

Law Commission Consultation

Thank you for getting in touch about your search warrants project, and for sending over the briefing paper. I'm sorry that it's taken us a little while to get back to you.

I can see that you're familiar with our guidance on confidentiality, which is guidance that we expect all doctors registered with us to follow. The legal and ethical principle of confidentiality is central to the relationship between doctors and their patients, and to maintaining trust in the profession. However, we recognise that the principle is not absolute, and there are certain circumstances in which it is legally permissible, and ethically justifiable, to disclose information without a patient's consent (which is, of course, the most usual basis on which a doctor would share information). However, we would not wish to see a weakening of this principle, and any changes that you make must uphold it.

We strongly agree with the fundamental principle that medical records must be excluded from the material covered by search warrants. But we do accept that there may be very exceptional circumstances in which it may be necessary to include medical records within the scope of a search or production warrant, where they are central to the investigation of a serious crime. However, the GMC does not have a view on the legislative means by which that might be achieved.

You have noted that currently, where there is no search or production warrant available, the disclosure of medical records relies on the decision of the record holder who must weigh up whether the disclosure would be in the public interest. You have proposed that this decision should be taken by a judge, and that this would be preferable for several reasons. We agree that there could be benefits to this approach, but there are also other considerations. For example, you say that doctors may not be best placed to assess the relevance of the information to the investigation. The other side of this though, is that judges may not be best placed to assess the other factors that might weigh against disclosure (factors that affect both the public and the patient's interest in keeping the information confidential).

We support a requirement that patients are informed about applications for search warrants or production orders that cover their medical records and have the right to make representations. Being open with patients about how their information will be shared is a key principle of our guidance for doctors, including in cases where the doctor must share information against the wishes of their patient (unless it is not practicable or safe to do so, see paragraph 68 of confidentiality). You have mentioned circumstances in which it might be impractical to seek a patient's views, including where it is not clear whose records may be present and material might need to be sifted. This raises some questions for us:

- What is the duty of confidentiality on a police officer or other employee who conducts sifting of material that includes medical records? It should be equivalent to the duty on doctors and other healthcare and affiliated staff who can access the records in the normal way.
- Any material that turns out not to be material to the case should not be disclosed further and should not be retained.
- Should people be informed that their records have been sifted after the fact?
- What if the material discloses evidence of another, unrelated crime? If doctors are informed of a crime, they must disclose this if they are legally required to. Otherwise, in the absence of patient consent, they may only disclose this information if it is justified in the public interest because failure to do so may expose others to a risk of death or serious harm. This takes into account various factors and the bar for disclosure is high. Would the police officers or other employees take a similar approach?

I hope that this is helpful and we'd welcome your responses to the above questions.