

# Subject Access Policy



Title:			
Subject Access Policy			
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## Version Control

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June 2022	NHSL Data Protection Manager	v3.0	Approved by the Policy Approval Group

## Executive Summary

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NHS Lothian is committed to Data Protection compliance and as such ensures individuals rights are taken into consideration at all times.

The Right of Access allows individuals to access all personal information held on them by an organisation. NHS Lothian outlines in this policy how a subject access request will be processed and managed in a professional and timely manner to ensure compliance with Data Protection legislation.

To ensure organisational compliance the following documents support this policy:-

Access to Health Records Guidance

Subject Access Requests – Staff Files

Processing Access Requests guidance.

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## 1.0 Purpose

The purpose of this policy is to ensure NHS Lothian process Subject Access Requests in line with the rights of the data subject as outlined in Data Protection Legislation.

## 2.0 Policy statement

The UK General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA) gives every living person (or an authorised representative) the right of subject access to personal data held by NHS Lothian. This legislation supersedes the Data Protection Act 1998 which has been fully repealed. The Access to Health Records Act 1990 (AHRA) no longer legislates for access to health records relating to living individuals but remains in effect for access rights to deceased patient health records.

## 3.0 Scope

This policy applies to all staff working for and associated with NHS Lothian.

## 4.0 Definitions

### 4.1 Health Record

The Scottish Government Health and Social Care Records Management: NHS Code of Practice (Scotland) 202006 defines a health record as:

‘a health record is anything that contains information, which has been created or gathered as a result of any aspect of the delivery of patient care’, including:

- personal health records (electronic, microfilm and paper based).
- radiology and imaging reports, photographs and other images.
- audio and video recordings, cassettes, CDROM etc.
- computer databases, output and disks etc and all other electronic records.
- material intended for short term or transitory use including notes and "spare copies of documents".

This list is not exhaustive. The health record should be constructed to contain sufficient information to identify the patient, provide a clinical history, details of investigations, treatment and medication’.

### 4.2 ‘Third Party Information’

The definition of ‘Third Party Information’ is information relating to:

“An organisation, other than the data controller (NHSL) or data processor (NHSL or authorised organisation that processes data on behalf of NHSL) that has provided information (about the data subject)”

This must not be confused with information that has been **provided by a third party**. Further information on Third Party Information is contained within the NHS Lothian Access to Health Records guidance document.

## 5.0 Implementation roles and responsibilities

### 5.1 NHS Lothian responsibilities

#### 5.1.1 NHS Lothian Executive Medical Director

The NHS Lothian Executive Medical Director, in their role as Caldicott Guardian for the organisation, has executive responsibility for the implementation of this policy.

#### 5.1.2 NHS Lothian Head of Health Records

Day to day responsibility for the management of subject access requests made in line with this policy lies with the NHS Lothian Head of Health Records, who manages the Subject Access Request Team teams throughout the organisation.

#### 5.1.3 NHS Lothian Data Protection Officer

The NHS Lothian Data Protection Officer is responsible for provision of expert advice to clinicians and Subject Access Request Team in relation to non-standard requests and enquiries.

#### 5.1.4 Heads of Service/Departments

Heads of Service/Departments are responsible for ensuring that personal data requested under the auspices of DPA is provided to Subject Access Request Team in a timely fashion.

#### 5.1.5 The NHS Lothian Digital & Innovation Executive Team

The NHS Lothian Digital & Innovation Executive Team will oversee and review the policy in line with NHS Lothian Policy Management Standards

## 5.2 General Principles Relating to Rights of Access

Under DPA, any living person who is the subject of personal data held and processed by NHS Lothian has a right of access to that personal data, regardless of where they live.

An individual does not have the right to access information recorded about someone else unless they are an authorised representative, have parent responsibility or, in the case of deceased patient records, are the Executor or have a claim arising from the patient's death.

NHS Lothian is not required to respond to subject access requests unless provided with sufficient details to enable the location of personal data, and to satisfy itself as to the identity of the individual making the request.

## 5.3 Requests for Access to Health Records

Any application for access to health records must be made in writing.

### 5.3.1 Staff Access to Personal Information

Staff wishing to access personal information held on them should make the request in writing to the Information Governance Department. Contact details are available on NHS Lothian intranet and internet pages.

### 5.3.2 Informal Requests for Access to Records:

A patient can make an informal request to see their healthcare record during a consultation or by arranging a time to view their records with the health professional concerned. This does not constitute a formal request under the auspices of DPA.

### 5.3.3 Requests made by a patient representative

A patient can authorise a representative to make a subject access request on their behalf. This must be done in writing, confirming the representative's identity and evidence to support the patient's authorisation.

Representatives able to provide evidence that they are acting under welfare power of attorney will be granted access to the health records of the patient. This should be restricted to the information necessary for the appointee to carry out his or her functions.

Where a patient is unable to provide consent for a representative to make a subject access request on their behalf for reasons of incapacity, NHS Lothian will give the patient assistance to ascertain whether it is possible to obtain consent by other means.

### 5.3.4 Fees to Access and Copy Health Records

Under the UK General Data Protection Regulation there is no fee required for a Subject Access Request.

## 5.4 Parental Responsibility

Parents, or those with parental responsibility, will generally have the right to apply for access to their child's health record.

The requirements of parental responsibility are defined in the Children (Scotland) Act 1995 and The Family Law (Scotland) Act 2006. Further guidance is contained within the NHS Lothian Access to Health Records guidance document.

## 5.5 Health Records Relating to the Deceased

Applications for access to health records of the deceased are made under the Access to Health Records Act 1990. Records made after 1 November 1991 can be made available to a patient's representative, executor or administrator upon production of documentary evidence of appointment.

Any person with a claim arising from the death of a patient has a right of access to information specifically relating to the claim.

## 5.6 Joint Records

Where joint records are held, for example in the case of a community mental health team, the relevant organisations (NHS Lothian and the relevant Local Authority) must be informed of the access request and agree who will lead the disclosure process. However, requests for joint records should not have to be made to both organisations. Either organisation can provide access to the record provided the applicant is informed that the information is jointly held.

The term 'joint records' does not include records, held separately by authorities and other organisations, which contain information provided by either organisation to the other. While the information held on each organisation's separate records might be similar, they cannot be considered as joint records. In such cases a separate application must be made to each authority/organisation.

## 5.7 Duty to Consult on a Valid Application for Access to Records

On receipt of a valid application for access to records, NHS Lothian has a duty to consult the relevant clinician on issues relating to disclosure of information:

- To confirm that the applicant is of an age and capacity to understand the nature of the application
- To take a decision regarding the withholding of access to all or part of a health record
- To provide assistance where records may need to be explained to the applicant

The clinician is responsible for providing confirmation to the Health Records Medical Legal team (or relevant team) that records are suitable for disclosure, or that access should be denied.

Where a number of health professionals have equal rights in maintaining health records for the applicant, the NHS Lothian Caldicott Guardian has the responsibility for designating the responsible health professional for any one request.

## 5.8 Timescales of Disclosure

NHS Lothian will respond to requests for access to records within the timescales outlined in the Data Protection Act 2018 and the Access to Health Records Act 1990.

Responses to requests for access under the Data Protection Legislation must be made within 30 days of the date of receipt of the request. In the case of access to the records of deceased patients there is a timescale of 21 days where records have been amended or added to in the 30-day period immediately preceding the date of application and 30 days in cases where no entries have been made during the 30 days prior to application.

If the application does not include sufficient information to identify the person making the request or to locate the information, this should be sought promptly, and the 30-day period begins when it is supplied.

Requests can be considered complete/closed 3 months after no further correspondence has been received from applicant in relation to queries and/or clarification of initial request

## 5.9 Denial of Access

Access to all or part of a health record will be denied if:

- In the opinion of the relevant health professional, the information to be disclosed would be likely to cause serious harm to the physical or mental health of the applicant or any other person. In some circumstances the health professional may indicate the removal of medical information before release.
- Where the record relates to, or has been provided by, an identifiable third party, unless the third party has consented to disclosure
- Where there is a genuine concern that a request by a representative is excessive to the stated purpose of the access. Staff should either challenge the representative or gain consent from the data subject.

## 5.10 Legal Privilege

Legal Professional Privilege protects all communication between a professional legal adviser and his or her clients from being disclosed without the permission of the client. The privilege is that of the client and not that of the professional legal advisor. This type of data is exempt from the right of subject access requests.

The NHS Lothian Data Protection Officer should be contacted for further information.

## 5.11 Collating Responses/Redaction

The Medical Legal (or relevant) staff member will collate the information received and prepare the disclosure response to the Data Subject as necessary.

The purpose of redaction is to irreversibly remove the exempt information from the final copy. Information must be redacted using a safe and secure process. Further information regarding redaction is contained within the NHS Lothian Access to Health Records guidance document.



## 5.12 Amendments to Health Records

If the patient feels that information recorded on their health records is incorrect, they should in the first instance approach the health care professional concerned to discuss the situation in an attempt to have the record amended. If this avenue is unsuccessful then they may pursue a complaint under the NHS Lothian Complaints Procedure in an attempt to have the record corrected or erased. The Caldicott Guardian must approve any amendments made to health records.

They could further complain to the Information Commissioner, who may rule that any erroneous information is rectified, blocked, erased or destroyed.

If the patient is not satisfied with the record, it is good practice to allow patients to include a statement within their record that they disagree with the content.

## 5.13 Dealing with access complaints

If a patient or their representative is unhappy with the outcome of their access to health records request (e.g., information they feel has been withheld or recorded incorrectly or they may feel that they have not been allowed sufficient time to view the record) sufficient information should be given for them to make an informed decision regarding any action they may wish to take to rectify their complaint. Clinical staff are encouraged to liaise with the Caldicott Guardian in these circumstances.

The individual should be encouraged to:

- Attend an informal meeting with a view to addressing and resolving the complaint locally
- Use the NHS Lothian Complaints Procedure or go straight to the Information Commissioner
- Alternatively, an individual may wish to seek legal independent advice to pursue their complaint. In all cases, wherever possible, local resolution should be sought. However, the individual has the right to pursue any of these channels at any time and may wish to pursue several actions simultaneously.

## 6.0 Associated materials

[NHS Lothian Data Protection Policy](#)

[NHS Lothian Access to Health Records Guidance](#)

[NHS Lothian Request for Personal Information Form](#)

[Subject Access Requests – Staff Files Process](#)

[Processing Access Request Procedure](#)

[NHS Lothian Complaints Procedure](#)

## 7.0 Evidence base

[Guide to the UK General Data Protection Regulation \(UK GDPR\), Information Commissioner's Office, 2018](#)

[Data Protection Act 2018 \(DPA\)](#)

[Access to Health Records Act 1990](#)

[Scottish Government Records Management: Health and Social Care, NHS Code of Practice \(Scotland\) 2020](#)

[Children \(Scotland\) Act 1995](#)

[Family Law \(Scotland\) Act 2006](#)

ICO Right of Access - Approach to dealing with information about third parties [ICO Right of Access](#)

## 8.0 Stakeholder consultation

NHS Lothian colleagues from the Information Governance Working Group and eHealth Executive Team were consulted in the review of this policy.

A draft version of this policy was placed on the NHS Lothian Consultation zone to give all NHS Lothian staff an opportunity to provide comment/feedback.

## 9.0 Monitoring and review

The strategic direction for Information Management and Information Governance will be set out in the Information Governance Working Group and eHealth Executive Team. The Digital Oversight Board, accountable to NHS Lothian Board will have overarching responsibility for monitoring the strategy and for ensuring that NHS Lothian has effective policies and management arrangements in place, which cover all aspects of Information Governance.

Assessments of compliance with relevant information governance standards will be undertaken each year, and an appropriate information governance improvement plan will be produced as a result. Delegated responsibility for overseeing the Information Governance Strategy, Policy and Implementation plan sits with the NHS Lothian Digital Oversight Board chaired by the Director of Digital. This group will secure the necessary resources to implement the Information governance action plan and will monitor activities and annually report progress to The Healthcare Governance Committee. Full terms of reference will be available on NHS Lothian Intranet.

The Executive Medical Director and Caldicott Guardian, is the named executive director on the Board with responsibility for Information Governance. The Director of Public Health & Health Policy is the designated interim Senior Information Risk Owner (SIRO) delegated responsibility for implementation and monitoring of the Information Governance Action plan which sits with the Information Governance and Security Manager.

Regular monitoring of compliance with this policy will be performed via National and local audits both internally and also by external contractors.

The effectiveness of this policy may also be monitored and evaluated using outputs from the following:

- IT Security investigations
- SAE reviews
- DATIX investigations
- Complaint investigations
- Regularly scheduled internal and external audits
- Staff feedback via conversations, queries, compliments & complaints
- Information Governance Working Group and the eHealth Executive Team.
- Post training feedback from staff

This policy, and its associated materials, will be reviewed every 3 years, as a minimum, or as a result of any changes in legislation, guidance, as the result of inspection or audit, or any other factors which may render the policy in need of earlier review.