

POCKET GUIDES
FOR NURSING AND HEALTH CARE



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MARC CORNOCK

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FOR NURSING AND HEALTH CARE



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Marc Cornock

The Open University



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If all information that a healthcare practitioner receives from patients has to be treated in confidence, how can Simon share information lawfully? This is the question that this chapter will answer.

3.1 When information can be shared

Like most healthcare practitioners and their patients, Simon will not care for Karin entirely on his own. Rather he will be part of a healthcare team, most likely a multidisciplinary team.

Simon will need to receive information from the other members of the team he is working with and also give information to that team about the aspects of Karin's care that he is involved with. If Simon and other members of the healthcare team do not have access to all the relevant information they need, aspects of Karin's care and treatment may not be as effective as they would be if the information was freely available to them for their assessment and planning of Karin's care and treatment.

This means that information that Karin has provided to Simon, expecting it to be treated confidentially, will need sharing. So how is it possible for Simon to share Karin's information without acting unlawfully?

The first point to make regarding the sharing of patient information is that there is no absolute right to confidentiality (*Section 1.5*).



This means that it is legally recognised that there are times when a patient's confidential information will need to be shared.

From a legal perspective there are four main exceptions to the principle of confidentiality. These are when:

- the patient consents to the sharing of information
- the information is being shared with other healthcare practitioners
- it is in the best interests of the patient to share the information
- it is in the public interest to do so.

The first three of these exceptions will be discussed in this chapter. The fourth exception relating to public interest will be discussed in *Chapter 4*.

3.2 Patient consent for the sharing of information

Consent is often considered a complex subject as there are specific legal requirements that need to be satisfied in order for consent given by a patient to be legally valid. Consent is the subject of a separate pocket guide; details can be found in the *Useful resources* section at the end of this book.

3.2.1 Brief review of consent

For consent to be legally valid, three main principles have to be satisfied. These are that the patient:

- is competent to give their consent
- has adequate information on which to base their decision
- has provided their consent voluntarily.

For now, we will assume that the patient is competent, adequately informed and acting voluntarily. Sharing a

patient's information when the patient is not competent to consent is discussed in *Section 3.7*.

3.2.2 When a patient consents to the sharing of their information

It is always better to ask for and receive a patient's consent before undertaking anything related to their care and treatment.

As a healthcare practitioner Simon has several different duties of confidentiality (*Section 1.8*):

- Common law duties
- Contractual duties
- The duty arising from his registration with a regulatory body
- Those duties arising from specific legislation
- The duty arising as a result of working in the NHS.

However, if Simon receives Karin's consent (that is consent that has been given voluntarily by a competent patient who has been adequately informed about how the information will be shared) to the sharing of her confidential information, this provides a lawful exception to Simon's duties of confidentiality to her.

This means that Simon would not be legally or professionally liable for the sharing of Karin's information.

One key thing Simon needs to note about asking Karin for her consent to share her information is that he must provide Karin with an adequate explanation about what information he intends to share and who he intends to share it with. If Karin provides her consent for Simon to share her information with fellow healthcare practitioners but Simon also shares Karin's information with her relatives, this would be outside the remit of the consent provided by her.

3.3 Sharing information with patient consent



Only those people who the patient has expressly consented to have their information shared with can receive that patient's information.

If Simon is unclear about whether a particular person can receive Karin's information, he needs to check with her and receive her express consent before sharing her information.

3.4 Sharing information with the healthcare team

There is a legal, ethical and regulatory recognition that healthcare practitioners such as Simon do not work in isolation and as such need to share information with and from other practitioners caring for and treating patients.

As a result, when Karin gives her consent to Simon to provide specific care or treatment to her, for instance an operation, she is also deemed, both legally and ethically, to have provided her implied consent to the sharing of her information with those healthcare practitioners who will also be involved in her care and treatment. This means that although Karin may not have been specifically asked for her consent to share her information, Karin's consent to the operation includes an implied acceptance by her that her information will be shared in her best interests with those who need it to provide her care and treatment.

The reason for the principle of implied consent in this context is that without the information the members of the healthcare team would be hampered in their ability to provide Karin with

the most effective care and treatment. Therefore, her best interests are served by the sharing of her information.

In addition, Karin would still have her personal information protected, as any member of the healthcare team who received her information from Simon would be bound by the same duties and obligations of confidentiality that bind Simon.

3.5 Sharing information with other healthcare practitioners

Implied consent only applies to those members of the healthcare team who need access to Karin's information.



Therefore, only those members of the healthcare team who are involved in her care and treatment are legally entitled to share her information under the principle of implied consent.

There is no reason to share Karin's information with healthcare practitioners who are not involved in her care and treatment as they do not need that information, and so her best interests are not served by them having access to it. So, for those healthcare practitioners not involved in her care and treatment, Karin's information should remain confidential.

It is important that Simon realises that, if he is not currently involved in Karin's care and treatment, he is not legally allowed to access her information under the principle of implied consent, even if he was involved in her care and treatment previously.

3.6 Information that can be shared under the principle of implied consent

Although there is no limit on what information or the amount of information that can be shared between those members of the healthcare team that are providing care and treatment to Karin, two rules need to be adhered to:

- There has to be a real clinical need for the specific information to be shared.
- Only the minimum amount of information that satisfies the clinical need and allows for safe and effective care and treatment to be provided should be shared.

These rules mean that:

- if certain information is not needed by Simon to provide care and treatment to Karin, he should not have access to it
- Simon should receive only what he needs in order to provide his part of Karin's care and treatment
- if Simon needs to provide information to other healthcare practitioners so that they can provide safe and effective care to Karin, he should limit the information he provides to them to that which they need in order to provide their part of Karin's care and treatment.

The laws of confidentiality and the duties that are placed on healthcare practitioners exist to protect a patient's right to keep their personal information confidential. Therefore, there has to be a clinical reason to access a patient's information and to share information with other healthcare practitioners.

As an example, if Simon were involved in the care of Karin's feet it is unlikely that he would need to know Karin's sexual history. Similarly, if Simon were aware of Karin's sexual history he should not make this available to others involved in the

care and treatment of Karin's feet where it is not relevant to the care and treatment she is to receive.

3.7 Confidentiality and patients who are incompetent

There are some patients who are deemed to be incompetent in relation to providing consent on their own behalf, and this may include the sharing of their information.

Additionally, if Karin were deemed to be incompetent to provide consent for her own care and treatment, Simon would not be able to rely upon the principle of implied consent, as that only applies when Karin is able to consent to specific care and treatment.

Patients who are deemed to be incompetent still require care and treatment, and for this to be effective their information needs to be shared, at least with members of the healthcare team. The patient's best interests provide the legal basis upon which information can be shared when the patient is incompetent.

It is considered to be in a patient's best interests that those members of the healthcare team who are caring for and treating them have access to information that is relevant to that care and treatment.

The same protections that exist under the principle of implied consent also exist when sharing information in the best interests of patients who are incompetent.



Thus, information should only be shared when there is a real clinical need to do so for the patient's care and treatment; and only the minimum amount of information that satisfies the clinical need should be shared.

3.8 Sharing information with relatives and next of kin

A relative is a person who has a relationship to another person, such as by blood, adoption or marriage.

The patient can nominate anyone to be their next of kin. They do not have to be a relative and could be a friend or a co-worker or someone who the patient is in a relationship with. The patient's next of kin is usually taken to be the point of contact about their care needs; the person that you would contact to provide information about the patient. However, from a legal point of view, next of kin has no specific meaning in a healthcare context.

Neither relatives nor next of kin have a legal right to receive information about a patient. Information should only be provided if the patient has given their consent for information to be shared with them, or the patient is incompetent to make such a decision and it is in the patient's best interests for that information to be shared.

If Simon is ever unsure whether he can provide information to a relative of Karin's, there are two approaches he can take, depending on whether or not Karin is competent at the time the request for information is made by the relative.



Notes

If Karin is competent	If Karin is not competent
<p>Simon can ask Karin if she wants that particular relative to receive the information they are requesting.</p> <p>Simon needs a lawful reason to divulge Karin's confidential information, so his next action will depend upon Karin's response. However, Simon must note that there is no automatic right for a relative to receive information.</p>	<p>Simon still needs a lawful reason to divulge Karin's confidential information, but this cannot come from Karin providing her consent, as she is not legally able to do so.</p> <p>Simon cannot use the implied consent that he could rely upon to share information with other healthcare practitioners involved in Karin's care and treatment, as a relative is not considered part of the healthcare team for these purposes.</p> <p>Therefore, the only legal justification Simon could use to share information with a relative of Karin is that it is in her best interests to do so; or if the relative is acting under a Lasting Power of Attorney (<i>Section 3.10</i>).</p>

3.9 Best interests

Best interests is often seen as a nebulous concept in many ways, because what is in one patient's best interests may not be in another's. So, two patients with the same condition and same apparent needs may have different care and treatment because their best interests are different.



Best interests can be thought of as determining what benefits a patient when the patient is unable to make that decision themselves.

If Karin is unable to make her own decisions because she is incompetent to do so and a relative of hers contacts Simon and asks for information about her diagnosis and treatment, Simon needs to apply the approach outlined in *Section 3.8*.

As Karin is incompetent in this scenario, Simon needs to consider whether it is in her best interests for him to divulge the information that has been requested. Each patient's particular circumstances need to be considered on an individual basis; however, there are some general points that can be made.

Simon has to consider two questions:

- Has Karin made any earlier decisions about sharing her information with her relatives?
- Has Karin ever made a decision regarding the divulging of her information to this particular relative?

If the answer to either of these questions is yes, Simon needs to act in accordance with what Karin's decision was.

If the answer to these questions is no, then Simon needs to consider whether sharing the information with this relative or keeping it confidential provides a greater benefit for Karin.

Sharing Karin's confidential information with a relative may be in her best interests because:

- Karin has a close relationship with the relative, or has nominated them as her next of kin, and would wish them to know but has been unable to communicate this
- the relative may be able to provide additional information to the healthcare team that are caring for and treating Karin
- the relative will be involved with Karin's care once she leaves the care of the healthcare team.

If Simon considers that any of the reasons just discussed apply, he may consider that it is in Karin's best interests to

share some information with her relative even though she is unable to provide consent for this herself.

If on the other hand it is known that Karin has a difficult or non-existent relationship with this relative, Simon may consider that Karin's best interests are fulfilled by not providing information to this relative and instead refer them to her next of kin or other nominated relative.

When a competent patient is first assessed, it is best practice to ask them about their wishes regarding giving information to their relatives, and also if there is someone they wish to nominate as next of kin to receive information on behalf of other family members. The patient can also be asked what information they would like to be shared and if there's any information they would not wish to be shared.

For a discussion on confidentiality and providing information in relation to child patients and their parents see *Section 5.2*.

3.10 Lasting Power of Attorney

Originating in the Mental Capacity Act 2005, a Lasting Power of Attorney (LPA) is a mechanism whereby a patient can nominate someone to act on their behalf in relation to their healthcare decision-making if they become incompetent at some point in the future.

There are some rigid rules regarding the making of an LPA, when it applies and the powers that the attorney has.

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In relation to confidentiality, the key issue is that someone who's been nominated by the patient to act as their attorney under an LPA has a right to receive information about the patient, the condition and their care and treatment. This is so the attorney can make appropriate healthcare decisions on behalf of the patient.

Therefore, if an LPA is in existence Simon would be able to ask Karin's attorney what information they would like to be shared and with whom.

The practical effect of an LPA is to substitute the attorney as someone who can be consulted when it is not possible to consult Karin herself.

It is important to note that Simon can only work with an attorney under an LPA when it meets the formal requirements as stipulated in the Mental Capacity Act 2005; one of these is that the LPA is registered with the Court of Protection and as such can be consulted by the healthcare team's legal representatives so that its validity can be checked.

3.11 Anonymised information

Some aspects of healthcare practice involve planning for future service provision. To facilitate this, audits are undertaken to see where a need exists and what sort of service is required. One way of conducting this is to look at information about the healthcare needs of past patients. To protect the confidentiality of these past patients, information is often anonymised so it is not possible to attribute it to specific patients.

According to the judgment in the Source Informatics Ltd case (see p. xx), where a patient's information has been suitably anonymised so that the patient cannot be identified from it, it is not unlawful for that information to be shared.

3.12 Confidentiality and the Data Protection Act

The Data Protection Act 2018 provides the current law on how personal information may be used. Its scope includes healthcare records and so all healthcare practitioners

need to be aware of its principles and requirements. It provides statutory protection for the processing of personal information, including healthcare information.

However, if their healthcare practice meets the needs of the practitioner's regulatory body regarding confidentiality, they will almost certainly be meeting the requirements of the Act.



Brief aside on the Freedom of Information Act 2000

This Act provides the public with the right to access information held by public bodies, including those within the NHS; however, it does not apply to an individual patient's information and so cannot be used by those wishing to access information about a particular patient.

3.13 In summary: sharing information without breaching confidentiality

Although healthcare practitioners have a duty and obligation to maintain a patient's confidentiality, this is not absolute, and it can be lawful for a healthcare practitioner to share a patient's information in certain circumstances.

These circumstances include when the patient is competent and either consents to the information being shared or consents to a specific procedure, and this results in implied consent for their information to be shared amongst the members of the healthcare team who are providing their care and treatment.

If the patient is incompetent to make their own decisions, information may be shared when it is in the best interests of the patient to do so.

Relatives and next of kin have no legal right to receive information about a patient but may do so when the patient

has consented or where it is in the patient's best interests for them to receive it.

If the patient has made an LPA, the attorney may receive information in order for them to make healthcare decisions on behalf of the patient.



Notes

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