

30 April 2018

Dear Steven,

Further to your previous correspondence and comments regarding the iO's advice to members in relation to the GDPR legislation and specifically the application of 'Article 9', the processing of special categories of personal data, I wanted to firstly thank you for raising these points with us. We take very seriously our duty to our members to provide them with the best advice available to ensure that they are fully protected and mitigate any risk of non-compliance with the new EU legislation.

This was never in question

We have therefore taken on board your concerns and sought further advice on your points from both from the ICO and legal experts in data protection legislation.

The guidance that the iO has received on Article 9, the processing of special categories of personal data, which for the purposes of osteopaths is listed as one of a number of special categories of data, is that it must be afforded the highest level of data protection.

Nor was this!

It should be noted at the onset that the processing of personal data should NOT be confused with seeking permission to treat a patient, which involves a contractual relationship.

For the purposes of GDPR the iO is strongly advocating Explicit Consent, as the reason for processing patients' data and the template documents prepared are based on this premise.

This is very different to saying that it is "explicitly required"

By way of background information, GDPR forbids the processing of data concerning health information (creation, management and storage of medical records) unless the patient has given explicit consent, or one of the nine other options can be fulfilled.

The IO in consultation with its legal advisors has looked at each of the other options and, whilst recognising that option H may be an alternative (processing is necessary for the purposes of preventive or occupational medicine*), this may prevent the subsequent sharing of this data with other medical professionals. It also does not fit with many of the other GDPR legally binding conditions imposed on osteopaths.

"May be"??? It is precisely what that sub-para is for!

Completely irrelevant.

LIKE WHAT?!

As an example, GDPR says 'consent' must be freely given, specific, informed and unambiguous. Not seeking explicit consent would put osteopaths in the difficult position of processing without a patient's consent or even knowledge.**

How could they POSSIBLY not know that you were writing down a case history??

In addition, as medical data is classified as special category data requiring the highest level of security under GDPR, we need to ensure that members are fully protected from legal uncertainties which currently exist in the GDPR legislation. Supposing a claim is brought against an osteopath and the insurance company refused to pay out because explicit consent had not been obtained.

They couldn't, because it isn't required!

As explicit consent will be required to share medical data regardless, and in light of these legal uncertainties, our legal advisor has suggested the easiest way to mitigate any potential risk to osteopaths and demonstrate best practice is to simply gain explicit consent through the privacy notice and explicit consent document that all patients will need to sign anyway as part of the GDPR process.

We have ALWAYS obtained contemporaneous consent to share medical data.

By simply adding the required wording for explicit consent in the privacy notice, and a signature on the simple processing form, both of which have been pre-prepared, it will provide members with the greatest protection from any grey areas in the legislation and they can be confident that, should for example future requests for data be made, it does not create potential for data breach issues later in the process.

Indeed, the iO provides forms for us to use for this very purpose. It is much better practice to do this than get blanket agreement when the patient first presents.

Concerns have also been expressed that if explicit consent is given the patient can subsequently withdraw it. This is true, but patients can also restrict processing or request erasure where consent has not been obtained.

GDPR also specifically states that although the data subject shall have the right to withdraw his or her consent at any time, the withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. It should also be noted that Article 17. 3 (e) allows for the retention of the patient's records for the establishment, exercise or defence of legal claims. This means that osteopaths can continue storing the data in accordance with their data retention procedures, despite the patient's request for erasure.

God knows how this is relevant. Patients CANNOT withdraw consent once we have their data.

Ultimately, it is up to members to make their own decisions concerning the processing of special categories of personal data, but the IO strongly advocates Explicit Consent because it removes any legal uncertainty and is easy to obtain.

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* This excerpt from the regs is very misleading. The sub para actually reads "processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment..."

** This is very mischievous use of English. By implying that consent is needed the iO's advisor is drawing the conclusion that practitioners could find themselves in a "difficult position". But consent is NOT needed. The GDPR quite explicitly permits the processing of personal data for medical purposes WITHOUT explicit consent. Tick box not required!