



Independent Mental Health Advocates

*Supplementary guidance on access to patient
records under section 130B of the Mental Health
Act 1983*

DH INFORMATION READER BOX

Policy	Estates Commissioning IM & T Finance Social Care / Partnership Working
HR / Workforce Management Planning / Performance Clinical	
Document Purpose	For Information
Gateway Reference	11715
Title	Independent Mental Health Advocates: supplementary guidance on access to patient records under section 130B of the Mental Health Act 1983
Author	Department of Health
Publication Date	30 Apr 2009
Target Audience	PCT CEs, NHS Trust CEs, SHA CEs, Foundation Trust CEs , Local Authority CEs, Directors of Adult SSs, Providers of independent mental health advocacy services
Circulation List	
Description	Guidance on issues arising in connection with independent mental health advocates' access to information in patient records that would not be disclosed directly to patients.
Cross Ref	Independent Mental Health Advocacy: Guidance for Commissioners Code of Practice to the Mental Health Act 1983
Superseded Docs	N/A
Action Required	N/A
Timing	N/A
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For Recipient's Use	

Independent Mental Health Advocates

*Supplementary guidance on access to patient records
under section 130B of the Mental Health Act 1983*

Prepared by Department of Health, Mental Health Division

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First published April 2009

Published to DH website, in electronic PDF format only.

<http://www.dh.gov.uk/publications>

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Executive summary

The Department of Health has been asked whether section 130B of the Mental Health Act 1983 allows Independent Mental Health Advocates (IMHAs) to see information in records which the patient themselves would have no right to see – and, if so, whether IMHAs may share that information with patients.

This document is intended only as general guidance. It should not be relied upon as a definitive or comprehensive statement of the law, and it is not a substitute for taking legal advice in specific cases, where necessary.

Key points are:

- 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.

Guidance

Purpose of this guidance

1.1 The Department of Health has been asked whether section 130B of the Mental Health Act 1983 allows Independent Mental Health Advocates (IMHAs) to see information in records which the patient themselves would have no right to see – and, if so, whether IMHAs may share that information with patients.

1.2 What follows is intended only as general guidance. It should not be relied upon as a definitive or comprehensive statement of the law, and it is not a substitute for taking legal advice in specific cases, where necessary.

Background

2.1 Under section 130B of the Mental Health Act 1983 (“the Act”), for the purpose of providing help to a qualifying patient, IMHAs may require the production of and inspect any records relating to a patient’s detention or treatment in any hospital or registered establishment or to any after-care services provided for the patient under section 117 of the Act. IMHAs may also require the production of and inspect any records of or held by, a local social services authority, which relate to the patient.

2.2 Under section 130B, IMHAs may only access records for the purpose of providing help to a qualifying patient in their role as an IMHA, and where the following conditions are met.

2.3 Where the patient has the capacity (or in the case of a child, the competence) to decide whether to consent to the IMHA seeing the records, the IMHA can only access the records if the patient has consented.

2.4 Where the patient does not have the capacity or competence to consent to this disclosure:

- records must not be disclosed if that would conflict with a decision made in accordance with the Mental Capacity Act 2005 on the patient’s behalf by a donee of lasting power of attorney or a deputy, or by the Court of Protection;
- otherwise, the record holder 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.

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In this latter case, the Code of Practice to the Act advises that the record holder 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.

2.5 In addition, anyone who refuses, without reasonable cause, to produce records that an IMHA has a right to inspect may be guilty of the offence of obstruction under section 129 of the Act.

Access to information in records that would not necessarily be disclosed to the qualifying patient

3.1 Under the Data Protection Act 1998, patients themselves have the right to apply to the record holder for access to their records. However, there are circumstances in which information in the records will be withheld from the patient. This includes:

- where it has been decided that it is not reasonable in all the circumstances to disclose information relating to or provided by an identifiable third person who had not consented to the disclosure (“third party information”) (other than, in the case of health records, a health professional who has compiled or contributed to the records or who has been involved in the care of the patient);
- where an appropriate health professional has said that the information should not be disclosed because it is likely cause serious harm to the physical or mental health or condition of the patient or any other person (“information risking serious harm”).

3.2 The same restrictions do not apply to IMHAs’ right of access under section 130B. Accordingly, there may be cases in which record holders must disclose information to IMHAs which they would not have disclosed to the qualifying patient. Where that is a possibility, record holders and IMHAs are advised to take account of the considerations set out below.

Considerations for record holders

Third party information

4.1 Because IMHAs have a statutory right to see relevant records in order to help and support patients, record holders cannot refuse to disclose information in those records relating to an identifiable third party individual simply because it would not have been disclosed to the patient under their right to access records under the Data Protection Act 1998.

4.2 As a general rule, the IMHA’s right of access will extend to such information, unless there are special reasons in the particular case which mean that the need to protect third party

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information overrides IMHAs' statutory right of access. If record holders think there may be such special reasons in a particular case, they are advised to seek legal advice.

4.3 Where records disclosed to IMHAs include third party information which would not have been disclosed to the patient, the Department of Health strongly recommends that record holders make the IMHA aware of this.

Information risking serious harm

4.4 Similarly, IMHAs' right of access to relevant records extends to information which would have been withheld from the patient under the Data Protection Act 1998, because it may cause serious harm to the physical or mental health or condition of the patient or any other person.

4.5 In such cases, the record holder must make the IMHA aware of any information that would have been withheld from the patient for this reason, so the IMHA knows what should not be disclosed to the patient.

Considerations for IMHAs

General

5.1 Section 130B gives IMHAs access to sensitive health information regarding the patient and possibly third parties. Like health professionals, IMHAs (and the organisations for which they work) are bound by common law duties of confidentiality in respect of such information. They must also ensure that they keep and use such information in accordance with data protection legislation, where applicable. All IMHA services should have policies and procedures in place to ensure compliance with these obligations.

5.2 In general, the IMHA should share information with the patient as part of their statutory duty to help and support the patient. However, the IMHA should not disclose information to the patient if there are legal reasons that would prevent them from doing so.

Deciding what information to request

5.3 Before IMHAs ask to see records which might include information that would not be disclosed directly to the patient, they should explain to the patient that such material might exist, and specifically ask the patient whether they consent to the IMHA seeing it, if it does. In doing so, they should explain to the patient that they will generally not be able to pass that information on, or even tell them that it exists.

5.4 In deciding what records they ask to inspect in cases where the patient lacks capacity to consent, IMHAs need to consider how this will affect their ability to provide help and support to patients in accordance with the Act. On the one hand, being in possession of information that

cannot be shared with the patient may cause difficulties in the relationship of trust with the patient. On the other hand, there could be circumstances in which not accessing all the available information could restrict their ability to help the patient as fully as possible.

5.5 When they request the production of records, IMHAs should tell the record holder whether they wish to see information that would not be disclosed directly to the patient.

Third party information

5.6 Where record holders give them access to information relating to, or provided by, another individual who can be identified from that information (ie a third party), IMHAs need to decide whether to disclose it to the patient, as they would with information from or about third parties they had acquired in any other way. In deciding that, IMHAs need to consider any third party rights to privacy or confidentiality that may arise.

5.7 Where the information relates to the patient but disclosure would also provide information relating to or provided by an third party, then the IMHA should not disclose this information to the patient unless:

- in the case of information from the patient's health records, the third party is a health professional who has compiled or contributed to the health records or who has been involved in the care of the patient;
- the third party gives their consent to the disclosure of that information; or
- it is reasonable in all the circumstances to dispense with that third party's consent.

5.8 If the third party has consented, or is a health professional who has compiled or contributed to the health records or who has been involved in the care of the patient, then the IMHA may disclose the information to the patient.

5.9 Otherwise, in considering whether it would be reasonable in all the circumstances to disclose the information, the IMHA should have regard, in particular, to the following factors:

- any duty of confidentiality owed to the third party;
- any steps taken to try to get the consent of the third party;
- whether the third party is capable of giving consent; and
- any express refusal of consent by the third party.

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5.10 Generally speaking, where a duty of confidentiality arises then the information should not be disclosed without that person's consent. A duty of confidentiality arises where information which is not generally available to the public has been disclosed with the expectation that it will remain confidential.

5.11 Confidentiality should not be assumed. It may be that the information is widely available, is already known to the patient, or there may be other factors – such as the public interest – which mean that an obligation of confidentiality does not arise. It would be reasonable in those circumstances to disclose the information.

5.12 However, whether third party information should be disclosed where the individual does not consent will always depend on the individual case. An IMHA should weigh the third party's rights to privacy and confidentiality (if they arise) against the patient's right to access information about themselves.

5.13 If the IMHA has not got the consent of the third party, and is not satisfied that it would be reasonable to disclose this information, they should not disclose the information. But they should consider what (if anything) they could tell the patient without identifying the third party, or enabling the patient to do so.

5.14 Confidential third party information which is not also about the patient should not be disclosed to the patient without consent, unless there is an over-riding case for doing so in the public interest (which is unlikely).

Information risking serious harm

5.15 Where the record holder has made the IMHA aware of information that would have been withheld from the patient because it may cause serious harm to the physical or mental health or condition of the patient or any other person, the IMHA must not disclose this information to the patient.

5.16 This is because:

- the patient themselves does not have the right to access those records under the Data Protection Act 1998;
- the IMHA only has the right to disclose information to the patient if it is for the purpose of helping or supporting the patient. If the information would in fact harm the patient, then this disclosure would not fall within the IMHA's remit;
- there is an implicit requirement on the IMHA to abide by the decision of the health professional under the Data Protection Act 1998 that the information may cause

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serious harm to the physical or mental health or condition of the patient or any other person, and so should be withheld from the patient.

Further information

Government guidance on information sharing generally (including links to more specialist guidance) can be found in “Information Sharing: Guidance for practitioners and managers” at [Government Information Sharing Guidance](#)

For general inquiries about this guidance and the Mental Health Act please contact MentalHealthAct2007@dh.gsi.gov.uk