

Taking and using visual and audio recordings of patients

Guidance from the BMA Medical Ethics Department

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Taking and using visual and audio recordings of patients

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 in hospitals and surgeries, which are the subject of separate advice from the Information Commissioner.¹

The guidance covers recordings of all types and reflects the basic principles of the GMC guidance on making and using visual and audion recordings of patients. (The guidance excludes pathology slides containing human tissue, although images of such slides are covered by this advice).²

When making or using recordings the GMC states that doctors must:

- give patients the information they want, or need, about the purpose of the recording
- make recordings only where there is appropriate consent or other valid authority for doing so
- ensure that patients are under no pressure to give their consent for the recording to be made
- where practicable, stop the recording if the patient requests this, or if it is having an adverse effect on the consultation or treatment
- anonymise or code the recordings before using or disclosing them for a secondary purpose,³ if this is practicable and will serve the purpose
- disclose or use recordings from which patients may be identifiable only with consent or other valid authority for doing so
- make appropriate secure arrangements for storing recordings
- be familiar with, and follow, the law and local guidance and procedures that apply where they work.⁴

Recordings made as part of a patient's care

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-rays⁵

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.⁶ Of course, 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.⁷ 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.⁸

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;⁹ 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.¹⁰ Extreme care should be taken about the anonymity of such recordings before using or publishing them without consent in journals or other learning materials.¹¹ 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.¹²

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 – such recordings are discussed on page 4.

Adult patients who lack capacity

Where adults lack the capacity to consent to an identifiable recording for assessment and treatment purposes, agreement should be sought from someone with the lawful authority to consent on their behalf. Where no individual has legal authority to make the decision on a patient's behalf, it may be in the patient's best interests to discuss the making of the recording with family or friends close to the patient. 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.¹³

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.¹⁴ (Recordings for use in widely accessible public media are distinct from other secondary purposes and are discussed on page 4). In relation to identifiable recordings used for secondary purposes the law in relation to adults lacking capacity is untested. In the BMA's view it is difficult to see how such a decision could be in the individual's best interests. Legal advice should be sought on a case-by-case basis for the use of identifiable recordings for reasons other than treatment and research. Involving incapacitated adults in research is dealt with in separate guidance material.

Children or young people

Parents usually authorise 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 applies to children and young people.

Recordings made for research, teaching, training and other healthcare-related purposes

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.¹⁵ 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.¹⁶

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.¹⁷

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 who lack capacity

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.¹⁸

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.¹⁹

Minors (under 16 in Scotland, under 18 in the rest of the UK) 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.

Recordings for use in 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 rare 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.²⁰ 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.²¹

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.²²

Adults who lack capacity

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.²³

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.

Telephone and other audio recordings

The monitoring and surveillance of telephone calls is subject to regulations by the Telecommunications Act 1984, which imposes a duty on those responsible for the call system to ensure that every reasonable effort is made to inform callers that their call might be recorded.

Calls to doctors' surgeries and to medical advice lines and similar services can obviously involve particularly sensitive information. In these circumstances it is important that callers are informed that their call may be recorded. Covert recordings of calls from individual patients should not be made.

In many areas, not only in health care, telephone calls are recorded for medico-legal purposes. Where telephone calls to a practice or out of hours service are recorded for these purposes, patients need to be told that conversations are being recorded and why. A failure to do so could mean that these recordings are unlawful. Information should also be available concerning how long recordings are kept and how patients can access them. As a general rule, the BMA encourages doctors to share information with patients whenever possible. If patients want to listen to recordings, this should be facilitated, if possible via the doctor who usually provides their care. The recording forms part of the patient's medical record, and could be accessible under the access provisions of the Data Protection Act 1998.

The BMA supports the use of tape-recording facilities for recording a discussion with a healthcare professional when a diagnosis or course of treatment is being discussed, when the aim is to assist patients to understand and recall facts. Doctors worry, however, if they feel that they are being recorded for future complaints or litigation, and may be less likely to want to express opinions freely.

Making recordings covertly

People using healthcare facilities should be informed of any use of surveillance camera for purposes such as security. The GMC acknowledges, however, that there may be exceptional circumstances where covert surveillance is acceptable if there is no other way of obtaining information which is necessary to investigate or prosecute a serious crime, or to protect someone from serious harm, for example, where there are grounds to suspect a child is being harmed by a parent or carer.²⁴ Before any covert recording can be carried out, authorisation must be sought from a relevant body in accordance with the law.²⁵ In any situation in which covert surveillance is proposed doctor should discuss this with an experienced colleague and seek independent expert advice.²⁶

Deceased patients

The duty of confidentiality continues after a patient has died. Where a recording was made when a patient was alive, doctors should follow a patient's known wishes after their death. This means that if a recording was made with the patient's consent for a specific purpose, it may be used after their death, provided there is no reason to believe that consent was withdrawn before the patient died.²⁷ However, if the recording will be in the public domain or the patient is identifiable, the GMC advises that consideration needs to be given to consulting the patient's family.²⁸ Legal advice should also be sought in these cases.

Storing and disposing of recordings

Recordings made as part of the patient's care from part of the medical record and must be treated in the same way as other medical records. The advice from the UK health departments on records retention, should be followed.²⁹

For recordings made for secondary purposes the GMC advises that doctors must be satisfied 'that there is agreement about the ownership, copyright, and intellectual property rights of the recording'.³⁰ Further advice can be sought from a Caldicott Guardian.

- 1 This is available at: www.ico.gov.uk/.
- 2 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London.
- 3 Secondary purposes are health-related uses which are not designed to benefit the patient directly, for example, teaching, assessment of healthcare professionals and students and research. General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 5.
- 4 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 8.
- 5 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 10.
- 6 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, paras 11 and 12.
- 7 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 13.
- 8 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 14.
- 9 Further advice on anonymising information is available from the Information Commissioner's Office. Information Commissioner's Office (2007) *Data Protection Technical Guidance – Determining what is personal data*, ICO, Wilmslow, section C.
- 10 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 17.
- 11 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 17.
- 12 BMJ editorial policies available at: www.bmj.com/bmj/authors/editorial-policies/ (accessed 28 February 2011).
- 13 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, paras 18-19.
- 14 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 20.
- 15 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 24.
- 16 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 25.
- 17 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 27.
- 18 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 31.
- 19 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 34.
- 20 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 38.
- 21 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 38.
- 22 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 44.
- 23 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 31.
- 24 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 54.
- 25 This is set out in the Regulation of Investigatory Powers Act 2000 and the Regulation of Investigatory Powers (Scotland) Act 2000.
- 26 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 54.
- 27 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 47.
- 28 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 48.
- 29 Department of Health (2006) *Records management: NHS code of practice*, DH, London; Scottish Government (2008) *Records Management: NHS code of practice (Scotland) Version 1.0*, SEHD, Edinburgh; National Assembly for Wales (2000) *Welsh Health Circular 71: For The Record*, WAG, Cardiff; Department of Health, Social Services and Public Safety (2005) *Good Management, Good Records*, DHSSPS, Belfast; Department of Health, Social Services and Public Safety (2000) *Preservation, Retention and Destruction of GP Medical Records Circular HSS (PCC) 2000/1*, DHSSPS, Belfast.
- 30 General Medical Council (2011) *Making and using visual and audio recordings of patients*, GMC, London, para 57.

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