

February 2004

Freedom of Information Act

Are you on track?

HEALTH LAW
REVIEW

The Freedom of Information Act 2000 (the Act) has a potentially huge impact on the NHS. It is vital that public authorities are aware of the rights and duties created by the Act and that they have the necessary procedures in place to be able to comply with it.

The aim of the Act is to promote a culture of openness and to enable the public to understand how public authorities carry out their duties, why they make the decisions they do and how they spend public money.

The Act places two main obligations upon public authorities in respect of all types of recorded information held by them:

- to adopt and maintain a publication scheme
- to deal with requests for access to information.

Does it apply to us?

The Act applies to public authorities, including:

- NHS Trusts, for example -
 - Acute Trusts
 - Ambulance Trusts
 - Mental Health Trusts
 - Primary Care Trusts
- Independent Practitioners, for example -
 - General Practitioners
 - Dentists
 - Optometrists and Opticians
 - Pharmacists
- Strategic Health Authorities
- Special Health Authorities.

What should we have done already?

Public authorities have a duty to adopt and maintain a publication scheme. This duty is now in force. All publication schemes in the health sector should have been active by 31 October 2003.

To comply with the Act, a publication scheme must specify:

- The types of information that will be published
- The manner in which the information is to be published
- Whether the material is intended to be made available free of charge or for a fee.

Publication schemes are likely to contain details of:

- Healthcare and other services provided
- Internal organisational structures
- Decision making processes
- Complaints procedures
- The rights of access available to the public
- Minutes of past and timings of future Board meetings
- Partnerships and relationships with other organisations.

Model publication schemes have been produced which have been approved by the Information Commissioner. If a Trust or independent practitioner adopts the model publication scheme relevant to their particular organisation or profession, it will not need to be approved further by the Information Commissioner. Any modifications to the model publication schemes will require the approval of the Information Commissioner.

Continued overleaf

Freedom of Information Act continued

Enforcement

If you are required to have an active publication scheme but do not have one, the Information Commissioner may serve you with an Enforcement Notice requiring you to take steps to comply with the Act. If you fail to comply with the Enforcement Notice, the Information Commissioner may refer the case to the High Court and the court may deal with you as if you are in contempt of court. At worst, this could lead to imprisonment.

What do we need to do in the future?

The second main consequence of the Act is that it grants individuals a right of access to recorded information held by public authorities. This right comes into force on 5 January 2005.

Once in force, requests must be:

- Made in writing (requests made by e-mail comply with this requirement)
- Responded to within 20 working days of receipt with confirmation of whether or not the information is held and, if applicable, communication of the information in question.

The Act sets out specific exemptions to the right of access which may excuse the public authority from complying with the applicant's request either in whole or in part. In the majority of cases, the applicant must be informed of the specific exemption relied upon together with an explanation as to why it applies in their particular case.

The exemptions include information which:

- Is reasonably accessible by other means. Therefore, all information accessible through a publication scheme will be covered by this exemption.
- Constitutes personal data of which the applicant is the subject. Such information would be accessible through the Data Protection Act 1998.
- If disclosed, would be likely to endanger the physical or mental health or safety of any individual.
- If disclosed, would breach a duty of confidentiality owed to another.
- Is subject to legal professional privilege.

The majority of the exemptions set out in the Act must only be relied upon if the public authority is

satisfied that the public interest in maintaining the exemption in question outweighs the public interest in disclosure.

The right of access comes into force in just over a year's time and it is vital that you have sufficient procedures in place to deal with requests made under the Act. The following should be considered as part of your preparations:

- Carry out an audit of information held
- Ensure your records are managed appropriately, including systems for storage, retrieval and destruction
- Ensure that all staff are aware of their obligations with respect to the management of records
- Designate a member of staff to be the central contact for requests made under the Act. This lead role should be acknowledged and made known throughout the organisation.
- Introduce a diary based system for dealing with requests for access to ensure that the deadlines laid down by the Act are met.
- Keep your publication scheme under regular review. Remember that information accessible via your publication scheme will not be accessible via the general right of access. Therefore a full publication scheme will help to reduce the burden of access requests.

Websites offering guidance

- Information Commissioner:
www.informationcommissioner.gov.uk
- Guidance on freedom of information within the NHS:
www.foi.nhs.uk
- Codes of Practice issued by the Lord Chancellor on the discharge of public authorities' functions and management of records - obtainable at two sites:
www.dca.gov.uk/foi/codepafunc.htm
www.dca.gov.uk/foi/codemanager.htm

Ian Cooper
ian.cooper@rlb-law.com

For specific advice on all aspects of the Freedom of Information Act and confidentiality within the NHS please contact: Ian Cooper in our Leeds office (0113 234 1220) or Andrew Parsons of our London office (020 7222 7040)

Images of patients

Beware the temptations of technology

Thousands of video and picture messaging telephones will recently have been bought by individuals. It will be tempting to use this technology in the workplace but should the temptation be resisted?

Photographs and film, indeed any image which illustrates a patient's condition or aspect of their treatment, forms part of the patient's medical record.

It does not matter whether the image was taken during working hours or in a clinician's own time. Nor does it matter whether the image was taken in the medical photography department or by clinicians themselves using personal cameras and telephones. Regardless of the circumstances, the record remains the property of the relevant Health Trust.

All medical records, and therefore all illustrative patient images from which personal information can be gained, are subject to the provisions of the Data Protection Act 1998 because they fall within the definition of personal data and sensitive personal data.

There is a very real danger that the provisions of the Act are being disregarded as new image technology is introduced, simply because health professionals are not aware how the Act applies to their practice.

Individual clinicians may well think it in their patient's best interests to take an image on a mobile phone and send it to a colleague on another site for a second opinion. Although perhaps well motivated, this action would be a mistake without the protection of a system of documentation and consent. Clinicians risk breaching the Data Protection Act and the common law principles of confidentiality and consent.

Establishing an up-to-date protocol

Trusts and private hospitals should develop an up-to-date and detailed Protocol which specifically addresses the use of patient images and the new technology.

Here are some areas which the Protocol should cover:

- Staff should understand that “photographic and video recordings which are made for treating or assessing a patient must not be used for any purpose other than the patient's care or the audit of that care, without the express consent of the patient or person with parental responsibility for that patient...” (*Department of Health 'Good Practice in Consent Implementation Guide' 2001*).
- The Protocol should set out who has the responsibility for obtaining express consent. Will it be the clinician or the medical photographer? Many health professionals are not sure or assume that the other party is handling the problem. As a result, many patients are currently receiving little or no information about the use of their images.
- There are three limbs to ‘express’ or ‘informed consent’: the patient must have the mental capacity to make a choice, the consent must be given voluntarily and there must be full disclosure about the potential uses to which the images may be put.
- The Protocol should particularly give staff guidance on what constitutes full disclosure, perhaps by encouraging proper use of patient information leaflets.
- Additionally, the Protocols of Trusts and private hospitals should cover the taking of and use of images in cases where the patient lacks the ability to make his or her own treatment choices. In general terms, therapeutic images should only be taken of an incompetent patient if it is considered in his or her best interests. In most cases non-therapeutic images should only be taken if it is possible to render the images genuinely anonymous.
- Trusts and private hospitals might also consider introducing a system whereby images are clearly labelled “only to be used for diagnostic or treatment purposes” or “authorised for undergraduate teaching” to minimise the risk of mistakes.

Give into temptation of technology by all means, but write a new Protocol first!



Kate Hill
Managing Director and Senior Trainer
InPractice

Human Tissue Bill

The Queen's speech announced that new legislation is to be introduced to revise the existing law on the retention and use of human tissue and organs. The Human Tissue Bill will implement changes following the Bristol, Alder Hey and Isaac Inquiries which highlighted serious failings in practices relating to organs, focusing on the failures of consultation with the relatives of deceased patients concerning the proposed retention and/or use of organs from the deceased patients - many of whom were children.

The Bill marks a major change in the law which, although having seen some changes with regard to issues such as the sale of human organs, has largely remained unchanged since the Human Tissue Act 1961. The 1961 Act has often been subject to criticism, largely with reference to the fact that it gives significant rights to the person 'lawfully in possession of the body', as a result of which hospitals have often been able to determine matters relating to the use and disposal of bodies of deceased patients. The Bill will repeal and replace the Human Tissue Act 1961 and also the Anatomy Act 1984 and the Human Organ Transplants Act 1989 as they relate to England and Wales.

The Bill will also introduce a regulatory regime in respect of activities involving human tissue and organs. In view of the amount of preparation anticipated for what is a major overhaul of the law and the corresponding healthcare practices it is not expected that the Bill will come into force before April 2005.

Alexandra Johnstone
alexandra.johnstone@rlb-law.com

RadcliffesLeBrasseur have published a detailed briefing note on the Human Tissue Bill. If you wish to obtain a copy, please address your request to: claire.mccormick@rlb-law.com.

InPractice Training services

InPractice offers interactive and practical medico-legal training specifically for healthcare providers. It has been providing training for over two years and works with 18 NHS Trusts, three private health providers and several major pharmaceutical companies.

InPractice can provide training on any current legal issue for healthcare providers such as informed consent, information sharing, serious untoward incident handling, root cause analysis, record keeping and documentation.

We offer our training in a variety of formats including a CD-Rom on Informed Consent, web based training and face-to-face workshops.

InPractice is a subsidiary company of RadcliffesLeBrasseur and is managed by Kate Hill who is an Associate Partner in the Healthcare team and an experienced trainer.

If you would like to discuss your training requirements with us, or obtain a quote, please visit our website at www.inpracticetraining.com or contact:
Joanne Kerr
Tel: 020 7227 7489
E-mail: joanne.kerr@inpracticetraining.com

5 Great College Street
Westminster
London SW1P 3SJ
Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU
Tel +44 (0)113 234 1220
Fax +44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA
Tel +44 (0)29 2034 3035
Fax +44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

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