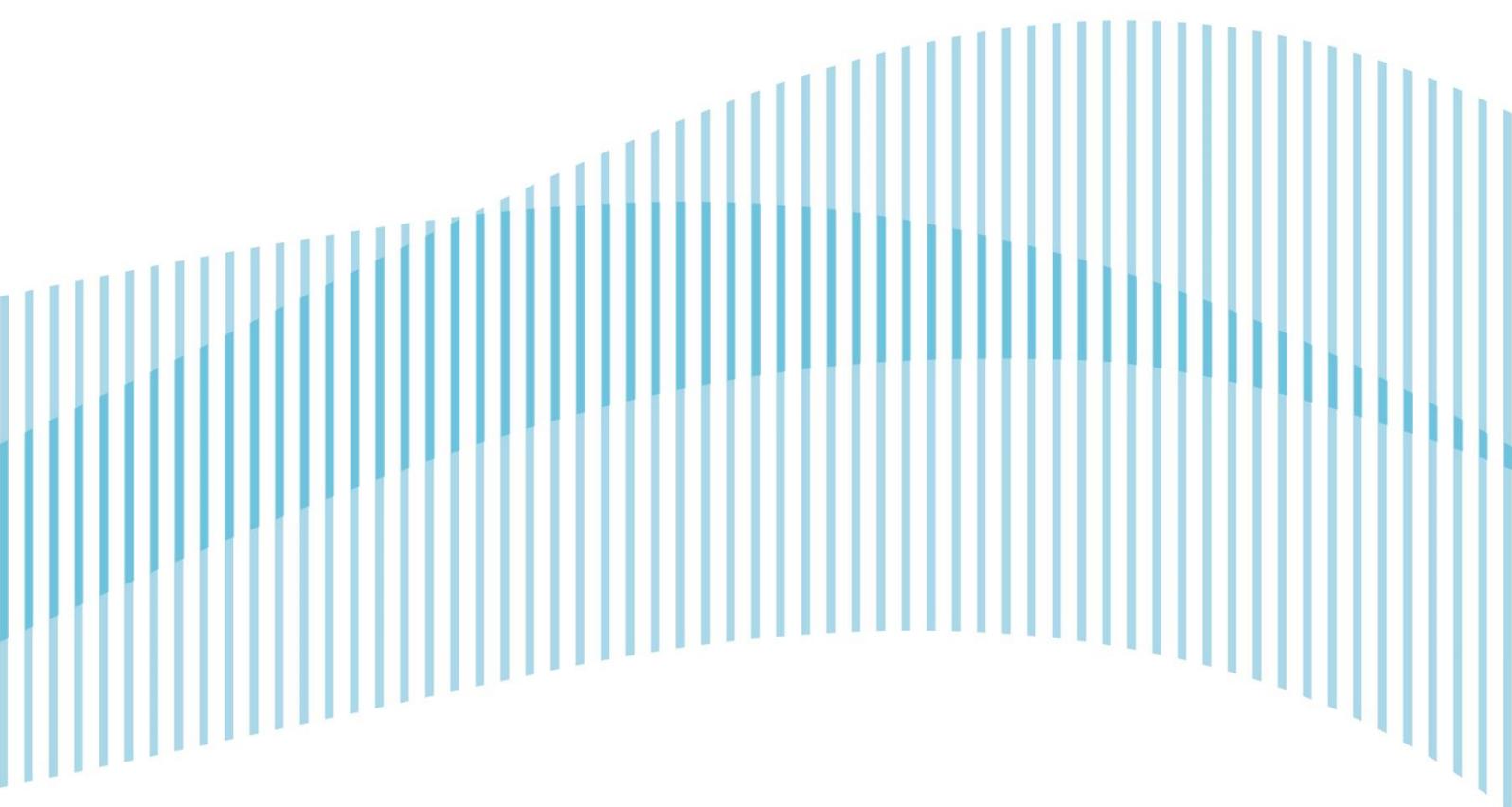


Patients recording NHS staff in health and social care settings

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1. Background

NHS Protect has received some enquiries that highlighted concerns about the overt and covert recording (both video and audio) of medical consultations or treatments through the use of portable recording devices on NHS premises or CCTV systems installed at home. Concerns were in particular about patients who covertly record their consultations in their own homes using a hidden camera or mobile device and without the knowledge or permission of those being recorded.

Unlike medical professionals, who are expected by the General Medical Council¹ to obtain patients' consent to make visual or audio recordings, patients do not need their doctor's permission to record a medical consultation or treatment. Patient recordings which are made either covertly and overtly in order to keep a personal record of what the doctor said are deemed to constitute personal 'note taking' and are therefore permissible.

It is, however, recognised that staff need guidance and advice about patients recording consultations or treatment being administered.

NHS Protect has produced the good practice advice in this document for use in health and social care settings. It can be used to provide clarification to NHS clinical and non-clinical staff working within health and social care settings on dealing with situations where patients are recording their treatment and care. This advice covers both covert and overt recording of consultations. However it predominantly concerns overt recording as the patient will generally ask NHS staff for permission for recording to take place.

2. Purpose

This short guide has been developed to provide advice to Local Security Management Specialists (LSMSs) to enable them to support and advise NHS staff on covert and overt recording by patients.

It will also assist LSMSs in raising awareness of the issues within their health bodies.

Finally, the guidance can help trusts to develop or review local policies and procedures. In particular, it is recommended that trusts review their current mobile communication devices policy and incorporate the recommendations in this guide where relevant and applicable.

This document is meant as guidance only and nothing in it constitutes legal advice. It will be for individual trusts to obtain their own legal advice on any specific case.

3. Risks

There are no specific legal requirements that govern an individual making a personal recording of their medical consultation or treatment, either overtly or covertly, for their private use. Recordings made to keep a personal record of what the doctors said are deemed to constitute 'note taking' and are therefore permitted when undertaken for this purpose. While a patient does not require permission to record their consultation, common courtesy would suggest that permission should be sought in most cases.

¹ http://www.gmc-uk.org/guidance/ethical_guidance/making_audiovisual.asp

The content of the recording is confidential to the patient, not the doctor or healthcare staff. The patient can waive their own confidentiality as they wish; this could include disclosing the details of their consultation with third parties or even posting and/or sharing the recording in unadulterated form on the internet through social media sites.

The position may, however, change once a recording is no longer used as a record of the consultation, for example where the recording is disclosed or publicised in a modified way which is not connected to the consultation. This could include an instance where it is designed to cause detriment to or harass another individual captured in the recording. Any such disclosure or publication, depending on the nature and context, may attract a civil action for damages and may also be a criminal offence.

For more guidance please read in conjunction with NHS Protect's document 'Misuse of social media to harass, intimidate or threaten NHS staff'.

Data Protection Act 1998

The recording of a consultation is likely to constitute processing of personal data under the DPA and as such it has to comply with the provisions of the DPA. There is an exemption in the DPA where personal data is processed by an individual for their own personal purposes. In such cases, the 'processing' does not engage the data protection principles of the act (the 'domestic purposes' exemption). However, further processing of the data would have to comply with the DPA.

Information Governance

Information governance refers to the legal and procedural framework that safeguards and ensures the appropriate use of patient and personal information by an organisation.

It is important to note that a patient's own private recording is not an information governance issue. As the Trust is not responsible for generating or making the recording, it is not liable for safeguarding the confidentiality, integrity or security of such material.

4. Potential legal action

If any part of the covert or overt recording of the patient's consultation is disclosed to a third party without the prior consent of the other recorded parties, then depending on the nature and the context of such disclosure, a criminal offence may be committed, civil legal action may be taken, or a breach of the DPA may occur.

Criminal offences

Criminal offences could arise from unauthorised disclosure, depending on how that disclosure or publication is made. However, the most likely offences could include an offence contrary to section 1 of the Protection From Harassment Act 1997, an offence contrary to section 4, 4A or 5 of the Public Order Act 1986, an offence contrary to section 1 of the Malicious Communications Act 1988 or an offence contrary to section 127 of the Communications Act 2003.

This list is not exhaustive and the specific offence charged would depend on the facts. For further information on the provisions of legislation referred to above please see the relevant

chapter in the NHS Security Management Manual. Specific advice can be sought from NHS Protect's Legal Protection Unit.

Civil action

Defamation

Actions for libel can be brought in the High Court for any published statements which are alleged to defame a named or identifiable individual (or individuals; under English law companies are legal persons, and allowed to bring suit for defamation) in a manner which causes them loss in their trade or profession, or causes a reasonable person to think worse of him, her or them. A statement can include an implication; for instance, a photograph or image in a particular context (for example, a photograph with an accompanying headline implying wrongdoing or incompetence) could be held as a personal allegation about the individual featured in the photograph.

Civil remedies

Injunctions

An injunction is a civil court order which orders a person to 'stop' or to 'do' a particular act or thing. A breach of an injunction is generally punishable as contempt of court and in some cases can lead to imprisonment. Interim injunctions can be sought to restrain publication where it is known that someone intends to publish defamatory material.

To obtain an interim injunction the aggrieved party must be able to show that they have a substantive cause of action. Injunctions are an 'equitable' remedy, which means the court is never obliged to grant them but will exercise its discretion to do so taking into account the conduct of the parties and all the relevant circumstances.

An interim injunction to restrain publication would be likely where a hospital becomes aware of someone's intention to publish something defamatory about staff at that organisation. It is unlikely to apply in circumstances where such a recording of a consultation has already been disclosed or published. In this situation, seeking damages may be the most likely remedy (please see below).

Further advice on injunctions can be sought from NHS Protect's Legal Protection Unit.

Damages

Damages are the main means by which somebody who has been defamed can seek redress. General damages are claimed to compensate for a loss of reputation, and special damages to compensate any financial loss incurred as a result of the defamation.

5. Precautionary measures

Where an NHS organisation does not have a specific policy in place covering covert and overt audio or video recordings made by patients, then it should seriously consider introducing one. If a policy on patient recording (or a related policy) exists, then including a suitable section to address the issue of patients recording staff (irrespective of the medium used) may suffice. Information leaflets or notices should inform patients and those

accompanying them that disseminating a recording of the consultation without the consent of others featured in it, depending on the nature and context of such disclosure, may lead to the commission of a criminal offence or result in civil proceedings.

By way of example, we would propose something along the following lines:

Overt patient recordings

Although we cannot place restrictions on a patient wishing to record notes of a consultation or conversation with a health professional, where it is felt absolutely necessary by the patient to do so, we should ensure that:

- any recording is done openly and honestly
- the recording process itself does not interfere with the consultation process or the treatment or care being administered
- the patient understands that a note will be made in their health record stating that they have recorded the consultation or care being provided
- the patient is reminded of the private and confidential nature of the recording and that it is their responsibility to keep it safe and secure
- any recording is only made for personal use
- patients are aware that the misuse of a recording may result in criminal or civil proceedings
- patients are discouraged from undertaking recordings in the first place, unless it is deemed absolutely necessary by highlighting the above responsibilities.

Covert patient recordings

Although we cannot place restrictions on a patient wishing to covertly record a consultation or conversation with a health professional, where organisations are aware that covert recording is a significant issue they should aim to discourage patients from doing so by ensuring that:

- the organisation promotes the open and honest recording of consultations, where a patient deems it absolutely necessary (see the advice above, which applies equally to covert recording)
- patients are aware that the organisation takes proactive steps to investigate and address any issues regarding the patient's treatment and care, to avoid them feeling it necessary to record their consultation
- relevant staff should consider providing patients with a written record summary, and or a verbatim record (if practical) of their consultation for their own personal use
- patients are advised that they are entitled to see their notes, if they so wish, by informally asking the healthcare professional in charge of the consultation, or to request a paper copy of their medical notes formally through a Subject Access Request (SAR) made under the Data Protection Act 1998
- patients are given information on how they can complain if they have an issue with their treatment and care, and their attention is drawn to the relevant guidance from the Care Quality Commission (see below) and Information Commissioner's Office.

Further guidance

The Care Quality Commission has published information for people who are thinking about using hidden cameras or any type of recording equipment to monitor someone's care, 'Thinking about using a hidden camera or other equipment to monitor someone's care' (CQC, 2015). The guidance is aimed at families, carers and people who use health and care services, for the purpose of monitoring and protecting theirs (or their loved one's) care, welfare and safety, and sets out some of the things to consider if they are thinking of using recording equipment, as well as explaining other steps they can take to raise their concerns.

6. References

Care Quality Commission, 'Thinking about using a hidden camera or other equipment to monitor someone's care' (2015)

http://www.cqc.org.uk/sites/default/files/20150212_public_surveillance_leaflet_final.pdf

Department of Health, 'Using mobile phones in NHS hospitals', (2009)

http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_092812.pdf

Information Commissioner's Office

<https://ico.org.uk/>

7. Contact details

Any enquiries about this document should be directed to the Policy and Standards or Legal Protection Unit email inbox (Policy@nhsprotect.gsi.gov.uk or LPU@nhsprotect.gsi.gov.uk).