

## Patient Records – Mental Health Advocates Access policy

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POLICY SPONSOR	Strategic Director for Social Care Partnerships
POLICY AUTHOR	Mental Health Act Services Manager

### EXECUTIVE SUMMARY:

- One procedure for use throughout Sussex Partnership NHS Foundation Trust.
- Incorporates amendments made to the Mental Health Act 1983 and the Code of Practice by the Mental Health Act 2007.
- This policy is not to be used for general access to health records requests. Please see Access to Health Records policy and procedure.
- This policy is not to be used for access to health records by solicitors, Tribunal doctors and independent doctors for the purposes of patient hearings.
- At the request of the Independent Mental Health Advocacy (IMHA) providers to Sussex Partnership NHS Foundation Trust *not for disclosure* documents should be withheld from IMHAs when accessing patient's health records.

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As a contingency a full set of up-to-date Trust policies are held by the Governance Support Team based at Trust HQ, Swanedan

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## **1.0 Introduction**

### **1.1 Purpose of policy**

The purpose of this policy is to provide guidance to Sussex Partnership staff and Independent Mental Health Advocates (IMHA) on the process and the procedures required to access patient records by IMHAs appointed by qualifying patients as defined at 1.2.1 below.

This policy is not to be used for requests for access to patients care records for any other purpose.

### **1.2 Definitions**

IMHAs are specialist advocates who have received training to work within the framework of the Mental Health Act (MHA) to provide support to qualifying patients.

#### **1.2.1 Qualifying patients are those who are:**

- detained under the MHA with the exception of those detained under sections 4, 5, 135 and 136 MHA,
- conditionally discharged restricted patients,
- subject to Guardianship,
- subject to Supervised Community Treatment

Informal patients are also eligible for support from an IMHA if they are:

- being considered for treatment under section 57 MHA (treatment requiring consent and a second opinion); or
- under 18 years of age and are being considered for electro-convulsive therapy or any other treatment to which section 58A MHA applies.

### **1.3 Scope of policy**

Section 130B MHA gives IMHAs a right to access clinical or other records relating to the patient's detention or treatment in hospital, or relating to any after-care services provided to the patient, including records relating to the patient held by a local social services authority.

### **1.4 Principles**

IMHAs are bound by common law duties of confidentiality in respect of such information. IMHAs must also ensure that, where applicable, they keep and use such information in accordance with data protection legislation.

In general, the IMHA should share information with the patient as part of their statutory duty to help and support the patient. The IMHA should not disclose information to the patient if there are legal reasons that would prevent them from so doing.

## 2.0 Policy statement

Sussex Partnership staff will adhere to the legal requirements outlined in this document and will support qualifying patients in appointing an IMHA. Staff will also ensure timely compliance with the process and procedures required to ensure IMHAs gain access to patient records within the timescales set at 4.8 and 4.9 below.

The involvement of an IMHA does not affect a patient's right to seek advice from a solicitor. Nor does it affect any entitlement to legal aid.

## 3.0 Duties

- 3.1 Before IMHAs ask to see records which might include information that would not be disclosed directly to the patient, they should explain to the patient that such material might exist, and specifically ask the patient whether they consent to the IMHA seeing it. In doing so, they should explain to the patient that they will generally not be able to pass that information on, or even tell them that it exists.
- 3.2 IMHAs should tell the record holder whether they wish to see information that would not be disclosed directly to the patient.
- 3.3 The above describes the duty to inform patients of the IMHAs right to access information that must not be disclosed to patients and the responsibilities of the IMHAs in this regard. However, the IMHA service providers to Sussex Partnership NHS Foundation Trust have requested that they are only given access to information that would be made available to the patient and that they will not be requesting access to records that would be withheld from the patient.

## 4.0 Procedure

### 4.1 Access to patients records

- 4.2 Where the patient has capacity to consent and is consenting, the IMHA has the right to see the patient's clinical records. Written confirmation of the patient's consent must be provided on the IMHA service providers consent form and will include the reason(s) for requesting access to the records.
- 4.3 Where the patient lacks capacity to consent; the IMHA must be allowed access to the records, but only if the following criteria are applied:
- 4.4 The record holder must ask the IMHA to explain what information they consider to be relevant to enable them to provide support to the patient, and the IMHA must explain why they consider it to be appropriate to have access to the records and the record holder must believe it is appropriate that the records are relevant.
- 4.5 The IMHA does not define any further what is meant by access being appropriate, so the record holder needs to consider all the facts of the case. However, the starting point should always be what is best for the patient and not (for example) what is most convenient for the organisation holding the record.

- 4.6 The consideration will therefore be whether the disclosure is in the patient's best interests. That decision should be taken in accordance with the Mental Capacity Act 2005 (or for children under 16, the common law), like any other decision in connection with the care or treatment of patients who cannot make the decision for themselves.
- 4.7 Where the patient lacks capacity, the records must not be disclosed if consent is refused by the holder of a Lasting Power of Attorney or a deputy appointed by the Court of Protection.
- 4.8 The requested records will be made available to the IMHA as soon as is practicable and will normally be within 72 hours of the request for access being made. However, where the 72 hours includes a weekend and/or bank holiday(s) it may be necessary to allow further time for access to be arranged taking into account the restricted availability of relevant personnel during that period.
- 4.9 If it is believed that the records will not be available within 72 hours this must be explained to the IMHA giving the reasons why and when they are expected to be ready. Any parts of the record that could be released more quickly should be made available and the rest of the records released to the IMHA as soon as possible thereafter.
- 4.10 Refusing disclosure without a reasonable cause is a criminal offence under section 129 of the MHA.
- 4.11 Withholding Information that may cause serious harm
- 4.12 IMHAs' right of access to relevant records extends to information which would have been withheld from the patient under the Data Protection Act 1998, because it may cause serious harm to the physical or mental health or condition of the patient or any other person.
- 4.13 The record holder must make the IMHA aware of any information that would have been withheld from the patient for this reason, so the IMHA knows what should not be disclosed to the patient.
- 4.14 Where the record holder has made the IMHA aware of information that would have been withheld from the patient because it may cause serious harm to the physical or mental health or condition of the patient or any other person, the IMHA must not disclose this information to the patient.
- 4.15 The above describes the legal right to access information that must not be disclosed to patients and the responsibilities of the IMHAs in this regard. However, the IMHA service providers to Sussex Partnership NHS Foundation Trust have requested that they are only given access to information that would be made available to the patient and that they will not be requesting access to records that would be withheld from the patient.

#### 4.16 Third party information

4.17 Where an IMHA is given access to information relating to, or provided by, another individual who can be identified from that information, ie a third party, IMHAs need to decide whether to disclose this to the patient, as they would with information from or about third parties they had acquired in any other way. In deciding that, IMHAs need to consider any third party rights to privacy or confidentiality that may arise.

4.18 Where the information relates to the patient but disclosure would also provide information relating to or provided by a third party, the IMHA should not disclose this information to the patient unless:

- in the case of information from the patient's health records, the third party is a health professional who has compiled or contributed to the health records or who has been involved in the care of the patient;
- the third party gives their consent to the disclosure of that information; or
- it is reasonable in all the circumstances to dispense with that third party's consent.

4.19 In considering whether it is reasonable in all the circumstances to disclose the information, the IMHA should have regard to the following factors:

- any duty of confidentiality owed to the third party;
- any steps taken to try to get the consent of the third party;
- whether the third party is capable of giving consent; and
- any express refusal of consent by the third party.

## **5.0 Development, consultation and ratification**

IMHA service providers, Directors of Care Group Services, Deputy Director – Social Inclusion and Senior MHA team were all consulted in the development of this policy.

This policy is ratified by PPF and the MHA Committee.

## **6.0 Equality and Human Rights Impact Assessment**

Decision relating to the appointment of an IMHA should take into account the cultural, national, racial or ethnic background of the relevant person.

An equality impact assessment has been completed for this policy in October 2010.

## **7.0 Monitoring Compliance**

Compliance with this policy will be monitored via the regular liaison meetings with the IMHA service providers and Sussex Partnership.

Key Performance Indicators to be set by the service providers.

## **8.0 Dissemination and Implementation of policy**

The policy will be available on the intranet of Sussex Partnership NHS Foundation Trust and staff notified via Partnership Bulletin.

Training and advice on the implementation of this policy can be obtained from the MHA Services department.

## **9.0 Document control including archive arrangements**

Mental Health Act Administration is responsible for the recording, storing, controlling and updating documents detailed in this policy.

In addition this policy will be stored and archived in accordance with the organisation-wide policy for the development and management of procedural documents (034/2008/Corporate).

## **10.0 Reference documents**

- Mental Health Act 1983 as amended by the Mental Health Act 2007
- Data Protection Act 1998

## **11.0 Bibliography**

IMHA Engagement protocol  
IMHA supplementary guidance on access to patient records under section 130B of the MHA 1983, Gateway reference 11715  
Code of Practice to MHA 1983 (2008)

## **12.0 Glossary**

IMHA Independent Mental Health Advocate. An advocate available to offer help to patients under arrangements which are specifically required to be made under the Mental Health Act.

Lasting Power of Attorney A Power of Attorney created under the Mental Capacity Act 2005 (Section 9(1)) appointing an attorney (or attorneys) to make decisions about the donor's

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personal welfare (including healthcare) and/or deal with the donor's property and affairs.

Court of Protection The specialist court established under s45 of the Mental Capacity Act 2005 to deal with issues relating to people who lack capacity to make specific decisions for themselves.

### **13.0 Cross reference**

- Access to Health Records Policy
- Authorisation for Access to Patient Records by Solicitors, Tribunal Doctors and Independent Doctors for Patient Hearings Policy

### **14.0 Appendices**

IMHA consent forms

- Appendix A – MIND - Brighton & Hove and West Sussex consent form
- Appendix B – Pohwer – East Sussex consent form



