

Health Records: Assisting the Police investigating a crime

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There may be many occasions when the Trust, or its health professionals are approached by the Police in the course of their enquiries when investigating a crime. At times, the Police have asked for disclosure of confidential health information or patient records to assist them with their investigation. This of course causes potential conflict between the possible public interest in solving crime, and the competing interest of maintaining patient confidentiality.

This article, aims in a concise practical way, to outline the factors which health professionals should consider when assisting Police with their enquiries in this context.

What is a health record?

This is best defined by Section 68 of the Data Protection Act 1998. This consists of *"information relating to the physical or mental health or condition of an individual, and has been made by or on behalf of a health professional in connection with the care of that individual"*.

This is a wide definition; a health record can be in any form, including computerised or manual records or a mixture of both. It can also include for example, clinical notes, x-rays, scribbled jottings, and laboratory results. In effect, a record is anything which contains information (in any media) which has been created or gathered as a result of any aspect of the work of NHS employees.

Confidentiality

As you are aware, all health professionals owe a duty of confidentiality to patients. This is, to a large extent an "implied promise", and it is reasonable to expect that a health professional will keep patient information confidential.

However, dilemmas around confidentiality arise when the principle of confidentiality is in conflict with other ethical principles such as avoiding harm to others.

Guidance on disclosure

Whilst there is no general obligation to assist the Police in their criminal investigations, it would be an offence, without lawful excuse, to obstruct the Police in the execution of that duty. However this has to be balanced with the protection of a patient's right to confidentiality.

The fact that there is no general duty to assist the Police does not preclude the disclosure of confidential information where the public interest in the disclosure of the information outweighs the private interest in withholding it – for example if the Police are investigating a serious crime. The definition of a serious crime would include one which has caused or may cause serious interference with the administration of justice or the investigation of an offence, death or serious injury.

The BMA state that the definition of serious crime includes offences such as alleged murder, manslaughter and rape. The BMA's position on disclosure to the Police is as follows:-

“While it is widely accepted that information should be disclosed to prevent or detect a serious crime, or bring to justice the suspected perpetrator before the crime can be repeated, it is sometimes argued that the obligation to disclose is weakened if there is no continuing danger. Whereas the justification for disclosing information about a serious, current or future threat is clear, the public safety justification for doing so in regard to a past offence is less if the individual was unlikely to repeat it. In general, however, health professionals should be very wary of concealing any information of substance which would lead to the resolution of a serious crime against a person”.

It is of course, always open to the Trust to consider requesting that the Police obtain a court order for disclosure of health information.

Alternatively, the Trust may take the position, based on the facts, to disclose the information to the Police if it will assist in investigating a serious crime, and this is in the public interest.

Disclosure in the Public Interest

There is a public interest in health professionals maintaining public confidentiality. On the other hand, there may occasionally be circumstances where the interest in maintaining confidentiality is outweighed by the public interest (disclosure to prevent a crime) and this justifies disclosure of confidential patient information without consent. The health professional will have to balance those competing public interests in deciding whether or not to disclose patient information.

Such disclosure will be there to protect the substantive public interest against real and serious risk of harm. However these disclosures require balancing the right of the individual against the public good.

Risk assessment

In order to do this, the health professional and/or Trust should undertake a risk assessment in relation to disclosure of information.

The risks and benefits of breaching the patient's confidentiality should be considered and weighed up against the risks and benefits to the public interest.

You are in fact putting in place an audit trail to show that the issue of disclosure has been fully considered and, if ultimately required, you could show the rationale and reasoning behind a decision to disclose or withhold confidential information. The audit trail is important and full accurate notes should be kept of this

process.

The Police should use any information disclosed only for the particular investigation, and should undertake to destroy it if the subject is not prosecuted.

Full notes of the discussions with the Police and with any other person should be kept so that a clear decision making trail as to whether or not information should be disclosed is audible.

Other key legislation

Article 8 - European Convention on Human Rights

Article 8 states:

- 8(i) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 8(ii) There should be no interference by a public authority for the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest of public safety or the prevention of disorder or crime or the protection of health or for the protection of the rights and freedoms of others.

Paragraph 2 of Article 8 would justify disclosure of records for the purposes of investigating a serious crime. However, any disclosure must be proportionate, ie only that information which is relevant to the investigation should be disclosed. The European Court has adopted this position in cases such as *Z v Finland (1997)*. In this case, the ECHR stated that although the protection of personal medical data and other information was of fundamental importance to a person or his or her Article 8 rights, interference with that right would be justified if it was proportionate and there was "an overriding requirement in the public interest". It was decided that the investigation of a potential crime may be of sufficient public interest to justify disclosure.

A claim for violating an individual's human rights could therefore be defended on the basis that the breach was justified by Article 8 (2).

The Data Protection Act

Certain disclosures of confidential information are also permitted under the Data Protection Act. One such disclosure is for the purpose of preventing or detecting crime including the apprehension or prosecution of offenders (Section 29). The Trust may also be able to rely on this exclusion if it decided to disclose patient information in the public interest.

Action plan upon request for patient information/records by the Police

1. Confirm with the Police whether or not it would prejudice their investigation if the individual were to be approached for their consent to disclosure. Often the answer will be that it will prejudice their investigation.

If it is not possible to obtain consent (which is probably the case), the Trust can either:

- 2.

- Require the Police to obtain a Court Order for disclosure.
- Weigh up the public interest and take the decision to disclose the information to the Police if it will assist in investigating what is a serious crime. Only relevant information should be disclosed.

3. Make full notes of all conversations with the Police and any other body, and the reasons for any decisions taken, including a risk assessment, as this will form an audit trail.

4. Obtain an undertaking from the Police that any information disclosed will only be used for the purpose of pursuing the current investigation and will be destroyed if the person is not prosecuted.

Conclusion

Overall, it is possible to disclose patient information and health records to the Police, but there must be a clear and considered reason for doing so, such that the public interest for the disclosure outweighs the individual's right to patient confidentiality. This must be clearly documented.



Jane Bennett
Solicitor
jane.bennett@bevanbrittan.com

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