Bolton Clinical Commissioning Group

Subject Access Requests Standard Operating Procedure

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Policy Author	**IG Manager (GMSS)**
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Approved documents are valid for use after their approval date and remain in force beyond any expiry of their review date until a new version is available.

Version Control Sheet

Version	Date	Reviewed By	Comment
0.1	September 2013	Diane Sankey/Mike Robinson	Escalated to CCG Exec for Approval
1	October 2013	Executive Committee	Approved – review two years
2	January 2015	Diane Sankey	Minor amendments to job titles/depts./CSU Name
3	**November 2016**	**IG Team**	**Minor amendments**
3	**November 2016**	**IM&T Operations Board**	**Reviewed and approved CO final sign off**

Analysis of Effect completed:	By: Mike Robinson	Date: 30 Sept 2013

1 Introduction

1.1 Objective

The objective of this procedure is to provide staff across Bolton Clinical Commissioning Group with a clear guide on how to manage incoming Subject Access Health Records requests which could be for full or partial access to health records and non-health records.

1.2 Scope

Under the Health and Social Care Act (2012), NHS Clinical Commissioning Groups do not have the legal right to process Personal Confidential Data (PCD), for secondary use without patient consent. (See IG012 Secure Transfer of Information Guidance September 2013).

However, a CCG has the right to process PCD if the information required or provided to the CCG is directly connected to a patient's NHS care and input is required by Bolton CCG as NHS commissioner e.g. Individual Funding Requests, NHS continuing health care applications, complaint or incident investigations, Safeguarding Children or Vulnerable Adult reviews, PALS enquiries.

Bolton CCG will therefore hold files containing confidential information about patients or relatives who act on their behalf and this procedure applies to any request received from an individual service user/patient.

The scope of this procedure primarily encompasses those members of staff involved in the management and administration of Subject Access Health Records requests. However this procedure applies to all staff who may receive a request for a patient/ individual record.

2 Roles and Responsibilities

2.1 The Chief Operating Officer

The Chief Operating Officer has ultimate responsibility for the implementation of the provisions of this Procedure. As the Accountable Officer, they are responsible for the management of the organisation and for ensuring that appropriate mechanisms are in place to support service delivery and continuity.

2.2 The Caldicott Guardian

The Caldicott Guardian has responsibility for overseeing the implementation of the laws and guidance that govern personal information and ensuring that best practice in relation to access to service user information is implemented within the best interests of the service user.

2.3 The Risk and Complaints Manager

The Risk and Complaints Manager will manage subject access requests and is responsible for ensuring that Bolton CCG meets its legal responsibilities and complies with internal and external governance requirements in processing applications for personal records and that a record of all subject access requests is maintained.

2.4 Staff

All staff have a duty to familiarise themselves with this procedure and comply with the processes, timescales and confidentiality requirement that support this procedure.

3 Definitions

Information Commissioner
The Information Commissioner's Office is the UK's independent authority set up to promote access to official information and to protect personal information.

Data Controller
Whilst employees are responsible for the collection of the data, Bolton Clinical Commissioning Group is responsible for determining the purposes and manner in which personal data is processed, and thereby Bolton CCG as an organisation is the official 'Data Controller'.

Data Processor
The data processor is all departments who process data except in the cases where they use third parties, e.g. Lancashire and South Cumbria Patient Data Agency.

Data Subject
The Data Protection Act 1998 gives individuals who are the subject of personal data ("data subjects") a general right of access to the personal data which relates to them.

4 Legal Requirement

Once the Data Controller has the request in writing, relevant documentation and fee, it should comply with the subject access requests promptly as instructed by the Department of Health. Where due to exceptional circumstances the CCG cannot meet this timescale, a response should be provided prior to the 40 days allocated for disclosure under the Data Protection Act 1998.

5 Steps to Follow

Any request for a personal record should be forwarded to the CCG Risk and Complaints Manager, St Peters House, Silverwell Street, Bolton as per the flowchart attached at Appendix A. The Information Commissioner published a Subject Access Code of Practice in August 2013 – click here to view the document.

Validity of request

An application for access is only valid where:-

- The request is in writing
- There is sufficient information to locate the records requested.
- The identity of the individual making the request is proven, consent of the patient and/or all necessary information has been provided.
- Under the DPA 1998, there is no obligation to comply with an access request unless the CCG has enough information needed to identify the applicant and locate the information and unless the required fee has been paid.

6 Access to patient information by Third Parties

These may include requests for patient records used by the CCG (for Individual Funding Requests, incident investigations, continuing healthcare purposes) from HM Coroner, Police, General Medical Council, Social Services.

Such requests fall outside of a subject access request. An appropriate clinician or Caldicott Guardian would provide final approval to release records to a third party. The Caldicott Guardian should have all the relevant facts provided on which to make a decision.

7 Requests for other Providers/Trusts

In the event that a request for subject access to health records or non-health records is received and does not relate to any services provided the person making the request must be informed in writing or by telephone.

The CCG will provide with details of where their request can be sent to for processing.

8 Removing Exempt Information

Only information relevant to the request should be sent, the rest should be removed. This could include:

- Third party information
- Information relating to adoption/fostering of patient
- Details relating to a physical or mental health conditions, which is likely to cause serious harm to them or another person.

- Statements on record made ‘in confidence’ on the understanding it would not be released to any other party

This list not exhaustive

9 Providing the Information Requested

The Integrated Governance Team will:

- Check the legality of the access request and associated consent documentation.
- Locate the records and request photocopied notes by sending an Email to relevant Manager.
- Send the Authorisation to Release Records form to the relevant Manager/Health Professional to review and sign.

Only copies of records (not originals) should be sent to the Integrated Governance Team. Officers will then:

- Write to the person/organisation making the request using the standard request for money template
- Upon receipt of payment, send the cheque to the Finance department along with the corresponding memo
- Release the notes by Recorded Delivery, using the standard response letter template

10 Fees

Bolton CCG will endeavour to keep the cost of disclosure to a minimum £10 fee for releasing copies of records held.

If there are special circumstances under which the relevant Manager or Clinician feels the request fee should be waivered or the applicant should be given the option of viewing the records and to make notes, this will be reviewed and agreed with the Risk and Complaints Manager and a record kept of the reason for this waiver.

10.1 Fees to access and copy Health Records

The CCG will charge a maximum fee of between £10 and £50 for complying with a Subject Access Request (SAR) relating to health records. The precise amount of the maximum fee depends on how the health records are held.

• The CCG will charge a minimum £10 for complying with a SAR relating to health records if they are held only electronically.
• The CCG will charge up to £50 for complying with a SAR relating to health records if those records are held either wholly or partly in non-electronic form.

However, if the health records in question fall into the second of the above two categories (that is, they are not exclusively electronic records), **and** they have been created or added to during the 40 days preceding the SAR, the CCG will offer the requester the opportunity to inspect the manual records free of charge, rather than being provided with a permanent copy of them. Individuals may tailor their SARs so that they relate only to information to which this right of free inspection applies.

11 Dissemination and Implementation

11.1 Dissemination

This procedure will be published on the intranet and awareness will be raised via the weekly newsletters.

11.2 Implementation

All CCG staff will be made aware of this procedure through generic and specific training programmes and guidance materials, which will be regularly reviewed and updated.

The GMSS Information Governance Team will support staff in the process.

12 Other relevant documents

This procedure should be read in conjunction with the following Bolton CCG Policies:

- IG001 Information Governance Policy
- IG002 Confidentiality and Data Protection Policy
- IG005 Records Management Policy
- IG012 Secure Transfer of Information Guidance
- Freedom of Information Process/Flow Chart

Appendix A: Process

STAGE 1

Bolton CCG receives a Subject Access Health records request

This can arrive in 1 of 2 ways:

1) Request is received directly by the Integrated Governance Team Or Integrated Governance will send Application Form via email or post.	**2)** Request is received by a member of staff of the Department that holds the records requested, i.e. Continuing Healthcare, IFR Effective Use of Resources Team

STAGE 2

Integrated Governance will: ➢ Scan and email the request (with consent) to the correct department Alternatively: ➢ Photocopy it and put in the internal post Along with ➢ Internal Memo (Appendix F) ➢ Authorisation to release records form (Appendix G)	Relevant Department send to Integrated Governance Team: ➢ a copy of the request ➢ Consent letter ➢ Completed and signed Authorisation to release records form (Appendix G) Assuming approval has been given to release the records then a copy (not the original records) should be sent to Integrated Governance Team via internal mail or handed over to Integrated Governance marked private and confidential
NOTE: Records cannot be released without approval	

Each request will be logged on Safeguard database and given its own unique reference number. Relevant correspondence will be scanned in and stored on the database; however original correspondence, copies of ID etc will be securely retained in a manual file.

For each SAR processed by the CCG, the database or manual file will include:

- Original request
- Application for Access (*if applicable*) (Appendix D)
- Consent form
- Payment letter from applicant
- Signed and completed Authorisation to release Records Form (Appendix G)
- Authorisation Memo (Appendix F)
- Request for money letter (Appendix H)
- Access response Letter (Appendix J)
- Cheque to Finance memo (Appendix I)

Access to files will be restricted to authorised members of staff

STAGE 3

On receiving the completed Authorisation to Release Form, the CCG will request the Applicant for payment as appropriate (Appendix H)

STAGE 4

When payment arrives (or if fee is waived) the CCG will send by a recorded delivery a copy of the records requested with a covering letter (Appendix J)

The Safeguard Database will be updated.

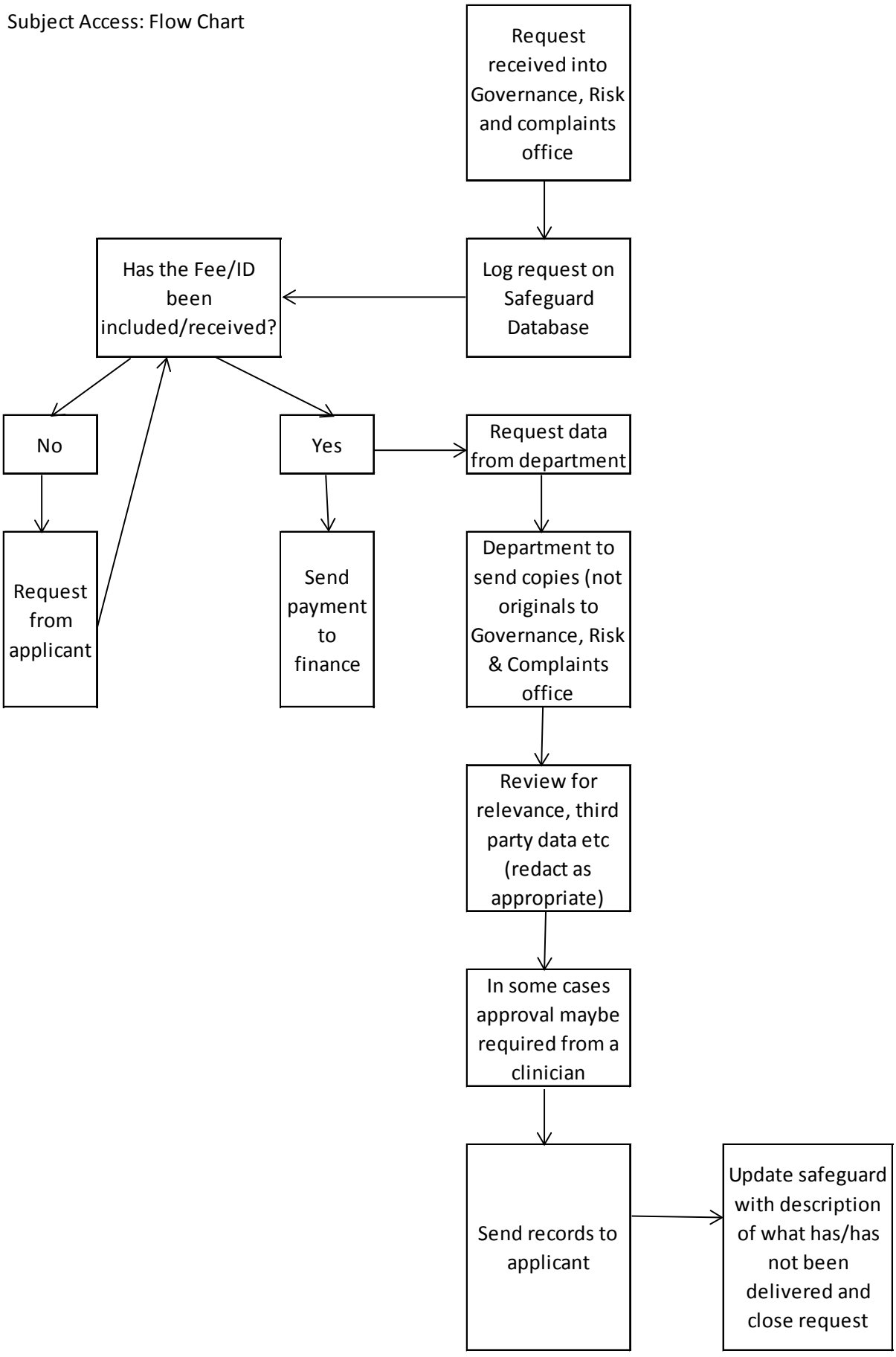
STAGE 5

Cheque for payment will be sent to finance with covering Memo (Appendix I)

STAGE 6

Manual copies of SAR applications will be retained on site for a minimum of two years and not kept beyond their retention period as defined by the Department of Health.

Subject Access: Flow Chart



Appendix B: Rights of access from various sources

- Records for Patients over the age of 16
- Requests for information from Solicitors, Children and Family Court Advisors (CAFCASS) or the Police concerning Children
- Request from Third Parties
- Where the patient is deceased
- Requests from the Police (patients over 16)
- Patients living abroad requiring access to their health records
- When access may be denied or limited
- Amendments to Health Records, Complaints

Requests for Access to records for patients under the age of 16

The applicant must have parental responsibility, as defined in the Children's Act 1989 as "all the rights, duties, powers, responsibilities and authority, which by law a parent of a child has in relation to the child and their property". However, where a child is considered capable of making decisions about his/her medical treatment, the consent of the child must be sought before a person with parental responsibility can be given access. Accordingly, an 'appropriate health professional' will need to judge whether the child understands the nature of the request. If the child understands, their written consent is required. If the child does not understand the nature of the request, someone with parental responsibility for the child, or a guardian, is entitled to give consent to disclosure. This will be by way of one of the following: -

- The applicant is the child's natural mother (and there is no Residence or other Court Order to the contrary).

- The applicant is the child's natural father and was married to the child's natural mother at the time of conception or birth of the child. The father does not necessarily still have to be married to the child's natural mother. He could be legally separated or divorced from her. This applies providing that there is no Residence or other Court Order to the contrary. It would be for the Bolton CCG to judge whether or not it would be in the child's best interests to disclose medical records to an 'absent ' parent.

- The applicant is the child's natural father and was <u>not</u> married to the child's natural mother at the time of conception or birth of the child but he has specifically sought to establish a legal right to parental responsibility. If there is no documentation to support his legal right, then the Bolton CCG is under no legal obligation to disclose information to him. However, the view could be taken that if it is in the child's best interests to disclose to the father, it might be reasonable to grant the request after seeking consent from the mother to disclose information.

- From 1 December 2003, changes to Section 111 of the Adoption and Children Act extends the way in which an unmarried father can acquire parental responsibility. In addition to acquiring parental responsibility by way of a former parental responsibility agreement, or by order of the Court, a child's

father can now acquire parental responsibility if he becomes registered as the child's father on the birth certificate. This means that where a birth is registered after 1 December 2003 and the unmarried father is named on the birth certificate, he will automatically have parental responsibility. In addition, where no father has been named on a birth certificate, the particulars can be re-registered to name the unmarried father, who again will have parental responsibility.

- The applicant has parental responsibility by way of a Residence Order. This could be the child's natural father, a grandparent/relative or Social Services. Documentary proof should be obtained.

- It is important to note that the law regards young people aged 16 or 17 to be adults for the purposes of consent to treatment and right to confidentiality. Therefore if a 16 year old wishes to keep treatment confidential then that wish should be respected. Children under the age of 16 who have the capacity and understanding to make decisions about their own treatment are also entitled to decide whether personal information may be passed on and generally to have their confidence respected. A child is considered to be 'Gillick Competent' if they have sufficient maturity and understanding in relation to the meaning of the application and giving authority to such a request.

Each application by a person having personal responsibility for a child for access to that child's medical records will need to be considered then on the following basis: -

- Is the child capable of understanding the nature of the application?
- If so, has the child consented to the application?
- If the child were not capable of understanding the nature of the application, would giving access be in the child's best interests?

In general terms it is unlikely that a child under the age of 8 years will be capable of understanding the nature of the application.

If the request is made by those with parental responsibility for a child aged 8 years or over, in each individual case it will be necessary to enquire of the health professional who has most recently treated the child as to whether in his/her opinion the child has reached an age where he/she has sufficient understanding and intelligence to understand the nature of the application for access to his/her records. Each application must be assessed on an individual basis, although once a child reaches the age of 13 or over there is more likely to be a presumption that he/she understands the nature of the application and therefore their consent will be required.

Requests for information from Solicitors, Children and Family Court Advisors (CAFCASS) or the Police concerning Children

Solicitors

Solicitors who are acting for parents/carers in civil proceedings should not be given information directly as there may be a conflict of interests that could breach confidentiality. Where there are clear child protection issues, the Bolton CCG may feel inclined to withhold information and could be justified with reference to Statutory Instrument 413, which states that where access to data could *"cause serious harm to the physical or mental health or condition of the data subject or any other person".*

Police

Sharing of information may be necessary in the child's best interests. Advice should be sought prior to releasing any information from the named nurse or designated nurse. The Police may ask for a statement in relation to that member of staff's involvement in the case. Any statement must be dated, signed and a copy kept.

Children and Family Court Advisors

Relevant information may be given; this can often be in a face-to face discussion. In all cases, advice should be sought from the appropriate named nurses for Child Protection. Written reports must be signed, dated and copy kept.

Witness Summons

A witness summons may be issued where a court considers it is in the best interests of the child. In cases other than where the local authority is seeking care proceedings, it will be expected that an affidavit pertaining to the summons outlining why the presence of a health professional is requested will be issued. Staff should inform the named/designated profession who will then inform the Complaint's and Litigation Office.

Child Protection Issues

Where a request for records is made on behalf of a child under 16 years the appropriate child protection register should be checked to determine whether the child is on the register.

Where a child is on the child protection register, careful consideration will need to be given as to whether giving access to that child's health records to those with parental responsibility would be in the child's best interests. In each case this issue must be considered on an individual basis, in consultation with the Social Services Department if necessary.

Requests from Third Parties

Where the patient is alive

Requests from third parties should include valid informed consent from the patient authorising the release of personal medical information.

If a patient's representative i.e. solicitor, is applying for access, the Bolton CCG may in some circumstances contact the patient to clarify that they fully understand they will be consenting to the release of their health records to a third party. This is particularly pertinent to requests, which authorise the release of ALL their records. Patients often do not realise the implications of signing a "blanket authority" as sometimes records of a very sensitive nature, completely unrelated to the matter the solicitor is pursuing for them are released. Original records should not be sent to Solicitors and reasonable copy charges should be invoiced. (See section on fees)

Where the patient is incapacitated

People who are appointed by a court to manage the affairs of mentally incapacitated adults **may** have access to information necessary to fulfil their function. Decisions to pass on information should take into account the patient's best interests and, as necessary, the views of relatives and carers. Documentary proof must be obtained to show they have authority to act on behalf of the patient.

As the law stands, nobody is empowered to give consent on behalf of an adult. However, if a patient is unconscious or unable to give informed consent or to communicate a decision, decisions to pass on information will in practice usually be taken by the 'appropriate health professional' concerned, taking into account the patient's best interests. Any decision made by a patient to deny disclosure of their data (whilst they still had capacity to decide) should be given appropriate consideration.

Where the patient the is incapable and have appointed a Power of Attorney, persons with powers of attorney have no data protection or common law functions. Nevertheless. Sometimes it may be appropriate to involve them as the persons who have the authority to make commercial arrangements for patients, including arrangements to provide both accommodation and nursing care. They, on their patient's behalf, may have an interest in securing the best value in a nursing and care package. Where that is the case, it may be necessary to consider whether the vital interests/medical care needs of the patient in question also require the disclosure of all or some of the sensitive personal information in question to the person who holds the power of attorney

Where the patient is deceased

The Data Protection Act 1998 does <u>not</u> apply in these circumstances. Relatives of someone who has died do not have an **automatic right** to the deceased's records. Under Section 3(1)(f) of the Access to Health Records Act 1990, a deceased patient's representative, or another individual with a claim arising from the patient's death have the right of access to health information in a deceased person's record.

Section 5 (4) of the Access to Health Records Act 1990 states that access shall not be given to any part of the records which, in the opinion of the record holder, would disclose information which is not relevant to a claim which may arise out of the patient's death. It is necessary to consider the type of claim envisaged by the applicant and decide which records are relevant to the claim.

Disclosure would be subject to the recorded wishes of the deceased patient. No information can be revealed which the patient gave in the past on the understanding that it would be kept confidential. Similarly no results of examinations/investigations which the patient thought would be confidential at the time they were carried out can be disclosed. The Act also places a duty on the relevant health service body to seek the advice of 'an appropriate health professional' prior to disclosure.

The principle of patient confidentiality remains in relation to a deceased patient and before disclosing the records, it is important to obtain evidence that the person making the application is in fact entitled to the records. Where the applicant is the patient's Personal Representative, proof will be obtained in the forms of Letters of Administration, Grant of Probate or a certified copy of the Will and the application treated as if the applicant . Once proof of appointment as a Personal Representative is obtained, the application shall be treated as if the request for the notes is from the patient and notes disclosed accordingly, **however, information will not be revealed if the patient requested non-disclosure and this is noted in the records**, **even if their personal representative, or any other person has a claim arising from their death.**

If the applicant is not a Personal Representative the dependant's of a deceased patient may have a claim arising out of the death under the Fatal Accidents Act 1976.

Requests from the Police (patients over 16)

If a request is made by the Police to <u>view</u> the record for a living person then the decision whether or not to disclose will lie with the 'appropriate health professional' and the decision should, if at all possible, be taken with the consent of the patient. A DP 9 form signed by the patient gives authority to the Police to gain access to their medical records. The DP 9 makes provision for the data subject to inspect the originals and take copies of parts required.

If the patient has not signed a DP 9, it should be consideration should be given to complying with the request. As much information as possible should be sought from the Police as to the crime, the nature and purpose of the enquiries, and the grounds for seeking access to the patient's records. The 'appropriate health professional' should decide if it is in wider public interest to do so and this outweighs the public interest in maintaining confidentiality. This wider public interest will include circumstances in which there is a "real danger to the public" or if a serious offence is being investigated. Where there are good grounds for the Police request, some disclosure may well be appropriate.

In all cases, it must be clearly understood that the information given is provided on the basis that is confidential and must be used for the strictly limited purpose of the enquiry in relation to which it is released.

Staff should ensure that if disclosure is agreed, a copy of the records requested, including information contained within the records. The original records must not be released.

If the Police make a request for access to the records of a deceased patient the reasons for this request should be ascertained and attempts made to obtain the consent of the Personal Representatives on behalf of the estate.

If the consent of the Personal Representative is obtained, access to the deceased's medical records may be given to the Police. However in the absence of consent from the Personal Representatives the medical records of the deceased can only be made available to the Police if it is in the wider public interest to do so and this outweighs the public interest in maintaining confidentiality. This wider public interest will include circumstances in which there is a "real danger to the public" or if a serious offence is being investigated. Each request will need to be assessed on its merits and advice should be obtained.

The Police do not have the right to obtain medical records (of either a living or deceased patient) under the Police and Criminal Act 1984 (PACE) unless they have obtained an order from a Circuit Judge authorising the release of the records to the Police.

Patients living abroad requiring access to their health records

For former patients living outside of the UK and whom once had treatment during their stay here, under the DPA 1998 they still have the same right to apply for access to their UK health records. Such a request should be dealt with as someone making an access request from within the UK.

When a patient moves abroad, their GP health records are transferred to the relevant Patient Data Agency within NHS England and records retained.

The DOH has recommendations on the retention of GP records (HSC 1998/217) and hospital or PCT (now NHS England) records (HSC 1999/053).

Original health records should not be given to patients to keep/take to a new GP outside the UK. The DOH recommends that original patient health records should not be sent to patients or their authorised representative because of the potential detriment to patients should the records be lost and for medico-legal purposes. However, in instances when a patient moves abroad, a GP may be prepared to provide the patient with a summary of the patient's treatment to take to their new GP. Alternatively, the patient should be encouraged to make a request for access to their record under the DPA 1998, to obtain a copy.

When access may be limited or denied

Under the Data Protection Act 1998, there are only two reasons where access could be denied or limited to a patient or their authorised representative.

- Where the information released may cause serious harm to the physical or mental health of condition of the patient, or any other person.

- Where access would disclose information relating to or provided by a third person and who could be identified by that information.

Where records contain information that relates to an identifiable third party, that information may not be released **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 dispense with that third party's consent (taking into account duty of confidentiality owed to the other individual, any steps to seek his/her consent, whether he/she is capable of giving consent and whether consent has been expressly refused).

- In circumstances where information may identify another individual who has withheld his/her consent, and disclosure is still necessary, the information could be provided without identifying the third party e.g. by removing the name or other identifying details about the third party.

Prior to the records disclosure to the patient or authorised representative, and in accordance with the DPA 1998, the PCT will ensure that an appropriate health professional has checked the records in order to comply with the above. Where the request has been made under the AHRA 1990, it is a requirement of the act that the records will be checked prior to disclosure. The record holder does not have to disclose the fact that information has been restricted or denied.

Deceased Patients Records

If the record has not been added to in the last 40 days a minimum fee of £10 will be charged at the record holder's discretion (the fee must not exceed that set by the Data Protection Act for Subject Access). A further reasonable fee to cover the cost of copying the record and postage is permitted. If access is sought to records created or added to less than 40 days prior to the date of the request, there is no access fee, however a reasonable photocopying and postage fee may be charged.

Amendments to Health Records

The Data Protection Act fourth principle states that information should be accurate and kept up-to-date and this provides the legal basis for enforcing corrections when appropriate. However, an opinion or judgement recorded by a health professional, whether accurate or not should not be amended subsequently. Retaining relevant information is essential for understanding the clinical decisions that were made and to audit the quality of care.

Where a person considers that any information contained in a health record to which they have been given access is inaccurate they may apply to the record holder for the necessary correction to be made.

The record hold shall: -

- If he/she is satisfied that the information is inaccurate, make the necessary correction.
- If he/she is not satisfied, make in the part of the record in which the information is contained a note of the matters in respect of which the information is considered by the applicant to be inaccurate; and
- In either case, without requiring any fee, supply the applicant with a copy of the correction or note.

The correction should be signed and dated by the holder of the record and applicant. Where corrections are made, care must be taken not to obliterate information. If the patient remains dissatisfied may pursue a complaint under the NHS complaints procedure in an attempt to have the information corrected or erased. They could further complain to the Information Commissioner, who may rule that any erroneous information is rectified, blocked, erased or destroyed.