

This guidance is supplementary to, and must be read in conjunction with the:

[Subject Access Policy](#)

[Processing Access Requests Procedure](#)

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

1. Access to Health Records

All requests for access to Health Records must be made to:

Loth.Legalservices@nhslothian.scot.nhs.uk

1. Any application for access to health records must be made in writing.
2. Applications must be signed and dated by the applicant.
3. Where an application is made on behalf of an individual, a signed form of consent must accompany the written application.
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.
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. The procedure for processing requests for access to records is outlined in [Processing Access Requests Procedure](#)
7. NHS Lothian has a 'Request for Personal Information' form available on our intranet and internet pages.
8. 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. However, it should be noted that the applicant does not have to provide a reason for applying for access to health records.

9. 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.

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

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:
2. To confirm that the applicant is of an age and capacity to understand the nature of the application
3. To take a decision regarding the withholding of access to all or part of a health record
4. To provide assistance where records may need to be explained to the applicant
5. 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.
6. 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.

3. 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 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

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

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.

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

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.

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.

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.

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.

Children under the age of 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. In Scotland, this position is further reinforced by the Age of Legal Capacity (Scotland) Act 1991, which states that:

“A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment”.

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 under-16s.

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.

4. Definition of 'Third Party Information'

The definition of 'Third Party Information' is information relating to:

"An organisation, other than the data controller (NHS) or data processor (NHS or authorised organisation that processes data on behalf of NHS) 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.

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.

5. Collating responses and redaction

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

On occasion it may be necessary to redact information from the disclosure.

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), Tippex or Microsoft Office functionality.

(Under no circumstances block, or erase the original medical data – photocopy the original and redact as described above)

- The Subject Access Request Team (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.
- 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
- 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.

NB: Remember to keep a record of what information has been removed and why.