The Information Commissioner's response to the General Medical Council's consultation "Confidentiality: draft explanatory statements and the confidentiality section in *0–18: guidance for all doctors* for consultation"

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 ("DPA"), the Freedom of Information Act 2000 ("FOIA"), the Environmental Information Regulations ("EIR") and the Privacy and Electronic Communications Regulations 2003 ("PECR"). He also deals with complaints under the Re-use of Public Sector Information Regulations 2015 ("RPSI") and the INSPIRE Regulations 2009. He is independent from government and upholds 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 Information Commissioner's Office (ICO) welcomes the opportunity to comment on this consultation, and would be pleased to be contacted by the GMC should any further clarification be required. Only those questions relevant to the ICO's remit have been answered.

A1 Do you agree with the advice in *Patients' fitness to drive and reporting concerns to the DVLA or DVA?*

Under the DPA, medical practitioners would likely have conditions other than explicit consent under Schedule 3 that would enable them to disclose this information to the DVLA when patients are unwilling to self-report. We also note that the guidance advises medical practitioners to try obtaining consent several times before reporting to the DVLA. Whilst we recognise the importance of consent under the common law duty of confidentiality, the DPA also considers fairness. Offering patients the opportunity to consent when doctors may have to disclose information to the DVLA in the public interest would be unfair. For more detail, please see the comments about paragraph 29, in response to question 3 of the consultation on the GMC's draft confidentiality guidance.

We do note that the process as outlined in the guidance aligns with DPA requirements to provide fair processing information to patients, both before the disclosure and after, should it be necessary.

The guidance could be clearer in emphasising that doctors have a duty to report and the lawful basis for doing so. Given that the patient presents a potential danger to the public by continuing to drive and there are likely to be other conditions that could be relied upon for reporting this information, the statements could focus more on how doctors can act quickly when consent is not possible. Consent under the DPA should also be freely given, and in situations where patients are faced with little choice but to consent or self-report, obtaining freely given consent may not be possible and could take a very long time. If the GMC is relying instead on consent to comply with the DPA as well as the duty of confidentiality, then it is worth considering whether this consent can be freely given and what would happen if consent is withdrawn.

B1 Do you agree that all doctors should offer to show reports to patients before they are sent to the person or organisation who has commissioned the report, unless one of the conditions set out in the guidance applies?

We note that this is not a requirement of the DPA, but it is good practice in terms of both transparency and fairness. We recognise that there are both potential benefits and harms for individuals that could result from this practice. Even if patients decline the opportunity to review the report, they would still be able to request a copy of the report under their Subject Access rights in Section 7 of the DPA, provided no exemptions apply. The GMC Guidance takes a more proactive approach by providing that up front. Provided the information is in an intelligible form, showing patients their report before sending it can ensure they are fully informed. It can also provide an opportunity to check that inaccurate and excessive data is not included in the report, and where a patient disagrees with an opinion, it is still good practice to note this objection, even if the opinion remains on the record. We note that because the guidance is more stringent than DPA requirements and conflicts with DWP guidance (which states that patients do not need to see reports before they are sent), it may need to be clearer if the GMC guidance takes precedence.

B2 Do you have any other comments on *Disclosing information for employment, insurance and similar purposes?*

The explanatory statement suggests that, though not typical, there will be some instances where disclosure of the full record will be relevant and provides two exemptions. These exemptions are general in nature, and we would suggest further guidance is needed for these situations to guard against disclosure of excessive data. We are particularly concerned that this guidance states that solicitors will need entire records, linked to concerns we have had in the recent past that some insurers have inadvertently or otherwise gained access to entire patient records for the purpose of insurance via subject access rights. This considerably increases the risk that third parties will obtain excessive and irrelevant information, perhaps via a route that was not intended to be used in this way. The statement should therefore more clearly differentiate between reports and release of the whole record. For reports for benefits purposes, while the statement links to guidance from the DWP, that guidance does not clearly state when disclosure of the whole record is required. The DWP guidance also does not address the data protection considerations associated with such reports. It may be helpful to add a link to other guidance on this topic, where such guidance exists.

C1 Do you think we should continue to include paragraph 4 of the current statement?

If paragraph 4 is removed, then this will remove the recommendation to tell patients that their information is used for financial, administrative, and similar purposes. It is a requirement of the DPA to tell patients about the purposes for which their personal data is being processed, so if the paragraph is removed it should be replaced by a similar statement.

C2 Do you have any other comments on *Disclosing records for financial and administrative purposes?*

The DPA requires processing to be fair, and a key aspect of this is telling patients how their information is used. The guidance does not include the obligation to tell patients that their data is used for financial, administrative, and similar purposes. Even if the information is shared in anonymised form, Anonymisation Code of Practice states that it is good practice to also provide fair processing information to patients.

From a data protection perspective, the recommendations to only send relevant information is important for complying with Principle 3 of the

DPA, and we agree that anonymised information will often be sufficient for these purposes. We note that even where a s251 approval currently exists, this is often only to disclose information in very specific circumstances we understand that some doctors are sending personal data more frequently than necessary. It would be helpful for the guidance to stress that any personal data that is sent, even where s251 approval has been obtained should align with the conditions of that approval. It is also fair to tell patients when you are disclosing their information unless any exemption applies, even in cases where s251 approval has been obtained and no matter if you are relying on consent or other scheduled conditions.

With respect to endnote 2 on p.10, which refers to the requirements across the UK and section 251, we suggest this important point could be added into the main text instead of the endnotes for further clarity.

D1 Do you agree with the advice in *Disclosing information about serious communicable diseases?*

No comment

E1 Do you agree with the advice in *Reporting gunshot and knife wounds?*

It is proportionate to ensure that police should not be informed when the wound is accidental or self-inflicted, but it could be clearer in the guidance. We would suggest that paragraphs 6 and 7 are merged, with a "*however*" being inserted at the start of the second sentence. This should reduce the risk of unnecessary disclosure after a fairly minor household injury and support patient confidentiality. Further clarification in this section could also help prevent under-reporting, eg individuals who have self-harmed being reluctant to present themselves for treatment if disclosure to the police was anticipated.

Paragraphs 3 and 9 indicate that patient names and addresses should not be disclosed in initial contact with police forces. Whilst we understand that this is initial contact and there are concerns around confidentiality, there are presumably some circumstances where it would be important to provide this at the earliest opportunity, especially where crime is involved. The GMC may want to work with police forces to develop guidance around proportionate responses in such situations. Again, it is likely that another schedule condition or exemption would apply to enable disclosure of personal information to the police.

Regarding the section on children and young people, the statement may also need to include guidance around how to go about reporting to other organisations than the police for child protection/safeguarding purposes. Similar guidance to that in paragraphs 6 and 7 might also be worth including here, as there would be different considerations in situations where wounds are the result of self-harm or accidental injury. In addition, from a data protection perspective, the rights of the child, especially if they are competent for the purposes of the DPA, and the legal basis for sharing data should also be considered when disclosing personal information to a parent.

F1 Do you agree that we should include guidance on learning from adverse incidents and near misses in this statement?

No comment

F2 Do you find the additional guidance on learning from adverse and near misses helpful?

No comment

F3 Do you agree with the revision to paragraph 15?

As written, paragraph 15 is not entirely clear. It would be better to more fully explain what is meant by public interest in this particular circumstance, as is done on page 33 in the consultation document.

F4 Do you agree with the addition of training records?

Further clarification regarding the records to which this section applies would be useful, as it seems in some parts of the guidance (see paragraphs 19 and 22), it seems this information would be published and not just recorded for training purposes.

We would suggest that in some cases, if information is published or presented at conferences, it would likely be difficult to anonymise a patient record whilst still ensuring it is useful for the purpose of learning and training. It is reasonable to seek patient consent for publishing identifiable information. The guidance makes clear that patients need to be given enough information to make an informed decision about this, which is consistent with the requirements of the DPA. More guidance can be found in our Anonymisation Code of Practice[1].

[1] https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf

F5 Do you have any other comments on *Disclosing information for education, training and learning from adverse incidents and near misses?*

In paragraph 27, the guidance states that disclosure of limited information without consent may be proportionate if likely to prevent future safety incidents and the likelihood of distress or harm to the patient is negligible. It will be important to ensure that there is a Schedule 2 and 3 condition applicable to this disclosure, and that it is fair to the patient.

G1 Do you agree with the advice in Responding to criticism in the press?

No comment.

H1 Do you have any comments on the confidentiality sections of the 0–18 guidance?

We note that this guidance will be reviewed in future, at which point implementation of the the EU General Data Protection Regulation (GDPR) will be imminent. The GDPR stresses the special considerations that must be given to the rights of children and has several articles directly relating to children. As no guidance yet exists on the GDPR, we suggest the GMC look to the ICO's future guidance in this area to ensure its guidance is consistent.

It is also worth noting that, unlike this guidance, the DPA does not set a specific age at which children and young people can give consent (although in Scotland there is a general presumption of competence from the age of 12). Even for individuals under 18, information about them is their personal data and does not belong to their parents or guardians. Rather than setting a specific age, data protection requires a case-by-case consideration of a young person's capacity to understand their rights. This is often discussed in terms of subject access rights, but should also be given consideration when disclosing information to parents.

We also note that the current guidance is not entirely clear in some places regarding with whom data will be shared (eg paragraphs 67, 68 and 69).