



briefing

Health and Social Care - May 2008

Mental Capacity Act 2005

Accessing information about a person who lacks capacity

Questions to ask when requesting personal information about someone who may lack capacity.

- Am I acting under a Lasting Power of Attorney or as a deputy with specific authority?
- Does the person have capacity to agree that information can be disclosed? Have they previously agreed to disclose the information?
- What information do I need?
- Why do I need it?
- Who has the information?
- Can I show that:
 - I need the information to make a decision that is in the best interests of the person I am acting for, and
 - the person does not have the capacity to act for themselves?
- Do I need to share the information with anyone else to make a decision that is in the best interests of the person who lacks capacity?
- Should I keep a record of my decision or action?
- How long should I keep the information for?
- Do I have the right to request the information under section 7 of the Data Protection Act 1998?

Questions to ask when considering whether to disclose information

- Is the request covered by section 7 of the Data Protection Act 1998? Is the request being made by a formally authorised representative?

If not:

- Is the disclosure legal?
- Is the disclosure justified, having balanced the person's best interests and the public interest against the person's right to privacy?

Questions to ask to decide whether the disclosure is legal or justified

- Do I (or does my organisation) have the information?
- Am I satisfied that the person concerned lacks capacity to agree to disclosure?
- Does the person requesting the information have any formal authority to act on behalf of the person who lacks capacity?
- Am I satisfied that the person making the request:
 - is acting in the best interests of the person concerned?
 - needs the information to act properly?
 - will respect confidentiality?
 - will keep the information for no longer than necessary?
- Should I get written confirmation of these things?

To discuss your queries further, please contact Eve Piffaretti.



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Eve advises and trains health and social care sector clients across the UK on a variety of issues relevant to their service including, consent, capacity, confidentiality, human rights, mental health law, the law relating to children, judicial review, community care and information governance. She has a expertise in advising on the law relating to vulnerable groups and in particular the implications of the Mental Capacity Act 2005, child protection issues and child care law, including treatment of children without parental consent. She also advises upon and audits policies, procedures and protocols.

She is the co-editor of Sweet and Maxwell's Encyclopaedia of Social Services and Child Care Law. Eve is an editor for Cross on Local Government Law. She has annotated statutes, such as the Equality Act 2006 and has edited other publications. Eve is a member of Public Law Wales, the Wales Medico – Legal Society and a guest Lecturer at Cardiff Law School. She is a member of the National Committee of Barnardos

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