



## ACCESS TO PATIENT RECORDS

## INDEPENDENT MENTAL HEALTH ADVOCATES INFORMATION SHEET



This information sheet is aimed at IMHAs as well as health and social care staff when working with patients that are detained under the Mental Health Act 1983 to support them in their role of providing information to patients and ensure they understand their rights with regards 'access to records'.

### What does the Code of Practice say about IMHAs accessing patients records?

Where the patient consents, IMHAs have a right to see any clinical or other records relating to the patient's detention or treatment in any hospital, or relating to any after-care services provided to the patient. IMHAs have a similar right to see any records relating to the patient held by a local social services authority.

### Does this mean IMHAs have an automatic right to see patient records?

Not quite. It means a patient can ask for their IMHA to look at their records, for example to look at what was recorded from a ward round, minutes of a meeting, detention papers, care plans etc. A patient has to consent to the IMHA looking at the records. IMHAs cannot look at patient records if the patient has not consented to this (unless they are unable to consent)

### So all patients do not have the ability to consent?

Not all patients will have the capacity to consent.

### What is meant by capacity?

Capacity to consent means someone can

- use information to make a decision
- retain information
- understand the information about the decision
- communicate the decision

If a person is unable to do any one of the above they are deemed to lack capacity. Capacity is decision specific so the above assessment must be carried out if there are concerns that a person may lack the capacity to consent to the IMHA accessing their records.

This is the 2<sup>nd</sup> stage of the two stage assessment of capacity. The first stage is that the 'diagnostic threshold' which asks 'does the person has an impairment or disturbance of the functioning of the mind or brain' that may be affecting decision making capabilities. Having a diagnosed mental disorder is considered an impairment or disturbance of the functioning of the mind or brain. This does not automatically mean a person cannot make decisions but it may be a factor at the time a decision needs to be made.

## So what happens if a person lacks capacity in these circumstances?

Where the patient does not have the capacity (or in the case of a child, the competence) to consent to an IMHA having access to their records, the holder of the records must allow the IMHA access if they think that it is appropriate and that the records in question are relevant to the help to be provided by the IMHA.

When an IMHA seeks access to the records of a patient who does not have the capacity or the competence to consent, the person who holds the records should ask the IMHA to explain what information they think is relevant to the help they are providing to the patient and why they think it is appropriate for them to be able to see that information.

## So how do IMHAs work with patients that don't have the capacity or competence to consent?

IMHAs deliver advocacy in two ways: instructed and non-instructed.

Instructed advocacy is where the patient understands the role of an IMHA and is able to clearly instruct the advocate as to what they want them to do and the action they wish to take.

Non-instructed advocacy is defined as: "... taking affirmative action with or on behalf of a person who is unable to instruct an advocate due to issues of capacity e.g. comprehension or communication issues<sup>1</sup>

The non-instructed advocate seeks to uphold the person's rights; ensure fair and equal treatment and access to services; and make certain that decisions are taken with due consideration for all relevant factors which must include the person's unique preferences and perspectives."

*In non-instructed advocacy "the advocate may observe, identify communicative behaviour, aim to establish some form of communication, gather information, ask questions and challenge opinions."* [www.sense.org.uk](http://www.sense.org.uk)

It is important that those who are unable to instruct an independent advocate are not left without their right to access advocacy. This client group is usually the most vulnerable and often unheard due to the nature of their capacity and decision making abilities (or lack of).

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<sup>1</sup> \*A person may be able to express what they want, e.g. to go home or a view of what they like or dislike, but may lack the capacity to instruct an advocate as to the action to take regarding a particular issue.

## How do those clients access the IMHA service then?

The Mental Health Act Code of Practice (20.19) clearly states:

*AMHPs and responsible clinicians should consider requesting an IMHA to visit a qualifying patient if they think that the patient might benefit from an IMHA's visit but is unable or unlikely for whatever reason to request an IMHA's help themselves.*

## Why would an IMHA wish to access records of a patient that can't consent?

There are a number of reasons for IMHAs wishing to access a patients records who cannot consent, they:

- may offer insight into ways of communicating with a client
- can offer key information about the person's wishes and views that the person may no longer be able to communicate
- can support the IMHA know what issues are currently being discussed within the care team to ensure they can advocate effectively
- can enable the IMHA to promote the person's rights

## So what information can be disclosed?

The Act does not define any further what it means by access 'being appropriate', so the record holder needs to consider all the facts of the case. But the starting point should always be what is best for the patient and not (for example) what would be most convenient for the organisation, which holds the records.

In deciding whether it is appropriate to allow the IMHA access, the holder of the records needs to consider whether disclosure of the confidential patient information contained in the records is justified.

## Key points to consider:

- record holders may not withhold information from IMHAs simply because it would not be disclosed to the patient under the Data Protection Act, either because it is provided by or relates to a third party, or because it would risk serious harm to the patient or anyone else. But, exceptionally, there may be special circumstances in which confidential third party information should not be disclosed;
- IMHAs should make clear to record holders whether or not they wish to see information in records which would not be disclosed to the patient under the Data Protection Act;

- record holders must tell IMHAs if they provide any information which would not have been disclosed to the patient because of a risk of serious harm. They are strongly recommended to tell IMHAs if any third party information they are providing would not have been disclosed to the patient;
- generally speaking, where a duty of confidentiality arises, IMHAs should not pass on information about or relating to third parties without their consent. But this will depend on the individual case.
- IMHAs must not pass on information which would not have been disclosed to the patient because of a risk of serious harm.

### **What are the safeguards for patient confidentiality and disclosing information to an IMHA on behalf of a patient that cannot consent to this?**

The key consideration will be whether the disclosure is in the patient's best interests. That decision should be taken in accordance with the Mental Capacity Act 2005 (MCA) (or, for children under 16, the common law), like any other decision in connection with the care or treatment of patients who cannot make the decision for themselves.

Record holders should start from a general presumption that it is likely to be in patients' interests to be represented by an IMHA who is knowledgeable about their case. But each decision must still be taken on its merits, and the record holder must, in particular, take into account what they know about the patient's wishes and feelings, including any written statements made in advance. (For further information on taking decisions in the best interests of people who lack capacity to make the decision themselves, please see the Code of Practice to the MCA.)

Records must not be disclosed if that would conflict with a decision made on the patient's behalf by the patient's attorney or deputy, or by the Court of Protection.

If the record holder thinks that disclosing the confidential patient information in the records to the IMHA would be in the patient's best interests, it is likely to be appropriate to allow the IMHA access to those records in all but the most exceptional cases.

### **Best practice in 'access to patients records'**

- IMHA providers use what is known as a 'form of authority' which patients can sign to confirm their consent as well as detail the information they'd like the IMHA to access\*

- IMHA providers should have a policy that details the process and outlines on a practical level how best to support patients as well as what to record when patients offer only verbal consent\*
- IMHAs should have a non-instructed advocacy policy that can include a pro forma to be given to staff ,on behalf of patients that cannot consent that forms part of the evidence of mental capacity decision making.
- IMHAs should be clear with the patient they represent and staff on the relevant unit what information they would like to see in order to assist staff easily accessing this.

\*It should be noted that not all patients that can consent would want to sign any forms, IMHAs must ensure they record the details as to why they've accessed records and note that verbal consent was given rather than written.

- IMHA providers should ensure they have a good understanding of data protection and confidentiality, see action for advocacy data protection guidance [INSERT LINK TO GUIDANCE]
- IMHA providers should ensure they have a policy in place outlining their position on whether or not they wish to see information in records which would not be disclosed to the patient under the Data Protection Act;

Mental health units and staff should be familiar with

- the rights and responsibilities of IMHAs.
- the rights of patients with regards to data protection and confidentiality (as well as how this impacts on the role of an IMHA).
- policies and procedures on this matter to ensure requests for access to records are dealt within a timely manner.