

# Decisions on sharing information related to a doctor with the police – supplementary guidance for decision makers

## Introduction

- 1 The purpose of this guidance is to provide additional support for decision makers by giving a detailed explanation of the key factors they must consider when deciding if information about potential criminal conduct should be shared with the police. It should be read in conjunction with the overarching guidance for staff on [sharing information with the police](#).
- 2 The guidance is not intended to be exhaustive as each potential disclosure will be unique and the decision maker must consider its individual circumstances before reaching a decision. It is intended to support a consistent approach by providing lawful and proportionate principles for decision makers to adopt when disclosing information to the police.

## Potential allegations of gross negligence manslaughter

- 3 If the concern relates to possible gross negligence manslaughter (GNM), you should also follow the guidance outlined in this [Memorandum of Understanding](#) (MOU) published and co-ordinated by DHSC if we have not already done so. As a signatory to the MOU, we have a responsibility to co-ordinate an Incident Coordination Group meeting although this will only arise if we are the first organisation to identify the concern. Although this is likely to happen rarely, any such instances should be brought to the attention of the Assistant Director for Investigations who will advise on the appropriate next steps. If the doctor is a trainee, you should also inform the Head of Section or Assistant Director for Quality Assurance - Monitoring and Improvement (QAMI) in Education who will refer to the relevant regional team and postgraduate training organisation. Please note that the MOU only applies in England and to cases where we need to investigate, in parallel, any incident where there is a reasonable suspicion that a criminal offence has or may have been committed by an individual providing healthcare services in a health or care setting and the individual's actions leads to or significantly contributes to the death or serious life-changing harm of a patient or service user (please refer to paragraph 4.1 of the MOU.)

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## Key considerations as listed in decision template

- 4 A template has been developed to enable the decision maker to record their decision in a consistent way that shows they have taken all the relevant factors into account. This will help provide an effective audit trail if we are challenged on a decision to share information. The template is at annex A and identifies the following as key factors:

## Identifying the potential criminal conduct

- 5 The decision maker should confirm the identity of the individual who is suspected of criminal conduct and the alleged victim (if applicable.) Reference should also be made to the evidence we have received which gave rise to the allegation of potential criminal conduct. The decision maker can do so in broad terms and does not need to give a detailed summary (this should have been completed by the referring Investigation Officer (IO) in the first part of the template.)

## Threshold for sharing information

- 6 The second question the decision maker must address is whether the threshold is met for sharing information with the police. The threshold to be applied is as follows:
  - Is there sufficient information to form a reasonable belief that a criminal offence may have been committed by a doctor or third party directly involved in a fitness to practise investigation and the police are not aware of the matter?
- 7 In order for it to be reasonable, there needs to be some evidence to support our belief and we should not make a referral based on information that amounts to an unsubstantiated or fanciful assertion. However, although some supporting evidence is required, we do not need to have made a judgement as to its credibility as this is a matter for the police.
- 8 Although we do not need to carry out detailed investigations to form a reasonable belief that a criminal offence may have been committed, we should carry out simple enquiries if they are necessary to clarify matters. This could include contacting a complainant or other party to check an important piece of information. The appropriate member of staff to make enquiries will be agreed with the Convictions team, but is likely to be whoever has built up the relationship with the information provider. They will do so discreetly without referring to the fact we are considering a disclosure to the police.
- 9 If the threshold is not met then the decision maker should proceed to record their decision that no disclosure should be made to the police. There is no need to complete the rest of the form.

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## Do we have a legal basis for disclosure under section 35B(2) of the Medical Act 1983 (“the Act”)?

- 10** If the threshold is met, the decision maker should go on to consider whether our discretionary power to share information under section 35B(2) of the Act is applicable. This is the relevant legal basis for disclosure and can only be used if the following criteria apply:

### Criteria one

- The information relates to an individual doctor’s fitness to practise

It may be necessary to obtain legal advice on the applicability of section 35B(2) powers of disclosure if the information arises in the context of a fitness to practise case (e.g. it is provided by a complainant or discovered in other investigation documents such as medical records or witness statements) but it is not clear if it relates to a doctor’s fitness to practise. There should be a direct link between the information which raises a suspicion of criminal conduct and an allegation about an individual doctor’s fitness to practise but the doctor does not need to be involved in the criminal conduct.

### Criteria two

- The decision maker considers it to be in the public interest to disclose the information

There is not a set definition of the public interest. However, in this context, the relevant public interest is in protecting members of the public from harm and allowing the police to carry out their statutory responsibilities to detect, prevent and prosecute crime. The Medical Act 1983 (as amended) makes it clear that public protection is the overarching objective of the GMC and that this includes protecting, promoting and maintaining the health, safety and wellbeing of the public. The public interest also involves “promoting and maintaining public confidence in the medical profession” in accordance with section 1B(b) of the Act. This is likely to be relevant where the alleged criminal conduct relates to a doctor’s behaviour outside of work, rather than their clinical practice. There is an important distinction however between what is in the public interest, and what is interesting to the public or subject to public clamour, especially in the media.

The public interest test will be satisfied in circumstances where we have formed a reasonable belief that a criminal offence may have been committed and the police are not aware of the matter. If the threshold for sharing information is met, the decision maker can safely conclude it will be in the public interest to make a referral to the police so they can undertake their statutory responsibilities.

### Legal advice on section 35B(2)

The decision maker should bear in mind that it will be necessary to obtain legal advice if there is a genuine concern over whether we can legitimately rely on section 35B(2) of the

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Act to share information. If the decision maker is not confident that we can rely on section 35B(2) powers but the threshold is engaged, legal advice should be sought as to whether there is any alternative basis on which we could make a limited disclosure to the police, in the particular circumstances of the case, and the decision maker should proceed to complete the rest of the form.

## Has the alleged victim or doctor (in the case of a self referral) raised any objections to the information being shared?

- 11** We will usually inform the victim of the alleged criminal conduct (where applicable) or, in the case of a self-referral, the doctor that we intend to share information about them with the police and give them an opportunity to raise objections. However, this will not be appropriate in the following circumstances:
- we have evidence of an immediate threat to specific individuals or the wider public or the alleged criminal conduct is so serious that we cannot delay sharing information with the police
  - the relevant individual is known not to have the capacity to consent to the disclosure of information (capacity should be assumed unless we have clear evidence that it is compromised)
  - it is not practicable to seek the views of the relevant individual on our intention to disclose the information e.g. we have no means of obtaining their contact details
  - in the case of a self-referral by a doctor, where there are no concerns that it may lead to them destroying evidence or interfering with witnesses.
- 12** We do not need to provide notification to the alleged perpetrator of the criminal conduct that we intend sharing information about them as this may give rise to tipping off concerns. This is compliant with data protection legislation which provides exemptions to its principles for the processing of personal data for the prevention and detection of crime.
- 13** We will not contact the alleged victim or doctor unless an initial view has been given by the Head of Section for NIT that the threshold for sharing information with the police has been met. This view will usually be given by e-mail. In some cases which are particularly complex or the decision is finely balanced, it may also be necessary to obtain legal advice on whether disclosure is appropriate before notifying the alleged victim that we are minded to share information about them with the police.
- 14** If we have contacted the alleged victim or (more rarely) a doctor who has self-referred criminal conduct to us, the decision maker will need to consider any objections that they have made to information about them being disclosed to the police. This is a relevant factor in the final decision and the objections need to be weighed against the other factors in favour of disclosure including the public interest.

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## Compliance with data protection legislation

- 15** It is important to ensure that any disclosure is lawful and proportionate. We should only disclose the information that is needed by the police to assess whether a criminal offence has been committed. The decision maker will need to consider whether the proposed disclosure will comply with the Data Protection Act 2018 (DPA) and the UK General Data Protection Regulation (UK GDPR)
- 16** The decision maker should take the following into account when considering if the proposed disclosure is in accordance with data protection legislation:

Disclosure to the police may involve more than one individual's personal data (for example, a doctor and a patient)

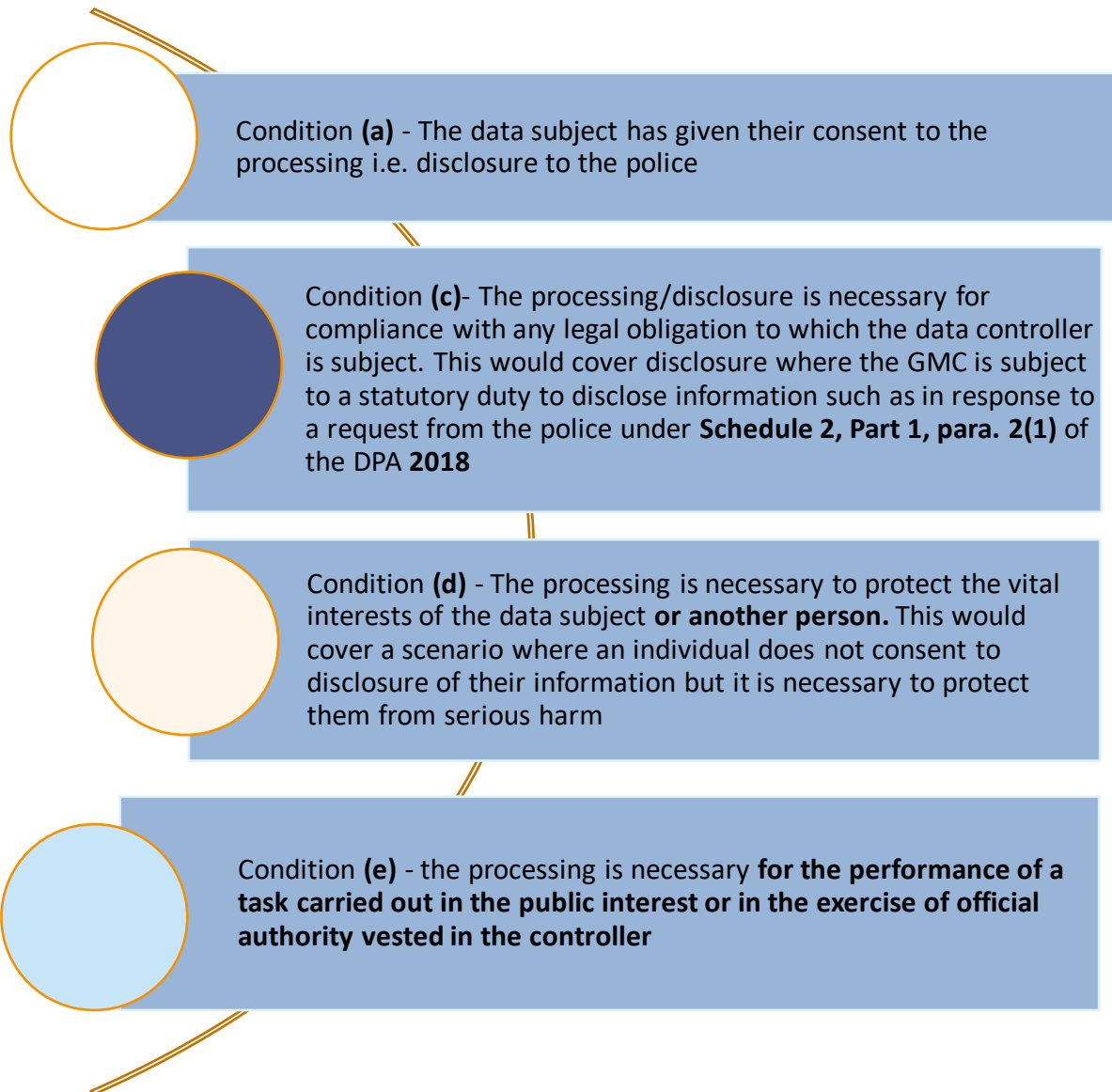
- The provisions of **data protection legislation** must be satisfied in respect of the information disclosed for each individual

Information disclosed to the police about the commission or alleged commission of a criminal offence **are no longer defined as special category data** under the DPA 2018 **but we still need to consider if disclosure is appropriate.**

- Disclosure of **this type of personal data** requires a condition under both **Article 6 and Article 9 of the UK GDPR** to be satisfied

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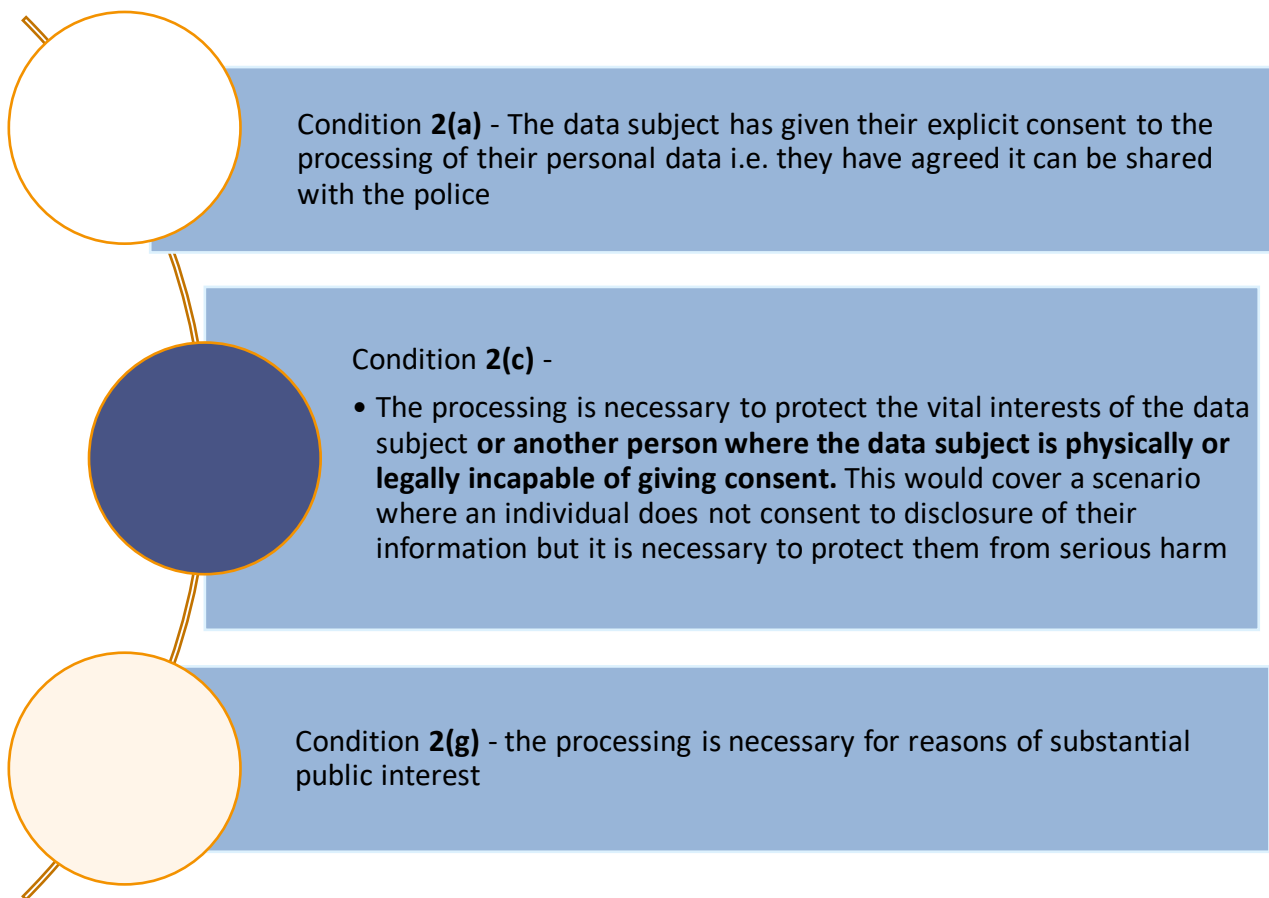
## Article 6 conditions



- 17** In order for the disclosure to comply with data protection legislation, it must satisfy at least one of the conditions listed in Article 6 of the UK GDPR. The most relevant conditions are listed in the diagram above and the decision maker should choose the most applicable one(s). It is likely that condition (e) will be most commonly used.

## Article 9 conditions

- 18** Information about the commission or alleged commission of an offence is not defined as special category personal data in the UK GDPR. Nonetheless all disclosures to the police about potential criminal conduct must satisfy one of the conditions in Article 9. This is in addition to an Article 6 condition as detailed above.



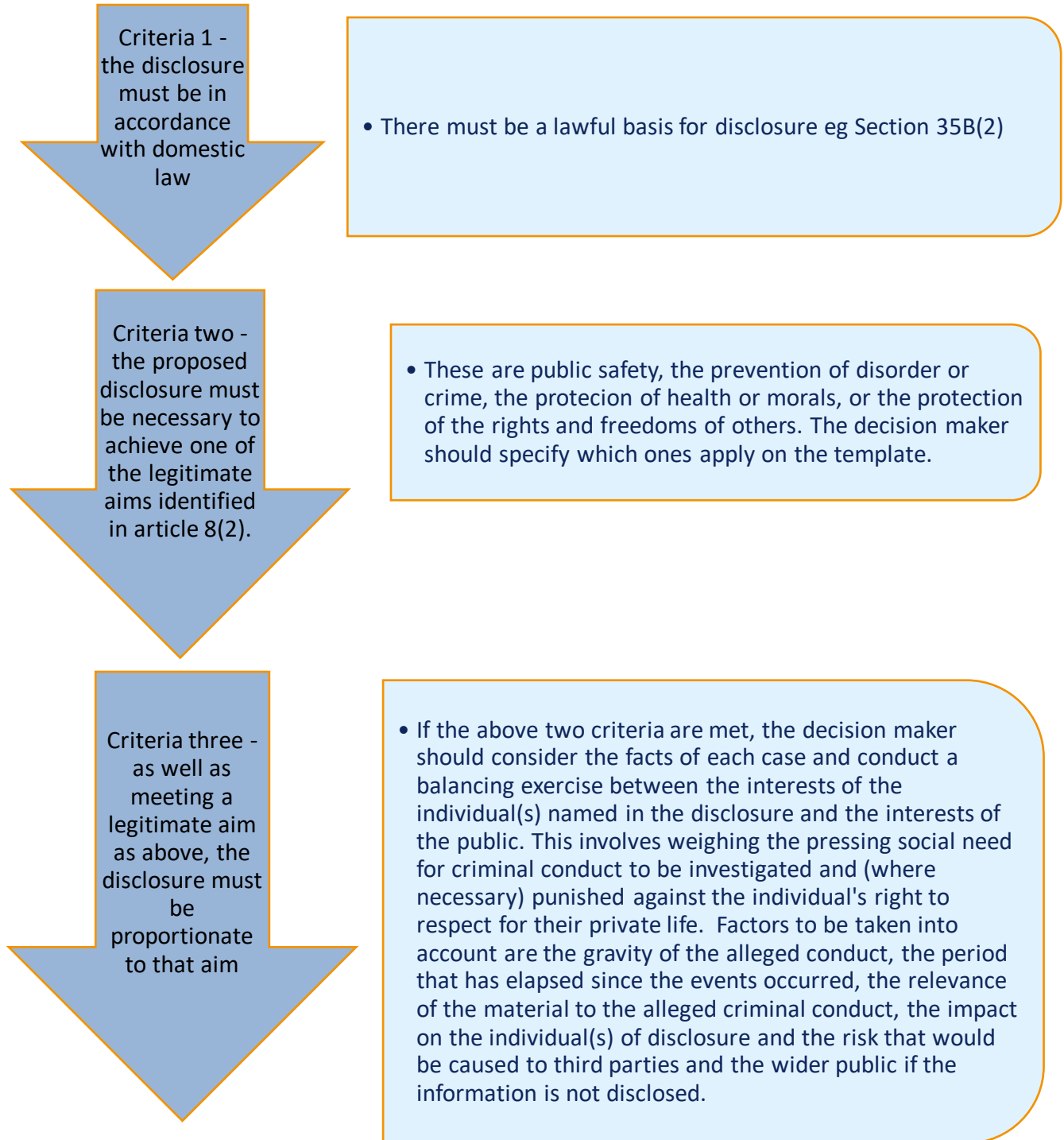
- 19 Condition 2(g) is likely to be most commonly met.
- 20 Once the decision maker is content that one of the conditions in both Article 6 and 9 of the UK GDPR are satisfied, they can move on to consider Article 8 of the European Convention on Human Rights (ECHR).

## Article 8 of the ECHR

- 21 The decision maker must also consider article 8 of the ECHR when reaching a decision on sharing information with the police. In this context, the purpose of Article 8 is to protect individuals from unlawful interference with their right to a private and family life. Article 8 protects confidential information that forms part of a person's private life, including information about their health, sexual relationships and allegations of professional misconduct or criminal conduct.
- 22 Sharing information with the police will almost always involve interference with Article 8 due to the nature of the information being disclosed i.e. allegations of criminal conduct. We must therefore be clear that this interference is justified by referring to one or more of the legitimate aims of disclosure which are specified in Article 8(2) of the ECHR. The relevant ones in relation to the police are public safety, the prevention of disorder or crime, and/or the protection of the rights and freedoms of others.
- 23 There are three criteria that must all be met to ensure the disclosure does not represent an

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unlawful interference with an individual's Article 8 rights. These are:



## Duty of confidence

- 24** The decision maker will also need to consider whether we intend disclosing any information to the police where a duty of confidence applies. This will most likely arise in the following situations:

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- The information forms part of the medical records relating to an individual which are confidential
  - The information in question has been provided to the GMC by a third party in confidence and the nature of the information has the necessary quality of confidence

**25** Confidentiality is not absolute and information which is subject to a duty of confidence can be shared either with consent or where it is justified in the public interest. If consent has not been obtained, the decision-maker should identify the public interest factors which override the duty of confidence or why these factors do not override the duty of confidence. The public interest is likely to override the duty of confidence in the following circumstances:

- The benefits to an identifiable individual or to society of the disclosure outweigh the public and the subject of the disclosure's interest in keeping the information confidential. Reporting a reasonable suspicion of criminal conduct to the police in circumstances where disclosure would be likely to assist in the prevention, detection or prosecution of a serious crime will almost always meet the public interest test.
- Failure to disclose the confidential information may expose others to a risk of harm which is so serious that it outweighs the individual's and the public's interest in maintaining confidentiality

### **Advising the alleged victim or doctor (if self-referral) of our decision**

**26** If the alleged victim or self-referring doctor has objected to information about them being shared with the police and we decide to proceed with the disclosure, we should inform them of our decision and the reasons for it.

### **Obtaining legal advice – Disclosures under section 35B(2)**

**27** The decision maker does not need to routinely obtain legal advice on potential disclosures to the police which can be made under section 35B(2). However it is open to them to do so if the issues are complex, or they are uncertain about whether the disclosure would comply with data protection legislation, the Human Rights Act or the duty of confidentiality. Legal advice may be necessary if the alleged victim of a criminal offence raises objections and the decision on whether these objections are outweighed by public interest factors is finely balanced.

### **Non section 35B(2) disclosures**

**28** Being unable to use our discretionary power under section 35B(2) does not prevent us from sharing information with the police and we should seek to do so if the threshold has been met. However, in circumstances where the applicability of section 35B(2) is unclear, legal advice should be obtained on whether there is an alternative legal basis for the disclosure.

**29** If we intend to make a disclosure without relying on a specific legal power, the decision maker should be especially careful when recording their reasons for doing so. In particular, they should demonstrate that they have balanced the necessity of disclosing information to assist in the prevention, detection or prosecution of a crime against the impact on any individual named in the disclosure of it being shared with the police.

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## Who will act as decision maker?

- 30** For disclosures under section 35B(2), the Head of Section for the criminal conviction teams will make the final decision on whether the information should be shared with the police after weighing up all the relevant factors.
- 31** However, in cases where we are unable to rely on section 35B(2) or its application is unclear, the decision will be escalated to the relevant Assistant Director. If there remains a question about the legal basis for disclosure, the sharing of any information with the police will also need to be authorised by the Director of Fitness to Practise.

## Recording the decision

- 32** The decision maker should record clear reasons for their final decision which refer to all the factors listed above so that it is clear they have been taken into account.
- 33** If the decision is to share the information with the police, the decision maker should confirm the specific documents to be disclosed and to whom they relate. The decision maker should also specify whether any redaction of third party details is required and confirm the police force to which disclosure should be made.

## Follow up enquiries

- 34** If further information is requested by the police following a decision to share a concern with them, this will need to be considered on a case by case basis. If it is requested using their statutory powers e.g. under Schedule 2, Part 1, paragraph. 2(1) of the DPA 2018 then we will comply with the request. If there is any doubt about the validity of the request, advice can be sought from the Information Access team.
- 35** If the request is not made under a specific authority, we will need to consider if it is in the public interest to disclose the information under section 35B(2). However, there will need to be a link to an individual doctor's fitness to practise and legal advice may be required on the applicability of our section 35B(2) powers.

## Annex A – Decision making template

### Sharing information with the police – template decision making document

Part one – to be completed by member of staff who identifies the potential criminal conduct before sending the form to the Investigation Manager of the Criminal Conviction team

Case/Enquiry Ref Number (if any):

Doctor’s name (if applicable):

Name of third party who is suspected of criminal conduct and their involvement [if any] in a fitness to practise investigation (if applicable):

<p><b>Background Information</b></p> <p><i>(Please outline briefly the information that has given rise to a belief that criminal conduct may have occurred including details of where the information has come from and the relevant key documents on SIEBEL.)</i></p>	<p><b>KCDs</b></p>
<p><b>Other information</b></p> <p><i>(If applicable, please explain any context relating to the case which is relevant to whether we should share the information with the police)</i></p>	
<p><b>Sharing information with the alleged victim</b></p> <p><i>(From the information available, are there any reasons why the alleged victim (if any) should not be informed of our intention to share information with the police e.g there is evidence they do not have capacity or would tip the alleged perpetrator off?)</i></p>	
<p><b>Has legal advice already been obtained? If so, please summarise the relevant points and any recommendations made about whether the information should be shared with the police</b></p>	

Decision : (for completion by Investigation Manager of Criminal Conviction team and to be countersigned by Head of Section, if necessary continuing on supplementary sheets. If the

disclosure is being made under an alternative legal basis to section 35B(2), it will need additional authorisation by an Assistant Director. Where there remains concern about the legal basis for any disclosure, it will require final approval from the Director of Fitness to Practise.)

<p><b>Please identify:</b></p> <p><b>(i) the alleged perpetrator of the criminal conduct</b></p> <p><b>(ii) the evidence to support the allegation that a criminal offence may have been committed</b></p>	
<p><b>Is the threshold test for sharing information with the police met? Please provide reasons</b></p> <p><b>See paragraphs 6-9 of decision makers guidance. If the threshold is not met please proceed directly to complete the final decision box below</b></p>	
<p><b>Can the information be legitimately disclosed to the police under section 35B(2) of the Medical Act 1983?</b></p> <p><b>Please confirm:</b></p> <p><b>(i) Whether the information relates to an individual doctor's fitness to practise or it relates to a third party but a doctor was directly involved in the events raising an allegation of criminal conduct and their involvement represents a fitness to practise issue*? AND</b></p> <p><b>(ii) Whether it is in the public interest to disclose the information to the police?</b></p> <p><b>If section 35B(2) does not apply or the applicability is unclear, please confirm this and continue to complete the decision</b></p>	

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\* Legal advice is likely to be required in this scenario to confirm whether section 35B(2) applies

<p>form. You should seek legal advice in all such cases and, if the advice advises an alternative legal basis or there is a question about the legal basis, specify that here and escalate as appropriate to an AD or the Director for sign off.</p> <p>If legal advice has been obtained, please briefly summarise the relevant points. The exact wording of the advice should not be reproduced as it is legally privileged.</p> <p>See paragraphs 10 and 28-29 of the decision maker’s guidance for further information.</p>	
<p><i>Has the alleged victim of the criminal conduct been contacted? Y/N</i></p> <p><i>(if the alleged victim was not contacted, please provide reasons for this)</i></p> <p><i>Please provide brief details of their comments (if applicable) and how any objections they have raised to disclosure have been considered when making this decision</i></p> <p><i>If the information was self-referred by a doctor, have we advised them we intend sharing it with the police?</i></p> <p><i>(if the doctor was not contacted, please provide reasons for this)</i></p> <p><i>Please provide brief details of the doctor’s comments (if applicable) and how any objections they have raised to disclosure have been considered when making this decision</i></p> <p>See paragraphs 11 to 14 of the decision makers guidance</p>	

<p><b><i>Data Protection legislation – please confirm that you have considered the relevant factors in relation to data protection legislation and whether the proposed disclosure will be compliant with its requirements?</i></b></p> <p><b><i>In particular you should identify the specific conditions of Articles 6 and 9 of the UK GDPR which have been met or provide details of why these conditions are not met</i></b></p> <p><b>See paragraphs 15 to 20 of the decision makers guidance</b></p>	
<p><b>Article 8 of the European Convention on Human Rights – please confirm that you have considered the relevant factors in relation to Article 8 and that the proposed disclosure meets the three criteria at paragraph 23 of the decision maker’s guidance.</b></p> <p><b>You should identify the competing interests and summarise the outcome of the balancing exercise you have conducted under article 8 explaining why the disclosure is considered necessary and proportionate. Alternatively, if you feel that disclosure would be a disproportionate interference with article 8, you should record this view and your reasons for it</b></p> <p><b>See paragraphs 21 to 23 of the decision makers guidance</b></p>	
<p><b>Duty of Confidence – is it necessary in the public interest to disclose confidential information e.g medical records to the police?</b></p>	

<p><b>You should identify the public interest factors that override the duty of confidence or why these factors do not override the duty of confidence</b></p> <p><b>See paragraphs 24 to 25 of the decision makers guidance</b></p>	
<p><b>Section 35B(2) disclosures - Has legal advice been obtained?</b></p> <p><b>This may be necessary in particularly complex cases or where further advice is needed on whether the proposed disclosure will be compliant with data protection legislation, the duty of confidence and/or the ECHR</b></p> <p><b>See paragraph 27 of the guidance</b></p> <p><b>If legal advice has been obtained, please briefly summarise the relevant points. The exact wording of the advice should not be reproduced as it is legally privileged.</b></p>	
<p><b>Recommendation and rationale – either:</b></p> <ul style="list-style-type: none"> <li><b>(i) share information with the police</b></li> <li><b>(ii) do not share information with the police</b></li> </ul> <p><b>If the recommendation is to share the information with the police, please confirm the specific information/documents to be disclosed and to whom they relate. Please also</b></p>	

<p><b>specify whether any redaction of third party details is required.</b></p> <p><b>Please see paragraphs 32-33 of the guidance</b></p>	
<p><b>Details of the police force to whom the disclosure should be made</b></p>	
<p><b>Other comments</b></p>	
<p><b>Decision (to be completed by Head of Section)</b></p>	

Name of person making recommendation (Investigation Manager of criminal conviction team):

(Signed)

(Dated)

Name of decision maker (Head of Section, National Investigation Team):

(Signed)

(Dated)

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*For disclosures made under an alternative legal basis to section 35B(2):*

*Authorised by:*

*Name of Assistant Director*

*(Signed)*

*(Dated)*

**If there is doubt about the legal basis for disclosure following input from IHLT, e-mail confirmation will also be required from the Director of Fitness to Practise that the disclosure can be made**