

# CONFIDENTIALITY

## and INFORMATION SHARING WITH CARERS



### Introduction

People's records are confidential, but there are circumstances where the law permits the release of information to relatives or carers even where the person is not able to give consent. The purpose of this briefing is to highlight the factors that should be considered when social services staff receive a request from a relative or carer for information or documentation concerning an adult who lacks the capacity to consent to its release.

There are some statutory rights which may provide third parties with a route to the information required in particular situations, for example, where there has been an appointment of an enduring power of attorney, or where action is being taken under the Mental Health (NI) Order 1986. However these rights only arise in specific situations as defined by statute. Outside of these statutory specific situations, the relevant law includes the Freedom of Information Act 2000 (FOI 2000), the Data Protection Act 1998 (DPA 1998) and the Human Rights Act 1998 (HRA 1998) as well as the common law. The case of *R on the Application of S v Plymouth County Council and C (an interested party) (2002)* (the S case) which was decided by the Court of Appeal for England and Wales is also helpful as it unravels the rights and interests involved when an access request is received. It is these general rights of access which form the substance of this briefing.

### The Statutory Schemes under the DPA 1988 and the FOI 2000

The DPA 1998 neither prevents nor obliges disclosure in such situations and criticism has been levelled on the Act for its failure to make special provisions regarding requests for access to information made on behalf of an adult who lacks sufficient understanding to make the request in his or her own name.

### Releasing information

The DPA 1998 does allow the release of sensitive personal information to a third party in the following situations:

- where it is necessary to protect the vital interests of the person involved or another person in a case where consent cannot be given (Schedule 3 paragraph 3);
- for the purpose of or in connection with any legal proceedings, or for the purposes of obtaining legal advice or where it is otherwise necessary for the purposes of establishing, exercising, or defending legal rights (Paragraph 6);
- where it is necessary for the administration of justice or the exercise of any function conferred on any person by or under an enactment (Paragraph 7).

In addition, the right under the FOI 2000 to make application for official information held by public bodies (the 'right to know') came into force in January 2005. The 'right to know' extends to personal data about someone other than the applicant and as such it fills some of the gaps left by the DPA 1998.

The term 'personal data' is defined by the DPA 1998 as amended by the FOI 2000. 'Personal data' is information about a living individual from which that individual can be identified. It may take any of the following forms:

- computer input documents;
- information processed by computer or other equipment;
- information in medical, social work, public housing or school pupil records;
- information in some sorts of structured manual records;
- unstructured personal information held in manual form by a public authority.

The last of the above categories was introduced into the DPA 1998 by the FOI 2000. For social services staff it means that, in effect, any information held about living individuals is potentially accessible under the FOI 2000.

Where the personal information is sought by a third party, again reference must be made to the DPA 1998 and disclosure withheld if it would breach any of the Data Protection Principles (see Appendix A). The Act also has some special rules to be applied in

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cases where the personal data is about someone who has formally objected to its disclosure.

The Act also includes exemptions from disclosure where the information was provided in confidence or disclosure would not be in the public interest. No definition of these terms is provided but the Information Commissioner has issued some useful guidance (see the Commissioners Website: [www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)). As with the DPA 1998, the gaps have to be filled by reference to the common law and the obligations imposed by the HRA 1998. These were highlighted in the S case.

### **S v Plymouth County Council and C (an interested party) – the facts**

C was the subject of a guardianship order. His mother, S, was his 'nearest relative' within the meaning of the mental health legislation and had attended care planning meetings and objected to the renewal of C's guardianship. She asked to see any documentation on which either the guardianship or its renewal was based but the local authority concluded that it was prohibited from disclosing confidential information about C, and that C lacked the capacity to consent to disclosure. His mother challenged the refusal to release the documents and eventually the Court of Appeal held in her favour and ordered disclosure to the mother and her solicitors.

### **Balancing rights and interests**

The Court of Appeal emphasised that the answer in these situations involves striking a balance between the public and private interests in maintaining the confidentiality of this information and the public and private interests in permitting or requiring its disclosure for certain purposes.

The court's starting point for considering the rights and interests in play in the case was to highlight the significance of the common law duty of confidence owed to C. The court stated the duty of confidentiality owed to the son should not be underestimated and highlighted that children and incapacitated adults have independent interests of their own. However, they added, the duty of confidence was not absolute. Whilst a person's wishes and feelings were important (and in the case under consideration there was nothing to suggest he objected to disclosure), even if the son had the capacity to object, such objections would not necessarily be decisive, for example for important public interest reasons.

The court also considered the extent to which all of the information in a local authority's files could be

said to be confidential. There might be information recorded which had been supplied by the person seeking it, for example, which could not be treated as confidential if that person sought access to the record of it. Some of the recorded information would be confidential to the son, but the duty of confidence might be owed to professionals in relation to other parts of it.

In addition, the son enjoyed the right to respect for his private life as protected by article 8 of the HRA 1998, which overlapped with the duty of confidence owed to him but was nevertheless distinct. On this, the court emphasised that if, because of a person's mental disabilities, they are unable to protect this right for themselves, a greater responsibility rested with the authorities to ensure that this right was respected.

The son had an interest in the protection from any risk to his health and welfare that might result from disclosure. He also had an interest in decisions about his future being properly informed. In legal proceedings about a child or a patient, such a person has an interest in the fairness of the trial and in having evidence about her/him being properly tested in court. Lastly, the son had a right to respect for the family life relationship which he and his mother enjoyed.

From his mother's perspective, respect for family life also imported a series of additional rights to be properly involved in a decision making process, the end result of which could impact on family life and, critically, his mother had the right to a fair hearing in terms of article 6 of the European Convention on Human Rights along with equivalent common law rights to access the court and to seek legal advice for the purposes of exercising that right.

Two further interests were identified by the court, though neither was considered significant to the determination of the issues in the instant case. These were the public interest in the proper administration of justice and the interest in the protection of other persons.

### **Striking the balance**

In reconciling these various interests, the court made a series of key findings. First, much of the information had been brought into existence to enable the local authority to fulfil its statutory functions in relation to the guardianship. Given the nearest relative's place in the guardianship process, it was not seen as a large step to include them in the relevant information.

Secondly, this information would have been made available had the local authority asked the court to displace the mother as nearest relative.

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Thirdly, there was an obvious public and private interest in the mother having expert advice before the matter reached court.

### **Applying this case to other decisions**

Clearly, the starting point for a trust or health board considering an access request by a carer will be to establish whether any of the information that would be disclosed as a result is confidential and, to the extent that it is, to whom the duty is owed.

Where the duty of confidentiality is owed to a person other than the incapacitated adult, for example another professional, that person can be asked to consent to the information release. If consent is not given or impossible to obtain, the factors identified in the DPA 1998 and the FOI 2000 for dispensing with the consent will clearly be relevant considerations.

Where the duty is owed to the incapacitated adult, the trust or health board will need to weigh up the interests identified in the S case and reach a view on whether they oblige disclosure in the particular case or not. The focus must be on the interests at stake not the fact of any dispute, and where a carer would have standing to bring a judicial review about care or treatment decisions (either on behalf of the incapacitated adult or in her/his own right) then common law and Article 6 interests will be engaged.

There is no problem when the information is not confidential. When a carer is closely involved in the assessment and care planning processes, much of the documentation generated by that process will

almost certainly be confidential in so far as the world at large is concerned, but can be legitimately shared with the carer. However, where large sections of an incapacitated person's records have been generated through processes in which the carer has had no involvement, confidentiality issues will arise and the trust or health board may well question the carer's right to have sight of this information. The final decision should take account of the power to disclose in certain situations under the legislation, the duty of confidentiality and the interests set out in the S case.

### **Appendix A**

There are eight principles put in place by the DPA 1998 to ensure that information is handled properly. They are that data must be:

1. fairly and lawfully processed;
2. processed for limited purposes;
3. adequate, relevant and not excessive;
4. accurate;
5. not kept for longer than is necessary;
6. processed in line with the person's rights;
7. secure;
8. not transferred to countries without adequate protection.

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An advice line operates from the Law Centre's Belfast and Derry offices between 9.30 am and 1 pm daily. The community legal advisers are Patricia Southern (028 9024 4401) and Vincent Shiels (028 7126 2433).

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