

TRUST POLICY CLINICAL PHOTOGRAPHY CONSENT AND CONFIDENTIALITY

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To be Read in Conjunction with: <ul style="list-style-type: none"> • Data Protection and Confidentiality (Dealing with Confidential Information) Policy • Information Technology and Cyber Security Policy • Consent – Including the Mental Capacity Act (Lawful Authority for Providing Examination, Care or Treatment) Policy • Media – Management of – Policy 				
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CLINICAL PHOTOGRAPHY CONSENT AND CONFIDENTIALITY POLICY

CONTENTS

Paragraph Number	Subject	Page Number
1	Introduction	Page 3
2	Policy Statement	Page 3
3	Definitions	Page 3
4	Scope	Page 3
5	Responsibilities	Page 3
6	Education and Training	Page 4
7	The Policy	Page 5

1. INTRODUCTION

The increasing use of technologies such as video and picture messaging has made it considerably easier to record, copy and transmit recordings of patients. Doctors may be interested in using new technologies to aid rapid diagnosis and consultation and therefore improve patient care. Doctors need to bear in mind that when used for clinical purposes such recordings form part of the patient's medical record and the same standards of confidentiality and the same requirements for consent to disclosure apply. A small number of exceptions to these requirements are covered in this guidance. The guidance does not apply to CCTV recordings of public areas.

All clinical photography undertaken within the University Hospitals of Derby and Burton Hospitals NHS Foundation Trust (the Trust) is subject to the following legislation which provides the patient with rights of confidentiality, protection against the unlawful processing of data and the right of consent:

- Data Protection Act 1998 95/46/EC
- Protection of Children Act 1989
- Mental Health Act 1983
- Mental Capacity Act 2005
- Obscene Publications Act 1956 and 1964
- Copyright, Designs and Patents Act 1988
- Professions Supplementary to Medicine Act 1960
- Clinical Negligence Scheme for Trusts 1995
- Human Rights Act 1998.

2. POLICY STATEMENT

The Trust is committed to ensuring that all clinical photography undertaken on its premises and of its patients conforms to current legislation.

This Policy is not intended to be over-restrictive but aims to ensure all parties are protected.

It recognises the essential role of photographic material within a teaching Trust for the benefit it brings to patients through the better education of its medical staff. In this respect, it recognises the need for continued use of material extant within the teaching domain prior to the implementation of this Policy.

3. DEFINITIONS

For the purpose of this Policy, photography will refer to an image created by the use of conventional still and digital photographic images and scanning devices.

4. SCOPE

The aim of this Policy is to make all the Trust employees, contractors or guests aware of their responsibilities when undertaking clinical photography on Trust premises.

5. RESPONSIBILITIES

Executive Medical Director will:

- Ensure that the Policy is reviewed in advance of the review date
- Manage the effective withdrawal of the Policy if appropriate
- Formally agree any exceptions
- Provide expert advice and guidance on Caldicott principles relating to this Policy.

Medical Photography will:

- Adopt the role of Policy developer
- Format and maintain a Trust register of approved parties / projects who undertake clinical photography and instruct that they store clinical digital images in a secure environment
- Provide advice and guidance on clinical photography issues as required.

Head of Information Governance will:

- Provide expert advice and guidance on Data Protection and computer security.

Caldicott Office Function will:

- Provide expert advice and guidance on Caldicott principles relating to this Policy
- Formally agree any exceptions
- Ensure the Policy is reviewed in advance of the review date.

Divisional Directors will:

- Ensure effective distribution and communication of the Policy throughout their Division
- Ensure the Policy is implemented and adhered to within their Division.

Ward and Departmental Managers will:

- Notify all new and existing staff of this Policy
- Ensure that all staff, contractors and other persons affected by the Policy comply with its actions
- Provide information on the location of cameras used for patient photography and the location of stored images to the Photography Department. This data to be kept in the Trust's Camera Register for the Chief Executive.

Please note: it is not necessary to include cameras that form part of a Medical device or CCTV. ie Endoscope, Fundus Cameras, Security Cameras etc.

Individual Trust Staff will:

- Familiarise themselves with the Policy
- Comply with the Policy relevant to their role and responsibilities.

6. EDUCATION AND TRAINING

All persons undertaking or requesting clinical photography on Trust premises must supply details of camera equipment, indicate where and how digital files are stored and sign a register stating that they will abide by the Policy and acknowledge their associated responsibilities.

7. THE POLICY

There must be a fully justifiable purpose for photography to be carried out.

Clinical Photography of Patient

The GMC identifies six categories of recordings for which consent to make the recordings is implicit in the consent given to the investigation or treatment, and does not need to be obtained separately:

- Images of internal organs or structures
- Images of pathology slides
- Laparoscopic and endoscopic images
- Recordings of organ functions
- Ultrasound images
- X-rays.

It is, however, clearly good practice to tell patients that images are being made as part of their care or treatment.

When these images are anonymous, the GMC advises that they may be disclosed for use in research, teaching, training, or other healthcare-related purposes, without consent, although doctors should, where practicable, explain that such recordings may be used in anonymised form for secondary purposes. These images, when used in connection with a case history could make a patient identifiable, and would, therefore require permission. The making of other recordings and images which contribute to patient care, and which fall outside the list above, generally require express patient consent. The GMC advises that, where practicable, doctors should explain any possible secondary uses of the recording in an anonymised form when seeking consent to make the recording. This discussion should be recorded in the patient's medical record.

The images and recordings in the list above are, when presented alone, intrinsically anonymous. Other images or recordings may be anonymised by removing identifying details. Anonymisation must be effective simply putting a bar across a patient's eyes would not be sufficient, for example. The GMC advises that, when deciding whether a recording is anonymous, doctors should bear in mind that apparently insignificant details may still be capable of identifying the patient. Extreme care should be taken about the anonymity of such recordings before using or publishing them without consent in journals or other learning materials. The British Medical Journal publishes a patient consent form for use wherever a patient might be identifiable from a case report, illustration or paper published in the journal.

The GMC draws a distinction between the use of these types of recordings for healthcare-related purposes such as teaching and research and the publication of images in media which are intended for a broad public audience and which are widely accessible to the public.

Medical Photography should be contacted to undertake all medical photography wherever practically possible. Only in exceptional / emergency circumstances and by prior agreement with Medical Photography should pictures be taken by another body.

A request for medical photography should be directed to the relevant Trust site at which the photographs are to be taken:

- For DERBY procedures: <https://neti.uhdb.nhs.uk/az-c-hnep-medical-photography-derby>
- For BURTON procedures: <https://neti.uhdb.nhs.uk/az-c-hnep-medical-photography-in-burton>.

Written consent from the patient should be obtained by the clinician and a copy of this should be sent Medical Photography.

Adults with Capacity

A full explanation of how the photographs will be used, including if there will be a secondary purpose for the photograph such as training or research, must be given to the patient and appropriate written consent obtained before any photography takes place. This must be documented by means of an official consent form or in the patient's medical notes in the case of bereavement photography

Where photography is for clinical purposes, the treating clinician must agree that the photography is clinically required

Consent documentation must be held within the patient's notes

Consent documentation should include consent form and summary of discussion and / or explanation as to the purpose and use.

Consent not Required

Photographs without consent may be obtained in certain circumstances for example, suspected non-accidental injury of a child or abuse against a vulnerable adult, where it is unlikely that the parent or guardian or next of kin will give consent and the recording of injuries can be demonstrated to be in the patient's best interests. Written consultant authority is required in such cases and immediate reference should be made to the Trust's Safeguarding Children and Safeguarding Adults Policy and Procedures.

Adults without Capacity (Including the Unconscious Patient)

Where adults lack the capacity to consent to an identifiable recording for assessment and treatment purposes, agreement should be sought from someone with lawful authority to consent on their behalf. Where no individual has legal authority to make the decision on a patient's behalf, a determination will need to be made, in conjunction with the patient's family and friends, as to whether it would be in the patient's best interests under the Mental Capacity Act 2005. Where there are no family members or friends available or willing to be involved in such a discussion or where treatment must be provided immediately, recordings may still be made where they form an integral part of an investigation or treatment in accordance with relevant legislation or common law and the clinician determines recording is in the patient's best interests.

Where a recording has already been made as part of the patient's care, but may also be of value for a secondary purpose the GMC advises that the recording should be anonymised wherever that is practicable and will serve the purpose. Legal advice should be sought on a case by case basis for the use of identifiable recordings OR reason other than treatment and research.

In the case of an unconscious patient, photographs may be taken but should not be used until signed consent has been obtained. The patient must be aware that photographs have already been taken and told the reason why they were taken. If informed consent is not subsequently forthcoming, the images will not be released and stored on the server with notes that they are to remain closed due to consent being withheld.

Children or Young Persons

Parents usually authorize recordings of their young children, while competent young

people choose for themselves. The same advice for adults with capacity on use and disclosure of recordings made as part of care also applied to children and young people.

Clinical Research and Training

Consent is required before making recordings for secondary purposes such as teaching, training, the assessment of healthcare professionals and research. It is good practice to get the patient's written consent, but if this is not practicable, the patient's oral consent should be obtained. The GMC advises that before making the recording, doctors should explain:

- The purpose of the recording and how it will be used
- How long the recording will be kept and how it will be stored
- That patients may withhold consent, or withdraw consent during or immediately after the recording, and this will not affect the quality of care they receive or their relationship with those providing care.

In some cases, although no recording has been planned, a recording of an unexpected development during the treatment process that would be valuable for teaching purposes may be made. Where the patient has capacity to consent their permission must be sought to make the recording. After a recording has been made, patients should be given the opportunity to see it and to withdraw consent for its future use. It is good practice to reaffirm consent for all continued use of identifiable recordings. It is common for video recordings to be used as a teaching tool. Some bodies, including the BMA, have been concerned that doctors are not able to exercise adequate control over such visual teaching material, which could be copied illegally. It is difficult, if not impossible, to police provisions that all material must be withdrawn if the patient revokes consent to its use, although all efforts should be made to destroy or anonymise such material. One solution is that video recordings can be edited and anonymised by obscuring or pixelating identifying features. Although this is not universally possible, it is recommended that this procedure be followed wherever feasible. Patients' facial expressions, however, are important for some purposes, such as teaching that involves neurological and neuropsychological conditions. If anonymisation is not possible, consent from the patient is essential.

Except when patients have given specific consent to other arrangements, patient-identifiable recordings should remain part of the patient's confidential medical record, subject to the same safeguards as other data.

Adults without Capacity (Including Unconscious Patients)

In England, Wales and Scotland it is lawful under the relevant mental capacity legislation to involve adults who lack capacity in research provided it is related to the condition with which they have been diagnosed; audio and visual recordings may form a part of such research. Incapacitated patients should be given the opportunity to withdraw their consent for the use of the recording if they regain the capacity to make a decision. In making audio or visual recordings for other secondary purposes the GMC states that doctors must be satisfied that the recording is:

- Is necessary, and benefits the patient or is in their best interests
- That the purpose cannot be achieved in a way that is less restrictive of the patient's rights and choices.

As mentioned above, the law in this area is untested and doctors should seek legal advice on a case-by-case basis

Children or Young People

A person with parental responsibility may consent on behalf of a child or young person who lacks the competence to a planned or unplanned recording for secondary purposes. The GMC advises that the recording should stop if the child or young person objects verbally or through their actions, if they show distress in other ways about the recording, or if the person with parental responsibility asks the recording to stop.

Minors (under 18) must be able to withdraw consent upon attaining maturity. When the minor continues to be a patient, there should be opportunities to discuss permission as he or she becomes able to decide.

Documenting suspected cases of child abuse sometimes involves photographic records of children's bodies. Although parental consent should be sought, if such clinical illustration is ordered by a court, and alerting the parent would put the child at increased risk, photographs may be taken without consent. Particular care must be taken with such sensitive material. Practitioners must ensure that it is stored safely and disclosed only for the purposes intended.

Stillborn babies and neonates who are on the point of death are sometimes photographed at the request of the parents, but photographs should not be used for any other purposes, unless the parents indicate that this would be acceptable. Great sensitivity is required regarding this issue.

Use of Mobile Devices

Clinical photography taken on mobile phones should not be used unless in conjunction with an official Trust recognised image capture system such as a dedicated clinical imaging app that stores images on an IG secure platform (eg the Consultant Connect App)

The Department of Health and the Medicines and Healthcare Products Regulatory Agency (MHRA) warn that picture-messaging technology used in a clinical setting cannot be assured to be safe, suitable or effective as it has not been subject to the usual medical devices regulations and there is also the potential for legal action to be taken against an individual doctor or hospital, if a patient comes to harm.

Additionally the use of mobile telephones to make video recordings is prohibited in accordance with the Trust's Telephone Policy.

There are some circumstances where mobile telephones are permitted for capturing images for domestic purposes ie non-clinical images. An example of this might be where parents are permitted to take photographs of their own children using mobile phones. Such domestic images are exempt under Article 2 (2)(a) UK GDPR which states that "This regulation does apply to the processing of personal data by an individual in the course of a purely personal or household activity". However, care should be taken to ensure that recordings do not include accidental inclusion of patients and staff without permission.

Recordings for use in the Widely Accessible Public Media (Television, Radio, Internet, Print)

In general, the rules relevant to making recordings for secondary purposes also apply to recordings for use in widely accessible public media, for example, to inform the general public. There are, however, some issues that are specific to recordings used in this context.

No identifying material may be published in textbooks or journals, or used for teaching without express patient consent (this should usually be in writing). For recordings or images which are not included on the list on page 1 the GMC advises that patient

consent is also required to make a recording that will be used in widely accessible public media even if it is considered non-identifiable.

Sometimes, doctors may wish to publish a recording of a patient which was made as part of their care, although consent was not obtained at the time of recording. In these circumstances, patient consent must be obtained if the patient is, or may be, identifiable. GMC guidance states that if the recording is anonymised, it is good practice to seek consent before publishing, bearing in mind the difficulties in ensuring that all the features of a recording that could identify the patient to any member of the public have been removed.

Patients should understand that, once material is published and in the public domain, it is unlikely to be possible to withdraw it from circulation. Where a video recording has been made for a broadcast, doctors should check that patients understand that, once they have agreed to the recording being made for the broadcast, they may not be able to stop its subsequent use. The GMC states that if patients wish to restrict the use of material they should be advised to get agreement in writing from the programme maker and the owners of the recording, before recording begins. That aside, the BMA takes the view that consent is not blanket permission but should be periodically renewed, giving the option to withdraw material from use or limit its future use. This is particularly important for children and young people. The GMC is clear that doctors must not participate in making or disclosing recordings of children or young people who lack competence, where it is believed that they may be harmed or distressed by making the recording or by its disclosure or use, even if a person with parental responsibility has given consent.

Adults without Capacity (Including Unconscious Patients)

As discussed above there are specific legal requirements for making recordings of adults who lack capacity, and using or disclosing such recordings. Legal advice should be sought in this area. As discussed above, the GMC states that in making audio or visual recordings for other secondary purposes doctors must be satisfied that the recording is necessary and benefits the patient or is in their best interests; and that the purpose cannot be achieved in a way that is less restrictive of the patient's rights and choices.

Children or Young People

In the case of young children who are unable to decide for themselves, the consent of parents is needed and, as with all recordings used for secondary purposes, agreement for continued use should be re-confirmed at regular intervals. As previously noted, it may not be possible for material which has been published in the public domain to be completely withdrawn, however, where it might be possible to restrict distribution or withdraw the recording from circulation this should be done if a young person revokes consent on attaining maturity.

Use of Photographs After Patient's Death

Where a patient dies before consent can be obtained, identifiable clinical shots can only be released with the agreement of the deceased's personal representative (see Access to Health Records Act 1990). A duty of confidentiality survives the death of the patient.

Where a patient who has consented to clinical photography dies, clinicians wanting to use these images for a purpose not covered in the original consent form should contact the patient's personal representative. They can then gain informed consent for the publication or other use of the images from the relatives.

Pictures of deceased patients should not be used if there are pictures of living patients (who can consent) available that could equally meet the clinician's need.

All parties and projects undertaking patient clinical photography shall respect the dignity,

religion, nationality and individual sensibilities of the patient.

General

- All parties and projects undertaking patient clinical photography shall be aware of and act appropriately upon the need for chaperones
- Consent is required even when the patient is incidental to the main picture, eg documentation of equipment or procedures
- All parties and projects undertaking clinical photography on Trust premises in Trust- employed time should be aware that, since the Copyright, Designs and Patents Act of 1988, full copyright and reproduction rights have been assigned to the Trust.
- Contracts with publishers and freelance organisations should be made so that the copyright on all photographs remains with the Trust
- Professional freelance photographers commissioned by the Trust must be made aware of patient confidentiality and associated rights
- All images, when published (eg digital images on a web site), must be accompanied with a copyright statement assigning copyright to the Trust and displaying the conventional copyright symbol ie ©
- No clinical photographic images should be kept for longer than is necessary
- To ensure an effective audit trail, all clinical photographs must be stored on hospital premises or computer systems using the patient's unique identifying number or hospital number
- Images should be processed and stored safely to prevent accidental loss, unauthorised viewing or damage. In this respect, all parties must be aware that digital images should be treated with the same level of security and confidentiality as traditional medical images
- Clinical photographic material must not be processed by commercial laboratories or agencies that have not been approved by the Trust
- Where possible, all clinical digital images should be stored in their original format without manipulation to preserve their integrity. Proof of the integrity of the original may be required, for example, where photographic evidence is required in a court case
- All personal data associated with photographic images must be kept so that it conforms to the standards stipulated by the Data Protection Act 1998
- Any photographic material that is no longer required must be destroyed or erased, along with its associated data, in accordance with current Trust practices
- It is prohibited to lend, sell or hire any clinical photographic image to external bodies without permission. In this respect, all staff are reminded that breach of copyright materials is punishable by law.
- It is important to remember that simply being in possession of material that has been reproduced without consent is an offence
- Passing of material to colleagues for internal use is permitted (eg for use in seminars, presentations, the Trust Intranet)
- Misuse of a clinical photographic image may be considered a breach of confidentiality
- Failure to comply with current UK legislation with regard to data protection is an offence and is punishable by law.