DATA PROTECTION

SUBJECT ACCESS POLICY
DATA PROTECTION SUBJECT ACCESS POLICY – EXECUTIVE SUMMARY

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<th>Key Messages</th>
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Principles of Data Protection

- Understanding Obligations
- Confidentiality and Legal Compliance
- Information Security
- Quality Assurance
- Legal and Related Policies and Guidance

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<th>Minimum Implementation Standards</th>
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Good Practice for Managers

- Has identified the staff in his or her area to whom this policy applies and has given the policy (or selected excerpts) to them.
- Has assessed the impact of the policy on current working practices, and has an action plan to make all necessary changes to ensure that his or her area complies with the policy.
- Has set up systems to provide assurance to him or her that the policy is being implemented as intended in his or her area of responsibility.

Good Practice for Employees

- Has read the policy (or selected excerpts) and considered what it means for him or her, in terms of how to conduct his or her duties.
- Has completed any mandatory education or training that may be required as part of the implementation of the policy.
- Has altered working practices as expected by the policy.
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Appendix 1 – Medical Legal Department Process

Appendix 2 – Medical Legal Escalation Flowchat

Appendix 3 – Staff Access Process
1. Introduction

1.1 The Data Protection Legislation (DPL) 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 This legislation supersedes the Data Protection Act 1998 which has been fully repealed.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.

2. Definitions

2.1 The Records Management: NHS Code of Practice (Scotland) 2012 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);
- all personal data relating to deceased individuals
- radiology and imaging reports, photographs and other images;
- audio and video tapes, 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'

3. Responsibilities

3.1 The NHS Lothian Director of Public Health and Policy, in their role as Caldicott Guardian for the organisation, has executive responsibility for the implementation of this policy.

3.2 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 Legal Issues teams throughout the organisation.

3.3 The NHS Lothian Data Protection Officer is responsible for provision of expert advice to clinicians and Health Records Legal Issues staff in relation to non-standard requests and enquiries.
3.4 Heads of Service/Department are responsible for ensuring that personal data requested under the auspices of DPL is provided to Health Records Legal Issues team in a timely fashion.

3.5 The NHS Lothian Information Governance Assurance Board will oversee and review the policy in line with NHS Lothian Policy management standards.

4. General Principles Relating to Rights of Access

4.1 Under DPL, 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.

4.2 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, have a claim arising from the patient’s death.

4.3 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. 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 DPL.

5.1 Requests made by a Patient Representative

5.1.1 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.

5.1.2 Representatives able to provide evidence that they are acting under 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.

5.1.3 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.
5.2 Parental Responsibility

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

5.2.2 The requirements of parental responsibility are defined in the Children’s and Young People (Scotland) Act 2014 as:

- to safeguard and promote the child's health, development and welfare,
- to provide direction and guidance,
- to maintain personal relations and direct contact with the child on a regular basis, and
- to act as the child's legal representative

5.2.3 Until 4 May 2006, the unmarried natural mother of a child automatically acquired parental responsibility on the child’s birth, whereas an unmarried natural father could only acquire parental responsibility in one of the following ways:

- by marrying the natural mother
- by entering into a formal written agreement with the child’s natural mother; or
- obtaining an Order from the Court for parental responsibility

5.2.4 As of 4 May 2006, an unmarried father may obtain parental responsibility for his child if he and the natural mother register the birth of the child together. This applies only to births registered from 4 May 2006. For all births registered prior to this date the conditions described in 5.2.3 must be satisfied to establish parental responsibility for an unmarried natural father.

5.2.5 Parental responsibility can also be acquired:

- Through appointment as the child’s guardian
- By way of a residence order from the Court
- By anyone having an Adoption Order made in their favour

5.2.6 A Local Authority can acquire parental responsibility by:

- Emergency protection order (local authority)
- Care orders (local authority). In this case the parents do not lose parental responsibility but the local authority can limit the extent to which a person exercises their parental responsibility.
5.2.7 Where a child is considered capable of making decisions about his/her clinical treatment, the consent of the child must be sought before a person with parental responsibility can be given access to the child’s health records.

5.2.8 Where, in the view of the health professional, the child is not capable of understanding the application for access to records, NHS Lothian is entitled to deny access as being against the best interests of the patient.

5.2.9 Legally, young people aged 16 and 17 are regarded to be adults for the purposes of consent to treatment and the right to confidentiality. As such, if a patient of this age wishes a health professional to keep any aspect of treatment confidential, this wish should be respected.

5.2.10 Children over the age of 12 but under 16 who have the capacity and understanding to take decisions about their own treatment are also entitled to decide whether personal information may be disclosed. Case law has established that such a child is known as ‘Gillick Competent’, i.e. where a child is under 16 but has sufficient understanding in relation to the proposed treatment to give or withhold consent, consent or refusal should be respected. However, good practice dictates that the child should be encouraged to involve parents or those with parental responsibility in their treatment.

5.2.11 In the Gillick case referred to above, two major principles were established which are known as the Fraser Guidelines:

- A parent’s right to consent to treatment on behalf of a child ends when the child has sufficient intelligence and understanding to consent to the treatment themselves (when the child becomes ‘Gillick competent’)
- It is for the healthcare professional to decide whether a child has reached this level.

The guidelines apply to all aspects of the care of children 12 to 16.

5.2.12 It should be established with whom parental responsibility lies in relation to any requests for access to health records, before any request is actioned. If you are in any doubt about the level of parental responsibility (for example if the parents are divorced) please contact the Data Protection Officer for advice.

5.3 Health Records Relating to the Deceased

5.3.1 Applications for access to health records of the deceased are made under the Access to Health Records Act 1990.
5.3.2 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.

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

5.4 Joint Records

5.4.1 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.

5.4.2 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.

6. Application for Access to Health Records

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

6.2 Applications must be signed and dated by the applicant.

6.3 Where an application is made on behalf of an individual, a signed form of consent must accompany the written application.

6.4 The application must clearly identify the patient in question, and the records required, including the following details:

- Full name – including previous names
- Address – including previous address(es)
- CHI or hospital number (if available)
- Dates of health records required.

6.5 If the request is to view records, suitable accommodation should be made available to the applicant for this to take place. An appropriate member of staff should remain throughout the period of access and should ensure that the record remains entire and an appropriate health professional should be on
hand to interpret abbreviations or clinical terminology used or to explain any information that is not readily intelligible.

6.6 The procedure for processing requests for access to records is outlined at Appendix 1. NHS Lothian has a ‘Request for Personal Information’ form (Appendix 2) that is provided to applicants on request.

6.7 NHS Lothian has a right to check with the applicant if they require access to their entire health record, and confirm what material the applicant requires prior to processing the request. This will decrease the cost of copying for the applicant. However, it should be noted that the applicant does not have to provide a reason for applying for access to health records.

6.8 To avoid multiple requests for information, the Head of Service/Manager holding the requested record, will ensure that all sources of information are searched for data relating to the request, including manual and computerised records.

6.9 This policy is supported by the ‘eHealth Policy PP27: Medico Legal Access Requests’ Standard Operating Policy document.

7. Duty to Consult on a Valid Application for Access to Records

7.1 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

7.2 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.

7.3 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.
8. Staff Access to Personal Information

8.1 Staff wishing to access personal information held on them should make the request in writing in the first instance to their Employee Relations Practitioner. A request may also be made, in writing to the NHS Lothian Data Protection Officer.

9. Fees

9.1 Under the terms of the Data Protection Legislation data will be provided free of charge.

10. Timescales of Disclosure

10.1 NHS Lothian will respond to all requests for access to records within the timescales outlined in the Data Protection Legislation.

10.2 Responses to requests for access under the Data Protection Legislation must be made within 30 days of the date of receipt of the request and all necessary information required to process the request has been provided. If the application does not include sufficient information to identify the person making the request or to locate the information (see 4.3), that information should be sought promptly and the 30 day period begins when it is supplied.

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

11. Denial of Access & Redaction

11.1 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.
11.2 Redaction

- The purpose of redaction is to irreversibly remove the exempt information from the final copy. Please remember to redact information using a safe and secure process, for example, black marker, Banner Correction Roller (correction tape), tipex or Microsoft Office functionality. *(Under no circumstances block, or erase the original medical data – photocopy the original and redact as described above)*

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

- A note must be made in the record stating the reason for withholding the information.

11.3 In addition, the Data Protection (Subject Access Modification) (Health) Order states that access may be denied in circumstances where:

- The granting of access to a patient representative would disclose information provided by the patient, in the expectation that it would not be disclosed to the person making the request;
- The granting of access would disclose information obtained as a result of any examination or investigation to which the patient consented, in the expectation that the information would not be so disclosed to another individual
- The patient has expressly indicated that such information should not be disclosed to another individual

11.4 Notification of refusal to grant access will be given as soon as possible in writing. NHS Lothian will record the reason for this decision, and will also fully explain the reason to the applicant.

Access to personal information will be denied to applicants where repeated applications are considered excessive; where an applicant has requested access more than twice in a two year period.

12. Definition of ‘Third Party Information’

12.1 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.

When reviewing information as part of a subject access request, consider:

- Does the request require the disclosure of information that identifies a third party?
  - Consider whether it is possible to comply with the request without revealing information that relates to and identifies a third party individual.
- Has the third party individual consented? Good practice to contact third parties and request consent.
- Would it be reasonable in all the circumstances to disclose without consent? Has the data subject already had a copy of the information? Consider if a genuine duty of confidence is owed to the third party, for example, the information is not available to the public and has been shared with the expectation it will remain confidential.

12. The above instruction is taken from the ICO ‘Subject Access Code of Practice’ three-step approach to dealing with information about third parties. Please consult this document for further guidance to assist with deciding whether to disclose information relating to a third party.

You must apply a case by case approach when reviewing third party information.

13. 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. Please contact the Data Protection Officer for further information.

14. 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. Please remember to redact information using a safe and secure process, for example, black marker, Banner Correction Roller (correction tape), tipex or Microsoft Office functionality.

NB: Remember to keep a record of what information has been removed and why, for example, legal privilege.
15 Amendments to Health Records

15.1 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.

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

15.3 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.

16 Dealing with access complaints

16.1 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.

16.2 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

16.4 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.

17 Policy Review

17.1 This policy will be reviewed by the Data Protection Officer in relation to the legal requirements of the Data Protection Legislation, Access to Health Records Act 1990 and any other relevant legislation or regulation. In keeping with Section 3.5 above, the NHS Lothian Information Governance Assurance Board will have overall responsibility for this policy.
18 References & Contacts

Data Protection Legislation:
Link to be inserted on publication

Access to Health Records Act 1990:
http://www.opsi.gov.uk/acts/acts1990/ukpga_19900023_en_1

The Parental Responsibilities and Parental Rights Agreement (Scotland) Amendment Regulations 2006:

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Appendix 1

PROCEDURE FOR PROCESSING ACCESS REQUESTS

1. Receive access request and update the Subject Access Request Log held on Medico-legal shared drive. Enter date received, patient name and details of information requested.

2. All requests **must** be made in writing or completed on subject access form.

3. Check completion of the form to ensure there is enough information to identify the patient and exactly what information they are requesting. If there is not enough information supplied on the initial request, send a copy of the form for completion to applicant.

4. Send patient template acknowledgement letter.

5. Check TRAK to identify patient and locate casenotes.

6. Retrieve case notes from library, consultant or clinic.

7. Photocopy requested information.

8. Review the copied notes to make sure no third party material is held i.e. information regarding a member of staff or another patient.

9. Using template letter (access ok doc), write to consultant to ascertain whether the consultant has any objections to the information being sent to the applicant.

10. Consultants are available to meet patients if there are any concerns

11. If there is no objection (this can be assumed if there is no response within 14 days) send photocopies of the requested information to the applicant

12. Complete request on SAR Log by adding CRN, disposal, note of any redactions and completion date to the initial entry.

Access – Court Order

1. Receive access request and update the Subject Access Request Log held on Medico-legal shared drive. Enter date received, patient name and details of information requested.

2. Check all information has been received i.e. name of plaintiff and the name and address of their solicitor, name of defendant and the name and address of their solicitor, the certificate for completion.
2. Check TRAK to identify patient and locate casenotes.

3. Retrieve case notes from library, consultant or clinic.

4. Photocopy requested information.

5. Request x-rays if required.

6. Complete certificate as required.

7. Print inventory from word.

8. Send x-ray disk and photocopied casenotes (unless original notes are requested).

9. Court of Session – send to solicitor.

10. Instruct Finance Dept at St John’s to raise invoice and send to requesting solicitor.

Requests from Procurator Fiscal’s Office and Central Legal Office

1. No need for Data Protection form.

2. No consultant consent needed/sought.

3. No Charge.

4. Originals can be requested and should be sent.

5. Follow steps 1 - 4

Police requests for case notes

Police Scotland have no automatic rights to gain access to health records apart from incidents relating to child protection; requests relating to child protection are dealt with exclusively by the Child Protection team at Royal Hospital for Sick Children. If the Police want case-notes they must produce one of the three following things:
**A Request Letter from the Procurator Fiscal’s Office**

Where an officer from Police Scotland presents NHS Lothian with a letter of authority from the Procurator Fiscal’s Office, this entitles them to receive either the original records or a photocopy. The Police must give reasonable notice so that the notes can be copied.

**A Sheriff Warrant**

An Order signed by a Sheriff agreeing that Police Scotland may obtain the original record or a photocopy.

Again, Police Scotland must give reasonable notice so that the notes can be photocopied.

If a Police Officer from Police Scotland comes to the Hospital with either a Fiscal Letter or Sheriff Warrant and it is not possible to photocopy the casenote, the officer must leave their full contact details (i.e. Station, Badge Number, Contact phone number etc) so that we can contact them to request that the notes be returned for copying.

**Police Request – Schedule 2.2(1) Data Protection Act 2018**

This allows the officer bearing the request to get a copy of the records. Standard Data Protection procedures apply and the officer may not uplift the records the same day.

They must submit the request and we will either deliver the records to them or arrange for them to come and collect them when they are ready.
Appendix 2

Subject Access Request – Staff Files Process

All information relating to individual subject access requests should be filed electronically by name of requestor and held within the SAR file, under staff access requests. Requests will also be added to the SAR staff request log. All requests should be responded to within 30 days.

- Requests received, scanned and electronically filed under staff name.
- All documentation from this point should be saved for future reference, including emails, letters, forms and phone call logs.
- Requests should be entered onto the SAR staff log with date.
- Requests should be forwarded to the member of staff’s line manager by email, requesting that the staff file be sent to the Information Governance Department as soon as possible.
- If the file has not been received within 10 days a further email should be sent reminding the manager of the 30 timescale and how many days remain.
- If documents not received refer request to senior manager.
- All files should be sent directly to Information Governance for review and if necessary Information Governance staff member will contact a senior member of Human Resources Department for advice.
- If redactions are necessary advice/guidance can be sought from the Information Governance Department.
- If redactions or information withheld, a letter should be sent to the applicant explaining what has been removed and why.

Template Letters

- Acknowledgement (only) letter.
- Acknowledgement/Request for further information (completion of form) letter.
- Covering letter providing information