



Response to Home Office consultation: ‘Police requests for third party material’



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1 Introduction

The [UK Caldicott Guardian Council \(UKCGC\)](#) is sponsored by the [National Data Guardian for Health and Social Care](#), and is a subgroup of her advisory panel.

The UKCGC supports Caldicott Guardians and others fulfilling the Caldicott function within their organisation by providing a point of contact for all Caldicott Guardians and for health and care organisations seeking advice on the eight [Caldicott Principles](#).

A Caldicott Guardian is a senior role within an organisation which processes health and social care personal data. They make sure that the personal information about those who use the organisation's services is used legally, ethically, and appropriately, and that confidentiality is maintained. Caldicott Guardians provide leadership and informed guidance on complex matters involving confidentiality and information sharing.

There are over 20,000 Caldicott Guardians in the UK.

In accordance with [National Data Guardian guidance](#), the following organisations should appoint a Caldicott Guardian:

1. Public bodies exercising functions that relate to the health service, adult social care or adult carer support in England and that process confidential information about patients and service users.
2. Other organisations providing services as part of the publicly funded health service, adult social care, or adult carer support pursuant to arrangements with a public body falling within point (1) above, and that process confidential information about patients and service users. Organisations that are not public bodies should appoint a Caldicott Guardian to assist with processing of confidential data of patients and service users of publicly funded services. However, these organisations may deem it appropriate for the Caldicott Guardian's remit to cover all processing of confidential patient and service user data (regardless of how services are funded).

This document sets out the UKCGC's response to the Home Office consultation 'Police requests for third party material'. The UKCGC has provided an overarching summary of the response followed by responses to those individual questions that it falls within the UKCGC's remit to respond to.

2 Summary

2.1 Remit of response

The UK Caldicott Guardian Council (UKCGC) is grateful for the opportunity to respond to this consultation. Caldicott Guardians frequently help their organisations to make decisions about whether individuals' health or social care information should be shared when the requests for information about them are received from the police.

Caldicott Guardians play a key role in ensuring that their organisations satisfy the highest practical standards for handling person-identifiable information and ensuring that confidentiality is respected. It is within this remit that the UKCGC is providing a response.

2.2 Relevant and proportionate

We recognise and respect that the police need timely access to relevant and appropriate patient and service user information in order to conduct their investigations. However, the views of organisations considering the confidentiality of their patients and service users and those of police conducting an investigation do not always align. Requests made by the police are frequently too broad: asking for excessive amounts of information without providing a clear rationale as to why it is needed.

This can be problematic for the health and social care sector, as the trust between an individual and health and care professionals is crucial to the delivery of care. People must have confidence that they can talk candidly to professionals to receive the support and care they require. If police requests for information are not necessary or proportionate, this could impact people's health seeking behaviours. People may fail to present to the health and care system for support, or they may not be fully honest with those treating them, to the detriment of their care.

For this reason, we strongly support legislation or guidance that will ensure that third party requests from the police are necessary and proportionate.

2.3 Common Law Duty of Confidentiality

This consultation fails to acknowledge both the professional and legal duties health and care professionals need to consider before sharing information with the police, and the unique nature of confidential health and social care data.

When health and care professionals receive requests for information, they must satisfy themselves that any disclosure of that information is permissible not just under data protection law, but also under the common law duty of confidentiality and in accordance with the eight Caldicott Principles.

The UKCGC feel it is crucial that the police are made aware of these duties and take them into account when requesting information from health and care organisations.

2.4 Length of time information is held

This consultation did not reference how long the information that is received by the police is retained, where it is held, and whether it used only for a specific case or more widely (and how the complainant is advised of this).

It is important that patients are informed of this.

2.5 Individual terms

This consultation focuses on requests for information of victims. However, the health and social care sector receives information requests for people other than just victims.

To reflect this, our response uses the terminology ‘patients and service users’ ‘individuals’ or ‘people’ to maintain a neutral position on how individuals are seen by the police.

3 Answers to consultation questions

17. In your experience, how much third-party material is typically requested about a victim? Select one response and include additional information if needed. a. None b. Requests seem to be specifically tailored to reasonable lines of enquiry for the investigation c. A lot of material is requested that doesn't seem to relate specifically to the alleged offence d. Other/additional information

The UKCGC understands that what information is necessary and proportionate needs to be considered in the circumstances of each case.

However, in our experience, Caldicott Guardians tasked with advising their organisations on disclosures of information to the police often receive insufficient information to help them navigate such decisions. Requests for information often seem too broad, or that excessive amounts of information are being requested without the provision of a clear rationale as to why it is necessary. In the absence of this rationale, it is hard for health and social care professionals who are considering the confidentiality of their patients and service users to align their thinking with that of the police conducting an investigation.

To remedy this, the UKCGC recommends that when the police request health and care information, they justify its purpose upfront by explaining what makes the request appropriate and proportionate in relation to what it is needed for.

Both data protection law and the common law duty of confidentiality must be satisfied when sharing information with the police. Requests for information often cite the crime and taxation exemption contained in Schedule 2, Part 1 of the Data Protection Act 2018 as a legitimising condition to disclose the information. Whilst it is useful for the police to highlight this legal gateway under data protection law, it does not consider the legal and ethical duty to maintain patient and service user confidentiality. Receiving explicit consent from a patient or service user can ensure compliance with this duty.

However, in the absence of consent, and in exceptional circumstances, disclosures of confidential information may be justified in the public interest. As such, a set of criteria should be developed by the police to determine what information is necessary and proportionate to request in each instance. These criteria could routinely be presented to organisations when requesting information. Providing clear, consistent justifications for requests would help health and care professionals to support police investigations in a more timely and efficient manner.

18. On average, how long does it take to process and answer a request for third party material?

The UKCGC does not have a numerical answer to this question.

The most time-consuming part of answering any request is determining whether information disclosure is lawful, ethical, and appropriate in that specific instance. The purely practical and administrative perspective (i.e., locating the information and issuing it to the police) only takes a short amount of time to process a request.

As mentioned in the response to question 17, requests for patient information are often broad and lacking the necessary detail. This means that health and care professionals often need to open up a dialogue with the police to understand what information it is appropriate for them to share in the scope of this specific request. This conversation is necessary to ensure that the information being released is proportionate, so that the organisation is not in breach of the common law duty of confidentiality. This dialogue often takes more time than any other part of the request.

It may also be necessary to contact the patient to establish if they are aware of the content of their notes and what is likely to be disclosed, extending the time further.

Note: the UKCGC has understood 'material' in this context to be recorded patient information, rather than physical evidence.

19. Does this differ by type of investigation? Select one. a. Yes b. No

20. If YES, please specify average time spent on processing and answering a request for third party material for: a. Rape and Sexual Offenses (RASO) b. Domestic Abuse c. Child Sexual Exploitation d. Assault or Violent Crimes e. Homicide f. Economic Crime g. Drug trafficking h. Acquisitive crime i. Modern slavery j. Other/Additional information

Our response to question 17 is also applicable here.

In our experience, the type of investigation is of less consequence than the proportionality and sensitivity of the information being requested.

Some patient information will be more sensitive (e.g., regarding an individual's mental or sexual health) and this will require the health professional to consider whether the request is proportionate or not. If requests are clear, and their supporting information is

comprehensive, then generally less follow up questions are needed. But if requests are unclear or lack detail, determining the scope can take time.

Officers who are experienced in asking health and care services for people's information often have a better understanding of the process and what organisations must satisfy themselves of before releasing patient information. This leads to better formed requests that are dealt with quicker.

21. Thinking about those cases which are quick to respond to, how long do they take from your experience?

Clear, comprehensive, proportionate requests for information should be able to be dealt with and processed quickly, subject to the availability of someone with the appropriate clinical knowledge to consider the request.

22. Thinking about those cases that take the most time to respond to, how long do they take from your experience?

As requests for information are dealt on a case-by-case basis, we feel that there is no realistic, representative response to this question.

23. In your experience, what prevents the timely return of third-party material? Check all that apply. a. There is no-one trained to handle such requests b. The requests are unclear and need to be clarified before they can be completed c. The requests are for a large quantity of documents and therefore take a long time to fulfil d. Other/additional information

Requests are often unclear and need to be clarified before they can be completed.

As with previous answers, most of the time spent responding to a request is trying to ascertain whether what is being requested is proportionate.

24. Please state how much you agree or disagree with the following:

- a. Engaging in Early Advice with the Crown Prosecution Service in rape cases helps to ensure requests for third party material are necessary and proportionate, in pursuit of a reasonable line of enquiry.
- b. There should be a statutory duty on policing to only request third party material that is necessary and proportionate, in pursuit of a reasonable line of enquiry for an investigation.
- c. There should be a statutory duty on policing to provide full information to the person about whom the third-party material is being requested. This could include details about the information being sought, the reason why and how the material will be used, and the legal basis for the request.
- d. There should be a statutory duty on policing, in their requests for information to third parties, to be clear about the information being sought, the reason why, how the material will be used and the legal basis for the request.
- e. There should be a code of practice to accompany the duties outlined in points b - d to add clarity on the expectations on policing and promote consistency in practice.

The UKCGC strongly agrees with measures (legislation or guidance) that will support the police in making requests for patient information that are proportionate, necessary and take into account the legal and ethical duties of health and care professionals.

When thinking about what is ‘necessary’ and ‘proportionate’, the UKCGC considers this from three key angles: the perspective of the individual and their expectations of confidentiality in health and social care services; what this means in respect of the common law duty of confidentiality; and what is advised in the Caldicott Principles.

As mentioned previously, the trust between a patient or social care service user and those providing their care is crucial to the running of the health and care sector. This trust is built upon a foundation of confidentiality: people share sensitive information because they believe it is being imparted within a relationship where privacy is guaranteed. This is how it should be. People must feel confident that they can talk openly to their health and care professionals to receive the support and care they require. But this is unlikely to be the case if people feel that the police might request information about them, or that information might be shared about them without their knowledge.

Caldicott Principle eight states that organisations should:

“Inform patients and service users about how their confidential information is used.”

In line with this principle, we strongly agree with one of the proposals that people should be informed of the third-party information being requested, why, and the legal basis. This would help to ensure that there are no surprises for members of the public about how their information is being used. Transparency is an essential ingredient to the creation and maintenance of trust in the health and social care system.

It is the UKCGC’s view that the police can also earn trust by informing individuals.

It is important to appreciate that the interpretation of proportionality may differ between the clinician, the complainant, and the police.

When advising an individual on the above, we also recommend that the police are clear on how long the information that is received by the police is retained, where it is held, and whether it is made available for a specific case or likely to be used more widely.