




# Audio and Visual Recording by Patients Policy

|  |   |                        |
|--|---|------------------------|
| <b>Policy number and category</b>                        | IG 13   | Information Governance |
| <b>Version number and date</b>                           | 1   | May 2022               |
| <b>Ratifying committee or executive director</b>         | Information Governance Steering Group   |                        |
| <b>Date ratified</b>                                     | May 2022  |                        |
| <b>Next anticipated review</b>                           | May 2025  |                        |
| <b>Executive director</b>                                | Executive Director of Finance   |                        |
| <b>Policy Lead</b>                                       | Head of Information Governance  |                        |
| <b>Policy author</b> <i>(if different from above)</i>    |   |                        |
| <b>Exec Sign off Signature</b> (electronic)              |  |                        |
| <b>Disclosable under Freedom of Information Act 2000</b> | Yes   |                        |

## Policy context

The purpose of this policy is to provide management and guidance to staff in relation to patients who wish to record their consultations or treatments including both overt and covert recordings, with or without the knowledge or permission of those being recorded at all Birmingham and Solihull Mental Health NHS Foundation Trust sites and where the patient is residing.

## Policy requirement (see Section 2)

The policy provides guidance where patient's either covertly or overtly record their consultations and the steps staff should take.

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## **1.0 Introduction**

### **1.1 Rationale (why):**

This policy also sets out the Trust's stance on overt and covert recording by patients.

### **1.2 Scope (when, where and who):**

The policy provides staff with clear instructions on appropriate behaviour by patients when using their own recording equipment on Trust premises. It will also signpost staff to documentation set out by national professional bodies.

### **1.3 Principles**

Recordings made to keep a personal record of what the NHS professional 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 by the patient in most cases.

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.

There are legislation and standards which relate to confidentiality and disclosure of person identifiable information.

### **Common Law Duty of Confidence**

The "duty of confidence" is long established within common law and as such applies equally to everyone. This means that any personal information given or received in confidence for one purpose may not be used for a different purpose or passed to anyone else without the consent of the data subject.

### **Data Protection Act 2018 and the General Data Protection Regulation (GDPR)**

Data Protection legislation consists of the UK Data Protection Act 2018 and the EU General Data Protection Regulation (GDPR). They must be read in conjunction with each other.

### **Principles**

The Data Protection Act 2018 has six principles that apply to the processing of personal data of living individuals:

1. Processing must be lawful and fair
2. Purposes of processing must be specified, explicit and legitimate
3. Personal data must be adequate, relevant and not excessive

4. Personal data must be kept accurate and up to date
5. Personal data must not be kept longer than is necessary
6. Personal data must be processed in a secure manner

To complement these, the GDPR also has six principles; that personal data of living individuals must be processed:

1. Fairly, lawfully and transparently
2. For specified purposes
3. Using the minimum amount necessary
4. Accurately
5. For only as long as it is needed
6. Securely

### **Human Rights Act 1998**

The main element of the Human Rights Act (HRA) 1998 relevant to data protection, confidentiality and medical/personal records is Article 8. This article states that:-

Everyone has the right to respect for their private and family life, their home and their correspondence and that there shall be no interference by a public authority with the exercise of that right except such as in accordance with the law and is necessary in a democratic society, in the interests of:-

- National Security
- Public Safety or the economic well-being of the country
- For the prevention of disorder or crime
- For the protection of health or morals
- For the protection of the rights and freedoms of others

In addition, Article 10 gives the right to freedom of expression but prevents the disclosure of information received in confidence.

### **Equality Act**

Enables patients to understand their rights to be treated equally and free from discrimination when buying goods or accessing services, including protection against harassment and rights to accessibility.

### **Caldicott Principles**

The Caldicott Report sets out the following set of principles for the management of patient identifiable data:

1. Justify the purpose(s).
2. Use and transfer patient identifiable information only when absolutely necessary.
3. Only use the minimum necessary patient identifiable information.
4. Access to patient identifiable information to be on a strict need to know basis.
5. Everyone to be aware of their responsibilities.
6. Understand and comply with the law.

7. The duty to share information can be as important as the duty to protect patient confidentiality.
8. Inform patients and patients about how their confidential information is used

### **Regulation of Investigatory Powers Act 2000**

The Regulation of Investigatory Powers Act is legislation governing the use of covert recording techniques by public authorities.

### **Professional Obligations**

As well as an obligation to the Trust, many staff are also bound by the Codes of Conduct of their respective professional bodies and should refer to their respective organisations for details of their guidelines.

### **Safeguarding**

Staff must consider the Trust's Safeguarding Policies in conjunction with this policy.

### **Potential legal action**

If any part of a covert or overt recording of the patient's consultation or members of the public, visitor and relatives, 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 Data Protection Act 2018 and GDPR may occur.

### **Criminal offences**

Criminal offences could arise from unauthorized disclosure of recordings, 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'.

### **Protection from Harassment Act 1997**

It is an offence under the Protection from harassment act 1997 to cause distress and upset to an individual if knowing that such action will cause distress and upset. This could apply if any individuals use the act of recording with the known intention to cause distress and upset.

### **Criminal Justice and immigration Act 2008**

If an individual is clearly recording with the intention to cause a nuisance then they may be committing an offence under the 'Criminal Justice and Immigration Act 2008' (section 119). This applies to persons who are not seeking medical advice, treatment or care could commit the offence if they, for example, use a mobile phone in such a way as to cause a nuisance or disturbance to an NHS staff member and where they fulfil the other elements of the offence (subject to certain safeguards set out in the act)

## **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.

The above list is not exhaustive and the specific offence charged would depend on the facts.

## **2: The policy**

### **2.1 Audio / Visual Recordings made by Patients**

Staff may encounter patients using recording devices. A large proportion of people own mobile phones, many of which have the facility to take photographs or make audio/video recordings.

It is important for staff to ensure that recordings made by patients do not compromise patient confidentiality and do not obstruct staff in their duty to provide effective patient care. If other patients are captured within the recording they must have provided their explicit consent to be recorded.

If a staff member sees a patient making a recording without prior consent that poses a risk to other patients confidentiality, then they should be advised that their actions are inappropriate and to delete the recording.

#### **2.2.1 Recordings in Clinical Consultations/Treatment Areas**

Article 2(c) of the General Data Protection Regulation (GDPR) states that the regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity. This means that recordings of this type are exempt from Data Protection legislation.

Patients may approach staff to request to audio record their clinical consultations/treatment/scans for private use, i.e. to act as an "aide mémoire". This is permitted under Article 2(c).

The Trust would encourage staff to cooperate with reasonable requests. However, if staff suspect the recording is not going to be used in this way, then they can object to it taking place.

If a patient wishes to make a recording, this should be discussed with the healthcare professional prior to the recording taking place. The healthcare professional is then responsible for establishing whether the recording is appropriate, taking into consideration whether any third-party patient confidentiality would be compromised and ensuring any identified staff provide consent.

The Trust recognises that patients may wish to take recordings of themselves when on Trust premises. As long as the recording does not identify anyone who has not given prior consent then it is acceptable.

It is important for the patient to recognise that recordings are made for their private use only. If they then go on to publish it in the public domain, e.g. on social media and individuals are featured who have not provided consent then this is classed as processing and it is therefore subject to Data Protection legislation.

If no consent was sought, then this should be logged as an incident. The patient's responsible clinician or clinical team must request that the patient remove the recording. Advice can be sought from the Legal Team and Information Governance Team.

### **2.2.2 Recordings in Public Areas/Waiting Rooms/Wards**

Patients should not be allowed to make recordings in areas frequented by patients and members of the public as recordings are likely to compromise patient confidentiality.

### **2.2.3 Covert Recordings**

If a recording is discovered retrospectively, then it is important to clarify the consent arrangements.

If there was no consent for the recording and individuals are featured that have not provided consent, then the patient should be instructed to delete it. If the recording is in the public domain, e.g. on the internet, then it should be removed by the patient. In the event of non-compliance, the incident may be reported to the police.

### **2.2.4 Communication with Patients**

Staff should consider displaying relevant posters contained in Appendices 2 and 3 in their areas to clearly set out to patients expected appropriate behaviour.

### **2.2.5 Escalation**

If a patient refuses to remove or delete a recording local resolution should try and be achieved, however, if following local resolution a patient continues to refuse to remove or delete a recording, advice should be sought from the Information Governance Team and also the Legal Team. There are legal powers which can be enacted to force the removal and deletion of recordings (please refer to section 1.3), however, to protect the clinical relationship with the patient, discussion should be held by the clinical team with the patient in the first instance to explain the reasons for removal and deletion of the recording.

## **3.0 Examples of Acceptable and Non-Acceptable Behaviour**

Examples of acceptable behaviour are:

- Patient agreeing with his consultant in advance to make an audio recording on his mobile phone of his clinic appointment and then playing it back later to his wife.

Examples of unacceptable behaviour are:

- Patient making a visual recording on her mobile phone of a busy waiting area and then publishing it on social media.
- Patient taking a photograph of other patients in their hospital beds in a ward.

- Relative/family member taking an audio/visual recording of a patient having treatment where the patient has clearly not provided consent

#### 4: Responsibilities

This should summarise defined responsibilities relevant to the policy.

| Post(s)                        | Responsibilities  | Ref |
|--------------------------------|---|-----|
| All Staff                      | Staff are responsible for complying with this policy and behaving in an appropriate way.  |     |
| Chief Executive                | As the Accountable Officer, they have the overall responsibility for Information Governance within the Trust.   |     |
| Caldicott Guardian             | The Caldicott Guardian (Trust's Medical Director) has overall responsibility for ensuring information relating to patients and the users of the services is used confidentially and handled with the appropriate safeguards.  |     |
| Senior Information Risk Owner  | The SIRO (Trust's Executive Director of Finance) is a mandated role and has overall responsibility for managing information risk across the Trust.  |     |
| Head of Information Governance | This role will lead the Information Governance agenda for the Trust and is accountable to the Associate Director of Performance and Information, Deputy SIRO. They will have day to day responsibility for all aspects of Information Governance (except information security and data quality although they will provide assistance where required). |     |

#### 5: Development and Consultation process

| Consultation summary   |                             |
|--|-----------------------------|
| <b>Date policy issued for consultation</b>                   | March 2022                  |
| <b>Number of versions produced for consultation</b>          | 1                           |
| <b>Committees / meetings where policy formally discussed</b> | <b>Date(s)</b>              |
| <b>Information Governance Steering Group</b>                 | 11 <sup>th</sup> March 2022 |
|  |                             |



| Where received | Summary of feedback | Actions / Response |
|----------------|---------------------|--------------------|
|                |                     |                    |
|                |                     |                    |

## 6: Reference documents

- Confidentiality Policy
- Care Records Policy
- Access to Information Policy
- Information Governance Assurance Policy

## 7: Bibliography:

- University Hospitals Plymouth NHS Trust 'Audio and Visual Recording Policy' 2019
- The Medical Ethics Department of the British Medical Association guidance.
- NHS PROTECT guidance on Patients recording NHS staff in health and social care settings, dated May 2016
- NHS PROTECT 'Misuse of social media to harass, intimidate or threaten NHS staff'.
- Protection From Harassment Act 1997
- Public Order Act 1986
- Malicious Communications Act 1988
- Communications Act 2003.
- GDPR May 2018
- Data Protection Act 2018
- CQC Guidance - Thinking about using a hidden camera or other equipment to monitor someone's care'
- Department of Health, 'Using mobile phones in NHS hospitals', (2005,2009)

## 8: Glossary:

### 8.1 Definitions

**Audio and Visual Recordings** are originals or copies of recordings, photographs, videos and other images that may be made using any recording device, including mobile phones.

**Patients** are people who use the Trust's services, including patients, visitors, carers and relatives.

**Staff** are any permanent or temporary worker, locum bank employee or contractor.

**Personal Information** is factual information or expressions of opinion, which relate to a living individual who can be identified from that information, or in conjunction with any other information coming into the possession of the holder of that data – this also includes any indication of the intention of any person in respect of that individual.

**Special Category Information** is information that relates to a living individual that includes racial or ethnic origin, political opinions, religious or other beliefs, trade union membership, genetics, biometrics, physical or mental health condition, sex life and sexual orientation.

**Confidentiality** means that information is only disclosed to individuals who are authorised to receive it by individuals who are authorised to release it. Disclosure is determined on a need to know basis.

**Overt Recording** is a recording that is openly carried out in plain sight and is not concealed.

**Covert Recording** is a recording that is not openly acknowledged or displayed, i.e. a secret recording.

**Aide Mémoire** is a memory aid, a reminder or memorandum for personal use.

## 9: Audit and assurance

| Element to be monitored  | Lead                           | Tool  | Frequency | Reporting Committee                   |
|--|--------------------------------|---|-----------|---------------------------------------|
| Number of incidents of patients recording in unauthorised areas (public or wards areas, or group settings) | Head of Information Governance | Eclipse incident reporting<br><br>In addition, analysis of incidents to be presented to Information Governance Steering Group in order to monitor trends and ensure policy is being correctly applied | Quarterly | Information Governance Steering Group |
| Number of complaints received from patients regarding staff  | Head of Information Governance | Complaints  | Quarterly | Information Governance Steering Group |

## 10. Appendices:

- ✦ **Appendix 1** – Equality Impact Assessment
- ✦ **Appendix 2 & 3** - Guidance Posters

## Appendix 1

### Equality Analysis Screening Form

A word version of this document can be found on the HR support pages on Connect

<http://connect/corporate/humanresources/managementsupport/Pages/default.aspx>

|   |                                   |   |                                |  |
|---|-----------------------------------|---|--------------------------------|--|
| <b>Title of Proposal</b>  | Audio and Visual Recording Policy |   |                                |  |
| <b>Person Completing this proposal</b>  | Kirstie Macmillan                 | <b>Role or title</b>  | Head of Information Governance |  |
| <b>Division</b>   | Corporate                         | <b>Service Area</b>   | Performance and Information    |  |
| <b>Date Started</b>   | December 2021                     | <b>Date completed</b>   | January 2022                   |  |
| <b>Main purpose and aims of the proposal and how it fits in with the wider strategic aims and objectives of the organisation.</b>   |                                   |   |                                |  |
| The purpose of this policy is to provide management and guidance to staff in relation to patients who wish to record their consultations or treatments including both overt and covert recordings, with or without the knowledge or permission of those being recorded at all Birmingham and Solihull Mental Health NHS Foundation Trust sites and where the patient is residing. |                                   |   |                                |  |
| <b>Who will benefit from the proposal?</b>  |                                   |   |                                |  |
| Staff, patients and visitors to Trust sites   |                                   |   |                                |  |
| <b>Impacts on different Personal Protected Characteristics – Helpful Questions:</b>   |                                   |   |                                |  |
| <i>Does this proposal promote equality of opportunity?</i>  |                                   | <i>Promote good community relations?</i>                      |                                |  |
| <i>Eliminate discrimination?</i>  |                                   | <i>Promote positive attitudes towards disabled people?</i>    |                                |  |
| <i>Eliminate harassment?</i>  |                                   | <i>Consider more favourable treatment of disabled people?</i> |                                |  |
| <i>Eliminate victimisation?</i>   |                                   | <i>Promote involvement and consultation?</i>                  |                                |  |
|   |                                   | <i>Protect and promote human rights?</i>                      |                                |  |
| <b>Please click in the relevant impact box or leave blank if you feel there is no particular impact.</b>  |                                   |   |                                |  |
| <b>Personal Protected Characteristic</b>  | <b>No/Minimum Impact</b>          | <b>Negative Impact</b>  | <b>Positive Impact</b>         | <b>Please list details or evidence of why there might be a positive, negative or no impact on protected characteristics.</b> |
| <b>Age</b>  |                                   |   | x                              | Supporting patients to be able to record their private consultations   |
| Including children and people over 65   |                                   |   |                                |  |

|   |   |  |   |  |
|---|---|--|---|--|
| Is it easy for someone of any age to find out about your service or access your proposal?<br>Are you able to justify the legal or lawful reasons when your service excludes certain age groups  |   |  |   |  |
| <b>Disability</b>   |   |  | x | Supporting patients to be able to record their private consultations |
| Including those with physical or sensory impairments, those with learning disabilities and those with mental health issues<br>Do you currently monitor who has a disability so that you know how well your service is being used by people with a disability?<br>Are you making reasonable adjustment to meet the needs of the staff, service users, carers and families? |   |  |   |  |
| <b>Gender</b>   | x |  |   |  |
| This can include male and female or someone who has completed the gender reassignment process from one sex to another<br>Do you have flexible working arrangements for either sex?<br>Is it easier for either men or women to access your proposal?   |   |  |   |  |
| <b>Marriage or Civil Partnerships</b>   | x |  |   |  |
| People who are in a Civil Partnerships must be treated equally to married couples on a wide range of legal matters<br>Are the documents and information provided for your service reflecting the appropriate terminology for marriage and civil partnerships?   |   |  |   |  |
| <b>Pregnancy or Maternity</b>   | x |  |   |  |
| This includes women having a baby and women just after they have had a baby<br>Does your service accommodate the needs of expectant and post natal mothers both as staff and service users?<br>Can your service treat staff and patients with dignity and respect relation in to pregnancy and maternity?   |   |  |   |  |
| <b>Race or Ethnicity</b>  | x |  |   |  |
| Including Gypsy or Roma people, Irish people, those of mixed heritage, asylum seekers and refugees<br>What training does staff have to respond to the cultural needs of different ethnic groups?<br>What arrangements are in place to communicate with people who do not have English as a first language?  |   |  |   |  |
| <b>Religion or Belief</b>   | x |  |   |  |
| Including humanists and non-believers<br>Is there easy access to a prayer or quiet room to your service delivery area?<br>When organising events – Do you take necessary steps to make sure that spiritual requirements are met?  |   |  |   |  |
| <b>Sexual Orientation</b>   | x |  |   |  |
| Including gay men, lesbians and bisexual people   |   |  |   |  |

|  |                    |                      |                   |  |
|--|--------------------|----------------------|-------------------|--|
| Does your service use visual images that could be people from any background or are the images mainly heterosexual couples?<br>Does staff in your workplace feel comfortable about being 'out' or would office culture make them feel this might not be a good idea? |                    |                      |                   |  |
| <b>Transgender or Gender Reassignment</b>  | x                  |                      |                   |  |
| This will include people who are in the process of or in a care pathway changing from one gender to another<br>Have you considered the possible needs of transgender staff and service users in the development of your proposal or service?                         |                    |                      |                   |  |
| <b>Human Rights</b>  |                    |                      | x                 | Supporting patients to be able to record their private consultations |
| Affecting someone's right to Life, Dignity and Respect?<br>Caring for other people or protecting them from danger?<br>The detention of an individual inadvertently or placing someone in a humiliating situation or position?  |                    |                      |                   |  |
| <b>If a negative or disproportionate impact has been identified in any of the key areas would this difference be illegal / unlawful? I.e. Would it be discriminatory under anti-discrimination legislation. (The Equality Act 2010, Human Rights Act 1998)</b>       |                    |                      |                   |  |
|  | <b>Yes</b>         | <b>No</b>            |                   |  |
| <b>What do you consider the level of negative impact to be?</b>  | <b>High Impact</b> | <b>Medium Impact</b> | <b>Low Impact</b> | <b>No Impact</b>   |
|  |                    |                      |                   |  |
| If the impact could be discriminatory in law, please contact the <b>Equality and Diversity Lead</b> immediately to determine the next course of action. If the negative impact is high a Full Equality Analysis will be required.                                    |                    |                      |                   |  |
| If you are unsure how to answer the above questions, or if you have assessed the impact as medium, please seek further guidance from the <b>Equality and Diversity Lead</b> before proceeding.   |                    |                      |                   |  |
| If the proposal does not have a negative impact or the impact is considered low, reasonable or justifiable, then please complete the rest of the form below with any required redial actions, and forward to the <b>Equality and Diversity Lead</b> .                |                    |                      |                   |  |
| <b>Action Planning:</b>  |                    |                      |                   |  |
| How could you minimise or remove any negative impact identified even if this is of low significance?   |                    |                      |                   |  |

How will any impact or planned actions be monitored and reviewed?

How will you promote equal opportunity and advance equality by sharing good practice to have a positive impact other people as a result of their personal protected characteristic.

Please save and keep one copy and then send a copy with a copy of the proposal to the Senior Equality and Diversity Lead at [bsmhft.hr@nhs.net](mailto:bsmhft.hr@nhs.net) . The results will then be published on the Trust's website. Please ensure that any resulting actions are incorporated into Divisional or Service planning and monitored on a regular basis.

## Appendix Two and Three

### Guidance Posters



Audio and Visual  
Recording Policy Po: