

## Access to medical records for assisted death: clarifying the guidance

Noel Conway recently lost his appeal at the High Court calling for a judicial review into the blanket ban on assisted dying and stated his intention to seek permission to appeal to the Supreme Court. Regardless of outcome, uncertainty remains surrounding the practice of access to medical records when a patient seeks an assisted death abroad.<sup>1</sup>

The numbers of British citizens dying in Switzerland is increasing year on year. Last year 47 British citizens died at Dignitas alone and their UK-based membership rose to 1139 people.<sup>2</sup> However, Dignitas is only one of three Swiss organisations that accept British citizens and so the true incidence remains unknown.

As part of the request for assistance to die in Switzerland a patient must provide medical verification of their condition. It is this that patients approach their doctors for in the UK to provide in the form of a written report or a copy of their medical records.

Following the Nicklinson, Lamb, and Martin case in 2013,<sup>3</sup> the General Medical Council (GMC) clarified guidance on this issue by stating that doctors should be prepared to listen to and to discuss the reasons for the patient's request. Any advice or information in response should be limited to:

- an explanation that it is a criminal offence for anyone to encourage or assist a person to commit or attempt suicide; and
- objective advice about the lawful clinical options (such as sedation and other palliative care).<sup>4</sup>

However, it is another GMC document<sup>5</sup> that provides detail regarding the issue of medical reports and access to records:

*'... writing reports knowing, or having reasonable suspicion, that the reports will be used to enable the person to obtain encouragement or assistance in committing suicide ... may also raise a question of impaired fitness to practise.'*<sup>5</sup>

British Medical Association advice mirrors this<sup>6</sup> and so if a doctor writes a report then the guidance is clear: doing so may result in a fitness-to-practise proceeding.

However, a second avenue exists that patients utilise: obtaining copies of their medical records.

*"... the Swiss organisations openly advise those seeking an assisted death not to mention the reason for their request [for their medical records]."*

### CAN I REFUSE?

Patients report being refused copies of their medical records because doctors knew their intended purpose. In fact, the Swiss organisations openly advise those seeking an assisted death not to mention the reason for their request out of fear of refusal. Under the Data Protection Act 1998, patients have a right to their medical records, regardless of use or reason. However, access to a patient's health records may be denied if *'the information released may cause serious harm to the physical or mental health or condition of the patient'*.<sup>7</sup>

If a doctor contacts their medical defence organisation regarding this scenario they will likely be given two options. Option one: give the medical records with a covering note stating that giving them should not to be construed as support or encouragement. Option two: refuse the request and let the patient appeal to the information commissioner if they so wish. However, if a request for medical records is refused by the GP due to fear of violating the GMC's professional guidance this would be misguided, as the document goes on to state:

*'Some actions related to a person's decision to, or ability to, commit suicide are lawful, or will be too distant from the encouragement or assistance to raise a question about a doctor's fitness to practise.'*<sup>7</sup>

These include but are not limited to providing access to a patient's records where a subject access request has been made (in accordance with the terms of the Data Protection Act 1998).

I contacted the GMC directly to clarify the scenario whereby a doctor is aware upfront of the intended use for the medical records. The GMC responded very clearly:

### ADDRESS FOR CORRESPONDENCE

**Paul Teed**

Population Health Sciences, Bristol Medical School, University of Bristol, 39 Whatley Road, Bristol BS8 2PS, UK.

**E-mail:** [pt16269@bristol.ac.uk](mailto:pt16269@bristol.ac.uk)

*'... we have had legal advice to the effect that a doctor's compliance with a subject access request even if they knew the reason for that request would be too far removed from the act of suicide to constitute encouragement or assistance' (personal communication, 20 March 2017).*

Thus, even if a patient requests copies of medical records with the stated intention of using them for an assisted death abroad and the doctor then complies with this request, this is deemed an action too distant to raise a question about a doctor's fitness to practise.

**Paul Teed,**

NIHR SPQR-Funded PhD Studentship, University of Bristol, Bristol.

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