

Number 3

Data Protection: Patient and Health Records

Anyone operating a residential care home will keep information about patients and their health records. The Data Protection Act 1998 (the “Act”) contains detailed rules on the processing of personal data and breach of these rules could ultimately result in criminal penalties, so it is essential that your systems comply with the law.

A later Care Homes Briefing will address specific issues affecting employee records.

Scope of the Act

The legislation applies to “personal data” - information about individuals (“data subjects”) who are either named or identifiable from the data or other information a recipient may have. It includes expressions of opinion, as well as visual data such as photographs, videos, patient scans, x-rays and magnetic resonance images.

Under the Act, ‘processing’ encompasses virtually every activity carried out with personal data, including storing, sorting and analysing data or even just holding or looking at it on screen. The only significant exception is manual records in existence before October 1998, which are exempted from certain provisions of the Act until October 2007.

Data protection notice

A notice must be supplied to the data subject before their data is processed. The notice must:

- identify the “data controller” (the person or organisation that determines the purposes and means of the processing – for a care home’s patients, the care home itself will be a data controller);
- describe the purpose of the data processing; and
- contain other information to make the processing fair – for example, details of any possible disclosure of the data to third parties.

When the personal data have been obtained from a third party (e.g. a purchased mailing list) the above notice will not be required where it would involve ‘disproportionate effort’ to notify the data subject, or where they already know about the processing.

Consent for the processing of data

Where none of the exemptions apply, explicit consent is required to process “sensitive personal data”. This includes information about the data subject’s physical or mental health and condition, and so a great deal of the personal data held by care homes about their patients is likely to be sensitive personal data. It also includes information about race or ethnic origin, criminal offences and proceedings, religious beliefs and political opinions.

There is an exemption for processing which is necessary for “medical purposes”, which is defined in the Act as processing:

- by a “health professional” (also defined in the Act); or

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- by a person who in the circumstances owes a duty of confidentiality equivalent to that of a health professional.

This exemption will often be of assistance for healthcare records.

Care homes will also hold non-sensitive personal data. This can be processed without consent if the processing is necessary for the legitimate interest pursued by the data controller (or the third parties to whom the data are disclosed) unless it is prejudicial to the rights and freedoms of the data subject. This exemption will often be available to care homes for non-sensitive personal data.

Disclosure of personal data to third parties is a form of processing so, before making any such disclosure, you should consider whether the data subject's explicit consent must be obtained.

Exemption for emergencies

The Act contains an exemption from the pre-conditions for processing where processing is necessary "in order to protect the vital interests of the data subject". The Information Commissioner recommends that this should only be relied on in matters of "life and death".

How to obtain consent

The Act does not define what is meant by "consent" but the European Data Protection Directive, which underlies many provisions of the Act, describes it as "any freely given and informed indication of his wishes by which the data subject signifies his agreement". This suggests that there should be active communication between the parties, rather than relying on passive non-refusal of consent.

When obtaining explicit consent for the processing of sensitive data, you should provide the data subject with detailed information describing the purpose and specific nature of the data processing.

Once given, consent does not last indefinitely. For example, if you have obtained consent to process personal data in the past but have no current relationship with the data subjects, you must obtain fresh consent to processing their data.

If the personal data has been obtained from third parties, you should check that the data subject gave his or her consent in the past and that the past consent also allows processing for the current purposes.

Access to personal data

Data subjects can have access to information about data held about them including whether their personal data are being processed, copies of the data, the purposes of the processing, the recipients and the source of the data. In addition, patients can apply for access to their medical records under the Access to Health Records Act 1990.

Security

Data controllers must take appropriate measures against unauthorised or unlawful processing, and against accidental loss, destruction or damage to personal data. This involves technical measures as well as administrative rules for employees with access to the data. In addition, express obligations must be included in contracts for the outsourcing of data processing.

Transfers of personal data abroad

The rules governing the transfer of personal data abroad are complex, so if you are contemplating such a transfer – or indeed if you are considering an arrangement (for example, a sale or acquisition) with an overseas organisation which could give them access to the personal data you are holding, you should seek legal advice before proceeding.

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Consequences of breach

If breach of the Act results in damage to a data subject, he or she has a right to compensation unless the data controller can prove that reasonable care was taken to comply with the relevant requirement. The data subject may also claim compensation for any distress suffered provided the data subject can demonstrate that some damage has been caused.

The Information Commissioner has powers of enforcement under the Act, ultimately backed by criminal sanctions – for example, where a data controller ignores the requirements of the Information Commissioner. Directors or other officers of the data controller may also be prosecuted – for example where a failure to notify the data subject or an unlawful sale of data is due to their personal negligence.

Death of a patient

On the death of a patient, the Act will no longer apply but the data controller will remain subject to the provisions contained in the Access to Medical Records Act 1990.

Conclusion

The above is only a summary of the rules on data processing – the Act itself has 75 sections and 16 schedules, not to mention numerous statutory instruments – and the law in this area is complex and detailed.

The new budget contains proposals to simplify the data protection legislation. It remains to be seen what effect these proposals will have in practice.

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.
Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.
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