

## ACCESS TO HEALTH RECORDS

### GAINING ACCESS TO YOUR RECORDS

Getting a look at and obtaining copies of health records can be a problem. There are 3 legal routes to access, but ask for voluntary disclosure first!

The legal methods are:-

- 1 Under the Data Protection Act 1998
- 2 Under the Access to Health Records Act 1990
- 3 Under Section 33 Supreme Court Act 1981

#### 1 **THE DATA PROTECTION ACT 1998**

Under this Act, with very few exceptions, a health record holder (known as the Data Controller under the Act) must disclose records to the patient (known as the Data Subject within the Act) or certain other people. Records relating to a deceased patient cannot be applied for under this Act - an application would need to be made under Access to Health Records 1990 or Section 33 Supreme Court Act 1981.

#### **Q What is a health record?**

**A** Any information relating to the physical or mental health or condition of an individual made by or on behalf of a health professional in connection with the care of that individual.

Under this Act, it does not matter how old the record is.

#### **Q Who is a Health Professional?**

**A** The Act defines Health Professional as including doctors, dentists, opticians, chemists, nurses, midwives and a number of other therapists and even scientists employed by a Health Service body.

#### **Q Who can apply for access?**

**A** The patient or anyone authorised in writing by the applicant, the parent of a child, a person authorised by the Court in relation to a mental patient

#### **Q What is the right of access?**

**A** To inspect the record and to have photocopies. It also includes a right to have an explanation of the record if it is not intelligible without explanation.

#### **Q Can any record be withheld?**

**A** Yes - if in the opinion of the record holder, the information contained in the record is likely to cause serious harm to the physical or mental health of the patient or of any other individual or if there would be a breach of confidentiality in respect of another individual. This provision is particularly important in relation to mental health records if the patient/psychiatrist relationship may be damaged. Note that the decision as to whether to withhold is in the hands of the record holder.

#### **Q How do I make an application?**

**A** The application would normally be made in writing - most hospitals have their own form and you simply ring the medical records department to ask for the form.

#### **Q How quickly must they let me have access?**

**A** Under the Act, the record holder should comply with a request promptly - the record holder is obliged to provide the records within 40 days from the day on which the record holder receives the request for records or if later, 40 days from which the record holder has received both the fee and

request. If a request is made by sending it by first class post, allow 2 days for the record holder to receive that request (but excluding weekends).

**Q Do I have to pay a fee?**

**A** If the record has not been added to within the last 40 days before the application, the Act prescribes a maximum fee of £50. This includes records and x-ray films. If the record has been added to within the last 40 days, and if no permanent copy is requested, the record holder may not charge a fee.

Please note that these fees may be altered in future.

**Q What is likely to be the attitude of the record holder when I apply?**

**A** Most hospitals are co-operative, though administrative pressure sometimes makes them slow in complying. Some GP practices and other therapists who are unused to applications under the Act may try to make an illegal charge or may say that you have to go through a solicitor - this is not right and you should quote the Act.

You should try to make sure the records are complete - this is often difficult to tell but some practices or hospitals have a practice of withholding laboratory tests, reports and other results or the nursing or physiotherapy records.

**Q What about x-rays and other radiographs?**

**A** These form part of the health record and you are entitled to copies. As such, the maximum charge of £50 applies to the provision of paper copies and films.

**Q What about records held on computer?**

**A** These are also covered by the Data Protection Act and you will be entitled to access under that Act.

**Q What if I disagree with the contents of a medical record?**

**A** There is provision in the Data Protection Act where if information contained within a record is inaccurate, the record holder may rectify, block, erase or destroy the data. This only applies if the data is incorrect or misleading about any matter of *fact* or contains opinion based on *factually incorrect* data.

If you disagree with an *opinion*, you can ask

for your views to be noted but there is no obligation to the record holder to do this under the Act.

**Q What if the record holder fails to comply with the Act?**

**A** Section 7 of the Data Protection 1998 requires for information requested to be provided within 40 days commencing on the day the request is received in writing together with the appropriate fee.

If there is a failure to comply with the request under the Data Protection Act then a complaint can be made to the Information Commissioner with a request for an Enforcement Notice. It is important to make a formal complaint to the NHS Trust or the GP practice with an insistence that the complaint is dealt with under the complaint procedures at the same time.

If the record holder fails to comply with the Enforcement Notice, the Information Commissioner can start criminal proceedings. This course of action is free.

It is also possible to make an application to the Court under section 7(9) of the Act for an Order compelling the record holder to comply with the request.

In addition, if you have suffered damage as a result of the record holder contravening the Act you are entitled to compensation under section 13 of the Act. This right is enforceable through court action but the Information Commissioner has the power to consider whether the contravention has caused any damage.

**2 UNDER THE ACCESS TO HEALTH RECORDS ACT 1990**

This has mostly been replaced by the Data Protection Act 1998 but the Act still applies where records are requested in relation to a deceased patient. As the Act came into force on the 1 November 1991, the patient's personal representative will not be able to obtain records made before that date, using the Act. Under this Act, records must be disclosed within 40 days; if the record was made within the 40 days before the Application, the records must be disclosed within 21 days. In the former, there is a fee of £10 plus photocopying charges and the cost of postage. In the latter, there are only the photocopying and postage charges payable.

### **3 UNDER SECTION 33 SUPREME COURT ACT 1981**

If you are intending to start proceedings for damages for personal injuries, the 1981 Act allows you to make an application to the Court for an Order to compel disclosure of documents which you need to see in order to work out your chances of success.

In an industrial injury case, this could include health and safety records, the Accident Book and documents of that sort.

In a medical negligence claim, it would be the medical records, though probably you would only use this procedure where access is required to a deceased person's records predating November 1991 (which is an unlikely situation nowadays).

There is no restriction on how old the record might be.

#### **Q Against whom can the application be made?**

**A** An application under Section 33 can only be made against a person who is likely to be a defendant to your legal action for damages.

#### **Q How do I go about it?**

**A** Firstly you or your solicitor should write asking for disclosure within a specified time. You should warn that you are intending to make an application to the Court if disclosure is not made within that time.

#### **Q How do I make an application to the Court?**

**A** The application is made by making a Part 8 application either in the High Court or in the County Court. It has to be made on the appropriate form with a witness statement stating why you think you may have a claim and why you think that the respondent may hold documents that you need to see in order to evaluate that claim.

#### **Q Should I get legal advice before I make the application?**

**A** Yes. These applications can be rather technical in their nature.

#### **Q What if I need medical records from a hospital or doctor who is not likely to be a defendant in order to evaluate my**

#### **potential claim?**

**A** First seek voluntary disclosure by writing to the record holder. You can use the Data Protection Act 1998.

In relation to a deceased patient, and if the record was made after the 1 November 1991 you can use the Access to Health Records Act. If, however, the record predates 1 November 1991, you would not be able to compel disclosure - you would have to actually start proceedings against the defendant by issuing a County Court High Court Claim Form and then make application for "third party disclosure".

#### **Q Is Public Funding (previously known as Legal Aid) available for applications under Section 33?**

**A** It may be, if you qualify financially and provided that it looks as if you have a claim for damages worth investigating.

Further information:

Office of the Data Protection Commissioner  
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Water Lane  
Wilmslow  
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Tel: 01625 545745

Website: <http://www.dataprotection.gov.uk>