fohn

FACULTY OF OCCUPATIONAL HEALTH NURSING

Leadership • Collaboration • Competence

Consent and Confidentiality in OH

Frequently Asked Questions and Case Studies

Consent and confidentiality are cornerstones of occupational health (OH) nursing practice and are requirements of the NMC Code [1].

FOHN has developed this set of Frequently Asked Questions (FAQs) to help clarify the principles and practice of obtaining consent and maintaining confidentiality. It represents a consensus view developed principally by members of the FOHN Board, in consultation with a range of other stakeholders. It is based on:

- The NMC Code (2018), which requires all registered nurses to 'Act in the best interests of people at all times', to 'make sure that you get properly informed consent and document it before carrying out any action', to 'respect, support and document a person's right to accept or refuse care and treatment' (including refusing consent to share information), and to 'share necessary information with other health and care professionals and agencies only when the interests of patient safety and public protection override the need for confidentiality'
- The FOM Ethics Guidance for Occupational Health Practice (2018). Although this is partially underpinned by guidance from the GMC, which applies specifically to doctors, it has been developed to apply more broadly to a range of OH professionals
- Data protection regulations, which include the Data Protection Act (2018) and the UK GDPR (General Data Protection Regulation), the Access to Health Records Act (1990) and the Access to Medical Reports Act (1988)
- Common law

These FAQs reflect general principles and are not intended to cover every situation. If in doubt, you should seek guidance from a senior colleague, your employer's legal team or your professional body or insurer.

Who is this document for?

What is the legal basis for maintaining OH records and writing OH reports?

What is Informed Consent?

Does consent have to be in writing?

Should the worker see the report before it is sent?

Does the worker have to re-confirm consent after they see your report?

What happens if the worker does not wish to see the report before it is sent?

How long is consent valid for?

What happens if consent is withheld by the worker?

Is consent required for health surveillance?

Is consent required for night worker health assessment?

When can confidential information be disclosed without consent?

When does the Access to Medical Reports Act 1988 apply?

When does the Access to Health Records Act 1990 apply?

What is a Subject Access Request?

What are the Caldicott principles?

Where can I get more information?

Appendix – case studies

Who is this document for?

This document is for Registered Nurses working in occupational health (OH), regardless of their job role or level of qualification. The term 'OH nurse' is used throughout for clarity.

It should be read and applied in conjunction with your or your employer's own policies.

Separate guidance on OH record keeping and on how to write a report following a consultation will be available shortly.

What is the legal basis for maintaining OH records and writing OH reports?

Maintaining OH records, the referral of individuals to OH by HR/management and writing OH reports are examples of data processing under the UK GDPR. The purpose for which you (or your employer) are processing data must be clear and transparent. It is recommended that the lawful basis for processing data in OH is either:

- Article 6(1)(e), 'processing is necessary for the **performance of a task** carried out in the public interest'. This applies to public authorities like NHS Trusts; or
- Article 6(1) (f): 'processing is necessary for the purposes of the **legitimate interests** pursued by the controller or a third party'. This applies to private sector OH providers.

For special categories of data, which include health records, it is recommended that the additional lawful basis for processing data is:

- Article 9 (2) (h): 'processing is necessary for the purposes of **preventive or occupational medicine'**.

It is not recommended that 'consent' is given as the lawful basis for processing data under GDPR. However, to comply with GDPR, data processors must act lawfully, which means obtaining common law consent.

What is Informed Consent?

When you see a worker for an OH consultation, it is essential that they give 'informed consent' for the consultation and the subsequent report. For consent to be 'informed', the worker must understand:

- the purpose of the assessment and what the role of OH is
- how any information they give to OH will be used
- the content of your report including any professional recommendations
- who the report is to be sent to and who else it might subsequently be shared with
- what the implications of your report might be, and the implications if you do not provide a report

The worker should understand that they can withdraw consent to proceed at any time.

Example of wording you may wish to use:

OH is a specialty that focuses on the health of workers. My role is to provide independent and impartial advice on your fitness to work. We will have a conversation about your health and your work. I will be taking notes, however these are confidential to occupational health. At the end of the consultation, I will compose a report for your manager/HR (whoever has referred them), and I will explain what I plan to put in that report. Is it ok to proceed?

Are you aware/do you understand what HR/your manager has written in the referral?

(It may be appropriate to read the referral form to the individual if they do not have a copy)

Does consent have to be in writing?

Documented consent (written or email) for the consultation and report provides you with the best evidence that a worker has given informed consent. Where consultations are conducted remotely, you might get consent verbally instead. You must record this in the notes contemporaneously, stating clearly what the worker has consented to, including a summary of the key points which will be in the report.

Example of wording you may wish to use:

From our discussion I will be writing a report that mentions the main symptoms you are experiencing (e.g.….) and the impact on your day to day abilities (e.g.….).

I will also include information on your clinical care and appointments as you have described so that HR/your managers understand what intervention is planned.

I will give my opinion which is that you are able to undertake your role/not undertake your role [or 'fit to work/fit with restrictions/not fit for work']

(If the worker disagrees with your opinion, you might document this in your report.)

My advice to management will include (e.g. accommodations/adjustments recommended, expected timescales)…….

Should the worker see the report before it is sent?

It is important that there are 'no surprises' about the information that is shared in the report you write during/following your consultation. Best practice is to provide the worker with a copy of your report before it is sent to the referrer. Make sure you have a secure and reliable route to do this (e.g. an e mail address which the worker consents to use for this purpose, with encryption or password protection). You should make it clear that they can point out any factual inaccuracies in the report but they do not have the right to edit your opinion. If they wish, they may add their own note to be provided alongside your report.

Does the worker have to re-confirm consent after they see your report?

Once you send the report to the worker, there are two options on how to proceed. Either approach is acceptable, but must be clearly documented in your own policy and explained to the worker.

a) You can require the worker to give explicit consent for you to release the report (e.g. by email). If a response is not received within the specified timescale (e.g. 2-3 days), it will be considered that consent has not been given; OR

b) You can wait a specified amount of time (e.g. 2-3 days). You do not need to get additional consent or confirmation before you send the report to the referrer, but you need to wait for the agreed time to elapse. This is the approach recommended by the FOM, on the basis that consent for the report was given during the consultation and has not been withdrawn.

Example of wording you may wish to use:

Please find attached a draft copy of your password protected OH Management Report.

The password for the report is your 6 digit date of birth (ddmmyy)

In order to avoid any delay please provide a response within 48 hours (Allow 2 working days). If we do not receive a response by this date then we will notify your line manager and HR that we do not have consent to release your report.

[OR: if we do not receive a response during this time, we will assume that the consent you have given remains valid, and will release the report to your line manager and HR]

Please respond using the following Options in your reply email:

Option 1: *I am happy for the current attached report to be sent to my manager and my employer's HR Team*

Option 2: *I would like the following factual inaccuracies to be corrected (please list):*

Option 3: *I would like the following comments to be attached to my report when it is sent to my manager and HR:*

Option 4: *I wish to withdraw my consent for the report to be sent to my manager and HR. I understand my employer will be informed and any decisions will be made without Occupational Health advice.*

What happens if the worker does not wish to see the report before it is sent?

You do not need to provide a copy of your report if the worker has said they do not wish to see it. In this case, best practice is to send a copy of the report to the worker at the same time as you send it to the referrer. As a (minimum) alternative, your policy might state that it is the responsibility of the referring manager to provide a copy of the report to the worker.

For an example of how this might work in practice, see **Case study one**

Example of wording you may wish to use:

We have discussed what I plan to put in the report, and you have consented to this. I will send you a copy of the report, to your personal e mail address, at the same time as I send it to the employer. Is that ok?

How long is consent valid for?

There is no specific time limit on how long consent is valid for. However, consent may cease to be valid if new information has become available since consent was given e.g. a change in the worker's health, a change in the information available about the worker's health, a change in what you plan to put in your report, or a change in the likely implications of your report. In these situations, you should contact the worker to reconfirm consent.

Consent is specific to the consultation and the report that follows it. If you write a further report with new information in it (e.g. following a review consultation), you will need updated consent.

What happens if consent is withheld by the worker?

If a worker declines consent for you to send a report (or consents but later withdraws it), you should advise the referrer that the worker does not consent to you providing a report.

You should make the worker aware that the employer is entitled to make decisions without a report being provided, and that this may affect their future employment.

You should ensure that the report, if already written, is included in the OH records, indicating clearly that it has not been sent because consent was not given.

For examples of how this might work in practice see **Case Study two** and **Case study three**

Is consent required for health surveillance?

It is good practice to obtain consent from a worker to conduct health surveillance under, for example, the Control of Substances Hazardous to Health Regulations 2002, and share the outcomes. However, if necessary, FOM ethics guidance is that basic information regarding whether a worker is fit/not fit/fit with adjustments may be provided to the employer without consent since health surveillance imposed by regulations is a statutory duty on both employer and employee. This must not include clinical information. The information provided should form part of the **Health Record**, a non-medical document to be kept by the employer.

Is consent required for night worker health assessment?

Night worker health assessments are a statutory requirement for the employer to offer, but they are not mandatory for the worker to undertake (reg 7, Working Time Regulations, 1998). A report that a worker is fit for night work can be made without consent. If a worker is not well suited for night work e.g. because it will make it more difficult to manage an underlying condition, this must not be disclosed without consent. If a night worker assessment shows a worker is unsafe to undertake night work because they could pose a risk to others, this might be disclosed without consent in the public interest (see below), although it should be discussed with the worker first to allow them to disclose themselves.

When can confidential information be disclosed without consent?

Information might be shared without consent in specific circumstances such as where this in in the public interest or where there is a court order.

If you are considering sharing information without consent you should discuss it first with a senior colleague/peer/physician. You should consider seeking legal advice and/or talking to your professional organisation.

You should also consider the Bolam test. This does not relate specifically to consent and confidentiality, but identifies the general standard expected of healthcare professionals. *Bolam v Friern Hospital Management committee (1957*) found that a doctor would not be negligent if they had acted in accordance with a reasonable body of medical opinion (even if a view also existed to the contrary). The standard of care expected in any situation is that of 'responsible, reasonable and respectable' practitioners. *(Bolitho v City and Hackney HA, 1998)*.

If you are going to disclose without consent, you should inform the worker that you are doing this if possible, so that they have the opportunity to take action themselves first. You should document your actions, decisions and the rationale in the occupational health records.

Examples of public interest or public protection might include:

- a worker with a notifiable disease: doctors (registered medical practitioners) have a statutory obligation to report under the Health Protection (Notification) Regulations 2010. Nurses do not have a statutory duty but it may be justifiable in the public interest to notify a doctor or the relevant local Health Protection team without consent to prevent the spread of disease
- unfitness to drive: neither doctors nor nurses have a statutory duty to report to the DVLA if someone is reasonably believed to be unfit to drive (the statutory duty to report is on the driver) but both doctors and nurses are advised by the GMC/NMC that they should report unfitness even without consent to DVLA where it is reasonably necessary to protect colleagues or the general public
- a worker's health endangers others, but the worker refuses to disclose information about the potential harm to others e.g. fitness to drive, bloodborne viruses, substance misuse
- to prevent/respond to crime. In a few cases there is a statutory duty to report criminal offences, for example under the Female Genital Mutilation Act (notification of a case of FGM) and the Terrorism Act 2000 (information relevant to preventing or investigating a suspected act of terrorism). However, where there is no specific statutory obligation occasionally confidential information may be disclosed without consent in the public interest. These will be exceptional cases where a serious crime is involved (e.g. murder, rape, manslaughter) and it is in the public interest that it should be reported to law enforcement officers. Information about, for example, petty thefts and other minor offences should not be revealed without consent

When can confidential information be disclosed without consent?

A court order e.g. from a judge or a coroner's court can require release of records without consent.

A solicitor or police officer cannot require release of records unless they have either consent or a court order. If they request information on the grounds of public interest, you should seek legal advice before proceeding.

Case study four Case study five Case study six

Example of wording you may wish to use:

Information held in the OH department will only be shared without your consent in exceptional circumstances: if it is necessary in the public interest e.g. to protect you or someone else from the risk of significant harm; or if required by law.

If it became necessary to break confidentiality for the above reasons this would be discussed with you if possible.

When does the Access to Medical Reports Act 1988 apply?

This Act applies where a medical report is being sought for employment or insurance purposes from a doctor who is or has been responsible for the clinical care of the individual (e.g. the worker's GP or consultant). It does not apply to reports being written by an OH nurse (or any other Registered Nurse). It requires written consent.

The role of the OH nurse is:

- to explain the process to the individual and advise them of their options e.g. to give consent, to see their doctor's report before it is sent (they have 21 days to do this), or to withhold consent
- to document the employee's consent, usually on a standard form
- to request the report (others can also do this e.g., HR)
- to write a report based on this information, provided they have obtained consent to do so

You should only request a specific report, you must not request access to the entire patient record. If the GP supplied the entire patient record, they would be in breach of the GDPR, as it would be excessive information. The GP/consultant can charge a reasonable fee for providing the report.

When does the Access to Health Records Act 1990 apply?

This Act provides that both an executor/administrator of the deceased's estate, and a person with a claim arising from the death, have a right of access to the deceased's health records after their death. Neither the GDPR nor the Data Protection Act 2018 applies to the personal data of the deceased.

What is a Subject Access Request?

A worker may ask for a copy of their own OH records to which they are entitled under article 15 of the GDPR and the Data Protection Act 2018. The information requested must usually be provided within a month and without charge. You should act in accordance with your local policy, taking particular care to verify the identity of the individual making the request. Exemptions to complying with an SAR might include if the record would disclose information about another individual without their consent, unless it is unreasonable of them to withhold consent; or if disclosure might put an individual's health at risk. If in doubt, you should seek guidance from a senior colleague or your employer's legal team.

What are the Caldicott principles?

The Caldicott principles were developed within the NHS to inform good information sharing (e.g. with other organisations and between individuals to enable patient care) whilst protecting the confidentiality of patient records. They do not alter the principle that Occupational Health records must not be shared outside of OH without consent. For example, they must not be shared with an individual's manager, even if that manager is themselves a health professional. Further details of the Caldicott principles are available here.

Where can I get more information?

Access to Health Records Act 1990. Available at: https://www.legislation.gov.uk/ukpga/1990/23/contents

Access to Medical Reports Act 1988. Available at: https://www.legislation.gov.uk/ukpga/1988/28/contents

Caldicott principles 2020. Available at: https://www.gov.uk/government/publications/the-caldicott-principles

Data Protection Act 2018. Available at: https://www.legislation.gov.uk/ukpga/1998/29/contents

FOM (2018). Ethics Guidance for Occupational Health Practice. 8th ed., Faculty of Occupational Medicine. Available at: https://www.fom.ac.uk/publications-policy-consultations/ethics-guidance-for-occupational-health-practice

HSE (2021) Record keeping [online]. Available at: https://www.hse.gov.uk/health-surveillance/record-keeping/index.htm

ICO Guide to the UK General Data Protection Regulation (UK GDPR). Available at: https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/

Nursing & Midwifery Council (2018). The code: Professional standards of practice and behaviour for nurses, midwives and nursing associates. Available at: https://www.nmc.org.uk/standards/code/

Appendix - Case Studies

Case study One – verbal consent to provide a report

OH nurse David conducted a phone consultation with Mrs Patel, who had been absent following routine surgery. She was feeling well and felt ready to return to her role, which was mostly office based.

Following the consultation, David explained to Mrs Patel that his report to HR would state that she had been absent following routine surgery, as detailed in the referral documents; that she was fit to return to work; and that she should avoid any significant manual handling activities such as carrying photocopier paper for the first four weeks after her return. Mrs Patel gave verbal consent to this and said she did not wish to see the report before it was sent to HR. She also consented to a copy being sent to her line manager.

David documented consent in the records, together with details of what he planned to write in the report. He later wrote the report, sent it to HR and the line manager and sent a copy to Mrs Patel at the same time, in accordance with the OH department policy and Service Level Agreement.

Case Study Two – consent withdrawn

OH nurse Jane saw Mrs Johnson for an OH consultation following management referral. Jane's view was that Mrs Johnson was "fit to complete her full contracted role, with no adjustments required".

Mrs Johnson was not happy about this decision, as she wished to work in a specific post / job area within the company. Jane restated that her role was to provide independent and impartial advice and that she could see no medical reason why Mrs Johnson could not work in all areas. The report was written to reflect this.

Mrs Johnson requested to see the report before it was sent. She was therefore given a copy and told that she had 48 hours in which to respond. Mrs Johnson responded, requesting that Jane add extra wording suggesting that "If Mrs Johnson does not work in [specific area] this will be detrimental to her mental health".

Jane declined to make this change as it did not reflect her professional opinion. She advised Mrs Johnson, by email, that the report would not be changed. Mrs Johnson could either 1) decline consent to share or 2) have her own email appended to the report.

Mrs Johnson chose option one. Jane advised the referrer that consent to release the report had been withheld. The employer therefore proceeded to manage the case with the information that they already had.

Case Study Three – consent given by subject to prior sight of the report

Mr Brown was referred to OH for an opinion on fitness to attend a disciplinary meeting for performance issues. There were no underlying medical concerns, and he was not on any treatment. He was very angry about the situation in which he found himself. He was articulate in the appointment, and there were no mental health red flags.

The OH nurse discussed the importance of meeting with the employer to resolve the issue as soon as possible, as delay could actually cause more harm (ref: FOM Ethics). Mr Brown agreed to this and consented to the report being sent to HR. He also said he wanted to see the report before it was sent, and gave the OH nurse an email address to use. The OH nurse advised that when he received the report, he would have 48 hours in which to respond.

Mr Brown did not respond to OH or make any comment on the report within the 48 hour time period. Therefore, the OH nurse sent the report to HR on the basis of the consent given during the consultation.

Case study four – release to police with consent

OH Nurse Priya received a request from the police for copies of OH records for a member of staff, in relation to an unspecified criminal investigation. The police attached a signed consent form from the staff member involved. They also stated that OH must not contact the individual.

Priya was uncomfortable and discussed the case with her manager who advised that the consent was valid. However, Priya still had concerns about whether the consent was informed and freely given, so she contacted the police and explained this. The police agreed that Priya could contact the individual, to seek confirmation. Following a telephone consultation with the staff member, Priya released the records in accordance with the consent.

Case study five – release following court order

A coroner requested a copy of the OH record after an employee committed suicide. This is a specific court order. They made the request through the employer's legal department, who then asked OH to give the records to the legal department.

The OH nurse was not comfortable with this, as she felt that the notes should go directly to the coroner who had requested them. She contacted the Coroner to ask what was required, copying the email into the legal team so they knew action was being taken. In the end the OH record was not required by the Coroner.

(note: GDPR does not apply to records of people who have died but the Access to Health Records Act does)

Case study six

A solicitor acting for Mr Zhou in a claim against his employer for unfair dismissal and disability discrimination provided OH nurse John with a consent to release Mr Zhou's records. Mr Zhou had signed the consent recently and the consent covered all OH records from the beginning of his employment.

An OH consultation had taken place after the consent was signed. John did not know Mr Zhou, and was not familiar with his handwriting. This was a subject access request (SAR).

John contacted Mr Zhou to ensure that it was he who had given consent and to clarify if the preplacement assessment records (which happened before the start of contract) and the OH record of the consultation were also to be included. He explained to Mr Zhou that any information provided to his own solicitor might subsequently be disclosed to the opposing legal team. Once it was clear what was actually needed by the solicitor, and that this differed to the details on the consent, John asked Mr Zhou to contact his solicitor and produce a new consent with the appropriate details.

NB If the solicitor was acting for the employer rather than Mr Zhou, John should not disclose Mr Zhou's records without his consent or a court order.

Faculty of Occupational Health Nursing. Promoting excellence in the education, research and evidence-based practice of all occupational health nurses.