

Dear Colleague

## SHARING OF PERSONAL SENSITIVE INFORMATION (MEDICAL/CLINICAL RECORDS) FOR COURT PROCEEDINGS

### Purpose

1. This is to make you aware of recent legal developments in disclosing patient's medical/clinical records to solicitors where they can potentially be treated as evidence in criminal cases.

### Background

2. Medical/clinical records are of course confidential which is legally protected. However, there are circumstances in which confidential material, such as medical/clinical records, may be sought for use in court proceedings.

3. There may be circumstances where either the prosecution or the defence legal team in a criminal case may seek to obtain ("to recover", in legal language) a person's medical records, to be used as evidence in a criminal case. They must apply to the courts for "an order for their production, or for their recovery" (by what is called commission and diligence). If the court agrees that the records should be made available, it will issue an order. ***It is important to note that although neither the prosecution nor the defence teams should request such records without express permission from the court, which may happen on occasion. In these circumstances, the records should not be released and the requester should be informed that a court order is required.***

4. Although it is only a court that can authorise the release of medical/clinical records in the context of criminal proceedings, it is normal for such an order to be sent to healthcare professionals via either the prosecution or defence solicitors, depending on which party sought the order from the court.

5. We understand a recent case highlighted the confusion that a request for release of clinical records can cause, when healthcare professionals mistakenly believed that the request was a "court order", when it actually came from the defence solicitor without being accompanied by a court order.

**From the Chief Medical Officer  
Dr Catherine Calderwood MA  
MRCOG FRCP(Edin)**

**Director Justice  
Neil Rennick**

---

#### **Enquiries to:**

Dr Mini Mishra  
Senior Medical Officer  
St Andrew's House  
EDINBURGH EH1 3DG  
mini.mishra@gov.scot

---

17 November 2016

---

SGHD/CMO(2016)20

---

#### **Addresses**

##### For action

NHS Board Medical Directors – to cascade to Community Hospitals and all doctors, including GPs  
NHS Board and Special Board Chief Executives

##### For information

NHS Board Caldicott Guardians  
NHS Board Directors of Public Health  
NHS Board and Special Board Chairs  
NHS Board Primary Care Leads  
Medical Records Managers  
British Medical Association  
General Medical Council  
Medical and Dental Defence Union of Scotland  
Medical Protection Society  
Medical Defence Union  
Academy of Medical Royal Colleges and Faculties in Scotland  
COPFS – to cascade to Forensic Pathologists  
Community Hospitals  
Hospices  
Independent hospitals  
Police Scotland

---

#### **Further Enquiries**

##### For policy issues

Saira Kapasi  
Violence Against Women Justice Lead  
St Andrew's House  
EDINBURGH EH1 3DG  
saira.kapasi@gov.scot

## **Recent Scottish Court decision**

6. The decision, in WF, Petitioner, concerned the use of any sensitive records in criminal cases. If the sensitive records of any party to a criminal case are being sought, the fact of their being sought must be intimated to the person whose records they are. That person may make representations to the court about his or her views on any potential release. Those representations may be made by his or her lawyer, who may be legally-aided if appropriate see link below).

<http://www.scotcourts.gov.uk/search-judgments/judgment?id=2af906a7-8980-69d2-b500-ff0000d74aa7>

7. The rights of the person to whom the documents refer have not been so clearly stated in law before, and nor has the availability of legal aid to challenge release. It is therefore to be expected that there may be more challenges to the recovery of documents in future.

**8. *We would therefore stress that, in general, medical/clinical records should not be released to the requesting legal teams, if a court order does not accompany the request – except in the very unusual circumstances described in paragraphs 9 and 10.***

9. The release of medical/clinical records may also be required by statute, or by an overriding public interest (such as the protection of a vulnerable or incapacitated person in an urgent situation).

10. There are also a range of circumstances in which doctors and healthcare professionals can and do share with or without a court order (**Annex 1**).

## **Action**

11. Without putting unnecessary and unreasonable barriers to legitimate and necessary information sharing, we would urge you to be vigilant about the person who requests the release of medical/clinical records and its purpose.

12. In general, the consent of the individual or legal guardian concerned should be expressly sought if personal identifiable information is to be disclosed for purposes other than their care or local clinical audit, unless the disclosure is required by law or can be justified in the public interest.

13. If you are unsure of any of the above, then you need to contact the Caldicott Guardian and/or the Information Governance Lead in your Health Board before you take any action. You can also contact your professional organisations for advice, rather than feel under pressure to release information about a patient.

Thank you very much for your co-operation in this important area.

Yours sincerely

*Catherine Calderwood*

*Neil Rennick*

**Dr Catherine Calderwood MA FRCOG FRCP(Edin)  
Chief Medical Officer**

**Neil Rennick  
Director Justice**

## Confidentiality and Consent Issues

1. Health Boards and GPs can ask to see a court order before releasing information or the Police etc. can start on the basis of a court order. But this is not the only route by which sensitive personal information can be lawfully shared (see link below).

[NHS Scotland Code of Practice - Protecting Patient Confidentiality](#)

2. General Medical Council guidance on Confidentiality says that Confidentiality is an important duty, but it is not absolute. (see link below).

[http://www.gmc-uk.org/guidance/ethical\\_guidance/confidentiality.asp](http://www.gmc-uk.org/guidance/ethical_guidance/confidentiality.asp)

*You can disclose personal information if:*

*a it is required by law (see paragraphs 17 to 23 of the GMC Confidentiality Guidance)*

*b the patient consents – either implicitly for the sake of their own*

*care (see paragraphs 25 to 31 of the GMC Confidentiality Guidance) or expressly for other purposes (see paragraphs 32 to 35 of the GMC Confidentiality Guidance)*

*c it is justified in the public interest (see paragraphs 36 to 56 of the GMC Confidentiality Guidance).*

*You must not disclose personal information to a third party such as a solicitor, police officer or officer of a court without the patient's express consent, unless it is required by law or can be justified in the public interest.*

*Whenever practicable, you should inform patients about such disclosures, unless that would undermine the purpose, even if their consent is not required.*

3. The Data Protection Act makes it permissible for sharing under section 29 (tax and crime); i.e. that the Data Controller is not in breach as there is an exemption etc.

Section 35.2 of the Data Protection Act also needs to be taken into account as below:

*35 Disclosures required by law or made in connection with legal proceedings etc.*

*(1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.*

*(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary—*

*(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or*

*(b) for the purpose of obtaining legal advice,*

*or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*

It should be noted that s35 (and s29) does not oblige a data controller to disclose – they merely provide an exemption to the general restrictions on disclosure detailed in s27(4) – see link below.

<https://ico.org.uk/for-organisations/guide-to-data-protection/>

4. Health Boards and GPs can also share on basis of evidence submitted for example from a person of suitable rank in Police Scotland (and to make a distinction between legitimate urgent business and Police 'fishing expeditions'). Health Boards often have single points of contact with Police who make these judgements and GPs should ask them for advice if required (see link below).

[www.sehd.scot.nhs.uk/mels/CEL2008\\_13.pdf](http://www.sehd.scot.nhs.uk/mels/CEL2008_13.pdf)