



SCOTTISH EXECUTIVE

Health Department
Human Resources Directorate

St Andrew's House
2 Regent Road
EDINBURGH
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Dear Colleague

**Confidentiality and Disclosure of Information:
General Medical Services (GMS), Section 17c Agreements,
and Health Board Primary Medical Services (HBPMS)
Code of Practice and Directions**

Summary

1. This Circular introduces the code of practice on Confidentiality and Disclosure of Information effective from 1 September 2005 along with Directions to Health Boards.

Background

2 The Code of Practice sets out guidance on the confidentiality of information held by contractors who provide General Medical Services (GMS), Section 17c Agreements and Health Board Primary Medical Services (HBPMS).

3. The Code of Practice has been developed by the Scottish Executive in consultation with the Scottish General Practitioners Committee (SGPC) of the British Medical Association.

4 An electronic copy of this Code of Practice can be found at the SHOW and Pay Modernisation Websites at :

[http://www.show.scot.nhs.uk/sehd/pca/PCA2005\(M\)10.pdf](http://www.show.scot.nhs.uk/sehd/pca/PCA2005(M)10.pdf)

and

<http://www.show.scot.nhs.uk/sehd/paymodernisation/>

22 August 2005

Addresses

For action

Chief Executives of NHS Boards
General Medical Practitioners

For information

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Action

5. NHS Boards are requested to bring this Circular to the attention of GP practices in their area and their Area Medical Committee for the attention of the Secretary of the GP sub-committee.

Yours sincerely



MIKE PALMER
Assistant Director (Workforce and Pay Policy)

NATIONAL HEALTH SERVICE (SCOTLAND) ACT 1978

Directions on the Confidentiality and Disclosure of Information: General Medical Services, Primary Medical Services Section 17C Agreements and Health Boards Primary Medical Services Contracts

The Scottish Ministers in exercise of the powers conferred by section 2(5) of the National Health Service (Scotland) Act 1978(a) and of all other powers enabling them in that behalf, hereby give, for the purposes of section 2(5) of that Act, the following Directions:

Application, commencement and interpretation

1. – (1) These Directions shall come into force on 1 September 2005.

(2) In these Directions –

- “1978 Act” means the National Health Service (Scotland) Act 1978;
- “default contract” means a contract under article 13 of the General Medical Services (Transitional and Other Ancillary Provisions) (Scotland) Order 2004(c);
- “GMS Contract” means a contract under section 17N of the 1978 Act;
- “GMS Regulations” means the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004;
- “HBPMS contract” means arrangements made under section 2C of the 1978 Act for the provision of primary medical services;
- “Section 17C Agreement” means an agreement for primary medical services made under section 17C of the 1978 Act;
- “Section 17C Agreement Regulations” means the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004;

Compliance with the Code of Practice: Confidentiality and Disclosure of Information

2. In exercising any function, or in enforcing any right or obligation, pursuant to –

- a term of a GMS contract that gives effect to paragraph 70 (provision of information) or 73 (annual review) of Schedule 5 to the GMS Contract Regulations;
- a term of a Section 17C Agreement that gives effect to paragraph 36 (provision of information) or 39 (annual review) of Schedule 1 to the Section 17C Agreement Regulations;
- any equivalent terms to those specified in paragraph (a) in a default contract; or

- any equivalent terms to those specified in paragraph (b) in an HBPMS contract.

a health board shall, insofar as it is relevant to its exercise of that function, or the enforcement of that right or obligation, act in accordance with paragraphs 20 to 24, 29 to 31, 33 to 35 and 37 of the document entitled “Confidentiality and Disclosure of Information: General Medical Services (GMS), Section 17C Agreements, and Health Board Primary Medical Services (HBPMS) Code of Practice” dated 1 September 2005.

Michael Palmer
A Member of the Staff of the Scottish Ministers

A handwritten signature in cursive script that reads "Michael Palmer".

Scottish Executive Health Department
Edinburgh
1 September 2005

**Confidentiality and Disclosure of Information:
General Medical Services (GMS), Section 17C Agreements,
and Health Board Primary Medical Services (HBPMS)
Code of Practice**

1 September 2005

CONFIDENTIALITY AND DISCLOSURE OF INFORMATION: GMS, SECTION 17C AND HBPMS CODE OF PRACTICE

Introduction

1. This Code of Practice sets out guidance on the confidentiality of information held by contractors - referred to collectively in this document as “contractors” – who provide General Medical Services (GMS), Section 17C Agreements and Health Board Primary Medical Services (HBPMS). Similarly where the term “contract” or “contracts” is used in this document it refers to the contracts or agreements entered into by those who provide GMS, Section 17C and HBPMS (unless there is a specific reference to the contrary). It also sets out guidance on the provision of contractor-held information to Health Boards, and access by, and disclosure of, that information to Health Boards or a person authorised in writing by Health Boards.
2. This Code has been developed by the Scottish Executive Health Department in consultation with the Scottish General Practitioners Committee (SGPC) of the British Medical Association, and other key stakeholders, including representatives from patient bodies. It makes explicit existing legal and ethical obligations of confidentiality, placing them in the context of new primary care contractual arrangements. It does not cover in detail all circumstances in which contractor-held information may be requested, but sets out principles of good practice for contractors of primary medical services and Health Boards who commission services from them. It also describes circumstances in which the Scottish Executive Health Department may request access to certain contractor-held information. Health Boards are required by Directions to comply with the provisions of this Code when exercising certain functions^a. Health Boards should normally seek actively to involve and engage the GP subcommittee of the Area Medical Committee in relation to the Code where there are any potential issues of contention or where contractors may require additional support.

^a The Confidentiality and Disclosure of Information – General Medical Services, Section 17c and Health Board Primary Medical Services Directions 2005.

3. Health Board Direct Provision of Primary Medical Services is not covered by the Directions to Health Boards since the arrangements for providing Direct Provision differ in certain respects from the other primary care contractual arrangements. However, Health Boards using Direct Provision are expected to follow the principles in this code.

Legal Context

4. The NHS (General Medical Services Contracts)(Scotland) Regulations 2004^b, the NHS (17C Agreements) Regulations 2004^c and the HBPMS^d directions (referred to collectively in this document as “the regulations and directions”) include provisions relating to patient records, the confidentiality of personal data, rights of access to, and the provision of patient and practice information held by contractors, In particular, the regulations provide that GMS contracts, Section 17C agreements and HBPMS contracts must contain a term requiring contractors, at the Health Board’s written request, to produce to the Health Board, or a person authorised in writing by the Health Board; or allow access by the Health Board, or a person authorised in writing by the Health Board, to:-
 - (i) information which is reasonably required by the Health Board for the purposes of, or in connection with the GMS Contract, Section 17C agreement or HBPMS contract; and
 - (ii) any other information which is reasonably required in connection with the Health Board’s functions^e.

Where full clinical records need to be accessed to gain information, this should be done by a clinician, normally a GP.

Such requests are required to be made by Health Boards in accordance with the Directions.

^b SSI. 2004/115

^c SS.I. 2004/116

^d Health Board Primary Medical Services Contracts (Scotland) Directions 2004 .

^e See paragraph 36,Schedule 1 SSI 2004/116 to the NHS (PMS Section 17c Agreements)(Scotland) Regulations 2004.

5. This Code does not detail each specific provision within the regulations that deal with obligations on a contractor to provide specific information or reports to Health Boards or other bodies, for example:-
- (i) the requirement to send clinical reports to the Health Board where services are provided to non-registered patients (see, for example, Schedule 5 paragraph 7 of the GMS Contracts Regulations);
 - (ii) notifications of deaths (see, for example Schedule 5 paragraph 79 of the GMS Contracts Regulations).

Scope of the Code

6. This Code applies to contractors and to Health Boards, to all the staff employed by the practice and Health Boards for the purposes of the contract, and individuals involved in work under the contract who are otherwise associated with the practice (for example locum GPs). It covers Health Board access to, or requests for disclosure of, contractor held information. This includes information to support payments under the Quality and Outcomes Framework (QOF) in relation to GMS^f.
7. Four categories of information are covered in this Code:-
- (i) anonymised or aggregated patient information;
 - (ii) confidential patient information;
 - (iii) practice-level information;
 - (iv) information about individual staff employed by the practice for the purposes of the contract, and individuals involved in work under the contract who are otherwise associated with the practice (eg locum GPs).

^f Detailed guidelines on the operation of the QOF are set out in *eg Delivering Investment in General Practice* http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4070242&chk=tokzna
Implementing the new GMS contract in Scotland (Chapter 3) –
http://www.show.scot.nhs.uk/sehd/paymodernisation/gms/leg_guide/gms_leg.htm#guidance
RCGP QOF Reviewers Manual :
<http://www.rcgp-scotland.org.uk/quality/qofreviewerstraining.asp>

8. In dealing with disclosure of information, contractors, Health Boards and the other bodies referred to in this document should have regard to other publications issued to support implementation of the GMS Contract, 17C and HBPMS, and to:
 - i) “ the NHS Code of Practice on Protecting Patient Confidentiality” (Aug 2003).
www.show.scot.nhs.uk/confidentiality or www.nhsis.co.uk/confidentiality.
9. Although they are not explicitly covered by this Code, Annex A outlines the position in relation to:
 - (i) Quality Improvement Scotland
 - (ii) NHS Scotland Counter Fraud Services (CFS)
 - (iii) NHS Internal Audit;
 - (iv) Social Services Departments;
 - (v) Researchers.

General Principles

10. Patient information held by contractors is generally held under legal and ethical obligations of confidentiality. Patients seeking treatment entrust sensitive information to those who provide their healthcare. They do so in confidence, and have the legitimate expectation that their privacy will be respected, and that their health records will be used by the health service to support their healthcare. Information that can identify individual patients must not be used or disclosed for purposes other than healthcare without the individual’s explicit consent, or some other legal basis, such as a robust public interest or legal justification for doing so.
11. However, the provision of care and treatment does require information to be shared appropriately amongst those that provide that care. In addition, data (which will in most cases be anonymised or aggregated) is required to support the wider functioning of the NHS, including for management of healthcare and audit purposes. When Health Boards require access to information, they should explain to practices the precise purpose for which access is required and who will gain access. Generally, patients who present for care are assumed to consent to the required information sharing between clinicians for the purposes of their individual healthcare needs, and those in the NHS to whom they are accountable. Ensuring that patients understand how such information may be shared underpins this assumption and is therefore extremely

important. Where appropriate, clinical and non-clinical staff may need to discuss consent issues with patients and check patient understanding. This is covered in more detail in the NHS Scotland Code of Practice on Protecting Patient Confidentiality.

12. Patient Information should only be held, used or shared appropriately and with good reason. Where information identifies individuals, it is likely to be subject to Data Protection Act provisions. Where those individuals are patients, there will be obligations of confidentiality and privacy. Even where there are no apparent legal restrictions on disclosing or permitting access to information, care should be taken to ensure that its use will not result in detriment, whether to individuals, to practices or the wider NHS, unless there is a robust public interest in disclosing information, such as clinical or financial audit or healthcare governance, or a legal basis, such as a request under the Freedom of Information (Scotland) Act or disclosure in accordance with the Data Protection Act.

13. The standards and constraints that apply to the holding, using and sharing of information are important components of NHS Information Governance. This Code of Practice reflects the NHS Information Governance principles and key standards in relation to the disclosure of, or access to, information. The NHS Information Governance toolkit is available at <http://www.show.scot.nhs.uk/dataprotection/> The key governance principles are that:-
 - (i) Contractors should provide a confidential and secure service for patients;
 - (ii) Information should only be disclosed or shared by contractors when it is lawful to do so;
 - (iii) Information should be disclosed or otherwise shared by contractors on a “need to know” basis;
 - (iv) Where Health Boards need to obtain information from contractors, the minimum necessary information should be determined and the disclosure limited accordingly;
 - (v) Where, exceptionally, there is a need for Health Boards to seek access to or to obtain information beyond that generally required for their day to day business, and where access to patient identifiable information is necessary (see paragraph 30-32), the process of obtaining such information will be open to audit and appropriate scrutiny – such as by NHS auditors, or Caldicott Guardians;

- (vi) Where data is required that identifies an individual patient, the patient's consent may be necessary, depending on the circumstances and purpose for which the data is required (see paragraphs 30-32). -

14. Even though sharing information for healthcare purposes will be lawful within GMS practices, 17C schemes or HBPMS arrangements, personal medical records should only be accessed within practices on a “need to know” basis, for example, by:-

- (i) GPs, who will usually have access to the complete clinical record;
- (ii) Other health professionals involved in the care of patients, eg nurses and allied health professionals employed by the contractor or other organisations such as the Health Board In some situations, only a summary of clinical information may be required that relates to a particular aspect of patient care^g;
- (iii) Contractor staff with responsibility for the management of patient records, including security and the transfer and updating of records;
- (iv) Health professionals employed by local authorities – eg in Care Homes.

Providing a Secure & Confidential Service

15. This Code requires that all disclosures of information follow the principles of limiting disclosure to the minimum necessary, keeping patients informed and seeking consent where appropriate, disclosing information for defined purposes only, and only permitting access to information on a need to know basis. This provides for a procedural hierarchy, i.e.

- (i) Where anonymised information will satisfy a purpose, disclosure should be limited to anonymised information as far as is practicable;
- (ii) Where anonymised information will not suffice or is impracticable, the patient's consent may be necessary, depending on the circumstances and purpose for which the data is required (see paragraphs 30-32). Where such

^g All qualified nurses are required to be registered with the Nursing Midwifery Council and are therefore required to abide by the Code of Professional Conduct, which includes protection of confidentiality of the patient or clinical record. Nurses are personally accountable for their own practices. Allied Health Professionals are regulated by the same requirements.

consent is not sought or is not required, reasons for disclosure must be demonstrated and recorded, and there must be a clear audit trail.

16. All NHS organisations are expected to meet, or have improvement plans that in time will enable them to meet, appropriate confidentiality and security standards as outlined in the NHS Scotland Code of Practice on Protecting Patient Confidentiality.
17. The key elements of information governance that contractors should have regard to are:
 - (i) Procedures should be in place to ensure that contractors, staff and volunteers are aware of their responsibilities regarding confidentiality and security;
 - (ii) Employment contracts should include specific requirements relating to the confidentiality of personal patient information, linked to disciplinary procedures;
 - (iii) Patient information should be recorded accurately and consistently;
 - (iv) Patient information should be kept private;
 - (v) Patient information should be kept physically secure;
 - (vi) Information should only be used and disclosed with appropriate care;
 - (vii) Patients should be informed, in general terms, how their information may be used, who will have access to it and the organisations it may be disclosed to.
18. Contractors are required by virtue of their Contract to nominate a person with responsibility for practices and procedures relating to the confidentiality of personal data held by the contractor^h. This reflects an existing requirement that applies to all other NHS bodies, where roles such as ‘Caldicott Guardian’ or ‘Caldicott Lead’ are common. In primary care, this responsibility might be delegated to an appropriate member of the practice, though clinicians will need to be involved where decisions about the disclosure of confidential clinical information need to be made. Contractors should also have regard to the need for security of personal data.
19. Contractors providing essential services must ensure that their Patient Information Leaflet contains details of who has access to patient information (including information from which the identity of the individuals can be ascertained) and the

^h See paragraph 68 to Schedule 5 of the NHS (GMS Contracts)(Scotland) Regulations 2004 and paragraph 34 to Schedule 1 of the NHS (PMS Section 17c Agreements)(Scotland) Regulations 2004

patient's rights in relation to the disclosure of such informationⁱ. The leaflet should refer to the possibility of anonymised or patient identifiable information being disclosed for the purpose of the provision of care and treatment and the management of healthcare services within the NHS. Patients should also be informed of their rights under the Data Protection Act, including any procedures for complaint or objection. Contractors may also want their leaflet to identify who should be the point of contact for those who have concerns about confidentiality issues. Practices may wish to refer to this Code of Practice in their Leaflet, and where a copy can be obtained.-

Anonymised or aggregated patient information

General

20. Wherever practicable, patient data disclosed for purposes other than the patient's care should be anonymised. Anonymised or statistical information is not confidential and may be used with relatively few constraints. *Anonymised information* is information that does not identify an individual. Anonymisation requires the removal of name, address, full postcode, date of birth, NHS number and local patient identifiable codes, and any other detail or combination of details that might support identification. *Aggregated information* is statistical information, which, if care is taken with respect to rare conditions etc, will also provide anonymity for patients.
21. In certain circumstances, contractors may need to anonymise patient records prior to disclosure. It will usually be for the person passing on the data to ensure that it is passed on in a non-identifiable form, wherever that is practical. Health Boards and contractors should aim to work together to develop the capacity to generate anonymised and aggregated information. In particular, the upgrading of practice IT equipment will provide opportunities to improve this capacity.
22. There are circumstances where it will not be practicable for anonymised information to be generated in order to satisfy the purposes of third parties. This may be because there is limited capacity to anonymise information by a contractor, or where the contractor is unable to anonymise data with a reasonable degree of ease for example

ⁱ See paragraph 69 to Schedule 5 of the NHS (GMS Contracts)(Scotland) Regulations 2004. Paragraph 35 to Schedule 1 of the NHS (PMS Section 17c Agreements) (Scotland) Regulations 2004 sets out requirements with regard to practice leaflets for PMS contractors who provide essential services.

because it would involve substantial additional work, or because the purpose to be satisfied requires examination of original records. Where any of these apply, care must be taken to ensure that disclosure of information is lawful.

Health Boards

23. Health Boards require access to anonymised patient information for a range of purposes in order to fulfil their statutory responsibilities to provide primary care services and discharge their wider functions. Where Health Boards require access, they should explain to practices the precise purpose for which access is needed and who will gain access. These circumstances include:-

- (i) Strategic planning;
- (ii) Financial management;
- (iii) Public health;
- (iv) Workforce planning;
- (v) To check that payments under the Quality and Outcomes Framework (QOF) are, or have been, accurate, complete and correct;
- (vi) To carry out an annual review of the contractor's performance, including patient experience, against the QOF;
- (vii) Clinical audit purposes;
- (viii) Internal audit;
- (ix) To deter, prevent and detect fraud;
- (x) Where the Health Board has concerns about a contractor's compliance with its contract.

24. A person acting on behalf of the Health Board, must, if requested, produce written authorisation to the contractor in order to see or access information held by the contractor.

Scottish Executive Health Department

25. Anonymised or aggregated information may also be requested for certain purposes by Scottish Executive Health Department.

26. Under paragraph 70 of Schedule 5 to the NHS (GMS Contracts)(Scotland) Regulations 2004 or its 17C/ HBPMS equivalents, a contractor is only required to provide information to the Health Board or a person authorised in writing by the Health Board. There may be some occasions where the information needs of the Scottish Executive Health Department can be more effectively met by asking a contractor directly for anonymised or aggregated information. Failure to comply with a request for information from a Health Board or the Department will not be a breach of contract. However, in deciding how to respond, contractors should bear in mind that the same request for information may later be made by the Health Board in accordance with the terms of the contract and this Code.
27. The Scottish Executive Health Department may request information deriving from practices in order to support the Department's work. These data, such as the Attribution Dataset for resource allocation, will usually be requested via Health Boards.

Confidential Patient Information

General

28. By definition, confidential patient information is that which can identify individual patients and is information that was gathered in circumstances where it is reasonable for the patient to expect his/her confidences to be respected.

Health Boards

29. The circumstances in which the Health Board, or persons authorised by the Health Board, may need to access and obtain information that identifies individual patients should be limited. A decision to disclose such information to the Health Board will be a matter for the contractor. However, a contractor may risk being in breach of its contract if it refuses to produce information which the Health Board reasonably requires and which it has requested in accordance with the relevant requirements of

this Code. The circumstances in which, in the view of the Department, patient identifiable information would generally be reasonably required by the Health Board and could lawfully be disclosed by the practice would include:-

- (i) where the practice is unable to anonymise data that is needed to support the wider functioning of the NHS, including the management of healthcare services, such as the QOF annual review process. For example, this may be where the practice does not possess an IT system which can ensure complete anonymisation, or where it is not practicable to anonymise paper records - such as where this would require substantial additional work on the part of the practice, or where the practice cannot guarantee to erase all identifying information. The practice should make a judgement in the context of each request for information as to whether or not anonymisation is practicable. Where anonymisation is not practicable, data may be released to the Health Board in patient identifiable form (but see paragraph 31).
- (ii) where the Health Board is investigating and assuring the quality and provision of clinical care - for example, in relation to a written complaint made by, or on behalf of, a patient (whether living or dead);
- (iii) where it is needed in relation to the management of the contract or agreement – for example, where remedial action, or termination of the contract/agreement is being considered (eg because of poor record keeping);
- (iv) where the Health Board considers there is a serious risk to patient health or safety;
- (v) investigation of suspected fraud or any other potential criminal activity;

30. In cases where patient identifiable information is required, it will, in some circumstances, be necessary to obtain the consent of the individual concerned to disclosure. This will depend upon the circumstances of the case. For example, consent will not be necessary to comply with the Data Protection Act or common law duties of confidentiality where the practice is unable to anonymise data and the Health Board reasonably requires access to that data for

- checking legal entitlement to payments; or
- the management of healthcare services - provided that those accessing that data are bound by a duty of confidentiality not to disclose information.

Where a Health Board requires access to a particular patient record for the purposes of the QOF and the practice can demonstrate that disclosure of that particular record would:

- (a) be unlawful for a reason not relating to data protection or the common law duty of confidentiality – e.g. because of a court order or another statutory requirement;
- (b) involve the disclosure of personal data relating to third parties without their consent and which cannot be removed with a reasonable degree of ease; or
- (c) a patient has explicitly requested non-disclosure of particularly sensitive aspects of their records which cannot be removed from the material to be disclosed with a reasonable degree of ease,

the practice should explain its reasons for non-disclosure to the Health Board and ask the Health Board to select a different record. Health Boards should normally accede to such requests, unless the purpose for which the information is required would thereby be defeated. If this is the case, the issue of consent to disclosure should be further considered.

31. Where the patient's consent is not sought to identifiable information, the reasons why must be documented and there must be a clear audit trail. The NHS Code of Practice on Protecting Patient Confidentiality provides further guidance about access to and disclosure of patient-identifiable information. Where a practice is making a disclosure on the basis that it is justified in the public interest (eg to prevent abuse or serious harm to others) and that the public good which would be achieved by disclosure outweighs the obligation of confidentiality to the individual patient concerned, such a disclosure should be proportionate and limited to relevant details. Contractors should be prepared to justify such disclosures to a court or regulatory bodies.
32. It is not in general necessary for the Department to see individual patient level data. However, Information Services, NHS National Services Scotland, as an agency of the Scottish Executive Department collates patient data at postcode level in the Attribution Data Set (Annex B) Whilst not containing readily identifiable individual level data, it includes sufficient detail to allow data about individuals to be deduced. Information Services, NHS National Services Scotland therefore has in place effective security and management protocols to safeguard patient privacy during data processing. All of the outputs are of aggregated data.

