

Who can make a complaint - consent and confidentiality

This is draft material and is not live guidance. It is shared for information and will be tested with organisations who have agreed to pilot the new Complaint Standards.

1. Introduction

1.1 This guidance is part of a range of guidance modules produced to help you implement and deliver the expectations set out in the Complaint Standards.

[Insert link](#)

1.2 This module will make sure you know:

- who can make a complaint and who can be a representative
- when consent is required and how to get it
- what to do when you don't have consent
- how to handle complaints about a child or an adult who cannot provide consent
- how to handle complaints when there is no right of access to personal information
- about the need to maintain confidentiality.

1.3 This guidance should be read in conjunction with the following modules:

- Identifying a complaint [Insert link](#)
- Early resolution [Insert link](#)
- A closer look- clarifying the complaint and explaining the process [Insert link](#)
- A closer look -the investigation [Insert link](#)
- Referring people to the Ombudsman [Insert Link](#)
- Complaints involving multiple organisations [Insert link](#)
- Independent NHS complaints advocacy, and other specialist advice and support for people raising complaints [Insert link](#)

2. Standards and relevant legislation

2.1 The relevant Complaint Standards are:

Promoting a just and learning culture

- Organisations make sure staff are trained to identify complaints in a way that meets the expectations set out in the Complaint Standards.

Welcoming complaints in a positive way

- Organisations clearly advertise how people can raise complaints in a way that suits them and meets specific needs. Organisations offer a range of ways people can complain, including online. It is easy for everybody to understand how the process works, including who can make a complaint and what will happen next.

2.2 The relevant Regulations that apply are:

[The Local Authority Social Services and National Health Service Complaints \(England\) Regulations 2009](#). These set out who can make a complaint at section 5:

‘(1) A complaint may be made by –

- (a) a person who receives or has received services from a responsible body; or
- (b) a person who is affected, or likely to be affected, by the action, omission or decision of the responsible body which is the subject of the complaint.

(2) A complaint may be made by a person (in this regulation referred to as a representative) acting on behalf of a person mentioned in paragraph (1) who-

- (a) has died
- (b) is a child.
- (c) is unable to make the complaint themselves because of– (i) physical incapacity; or (ii) lack of capacity within the meaning of the Mental Capacity Act 2005(a); or (d) has requested the representative to act on their behalf.

(3) Where a representative makes a complaint on behalf of a child, the responsible body to which the complaint is made–

- (a) must not consider the complaint unless it is satisfied that there are reasonable grounds for the complaint being made by a representative instead of the child; and
- (b) if it is not so satisfied, must notify the representative in writing, and state the reason for its decision.

(4) This paragraph applies where–

- (a) a representative makes a complaint on behalf of–
 - (i) a child; or

(ii) a person who lacks capacity within the meaning of the Mental Capacity Act 2005; and

(b) the responsible body to which the complaint is made is satisfied that the representative is not conducting the complaint in the best interests of the person on whose behalf the complaint is made.

(5) Where paragraph (4) applies—

(a) the complaint must not be considered or further considered under these Regulations; and

(b) the responsible body must notify the representative in writing, and state the reason for its decision.

(6) In these Regulations any reference to a complainant includes a reference to a representative.’

2.3 The Information Commissioners Office defines consent in Article 4(11) as: *‘any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her’.*

2.4 If you are dealing with a complex situation and are unsure what to do, please contact either your organisation’s legal or information rights lead/team or the Information Commissioners Office [[Insert link](#)] for advice on how to proceed.

3. What you should do

Who can make a complaint and what consent do you need?

3.1 Complaint from the person who has directly been affected

In most cases complaints will be made by the person who received the care or service complained about, or who has been affected by a decision made by your organisation.

3.2 When you receive the complaint, you should explain to the person what you will do to look into their complaint. As part of that, you need to explain that you will need to look at any relevant personal information, such as their clinical records. It’s good practice to get their written consent to do this.

3.3 You should also explain that other relevant people inside (and potentially outside) your organisation may need to see this information as part of your investigation and response to their complaint. See consent form examples below (Example one) [Insert Link](#).

3.4 Complaint from a representative

If the person directly affected does not want to complain themselves, they can ask someone else to make the complaint on their behalf and represent them throughout the process.

3.5 A representative can be anyone such as:

- A family member
- A friend
- An advocate
- A legal representative
- An MP or local Councillor

3.6 There is no restriction on who may act as a representative and this list is not exhaustive.

3.7 If the complaint is made by a representative, you must make sure that you follow confidentiality and data protection legislation. In addition to authorising the representative to act on their behalf, the person affected must consent to you discussing their complaint and sharing their personal information with them. See consent form examples below (Example two) [Insert Link](#).

3.8 If the person affected does not consent to you discussing the complaint with their representative then you should take this into account. You will need to consider if any issues in the complaint are only about the person making the complaint. If there are, then you can consider those issues as the person will then be making the complaint on their own behalf.

3.9 You should explain to the person making the complaint that only the issues that directly affected them can be investigated. However, as you have not got consent to share personal information about the other person involved you will not be able to investigate any matters relating to them or share personal information about them which may leave some of their concerns unanswered.

3.10 Complaint made on behalf of or by a child

A person with parental responsibility can make a complaint on behalf of a child if you judge that the child does not have sufficient understanding of what is involved. You do not need the child's consent in these circumstances (or the consent of the other parent/guardian).

3.11 It is good practice, if you can, to explain the process to the child in a way that they can understand. This includes telling them that information from their health records may need to be shared with the people looking into the complaint and with their parent or guardian who is making the complaint.

- 3.12 If the child has sufficient maturity and understanding they can either make the complaint themselves or consent to a representative making the complaint on their behalf. See guidance above.
- 3.13 Complaint made on behalf of an adult who cannot give consent
You may receive a complaint where the person directly affected does not have the capacity to consent to the complaint being made on their behalf. In this case, you should first consider if the person making the complaint on their behalf has a legitimate interest in the person's welfare and that there is no conflict of interest.
- 3.14 You also need to consider if the person making the complaint has a right of access to the personal information of the person directly affected. This will usually have been considered during the period of care complained about as the person raising the complaint is likely to have been involved in discussions and decisions about care. If not, then you will need to establish right of access at this stage. For example, are they an attorney with authority to manage the property and affairs of the individual or are they a person appointed by the Courts to make decisions about such matters? For further information see the Information Commissioner's guide: [Who can access personal data](#).
- 3.15 You should capture the right of access to the relevant personal information in your records. See example form below [\[Insert Link\]](#).
- 3.16 It is also good practice to keep the person directly affected by the complaint informed of the progress of any investigation, where possible and appropriate.
- 3.17 Complaint made on behalf of a deceased person
You have a duty of confidentiality to your patients and service users, and that duty remains in place after death.
- 3.18 If the person has died, under the case law relating to Article 8 of the ECHR [\[INSERT LINK\]](#), the 'personal representative' of the deceased or the legal executor of their estate will control access to any personal information. This includes clinical records. However, anyone who may have a potential claim arising out of the death, such as family and friends named in the will, may also be entitled to access to the deceased person's personal information under the Access to Health Records Act 1990. You should capture the right of access to the relevant personal information in your records. See example form below [\[Insert Link\]](#).
- 3.19 It may be that the person who makes a complaint is not the personal representative, executor or a person who is entitled to access under the Access to Health Records Act 1990. In these cases, you should only investigate the complaint and report back without releasing confidential personal information. See below for further information.

- 3.20 Complaints where there is no right of access to personal information.
There are no restrictions in the Regulations on who can complain. However, there are restrictions on the type of information you can share when responding to a complaint if there is no right of access to personal information.
- 3.21 If you receive a complaint where there is no right of access to the relevant personal information, you should take this into account when responding to the complaint. In these cases, you should explain the situation to the person making the complaint at the beginning of the process. You should be clear that the matter can be investigated but it is likely that there will be a limit to the amount of information that can be shared during the investigation. Explain that this may also impact on what can be included in the response and may leave some of their concerns unanswered.
- 3.22 You can ask them to consider if another person, who does have a right of access to the relevant personal information, would like to make the complaint instead. If there is another person with a right of access they could also appoint the person making the complaint as their representative. Or, you can ask whether they would like you to continue with the investigation on the understanding that you may only be able to issue a response that addresses the matter complained about in a general sense and does not include any personal information about the person directly affected.
- 3.23 Complaints where the representative is not acting in the best interests
If at any time you believe that a representative is not acting in the best interests of the person affected you should consider whether to stop your consideration of the complaint. If you do this, you must share your reasons with the representative in writing and advise them that they may complain to the Parliamentary and Health Service Ombudsman if they are unhappy with your decision.
- 3.24 Confidentiality of complaints
NHS organisations have a duty of confidentiality towards patients. You should only collect and disclose information to those staff who are involved in the consideration of the complaint. Documents relating to an investigation should be securely stored and kept separately from clinical records or other patient records. The complaint records should only be accessible to staff involved in the investigation.
- 3.25 Complaint outcomes may be anonymised and shared within your organisation. They may also be published to promote service improvement as long as individuals are not identifiable from the information shared.

4. Examples and case studies

- 4.1 Case examples of different scenarios - including cases where there is no right of access to personal information. **To follow**
- 4.2 Example Privacy statement **To follow**

5. Practical tools

- 5.1 Information Commissioner's Office GDPR Guide: [Who can access personal data](#)
- 5.2 BMA Guidance for health professionals May 2018: Access to Health Records <https://www.bma.org.uk/media/1868/bma-access-to-health-records-nov-19.pdf>
- 5.3 Rethink factsheet: Complaints about the NHS or social services <https://www.rethink.org/advice-and-information/rights-restrictions/rights-and-restrictions/complaints-about-the-nhs-or-social-services/>
- 5.4 Easy read factsheet: How information about you is shared with your family <https://www.nhs.uk/NHSEngland/AboutNHSservices/mental-health-services-explained/Documents/easy-read/MH-CoP-Sharing-my-Info-with-family.pdf>
- 5.5 Template consent forms:
 - **Example one:** Consent form for patient or service user making their own complaint [INSERT LINK](#)
 - **Example two:** Consent form for a representative to act on behalf of the person affected [INSERT LINK](#)
 - **Example three:** Consent form for complaints against multiple organisations (including health and social care) [INSERT LINK](#)
 - **Example four:** Consent for advocate to act on behalf of person making the complaint [INSERT LINK](#)
 - **Example Five:** Easyread consent form
- 5.6 Example form for capturing the right to access personal information when a complaint is made on behalf of someone who lacks capacity to consent or who has died [INSERT LINK](#).

6. Version control

- 6.1 Pilot Draft - March 2021

Example one: Consent form for patient or service user making their own complaint

CONSENT FORM

I [insert full name of person making the complaint] give permission to [insert name of your organisation] to investigate my complaint.

I understand that access to my personal information and/or relevant medical records will be required to investigate and respond to my complaint and may be seen by the people involved in investigating and responding to my complaint.

I agree that relevant personal information about me may be shared and gathered from the following organisation and agencies to help investigate and respond to my complaint:

[Add list of any organisations who may hold information that will be needed to investigate and respond to the complaint]

My details:

My Name	
Address	
Post Code	
Telephone contact No(s)	
Email	
Date of birth	
Date	
Signature	

I understand that my data will be processed in line with General Data Protection Regulations (GDPR) 2018.

My consent to share personal information is entirely voluntary and I understand that I may withdraw my consent at any time.

Should you have any questions about this form or the process, please contact us - see details below.

Please return this consent form as soon as possible so there is no delay in the handling of your complaint.

Please return to: [organisation to insert relevant address and contact details]

Example two: Consent form for a representative to act on behalf of the person affected

Consent form

For someone to act as my representative for the consideration of my complaint

I, [insert full name of person affected] understand that [insert name of the person making the complaint on their behalf - the representative] has made a complaint on my behalf to [insert name of your organisation] about [insert brief details of the complaint]

I confirm that:

- I support the complaint,
- I understand that access to my personal information and/or my medical records will be required in order to investigate and respond to the complaint and may be seen by the people involved in investigating and responding to my complaint
- I agree that relevant personal information about me may be shared and gathered from the following organisation and agencies to help them investigate and respond to my complaint:
[Add list of any organisations who may hold information that will be needed to investigate and respond to the complaint]

I authorise [insert name of the representative] to act on my behalf during the consideration of my complaint and I give my permission for personal information (including relevant extracts from my medical records) which the organisation holds as confidential, to be shared with them.

My details:

Name	
Address	
Post code	
Telephone contact no(s)	
Email	
Date of birth	
Relationship to the person making the complaint on my behalf	
Date	
Signature	

I understand that my data will be processed in line with General Data Protection Regulation (GDPR) 2018.

I understand that my consent to share personal information with my representative and those considering my complaint is entirely voluntary and I may withdraw my consent at any time.

Should you have any questions about this form or the process or wish to withdraw your consent please contact us - see details below.

Please return this consent form as soon as possible so there is no delay in the handling of your complaint.

Please return to: [organisation to insert relevant address and contact details]

Example 3: Consent form for complaints against multiple organisations (including health and social care)

**Consent for sharing my personal information with the other organisation(s)
I am complaining about**

I [insert full name of person affected] hereby give my permission for [insert name of organisation who has received complaint] to share any relevant personal information they hold about me with the other organisations and service providers who are involved in the care/service I have complained about (see details below).

I also give my permission for the organisations listed below to share any relevant personal information they hold about me for the purpose of investigating and responding to my complaint.

I understand that this may include relevant extracts from my medical records (and social care records if applicable).

I understand that my rights under the Data Protection Act will not be affected.

Statement of consent:

- I understand that personal information is held about me.
- I have had the opportunity to discuss the implications of sharing or not sharing information about me.
- **I agree that relevant personal information about me may be shared and gathered from and between the following organisation and agencies to help them investigate and respond to my complaint:**
 - [List organisations involved in investigating and responding to the complaint]

Are there any organisations or agencies you do not want us to share or gather information from? Please list them here:

My details:

Name	
Address	
Postcode	
Telephone contact no(s)	
Email	
Date of birth	
Date	

Signature	
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Should you have any questions about this form please contact us - see details below.

Your consent to share personal information is entirely voluntary and you may withdraw your consent at any time. Should you have any questions about this process, or wish to withdraw your consent please contact: [insert name and contact details for key contact]

Please return this consent form as soon as possible so there is no delay in the handling of your complaint.

Please return to: [organisation who has received the complaint to insert relevant address and contact details]

Example 4: Consent for advocate to act on behalf of person making the complaint

Consent Form

To be completed by the Client

Client name	
Client address	
Telephone	

I, the Client, give consent to **[insert name of advocacy provider]** as the Provider of the Independent Health Complaints Advocacy Service to undertake work on my behalf and to contact any relevant parties should I request it. (In signing the Consent Form you accept that if you should instruct **[insert name of advocacy provider]** to contact another party on your behalf that it may be necessary for a copy of this form to be viewed by that party to make evident that **[insert name of advocacy provider]** has been granted consent to act in this case).

I understand that all information* that **[insert name of advocacy provider]** receives will be strictly confidential to **[insert name of advocacy provider]** and myself as **[insert name of advocacy provider]** Client. I will also see all information that **[insert name of advocacy provider]** receives on my behalf.

*Your personal details will remain strictly confidential to **[insert name of advocacy provider]**, however, anonymous details of your case will be added to our recorded statistics which may be shared with other relevant organisations to assist in the performance monitoring of the NHS.

Client signature	
Date	

To be completed by the Patient and Client (If Applicable)

I, the Patient give consent to the above named person being **[insert name of advocacy provider]** Client to act on my behalf in this matter. (This section is only to be completed if the Client is not the Patient and has been nominated by the Patient to act on their behalf. Patient consent for the Client is not necessary if the Patient is under the guardianship of the Client or is unable to act in the complaint.)

Patient name (
Patient signature	
Date	

Please contact us if you have any questions about this form:
[insert contact details for advocacy provider]

Example 5: Easyread consent form



This form should be used if you want to make an NHS complaint for someone else. That person has to give you permission to make the complaint for them. You should send a copy of this form with your complaint.

Section A – About you



Your Name:



Your Address:



Your telephone number:










Your mobile telephone number:






Your Email address:

Section B - About the patient

	Name of patient:			
	When was the patient born?	Day 	Month 	Year 
	Patient's address:	(if this is a different address from yours):		
	How does the patient know you?			

Section C - Consent

Has the patient agreed to this complaint? <div style="border: 2px solid red; border-radius: 50%; padding: 5px; display: inline-block; margin-top: 10px;"> Circle your answer </div>	Yes 	No 	They have died 
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If the patient can agree to you making the complaint, ask them to sign below.



I am the patient

I agree that the person named in this form can make a complaint for me.



I agree they can see information about me. This includes my medical records and any other information that they need to make the complaint.



Patient's Signature: _____



2013

Today's Date: _____



If the patient is younger than 16, their parent or guardian must fill in this section:









My name is:












I am:

(Name of patient's parent or guardian.)

	I agree that:	_____ (Name of person making the complaint.)
	can make a complaint:	_____ (Name of patient.)
	I agree that they can see any information that could help them make the complaint. This includes medical records.	
	Your Signature: _____	
	Today's Date: _____	

 **If the patient has died, their nearest family member or legal representative must fill in this section:**

	My name is:	_____
	I am:	_____ (Patient's nearest family member or legal representative.)

	I agree that:	_____ (Name of person making the complaint.)
	can make a complaint:	_____ (Name of patient.)
	I agree that they can see any information that could help them make the complaint. This includes medical records. By law I am allowed to give my permission.	
	Your Signature: _____	
	Today's Date: _____	
<p>If the patient cannot give their consent, fill in this section.</p> <p>You need to say why they are not able to agree to you making the complaint.</p>		
	I am the patient's representative <input type="checkbox"/>	
	Your Signature: _____	



2013

Today's Date: _____

The patient is not able to give their direct consent because:

Example 6: Form for capturing the right to access personal information when a complaint is made on behalf of someone who lacks capacity to consent or who has died

Consent form

For use where the person affected cannot provide consent

I [insert full name of person making the complaint] am making a complaint to [insert name of the organisation] on behalf of [insert full name of person affected] who is unable to make the complaint as: (please tick one)

- They are a child
- They lack capacity
- They have died
- Other [please explain why the person cannot make the complaint themselves or provide consent for you to act as their representative]

Person affected/Patient details

Name of child/person affected	
Address	
Postcode	
Date of birth	
Date of death (if applicable)	
Relationship to person making the complaint	

I understand that the organisation I am complaining about has a duty of confidentiality to their patients and service users. (That duty remains in place after death.)

I understand that access to the personal information and/or medical records of the person I am complaining on behalf of will be required to investigate and respond to my complaint and that I may only see that information if I have a right of access to that information.

I believe I have a right of access to that personal information because [please explain why you believe you have a right of access and provide any evidence you might have in support of that]

I understand that, if I do not have a right of access to the relevant personal information that the organisation can still respond to my complaint but will be unable to release any personal information in their response which may leave some of my questions unanswered.

I have considered if someone who does have a right of access to the relevant personal information would be better placed to make the complaint.

My details:

Name	
Address	
Postcode	
Telephone contact no(s)	
Email	
Date	
Signature	

Should you have any questions about this form please contact us - see details below.

Please return this form as soon as possible so there is no delay in the handling of this complaint.

Please return to: **[insert relevant address and contact details]**