law should still be satisfied (normally by consent) before information is disclosed.[3]

Q. Should all information available be disclosed to a LSCB when investigating a child's death?

A. Local Safeguarding Children's Boards may require access to health records relevant to a deceased child from an NHS body to conduct an investigation/inquiry. It is highly likely that the public interest served by this process warrants full disclosure of all relevant information within the child's own records. However, in some circumstances the LSCB may also require access to information about third parties (e.g. members of the child's immediate family or carers). In all cases the LSCB should explain why it believes information about third parties is relevant to its enquiries, and you should use this to consider whether or not there is an overriding public interest to justify the disclosure of the information requested. In cases where you determine disclosure to be in the public interest you must ensure that any information you disclose about a third party is both necessary and proportionate.

Q. Should all information requested be disclosed to Coroners for the purpose of carrying out an inquiry? [4]

A. It is the Department of Health's view that the public interest served by Coroners' inquiries will outweigh considerations of confidentiality unless exceptional circumstances apply.

When an NHS organisation feels that there are reasons why full disclosure is not appropriate, e.g. due to confidentiality obligations or Human Rights considerations, the following steps should be taken:

a) the Coroner should be informed about the existence of information relevant to an inquiry in all cases;

b) the concern about disclosure should be discussed with the Coroner and attempts made to reach agreement on the confidential handling of records or partial redaction of record content;

c) where agreement cannot be reached the issue will need to be considered by an administrative court.

[3] Section 13 of Model B3 in Confidentiality: NHS Code of Practice (DH 2003) provides more information about disclosures to MPs

[4] Coroners' inquiries are an important part of determining cause of death in a huge number of cases in the UK. Prompt access to confidential information regarding patients and others involved in an investigation is often vital to the reliability of the outcome of an inquiry.

Q. Should consideration be given to surviving family members when disclosing information about deceased patients?

A. NHS body's should have consideration to the potential harm or distress to the requester or other individuals either through supplying or withholding information. Where information is disclosed the amount of information provided should be proportionate to the need. Requesters should be sensitively informed where the decision is taken to withhold information.

Q. How do Independent Mental Health Advocates (IMHAs) and The Mental Health Act 1983 apply to access to health records?

A. Under this Act, certain people ("qualifying patients") are entitled to support from an IMHA. Subject to certain conditions, section 130B of that Act says that, for the purpose of providing help to a qualifying patient, IMHAs may require the production of and inspect any records relating to the patient's detention or treatment in any hospital or to any after-care services provided for the patient under section 117 of the Act.[5]

The Department has published guidance on IMHAs' rights to information which would not be disclosed in response to an access request from the qualifying patient themselves. This is available on the Department of Health website:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_098828

Q. How do Deputies and Lasting Powers of Attorney and The Mental Capacity Act 2005 (MCA) apply to access to health records?

A. The MCA generally only affects people aged 16 or over. The Act provides a statutory framework to empower and protect people who may lack capacity to make some decisions. The MCA set up a new Court of Protection, which is permitted to appoint a deputy, to deal with property and affairs and/or personal welfare decisions. People whilst they still have capacity can appoint a Lasting Power of Attorney, also either for property and affairs and / or personal welfare decisions. Personal welfare deputies and attorneys can ask to see information concerning the person they are representing as long as the information applies to decisions they have the legal right to make.[6]

Q. Can NHS bodies disclose information in response to allegations made about the operation and conduct of its staff?

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[5] Chapter 20 of the Code of Practice: Mental Health Act 1983 provides more information: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_084597

[6] The Department of Health, in partnership with the Welsh Assembly Government and the Social Care Institute for Excellence, has published a range of materials including training materials to support the implementation of the MCA, that can be downloaded from the DH website: http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityAct2005/index.htm

A. Where allegations are made against a NHS body in the media by patients or relatives the NHS body may wish to respond in order to maintain the reputation of the NHS. However, in doing so, NHS body should not disclose further confidential information and the level of disclosure should be proportionate to the need, with strong considerations on the impact of possible harm caused to others.

Q. How long should health records be kept for?

A. NHS organisations should retain records in accordance with the retention schedules outlined in the Department of Health Records Management NHS Code of Practice before determining whether they should be archived or destroyed[7]. Where records are to be archived they should be transferred to a designated local Place of Deposit (POD) or to the National Archives. The Code is available from the following link:

http://www.dh.gov.uk/en/Managingyourorganisation/Informationpolicy/Recordsmanagement/index.htm

Q. What if records are stored at an archive?

A. Archives may also receive requests for deceased health information from individuals and may consider the use of this guidance as a framework on decisions for disclosure.

[7] The Department of Health's Records Management: NHS Code of Practice provides best practice guidance on records management issues and includes a retention schedule for various categories of records.