



Information Commissioner's Office

The Information Commissioner's response to the Welsh Government's consultation on the Mental Health Act 1983 Code of Practice for Wales

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Background to the Information Commissioner's Office

The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations and the Privacy and Electronic Communications Regulations. The Information Commissioner's Office (ICO) is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The ICO will provide a response only to consultation issues relevant to the scope of this office.

Our comments below relate to the chapters and numbered paragraphs in your draft Code of Practice (Code).

Chapter 1

1.11 – 1.14, 1.17 Empowerment and Involvement, and Keeping People Safe

The patient's right of access to information that is held about them is an important element of empowerment. Under section 7 of the DPA all individuals (or someone legally authorised to act on their behalf) have the

right to make a “subject access request” to be informed about and given a copy of all their personal information held by an organisation. This is a very strong right although there are some exemptions that may apply, for example if in the view of the appropriate health professional disclosure would be likely to cause significant mental or physical harm. Service managers and clinicians should be prompted to refer to their organisation’s Information Governance team for detailed advice on responding to requests.

The right of subject access applies to many of the matters covered by your draft Code – and to patients of all ages, visitors, staff, relatives and volunteers etc. It may be worth noting that whilst the Code refers to proactively disclosing information to the individuals concerned, staff should also be aware and make sure patients understand that individuals can submit a subject access request for their own personal information at any time.

1.33 Supporting Information

Whilst we understand that it is not possible to include an exhaustive list of all relevant legislation and strategies, given the importance throughout the Code of the concepts of confidentiality, consent and transparency, we think it would be useful include specific reference to the DPA. The Code makes numerous references to Article 8 of the ECHR which relates to privacy (eg: particularly in chapters 8, 10 &11), and it is the DPA which implements the information rights dimensions of this into UK law.

Chapter 4 Information for patients, nearest relatives, families, carers and others

4.14 Information about detention and CTOs

Our comments above about the right of subject access are also relevant to this chapter, and in particular to paragraph 4.14. Individuals have a legal right to receive a copy of their information within 40 days of making a valid request, unless an exemption set out in the DPA or its subordinate legislation applies.

Your text at paragraph 4.14 refers to “*hospital managers*” making a decision on whether disclosure of the documents “*would adversely affect the health or wellbeing of the patient or others. It may be necessary to remove any personal information about third parties...*”. These points relate to the DPA, but require a little clarification.

The Data Protection (Subject Access Modification) (Health) Order 2000 SI 2000 No. 413 includes the following points of relevance:-

- Decisions about the disclosure to or withholding of health information from a patient or their representative must be made by the “*appropriate health professional*”. The “*appropriate health professional*” usually means the clinician who is or was most recently responsible for the patient’s relevant care.
- Paragraph 5 of the SI states that in order for information to be exempt from subject access by the patient or their representative, the relevant health professional must be satisfied that disclosure of that information “*would be likely to cause serious harm to the physical or mental health or condition of the data subject or any other person*”. This is a higher legal bar than your draft text describes.
- Whilst it is normal practice to redact any information relating to identifiable third parties unless they have consented to the disclosure, section 7 (4-6) of the DPA sets out provisions when such third party information may be disclosed without consent, for example information relating to health professionals who have been involved in the care of the patient.

4.34 Additional Information

The patient’s right of access to their personal information is under the DPA, not FOIA as suggested in your draft. In the main, the FOIA covers access to official (and non-personal) information held by a public body. If an individual includes a request for their own information within a FOIA request, the personal information elements would be exempt from disclosure under FOIA and the organisation required to consider disclosure of the personal information under the terms of the DPA. It is the responsibility of the organisation to handle the request under the appropriate legislation, regardless of what the requester may or may not reference in their request.

Chapter 6: Independent Mental Health Advocacy.

It may be worth clarifying that the IMHAs’ rights to access the patient’s personal information are limited to what is set out in the MHA 1983. Whereas, a representative nominated by a patient with appropriate capacity, someone with relevant LPA or relevant Deputy of the Court of Protection will be able to exercise the patient’s wider information rights under the DPA.

Chapter 10: Information Sharing

There are 4 laws that are particularly relevant in this context to whether patient information may be shared in any particular situation. They are:

- The Data Protection Act
- The Common Law of Confidence
- The Mental Health Act
- The Mental Capacity Act.

The Data Protection Act and Common Law of Confidence set the overarching legal framework for confidentiality and sharing of personal information, whilst the Mental Health Act, Mental Capacity Act and many other pieces of legislation provide what are often referred to as “legal gateways” that require or empower organisations to share certain information in specific contexts.

Guidance on how to share personal information legally can be found in the ICO’s [Data Sharing Code of Practice](#). The Wales Accord on the Sharing of Personal Information (WASPI), to which you refer at paragraph 10.2, is an excellent template for organisations to follow when developing data sharing agreements, and the ICO strongly encourages organisations to use WASPI to facilitate good practice. However, your wording implies that WASPI has legal status in Wales, which is misleading. The law is the DPA, while WASPI is a tool to support organisations in Wales to operate within a complex legal framework.

It is always difficult to provide generic guidance about information sharing as each decision to share must be made in context – for example:

- Who is the proposed disclosure to?
- What information do they need?
- Why do you want to disclose it to them?
- What are the data subject’s reasonable expectations?

It is only when you are clear on these core basics that you can begin to work out whether a particular proposed disclosure is going to be legal and fair. In your draft Code, more emphasis could usefully be placed on identifying these basics at an early stage.

A related point is about the patient’s expectations of confidentiality, the quality of confidence and the requirement under the Data Protection Act to ensure that you are treating the individual fairly. It is important to be fair and open with patients why you need their information, how you will use it and whether you expect to share it. It is sensible to be cautious about setting up expectations of total confidence if the reality is that in order to provide appropriate care and support you may need to share information – it is fairer to be transparent with the patient about how their information may need to be shared and to offer them an opt out if appropriate, making sure that the consequences of opting out are clear. The ICO’s [Privacy Notices Code of Practice](#) provides useful guidance on

being open and transparent with individuals about how you are using their information. Clearly there will be many situations with patients when they are not able to take in written privacy / fair processing information and so verbal information from staff will be even more important.

Chapter 11

11.26 – Restriction or exclusion [of visitors]

It is good to see that where possible the visitor will be proactively informed about the restriction or exclusion that has been applied to them. It may also be worth noting here that the visitor will have the right under the DPA to submit a subject access request for any / all information the organisation holds about them, including the reasons for any restriction or exclusion. Personal information covered by a valid subject access request can only be withheld under the exemptions set out in the DPA.

Chapter 19: Children and young people

The Children and Young People's Commissioner for Wales has produced a leaflet on [Consent in Healthcare](#) which may be a useful resource for CAMHS providers.

The concept of Gillick competence which you set out with regard to consenting to treatment and care, also applies with regard to the young person's competence to use their information rights under the DPA.

Please contact the ICO's Cardiff Office on 029 2067 8400 if you would like to discuss any aspect of the above response.

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