To consider

**Updated guidance on obtaining consent and disclosing information in fitness to practise proceedings**

**Issue**

1. Our guidance on obtaining consent and disclosing information in fitness to practise proceedings has been updated to take into account case law and planned changes to procedure.

**Recommendation**

2. The Strategy and Policy Board is asked to approve the updated guidance, at Annex A.
Updated guidance on obtaining consent and disclosing information in fitness to practise proceedings

Issue

3 Following GDC v Savery [2011] EWHC 3011 (Admin), we made interim changes to our approach to obtaining consent to share information during fitness to practise proceedings, in order to integrate the principles raised in this judgment.

4 We have now produced substantive guidance to take account of the Savery judgment and more recent planned changes to our fitness to practise procedures including:

   a Changes to the way we deal with complaints in Stream 2.

   b The planned extension of our use of pre-triage enquiries.

5 The issue of consent arises whenever we handle personal data about third parties, referred to as data subjects. It is the use of the data subject’s personal information, rather than permission to pursue an investigation, for which we ask consent.

6 The most common data subjects we will request consent from in fitness to practise procedures include patients and other complainants like the doctor’s work colleagues who are not the doctor’s employer. Personal data we handle will most commonly be the identity, information or records of a patient or complainant.

7 This updated guidance deals with the circumstances in which we may use a data subject’s information to investigate a doctor with or without their explicit consent. Guidance to make these decisions is based on the legal framework for sharing information on which we have taken advice, including:

   a Our duty of confidence.

   b Our powers as outlined in the Medical Act 1983.

   c The Data Protection Act 1988 (DPA).

   d Article 8 of the European Convention on Human Rights Act (HRA).

Principles of the guidance

8 If consent to use the data subject’s information has not already been given via the online complaints form or paper complaint form, we must seek consent.

9 There is no single rule that governs when and how consent should be obtained. Sharing personal information without consent is likely to breach the DPA and the HRA unless it can be justified. To be justified it must be a proportionate response in light
of our regulatory function. What is proportionate will differ depending on the nature of the case and the investigation taking place. Where we receive consent we can share the data subject’s information. We have produced detailed guidance for where we do not receive consent, or no response is received. The key principles are set out below.

10 Where the circumstances of the case suggest that using a data subject’s information without their explicit consent is necessary, this action must be justified as in the public interest.

11 To assess whether we are justified in the public interest, there must be a realistic prospect that we will be able to investigate the complaint. For example, disclosure without consent in the public interest is unlikely to be justified in cases that do not meet our threshold, where we are unlikely to be able to proceed with an investigation or where we have decided to close the case.

12 The need to request consent must be balanced with the public interest issues that arise in different types of cases.

a The guidance outlines specific timeframes within which we should wait for a response from the patient/complainant regarding consent. These timeframes exist to ensure we can take swift action where necessary.

b For Trust referrals involving multiple patients’ details, to avoid significant delay to our investigation, we would disclose the complaint and simultaneously raise the issue of consent with the Trust.

c If a significant concern has been raised that may warrant an IOP, the requirement for consent can be overridden in the public interest.

13 There is no consent requirement for anonymous complaints as we do not know the identity of the data subject to be able to ask them for their consent.

14 For complaints from data subjects who wish their details to be kept confidential, we must take care when sharing information about the complaint to ensure identifying information regarding the patient/complainant is not included in the information disclosed.

Next steps

15 Once this guidance is approved, the new processes will be incorporated into relevant operational manuals.
Supporting information

How this issue relates to the corporate strategy and business plan

17 This issue relates to Strategic Aim 3 of the Corporate Strategy and Business Plan: improve the level of engagement and efficiency in the handling of complaints and concerns about patient safety.

What engagement approach has been used to inform the work (and what further communication and engagement is needed)

18 We have worked closely with representatives from investigations, case review and change management teams in developing this guidance. Once this guidance is approved and changes made to operational manuals, these teams will attend a training session to ensure they are aware of the amendments to the guidance.

If you have any questions about this paper please contact: Anna Rowland, Assistant Director - Policy and Planning, ARowland@gmc-uk.org 020 7189 5077.
Updated guidance on obtaining consent
Guidance on obtaining consent and disclosing information in fitness to practise proceedings

Review date: August 2018
Guiding principles

1. The question of consent arises whenever we handle personal data about third parties – referred to as data subjects. It is the use of the data subject’s personal information, rather than permission to pursue an investigation, for which we ask consent.

2. The most common data subjects we will request consent from in fitness to practise procedures include patients and other complainants like the doctor’s work colleagues who are not the doctor’s employer. Personal data we handle will most commonly be the identity, information or records of a patient or complainant.

3. Consent to our use of personal data can only be given by the data subject or by someone with authority to act on their behalf. This means that if a complainant is writing on someone else’s behalf, we either need the consent of the other person or confirmation of the authority of the complainant.

4. We can in some circumstances use personal data where consent is not available or has been refused. However, such use must be justified as necessary and proportionate so as to ensure we do not breach:
   a. our duty of confidence
   b. the principles of our guidance to doctors on use of confidential information
   c. or unlawfully interfere with a data subject’s rights under:
      • Data Protection Act 1988 (DPA)
      • Article 8 of the European Convention on Human Rights.

5. The need to ask for consent cannot usually be avoided by redaction because the doctor will usually need to know the identity of the patient to be able to respond to the allegations although redaction may be appropriate in some circumstances.

6. Note for staff: This guidance must be read in conjunction with operational manuals relevant for their team.
Pre-triage enquiries

Rationale

7 Pre-triage enquiries play an important role in our regulatory function by enabling us to gather information to decide whether we need to investigate a complaint. It is important that such enquiries are made swiftly so that serious matters can be investigated where appropriate. Therefore our approach to these enquiries prioritises speedy sharing of information unless there is good reason not to do so. For this reason, there is a 14 day time limit for data subjects to respond to our request for consent to disclose.

Procedure

8 If our enquiries require disclosure of unredacted patient/complainant details and consent has not already been given via the online complaints form or paper complaints form, we must seek consent.

9 We should inform the data subject (usually the complainant) that we may disclose information regarding the complaint to other parties including the doctor without their consent, but we would prefer to have it. We should also ask for reasons to be provided if consent is refused.

10 The patient/complainant should be given 14 days to respond to our request.

11 If we do not receive a response, we should proceed to disclose.

12 If the data subject objects to our sharing the information, we should consider the reason for the objection and whether we can proceed to disclose without the data subject’s co-operation where this can be justified in the public interest.

13 For confidential complaints: in these cases, if we have decided to disclose with or without consent, we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed.

14 For anonymous complaints: There is no consent requirement here as we do not know the identity of the patient/complainant to be able to ask them for their consent. In disclosing, care should be taken that the information disclosed does not inadvertently identify the complainant.

15 For Trust referrals involving multiple patients details, we should disclose the complaint and simultaneously raise the issue of consent with the Trust.

Cases closed under the five year rule

Rationale

16 Our rules state that before a case is closed at triage under the ‘five year rule,’ the complainant and the doctor should be notified.

17 In these cases we should ask the data subject for their consent before we disclose the existence of the complaint to the doctor but as we have decided not to proceed with an investigation, disclosing without consent will interfere with the data subject’s rights under DPA and HRA and is unlikely to be justified.
**Procedure**

18 If consent has not already been given via the online complaints form or the paper complaints form, we must seek consent.

19 We must write to the data subject (usually the complainant), explaining we will not be taking the case forward, but that our rules require that we disclose the complaint to the doctor.

20 The data subject should be given 7 days to comment. If we do not receive a response within 7 days we will send a chaser letter providing an additional 7 days.

21 Where the data subject gives their consent we should disclose the complaint to the doctor, and then proceed to close the case.

22 Where consent is refused we should consider the public interest test, however as we have already decided not to investigate these cases it is unlikely that interference with the data subject’s rights would normally be justified.

23 If we do not receive a response, we should refer the complaint to an Assistant Registrar with a view to closing the case.

24 For confidential complaints: in these cases, if we receive consent to disclose we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed.

25 For anonymous complaints: There is no consent requirement here as we do not know the identity of the patient/complainant to be able to ask them for their consent. In disclosing, care should be taken that the information disclosed does not inadvertently identify the complainant.

**Current Stream 2**

**Rationale**

26 In Stream 2 cases, we have decided that no issue of impairment appears to arise from the complaint or information alone. This means that disclosure without consent will interfere with the data subject’s rights under DPA and HRA and is unlikely to be justified.

**Procedure**

27 If consent has not already been given via the online complaints form or paper complaints form, we must seek consent.

28 The data subject (usually the complainant) should be given 7 days to respond to our request. If we do not receive a response within 7 days we will send a chaser letter providing an additional 7 days.

29 Where the data subject objects we should consider the public interest test, however as we have already decided not to investigate these cases it is unlikely that interference with the data subject’s rights would normally be justified.
If consent is refused or if we do not receive a response, we should refer the complaint to an Assistant Registrar with a view to closing the case.

For confidential complaints: in these cases, if we receive consent to disclose we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed.

**New process: Notify RO/ SP or employer**

For these complaints, we have decided that no issue of impairment appears to arise from the complaint or information alone but these are matters that should be dealt with locally and therefore prompt disclosure to the doctor’s responsible officer or suitable person is important. For this reason, there is a 14 day time limit for data subjects to respond to our request for consent to disclose.

**Notify RO/ SP - Rationale**

In these instances, we will not process these complaints ourselves but pass them to the doctor’s responsible officer or suitable person for them to deal with. In view of the ROs statutory function and the similar role undertaken by SPs, it is important that these complaints are shared with ROs and SPs unless there is good reason not to do so.

In cases where the doctor does not have a responsible officer or a suitable person, we should request consent and disclose the complaint to up to four of the doctor’s current and past employers (see paragraph 35-39 below).

**Notify RO - Procedure**

If consent has not already been given via the online complaints form or paper complaint form, and where it is reasonable/practical to do so, we should inform the data subject (usually the complainant) of our intention to disclose the complaint to the doctor and responsible officer or suitable person and give them 14 days to object.

If we do not receive a response, we should proceed to disclose information to the doctor and their responsible officer or suitable person.

Where the data subject objects we should consider the public interest test, however as we have already decided not to investigate these cases it is unlikely that interference with the data subject’s rights would normally be justified.

For confidential complaints: in these cases, if we have decided to disclose with or without explicit consent, we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed.

For Trust referrals involving multiple patients details, we should disclose the complaint and simultaneously raise the issue of consent with the Trust.
**Notify employer - Rationale**

40 In these instances, we will not process these complaints ourselves but pass them to the doctor’s employer in view of the doctor not having a responsible officer or suitable person. This therefore requires a speedy consent process to be carried out without delay.

**Notify employer - Procedure**

41 If consent has not already been given via the online complaints form or paper complaint form, we must seek consent.

42 The data subject (usually the complainant) should be given 7 days to respond to our request. If we do not receive a response within 7 days we will send a chaser letter providing an additional 7 days.

43 If consent is refused or if we do not receive a response, we should refer the complaint to an Assistant Registrar with a view to closing the case. As we have already decided not to investigate these cases it is unlikely that interference with the data subject’s rights would normally be justified.

44 For confidential complaints: in these cases, if we have consent to disclose, we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed.

**Stream 1**

**Rationale**

45 Stream 1 investigations play a critical role in our regulatory function by enabling us to gather information to decide what action is necessary to protect patients or uphold public confidence.

46 For this reason, we can disclose the data subject’s information without consent in order to take forward an investigation but cannot justify doing so if we are unlikely to be able to establish sufficient evidence to proceed.

**Procedure: Cases where there are no other witnesses or lines of enquiry apart from the patient/complainant**

47 If consent has not already been given via the online complaints form or paper complaint form, we must seek consent.

48 We should make it clear with the data subject (usually the complainant) that we may disclose information regarding the complaint to other parties including the doctor without their consent, but we would prefer to have it. We should also ask for reasons to be provided if consent is refused.

49 The data subject should be given 7 days to respond to our request. If we do not receive a response within 7 days we will send a chaser letter providing an additional 7 days.

50 The letter should explain that we need may not be able to proceed with an investigation without their consent to disclose the complaint.
51 If the patient/complainant is the sole witness and consent is refused or the patient/complainant does not respond we will struggle to build a case. Disclosure is unlikely to be justified in these cases on the grounds that without the consent of the patient/complainant it will be very difficult to establish evidence of impairment and therefore these cases are unlikely to proceed. The complaint should be referred to an Assistant Registrar with a view to closing the case. This closure is in effect at Rule 4.

52 If in doubt about whether other evidence might be available, a view from GMC Legal on possible lines of investigation should be sought.

53 For confidential complaints: in these cases, we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed. However, if as the case progresses the complainant’s request to ensure their identity remains confidential impedes our ability to investigate the case, we should consider whether, based on the individual circumstances of the case, it is in the public interest to disclose the identity of the complainant to further our investigation (i.e., because in view of the nature and seriousness of the concerns the public interest outweighs the complainant’s request for confidentiality. We would only disclose in exceptional circumstances.

54 For anonymous complaints: There is no consent requirement here as we do not know the identity of the patient/complainant to be able to ask them for their consent. In disclosing, care should be taken that the information disclosed does not inadvertently identify the complainant.

Procedure: Cases with other witnesses or lines of enquiry other than the complainant

55 If consent has not already been given via the online complaints form or paper complaint form, we must seek consent.

56 We should make it clear to the data subject (usually the complainant) that we may disclose information regarding the complaint to other parties including the doctor without their consent, but we would prefer to have it. We should also ask for reasons to be provided if consent is refused.

57 The patient/complainant should be given 7 days to respond to our request. If we do not receive a response within 7 days we will send a chaser letter providing an additional 7 days.

58 Where consent is refused and the reasons given reveal a real risk of significant harm if the data was to be disclosed to the doctor (or there is no response and reason to believe that there is a real risk of harm), an Assistant Registrar must make a decision about whether to disclose or whether to close the case without disclosure to the doctor. The Assistant Registrar will need to balance the risk to the patient/complainant against the wider risk to patients and the public.

59 Where consent is refused and the reasons given do not reveal any real risk of harm, or there is no response, we should consider whether we can build a case without consent and proceed to disclose where this can be justified in
the public interest. In these cases, the prospect of establishing a case without the patient/complainant is likely to justify disclosing without consent.

60 We must inform the patient/complainant that we are proceeding with the investigation.

61 For confidential complaints: in these cases, we must take care when sharing information about the complaint with the doctor to ensure identifying information regarding the patient/complainant is not included in the information disclosed. However, if as the case progresses the complainant’s request to ensure their identity remains confidential impedes our ability to investigate the case, we should consider whether, based on the individual circumstances of the case, it is in the public interest to disclose the identity of the complainant to further our investigation (ie because in view of the nature and seriousness of the concerns the public interest outweighs the complainant’s request for confidentiality. We would only disclose in exceptional circumstances.

62 For anonymous complaints: There is no consent requirement here as we do not know the identity of the patient/complainant to be able to ask them for their consent. In disclosing, care should be taken that the information disclosed does not inadvertently identify the complainant.

Other issues

Case evidence does not identify patients

63 There are some cases where the doctor has not had direct patient contact and could not know the patient’s identity. The most common example is of doctors working in pathology labs. Such cases do not require consent for disclosure of evidence provided no patient identifying information is disclosed.

Information from employers

64 Trusts should ideally obtain consent before sending us information containing patient data. However, regardless of whether a Trust has or has not obtained consent, we still need to seek consent from the individual data subject before sharing that data with the doctor or other third parties.

65 For Trust referrals which involve multiple patient details, we can disclose and simultaneously raise the issue of consent with the Trust as seeking consent from multiple patients would interfere with our regulatory function in progressing serious matters within a reasonable and appropriate timeframe.

Interim Orders Panels

66 IOP cases will always be in Stream 1 and therefore the same principles of disclosure apply as for Stream 1 above. Consent is required before we can refer to IOP because we have to disclose the information to the doctor. Where IOP is a likely option, we should give the patient/complainant 14 days to respond to our request via mail.
If the doctor poses a significant risk, the requirement for consent can be overridden in the public interest. Before taking this action, clearance should be sought from an Assistant Registrar.

**Consent on behalf of others**

Parents or guardians can give consent for access to medical records of children.

There is no specific age at which consent from the child should be sought – this depends on the competence of the child to give consent. Where this is relevant to a case, advice should be sought from the Policy and Planning team as to whether the child is ‘Gillick competent’. For further information, see GMC guidance ‘Consent: patients and doctors making decisions together.’

If a complainant is acting on behalf of another adult, the consent of that adult will be required unless the complainant can show legal authority, such as power of attorney, to act on their behalf.