**14.10.2020**

**Occupational Health Records of deceased persons - ethical considerations relating to confidentiality and disclosure**Although the topic of confidential OH records is well covered in the 8th Edition of the FOM Ethics Guidance, the recent pandemic events have seen a number of similar contacts seeking ethical advice from the Faculty in relation to requests for release of OH clinical records without informed consent.

Most such requests relate to OH records of deceased NHS workers where the concern of interested parties is centred on COVID-19 as the potential causal agent. In some cases, the records are being requested by non-clinical staff (HR or lawyers) to consider issues relating to the possible legal liability of the employer. In others, a Medical Director or Caldicott Guardian has been the origin of a request to support an internal investigation and, in some cases, the request has come directly from HSE.

OH staff have been placed under considerable duress for urgent release, and senior staff in the employing organisations have argued that they are the owners of the records and have the right to access as Data Controllers.

Ethically, it would be usual to require informed consent from the next of kin to release a confidential clinical OH record. Legally, the Access to Health Records Act 1990 gives the right of access to the personal representatives of the deceased’s estate and anyone with a claim arising from the death. Neither the GDPR nor the Data Protection Act 2018 applies to the personal data of the deceased.

As the FOM Ethics Guidance makes clear, OH practitioners holding clinical records have duties to protect confidentiality that extend beyond GDPR or Data Protection Regulation. Even where consent is not used as a lawful basis for processing personal data under the GDPR, clinical OH records are also covered by Common Law duties to protect confidentiality and by professional registration requirements, both of which require Informed Consent to release records, except in limited circumstances, where there is a statutory exemption or it is in the public interest to do so.

HSE, as a Regulatory Authority, does have a statutory power to make such requests and, whilst it would be good practice to inform the next of kin of release of a copy, the OH records can be released to enable HSE investigation.

A lawyer or employer does not in most cases have statutory authority to access the contents of OH records, in breach of the common law duty of confidence, without informed consent or a court order. Recent emergency measures to control the pandemic have seen a ministerial statement made in pursuance of Regulation 3 of the Health Service (Control of Patient Information) Regulations 2002 that requires, if a clear public interest argument is made, compliance with a request to enable an investigation. Such a request has been validly made for the release of OH records in relation to a cluster of NHS COVID related morbidity in a single organisation – in this case, the records were released to a senior clinician leading the investigation.

OH staff are advised to question the basis of an authority being cited as a reason for the release of a clinical record. Those requesting records, with appropriate authority, would be expected to be able to cite the relevant legal basis under which the request is being made. It is important to recognise that the GDPR alone is not a sufficient basis. Wherever possible, the informed consent of the next of kin should be sought. Clinicians may also seek advice from their clinical indemnity insurer or Registration Body.

OH staff are advised to make sure that their actions, when releasing OH records are clearly recorded in the employee’s records. It should be apparent who the records were released to, when, and on what legal basis. In doing so the OH professional should be able to demonstrate that they have acted in good faith and in line with expected practice.

These requests have also highlighted concerns about the integrity and protection provided when electronic clinical records are stored on the employer’s IT systems. OH providers should ensure security measures are maintained to limit access as far as reasonably possible to only authorised OH staff (or in the case of general clinical records, appropriate staff) with a genuine legally appropriate need to access and use the record (as defined within Data Privacy notices), just as you would with physical written records filed in appropriately locked storage.

If the OH professional has reason to believe OH records were inappropriately released, they should consider alerting their organisation’s Data Protection Officer as well as seeking advice from their indemnifying organisation. OH professionals can also seek advice from the Office of the National Freedom to Speak Up Guardian as well as the Office of the Information Commissioner.

**Acknowledgement**

The Faculty of Occupational Medicine acknowledges and is grateful for the work of the FOM Ethics Committee who have provided this clarification.

Dr Anne de Bono Dr Steve Boorman   
President Chair, Ethics Committee **References**

[Ethics Guidance for Occupational Health Practice](https://www.fom.ac.uk/publications-policy-consultations/ethics-guidance-for-occupational-health-practice), Faculty of Occupational Medicine (2018) 8th edition (3. Information)

Notice from the Secretary of State for Health and Social Care under the Health Service (Control of Patient Information) Regulations 2002 requiring NHS England and NHS Improvement to process confidential patient information for purposes related to COVID-19. <https://www.england.nhs.uk/wp-content/uploads/2020/06/COPI-notice-to-nhs-england-improvement-covid-19.pdf>