

## Lawful Basis for Processing Data for CHCs

The lawful basis for processing patient information requires that we comply not only with the GDPR but also with the common law duty of confidentiality.

This briefing note reviews the lawful basis for processing pseudonymised data as most CHCs are processing pseudonymised data.

GDPR will be brought into law through the UK Data Protection Act which is currently being debated in parliament. This document will need to be reviewed in light of the Act when it is published. In the meantime, under GDPR organisations (data controllers) must establish, record and inform subjects about the lawful basis that they are relying on to process personal data.

We are awaiting NHS specific guidance from the IG Alliance on whether or not pseudonymised data will be considered to be personal data and therefore subject to the GDPR. Until then, it is appropriate to assume that it might be and to establish a lawful basis if it is required.

### Common Law Duty of Confidentiality

The lawful basis for processing patient confidential information under the common law duty of confidentiality is to either gain patient consent OR gain support under Section 251. Pseudonymised data, when processed under the conditions set out in the Information Commissioner's Anonymisation Code of Practice (incorporated into the CHC safeguards), is not considered to be patient confidential information and does not require a lawful basis for processing.

### GDPR

Consent is one way to comply with the GDPR. However, in many health and social care contexts obtaining GDPR-compliant consent which is stricter than that required for confidentiality may not be possible.

In some circumstances, where processing patient confidential data, you may rely on patient consent to meet confidentiality requirements even though you are not relying on consent as the basis for lawful processing for GDPR purposes.

Organisations should consider relying on the alternatives to consent for GDPR purposes. Different individuals' rights provided by the GDPR are engaged depending on which basis for processing is chosen. Generally, individuals have more rights where consent is relied on as the basis for lawful processing under the GDPR.

The GDPR sets out conditions for lawful processing, and further conditions for processing special categories of personal data (Articles 6 and 9). These are similar to the conditions in Schedules 2 and 3 of the Data Protection Act 1998 (DPA98). Personal data concerning health is one of the special categories so organisations that process such data must be able to demonstrate that they have met a condition in both Article 6 and Article 9 of the GDPR.

Under GDPR, organisations are required to include the legal basis for processing in information provided to patients and service users (previously referred to as 'fair processing notices').

The CHCs are all hosted by organisations that are public authorities so they should apply 6(1)(e) as their Article 6 condition:

*6(1)(f)'...legitimate interests...except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject...'*

The Article 9 condition for research is:

*9(2)(j) '...scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or member State law which shall be proportionate...and provide for suitable and specific measures to safeguard the fundamental rights and interests of the data subject ...'*

The application of these conditions does not remove the need for consent or an appropriate legal basis (e.g. section 251 support) that meets confidentiality (where processing confidential data) and ethical requirements.