Trust Policy

For

Photography & Video Recording of Patients

(Confidentiality & Consent, Copyright & Storage)

A policy recommended for use

In: All areas involving patients

By: All staff who take photographs or video recordings

For: Ensuring that national guidance is followed when taking recordings

Key Words: Photography, video, recordings, consent, copyright, storage, mobile phones

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## Policy relating to the Photography & Video Recording of Patients

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1. Introduction

This policy applies to all employees of the East and North Hertfordshire NHS Trust. Its purpose is to protect both patients’ right to confidentiality and also the Trust from any litigious claims that may arise from misuse of clinical recordings.

2. Purpose of this policy

This policy aims to provide guidance for all staff of the Trust involved in any clinical recording of patients including the use of ‘smartphone imaging’. It is not intended to be over restrictive but to protect both the patients’ confidentiality and to protect the Trust from any litigious claims that may arise from the misuse of recordings.

3. Definition of terms

In this Policy, the term ‘recording(s)’ is used to refer to photography (either analogue or digital), video and audio.

4. Minimum requirements

All recordings intended to illustrate a patient’s condition or an aspect of their treatment are medical records, whether they were originally created specifically for this purpose or not. They therefore should be treated as rigorously as any other medical record.

Wherever possible, clinical recordings must be undertaken by a Clinical Photographer from the Department of Clinical Photography & Illustration.

It is mandatory that the ‘Request for Clinical Photography’ form (available from the Department of Clinical Photography & Illustration) is completed by any member of staff requesting clinical recordings of patients. This is to ensure that recordings are correctly consented and documented in the patient’s case notes for future reference.

If a Clinical Photographer is not available, Trust staff are permitted to take clinical recordings themselves with permission from the department. Under no circumstances should a mobile phone be used for this purpose. This is provided that the following minimum information is clearly recorded on the ‘Request for Clinical Photography’ form:

- The name of the doctor / health care professional who took the photograph
- The reason for the recording

Individuals wishing to use any technology for capturing digital clinical images must be aware of the risks and take professional responsibility to gain patient consent and ensure patient confidentiality. The Trust’s policy on data security and the Data Protection Acts apply. Recordings should be removed from camera as soon as possible after capture and made available to clinical photography.
5. Referring patients to Clinical Photography

Before referring patients to Clinical Photography, please complete the ‘Request for Clinical Photography’ form and distribute as per directions;
- GREEN copy to be filed in the patient’s case notes
- YELLOW copy handed to the patient
- WHITE copy to Clinical Photography with full details of views required, name of consultant and where possible a diagnosis

6. Confidentiality and consent

In order to ensure that the patient’s right to confidentiality is preserved, the Trust has adopted the policy that informed consent to any clinical recording must be obtained from all patients for each recording. As stated above, since clinical recordings form part of a patient’s confidential medical record they must be treated in the same way as written notes.
Confidentiality is a patient’s legal right and staff are therefore reminded that breach of confidentiality may well amount to serious professional misconduct with inevitable disciplinary consequences and could result in substantial financial damages to the Trust.

The ‘Request for Clinical Photography’ form allows two levels of consent;
- A: for inclusion in the medical records
- B: for teaching in healthcare (this does NOT include publication use).
If these sections are incomplete, consent A will be assumed, such as when a patient is unable to give consent due to any incapacity (see 6.3).
There is also a dedicated section on the reverse of the form for publication. You should only complete this if you have a named publication.

The Trust requires that:

- The patient’s consent is obtained in writing using the ‘Request for Clinical Photography’ form, before any clinical recording is undertaken exceptions to this could include the photography of elderly patients including those with dementia under the (Trust Safeguarding Adults guidelines)
- Should you wish to utilise the clinical recording for teaching and/or publication, further signed consent must be sought. There are facilities for this on the request form as detailed above
- Prior to publication (e.g. journal, website, book, newspaper etc.), the patient’s consent must be obtained for each individual use. Again, there are facilities for this on the request form, but you must designate a specific named publication
- Only authorised copies are made (please see 10)
- When making any recording you respect the patients’ privacy, dignity, ethnicity and religious beliefs
The following general principles apply to most recordings, although there are some exceptions detailed below:

- Seek permission to make the recording and get consent for any use or disclosure
- Give patients adequate information regarding the specific purpose of the recording and time to read any explanatory material provided
- Patient information material should where possible, be available in the patient’s language and when necessary, translations should be available
- Ensure that patients are under no pressure for the recording to be made
- Do not participate in any recording made against a patient’s wishes
- Stop the recording if the patient asks you to or if it is having an adverse effect on the consultation or treatment
- Do not use recordings for purposes outside the scope of the original consent for use, unless further consent is obtained
- It will be the sole responsibility of all staff (including community) to ensure that informed consent for photography is clearly recorded in all case notes
- Under no circumstance must clinical images be stored on personal computers, mobile phones or any other removal storage device
- Recordings that have inadvertently picked up images of another patient, who has not consented and is clearly identifiable, must not be published under any circumstances. Unless deleterious to the care of the subject patient, they should be destroyed.

6.1 Withdrawing consent

Patients have the right to withdraw consent for the use of their images at any time. The recording with then be destroyed or downgraded to a lower consent level.

When obtaining consent for publication, it should be made clear to the patient that once a recording is in the public domain, there is no opportunity for effective withdrawal of consent.

If a consenting patient subsequently dies, permission should be sought for any new use outside the terms of the existing consent as usual. In this instance the consent of both the personal representative and the next of kin is required.

6.2 Consenting minors

In the case of minors, the patient or guardian must sign the consent form. However, if a child of sufficient maturity and understanding (Fraser competent) is not willing for a recording to be made, this must be accepted and the recording cancelled. No recording should continue, irrespective of the wishes of the person with parental responsibility.

Additionally, when recording children the following guidelines should be followed:

- Recordings of children should be taken only if there are specific features that need recording for clinical use e.g. assessing the progression of a skin lesion or of an important clinical sign that is rarely seen
- Whole body shots should not be taken unless completely necessary
- Records of genital areas or of the chest in peri or post-pubescent girls should only be taken in exceptional circumstances.
- Where ‘intimate’ photographs of children are required, the Trust strongly advocates the use of professional, registered Clinical Photographers who are trained to manage such patients and have developed credible audit trails where the integrity of the image is intact in support of the clinician in any potential medico-legal situation.

Recordings of non-accidental injuries (NAI’s) may only be carried out with: informed parental consent, consent from the child (Fraser competent) or in exceptional circumstances, with a Court Order and in consultation with the Child Protection Team. In addition, the Child Protection Team and Paediatric Consultant must be fully informed of any consent refusal and this must be documented in the case notes.

Images of any NAI may only be viewed in a restricted healthcare setting e.g. case conference where it is deemed essential for the care of the patient and where information is shared on a confidential basis. Under no circumstances must recordings be copied for personal use.

6.3 Recordings of the unconscious/anaesthetised/mentally impaired patient

If recordings are to be used for medical records and teaching in a healthcare setting use only, you may record patients who need emergency treatment but cannot give their permission for the recording to be made. You do not need a relative’s agreement before starting the recording but must stop if a relative objects. Before these recordings are used however, the patient’s consent must be obtained. If retrospective consent is not obtained then the records will be either restricted to consent level A or quarantined i.e. images removed from the individual’s medical record and retained within the archive but not accessible to view.

If however a patient dies before a retrospective consent can be obtained, material by which the patient is identifiable (blacking out eyes is not acceptable) can only be released with the consent of the deceased’s personal representatives. In addition, wherever possible the consent of the next of kin or near relatives should be obtained, particularly where the personal representatives are not relatives of the deceased. The duty of confidentiality survives the death of the patient and the Trust can be prosecuted under the Access to Health Records Act (1990).

Wherever possible, it would be best practice for the consultant/nursing staff to explain to their patient’s, as part of the process of obtaining consent to the treatment or assessment procedure, that a recording may/will be made and obtain signed consent at this point if possible.

6.4 Recordings where consent is not required

You do not need consent or permission to make recordings of the following:

- Images taken from pathology slides
• X-rays
• Laparoscopic images
• Images of internal organs
• Ultrasound images
• Retinal images

These recordings are unlikely to raise issues about anonymity and will not identify the patient. Before use, however, the recording should be anonymised by the removal of any identifying marks e.g. tattoos, NHS number. Nonetheless, it may be appropriate to explain to the patient, as part of the process of obtaining consent to the treatment or assessment procedure that a recording will/may be made.

7. Existing collections used for teaching purposes

It is accepted that some doctors may have existing collections of recordings (taken by themselves or by departments of medical photography), which they use solely for teaching purposes (not for publication). Such collections may have significant value for teaching purposes. You may continue to use these recordings providing you can prove that consent for this use was obtained and that there is no chance that the images may be identified. For this reason these recordings should only be used within a confidential healthcare teaching environment.

Recordings that have not been consented and clearly identify the patient must not be used and be destroyed. When making a judgement about whether the patient may be identifiable, you should bear in mind that apparently insignificant features (such as a tattoo) may still be capable of identifying the patient to others.

8. Publication of clinical recordings

As detailed in 6, prior to publication, the patient’s consent must be obtained. This must be for each specific use for a named publication; it cannot be general consent for publication.

It must be made clear to the patient that once a recording has been placed in the public domain (i.e. web site), there is a possibility of such recordings being seen or downloaded by someone other than the intended recipient and that once such recordings are in the public domain, there is no effective means of withdrawing consent (see 6.1).

A patient’s image must not be altered in any way to achieve anonymity in order to avoid the need for informed written consent e.g. blacking out of the eyes.

If a consenting patient subsequently dies, permission should be sought for any new use outside the terms of the existing consent. In this instance, the consent of both the personal representative and the nearest relative(s) should be obtained. You are reminded that the duty of confidentiality survives the death of the patient.
All recordings originating within the Trust are the sole copyright of the East and North Hertfordshire NHS Trust and as such this copyright cannot be passed on to any publisher.

The department of Clinical Photography will provide safe transfer and storage of clinical recordings requested for publication by Trust staff, only after the appropriate consent has been obtained and made available. The transfer media will then be erased or returned to the department by the requesting staff.

9. Storage of recordings

Since clinical recordings are deemed to be part of a patient’s confidential record and may be required for disclosure, it is important that a robust system is in place for identifying, retrieval and storage of clinical recordings.

The Department of Clinical Photography has a Trust image management system, named WABA. This password protected system is available to access from any Trust PC. Users must request an account from the department and are allocated the appropriate level of access via their account to search and view clinical recordings. Please contact us should you wish to set up an account.

In line with the Data Protection Act 2000, and Trust policy, all recordings must be stored securely on WABA along with Trust PC’s / Trust server / IT supplied encrypted memory sticks where necessary. Personal PCs and any unsecure removal data storage device e.g. CD-ROM, USB memory sticks and memory cards must not be used for storage of clinical recordings.

As discussed in 4, all clinical recordings undertaken by non-clinical photography staff should be provided to the department along with the completed ‘Request for Clinical Photography’ form for upload to WABA and subsequent storage.

Recordings are usually available to view on WABA within 24 hours of capture. Please ensure that when viewing recordings computers must be located in such a way that the images of patients displayed on screen cannot be seen by passers-by.

Before leaving the employment of the Trust, staff must erase any digital images of patients from their personally owned computers unless specific permission to retain images for teaching purposes is obtained from the Medical Director or nominated representative.

9.1 Analogue photography

Photographic negatives or prints should be securely stored in the originating department/patients case notes labelled accordingly.

In the case of colour transparencies, ideally a second copy should be taken at the time of photography, and stored within the originating department, to serve as a secure master copy.
10. Additional Copies

Additional copies may be requested by clinicians for referral to hospitals outside the Trust e.g. for a second opinion. These will be provided as PDF files sent over email to nhs.net accounts only.

Under Access to Health Records Act 1990, additional copies of recordings can be provided at cost to the patient.

If images are required for medico legal purposes, a request for additional copies should be made through the patient’s legal representative. All requests for recordings of patients taking possible legal action against the Trust must be forwarded to the Trust legal department.

11. Copyright

Copyright of all recordings undertaken by staff in the course of their employment is vested in the East and North Hertfordshire NHS Trust irrespective of who owns the recording device.

Individuals are reminded that when submitting articles for publication, under no circumstances will copyright be signed over to another party without the express permission of the Medical Director of the East and North Hertfordshire NHS Trust.

12. Non-clinical photography

The department also undertakes non-clinical photography for the purpose of Trust promotion or teaching.

In cases where a patient or member of the public is incidental to a recording, e.g. where the recording is to illustrate a ward layout, informed consent to appear in the recording and its intended purpose is still required.

In these circumstances, East and North Hertfordshire NHS Trust has adopted the policy that such permission must be documented on a general consent form known locally as the ‘General Photography and Video’ consent form. This form is available to print from the Clinical Photography & Illustration page on the Trust Knowledge Centre. Completed forms and recordings must be made available to clinical photography for appropriate storage and retrieval purposes.

Members of Trust staff who normally operate equipment / work in this area are deemed to have given their consent to the recording and its further use by appearing in the recording. If the member of staff does not normally work in that area, then consent should be obtained.

The patient/staff’s permission in writing is obtained for the original recording and for its future use as detailed on the General Photography & Video consent form, regardless of whether external agencies additionally obtain their own permissions.

Prior to further use other than as described on this form, the patient’s permission for the specific use proposed is sought.
Visitors, press reporters, external photographers and film crew wishing to make recordings must seek the specific permission from the Head of Public Relations of the East and North Hertfordshire NHS Trust.

Contracts with external photographers and film crew must ensure that they waive ownership of copyright and moral rights in the recordings they prepare, although they may still be allowed to retain the right to reproduce the recording. The individual commissioning such images for the Trust must be responsible for ensuring that the resultant images are fit-for-purpose and are compliant with Trust Policy. Such images should be made available to the department for upload to the WABA along with the necessary consents / model releases.

13. Mobile telephones

Some mobile computing devices such as mobile telephones have the capability to capture and store images either within the device’s own memory or to be downloaded to another medium e.g. personal computer. There is also the risk to both patients and the Trust that smartphone images can be used in unconsented / unregulated smartphone apps, some for diagnostic purposes. Unfortunately, these may be accessible to the medical profession and a much wider general audience. Therefore, the use of mobile telephones to take clinical recordings is prohibited in accordance with the Telephone Policy of the East and North Hertfordshire NHS Trust.

The Department of Health and the Medicines and Healthcare Products Regulatory Agency (MHRA) warn that picture-messaging technology used in a clinical setting cannot be assured to be safe, suitable or effective as it has not been subject to the usual medical devices regulations and there is also the potential for legal action to be taken against an individual doctor or hospital, if a patient comes to harm.

In exceptional circumstances patients / relatives found to be utilising mobile phones or similar recording devices for unauthorised recording of telephone discussions or a patient’s treatment may be requested to leave the premises. Please note, although staff are unable to confiscate recording devices, the Trust could in exceptional circumstances instigate civil proceedings.

There are some circumstances where mobile telephones are permitted for capturing images for domestic purposes i.e. non-clinical images. An example of this might be where parents are permitted to take photographs of their own children using mobile phones. Such domestic images are exempt under section 36 of the Data Protection Act which states that “personal data processed by an individual only for the purposes of that individual’s personal, family or household affairs are exempt from the data protection principles and provisions of Parts I and II”. However, care should be taken to ensure that recordings do not include accidental inclusion of patients and staff.

14. Primary care sector

It is recognised that those working within the Primary Care Sector have different requirements in terms of clinical recordings; however, the principles set out in
this policy apply to all working in the Primary Care Sector as well as those
detailed below;

All recording equipment and portable media must be held securely on NHS
premises, only removed when strictly necessary, and returned as soon as is
practicable.

Details of all equipment must be held locally by an appropriate member of staff
on a register to assist identification in cases of theft or loss. Primary Care
management need to be aware who holds these registers.

Staff removing equipment from the premises must record this in an equipment
log.

When in transit with such equipment containing clinical recordings, particular
care must be taken. Portable media such as digital cameras and camcorders
should never be left in a public area unattended and always be returned to base
on the same day of use, unless special permission is given by Head of
Department.

Camera memory cards and video media (tapes etc.) should be carried
separately from recording equipment; if equipment is lost or stolen, then
recordings will not lost.

Clinical recordings from digital cameras should be uploaded onto a secure NHS
network as soon as is practical. Once uploaded, the recordings must be erased
from the memory card before being locked away securely, or before equipment
is taken out by another member of staff.

If instant (Polaroid™ type) prints are produced then the patient NHS number
and name must be written in the space provided in indelible ink prior to filing in
the patient record.
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Supporting / Relevant Legislation

The Mental Health Act (1983).
The Obscene Publications Act (1959).