Disclosures relating to patients unable to consent

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ENGLAND FACTSHEET

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You owe a duty of confidentiality to all your patients, past or present, even if they are adults who lack capacity. You may be asked to provide information from the medical records of patients who are incapable of giving consent, are aged under 18, or have died. This factsheet gives you further information about dealing with these circumstances.

Children and young people with capacity

Many young people have the capacity to consent to the disclosure of their medical records. If the child or young person (under 18 years of age) is able to understand the purposes and consequences of disclosure (Gillick competent) they can consent or refuse consent to the disclosure. You should discuss disclosing the information with them and release it only with the child or young person's consent.

If a child or young person under 18 refuses consent, you should nevertheless disclose the information if this is necessary to protect the child, young person or someone else from serious harm, or if disclosure is justifiable in the public interest.

Examples include situations where you consider that the child or young person is at risk of neglect or abuse, the information would assist in the prevention, detection or prosecution of a serious crime, or where the child or young person may be involved in behaviour that might put themselves or others at risk of serious harm. It would also include a situation where a child or young person has refused to allow a carer to be told of a condition or treatment, from which there is a risk of a serious complication arising.

You should give careful consideration to the child's reasons for refusal of disclosure, and explain to them your reasons for disclosing the information and what you intend to disclose – unless doing so would undermine the purpose of the disclosure

You should involve the child or young person in the decision and ensure this is documented – including notes on how the decision was reached.

Children and young people without capacity

The overriding principle, when dealing with the disclosure of the medical records of children or young people who do not have the maturity or understanding to make a decision, is ensuring that you act in their best interests.

If the child or young person lacks the capacity to consent to the disclosure of information, those with parental responsibility can consent on their behalf. The consent of only one person with parental responsibility is needed for consent for disclosure.

If you do not believe that the decision made by those with parental responsibility is in the best interests of the child or young person, and the disagreement cannot be resolved with discussion and mutual agreement, it may be necessary to seek the view of the courts. You should contact MPS for further advice if such a situation arises.

In young people aged 16-17 who lack capacity, both the Mental Capacity Act 2005 and the Children Act 1989 can apply, depending on the circumstances. In England, the MCA defines anyone of age 16 as an adult. In relation to disclosure of information, the most important principle is to ensure that you are acting in the patient's best interests.

Adults lacking capacity

The Mental Capacity Act 2005 applies to adults without capacity, and further details about the disclosure of confidential information about a patient lacking capacity can be found in the Mental Capacity Act Code of Practice. Under the Act, patients are assumed to have capacity, unless they have an impairment affecting their mind (eg, dementia), which means they are unable to make a specific decision at a specific time.

There is also a requirement to ensure all practical steps have been taken to help the individual make a decision.

The overriding principle is that the disclosure of confidential information is made in the best interests of the person lacking capacity. This may involve releasing information about their condition – for example, to their carer, to ensure they receive the best treatment.

If the patient has made a lasting power of attorney that covers personal welfare, you must consider the views of anyone who has legal authority to make a decision on the patient's behalf, eg, a lasting power of attorney that covers personal welfare, or who has been appointed to represent them. Likewise, if the Court of Protection has appointed a deputy to make welfare decisions on behalf of the patient, that person must be consulted in relation to disclosures of confidential information.

Disclosure after a patient's death

Your duty of confidentiality extends beyond the patient's death. However, there may be circumstances when disclosure may be justified. For example, you are under a professional duty to respond to complaints, and this includes complaints made by bereaved relatives. Any disclosure must be justifiable and the reasons for doing so must be fully documented.

Who can you disclose information to?

The Access to Health Records Act 1990 applies to records of deceased patients, and to information recorded in or after November 1991. Under the Act, upon request, relevant information should be disclosed to the personal representative of the deceased (the executor of the deceased's will or the administrator of the estate if your patient died without leaving a will) or anyone who may have a claim arising from the patient's death.

If the request for disclosure is made by someone other than the personal representative or a person with a potential claim arising from the patient's death, then, where possible, you should advise them to seek the consent of the personal representative. If this is not possible you should consider whether disclosure would be justified in all the circumstances of the case (for further information see the MPS factsheet *Confidentiality – Disclosures without consent*).

What information can be disclosed?

If the patient has asked that specific information remains confidential, their views should be documented, and respected, subject to disclosures that are required by law or justified in the public interest. However, even in circumstances where you are not aware of any specific requests from the patient, there are factors you should take into account before disclosing any information:

- Is it information which, by its nature, the patient might not have wanted disclosed?
- Could the disclosure of the information cause serious harm or distress to others?
- Would the disclosure inadvertently reveal information about a third party?
- Is the information already in the public domain?
- Is the disclosure necessary?

If you are uncertain, contact MPS for further advice.

A decision not to disclose information covered by the Act can be reviewed by the courts in the event of a disagreement.

Further information

- GMC, *Confidentiality* (2009) – www.gmc-uk.org
- GMC, *Making and Using Visual and Audio Recordings of Patients – Guidance for Doctors* (2011) – www.gmc-uk.org/recordings

For medicolegal advice please call us on:

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