



The Royal College of Pathologists
Pathology: the science behind the cure

Guidelines on the release of specimens and data to the police and other law enforcement agencies

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STAKEHOLDERS

Stakeholders approached for advice in the drafting of this document include:

All Specialty Advisory Committees of The Royal College of Pathologists
The Royal College of Pathologists' Ethics Committee
The Royal College of Pathologists' Lay Advisory Committee
Forensic Science Service
Home Office
Crown Office
Department for Health, Social Services and Public Safety, Northern Ireland
Association of Chief Police Officers
Association of Chief Police Officers of Scotland

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1 SCOPE

These guidelines give advice to pathologists and laboratory staff on the release of patient samples to the police or other law-enforcement agencies. They should be used as a basis for the writing of local policies. The section on actions to be taken by biomedical scientists should be the basis of local standard operating procedures (SOPs).

This document is applicable throughout the United Kingdom and Northern Ireland and any differences between countries will be stated in the relevant section.

Guidelines on maintaining the chain of evidence (chain of custody) will be published separately. However samples received in a diagnostic laboratory, which are taken for clinical analysis, may fail to meet forensic standards in this regard.

2 INTRODUCTION

Laboratory samples and data, such as results, are sometimes required as part of a criminal investigation or a coroner's enquiry into a death (e.g. for toxicology analyses or DNA studies). In Scotland, both functions are under the jurisdiction of the Procurator Fiscal.

It is essential to the administration of justice that, if such materials are to be handed over, it is in accordance with the appropriate laws.

It is thus necessary to keep accurate records of the handling of material from the point of receipt if possible, to the point of handover, or the point of secure storage if a request for handover is refused. This forms part of the 'chain of evidence' and prosecutions may fail if this documentary chain is broken. If necessary, the police may establish a complete chain of evidence by seeking consent from the person providing the specimen for a DNA comparison between a specimen held in the laboratory and the person themselves. Care is required with definitions of terms such as 'booking times' or 'time of receipt' because these differ for various laboratory information systems and the pathologist may be 'put to strict proof' in quoting this information.

Dealing with such serious issues can be a daunting experience for laboratory personnel, particularly outside normal working hours. It is important that senior staff from the pathology laboratory and a senior manager from the employing organisation can be contacted at any time. These guidelines, once translated into a local policy and SOP, should give confidence to biomedical scientists and others in the handling of such situations without confrontation.

3 THE LAW

Relevant legislation includes:

- Police and Criminal Evidence Act (PACE) 1984 (applies to England and Wales)
- Criminal Procedure (Scotland) Act 1995
- Criminal Procedure (Amendment) Scotland Act 2004
- Criminal Justice (Scotland) Act 2003
- Police and Criminal Evidence (NI) Order 1989
- Data Protection Act 1998
- Human Rights Act 1998
- Human Tissue Act 2004 (does not apply in Scotland; relevant Scottish legislation will be enacted in the near future).

These Acts are designed to protect an individual's rights, including confidentiality. There are circumstances where disclosure in connection with judicial procedure should take place. Please refer to the General Medical Council's 2004 paper, *Confidentiality: Protecting and Providing Information*. www.gmc-uk.org/standards/confidentiality.htm

Under Section 11 of PACE, samples and information (including request forms and laboratory reports) collected from a patient in the course of their care are excluded material and cannot, in general, be seized without the consent of the patient or the order of a judge. This protection does **not** apply to samples or information collected from human subjects solely for the purposes of research, nor does it apply to veterinary samples or information. However, specimens and information collected for the dual purposes of clinical care and research **are** excluded.

The situation pertaining to samples and other material derived from post-mortem examination is less clear as there is little or no case law in this area. However, the College has obtained legal advice and this states opinion that such material, if its primary purpose is establishing the cause of death or other diagnosis, is excluded.

A police officer, and in England and Wales some civilian investigation officers, have a common law power to seize objects and data that may be evidence if (s)he believes that, if they are not seized, they may be concealed, lost, altered or destroyed. This power, which is retained by Section 19 of PACE, must be exercised reasonably. Ordinarily, because laboratories store specimens and retain data for periods of time in excess of that required to obtain either consent or a court order, it would be unreasonable for an officer to seize them on these grounds. Difficulties may arise with time-dependent analyses where delay may adversely affect laboratory results, and common sense should apply in these circumstances.

Once a patient has died, the coroner may have the right to seize samples or other material collected from the patient during life, provided that the information derived from them may assist the purpose of the inquest. The purpose of an inquest is to establish who the deceased was and where, when and by what means (s)he died. If the patient has died but is not the subject of an enquiry on behalf of the coroner in relation to that patient's death, then the coroner does not have the right to authorise the seizure of samples or material. The legal issues in such cases can be complex and advice should be sought from the employing organisation's legal advisors. If in any doubt, the safest option is **not** to hand over the sample or material unless ordered to do so by a judge. Common sense and discretion needs to be used and a sense of proportion applied, with an appreciation of the patient's interest and the public's interest in a particular set of circumstances.

4 ACTIONS TO BE TAKEN WHEN A REQUEST FOR SEIZURE IS MADE

4.1 During working hours

When a police officer or other agent asks for a sample or other materials to be handed over:

Office staff, medical laboratory assistants (MLAs) and trainee biomedical scientists

- The officer should be asked to wait while an appropriate senior member of staff is contacted. This should be the relevant departmental consultant. If the consultant is off site, in order of preference, the clinical director, laboratory manager or most senior available chemical scientist or biomedical scientist should attend and deal with the matter directly.
- The member of staff should politely decline to enter into any further conversation regarding the patient or any samples or data relating to them, and should suggest that the officer directs all enquiries to the senior person dealing with the matter.

Consultant or other senior pathology, management or laboratory staff

- The credentials of the officer should be established by asking to see a warrant card and the details recorded. If a police officer is in uniform, the warrant card number should be checked to ensure it matches up with the collar number on the uniform.
- It should be established that the sample and/or other material that is being requested is present in the laboratory and whether or not any further work needs to be done on it.
- Consideration should be given to the size of the sample, the feasibility of dividing it, its stability and the volume required to complete the diagnostic work.
- The sample and/or other material should be checked to ensure that they have correct identifiers on them, complying with local labelling and/or reporting policies, and that they originate from the patient in question.
- It should be established whether or not the patient is alive.
- With regard to samples, the officer should be informed that the sample is in existence and will not be destroyed until the issue, if any, as to whether or not it should be handed over is resolved. No other information about the patient should be given.

Health and safety

When handing over the samples to an officer, due regard must be taken to ensure the health and safety of the officer.

If the patient is alive and able to give consent

- The officer is required to present **either**:
 - the patient's written consent **or**
 - an order from a judge (NB In Scotland, substitute the term 'sheriff' for 'judge' throughout).
- The consent must be signed and dated by the patient.
- Copies must be taken of any consent or judge's order.

If the patient is alive but not able or unwilling to give consent

- The officer is required to present an order from a judge, unless the patient is the subject of a police enquiry relating to a road traffic offence e.g. driving under the influence of alcohol or drugs.
- Copies must be taken of the judge's order.

Please note: except in Scotland, nobody can give consent on behalf of an adult patient. If presented with such circumstances, a consultant should discuss this with a supervising police officer. The situation in England with regard to consent may change in 2007 when the Mental Capacity Act comes into force.

If the patient is a child

The law in relation to consent of children is complex. In English law, for example, a child aged 16–18 years can consent to medical treatment including examination and investigation, but cannot refuse treatment intended to save their lives or prevent serious disability. It may be unlikely that a refusal to consent to release of specimens or data would be overturned on these grounds, but any legal ruling is likely to consider the best interest of the child. Children under the age of 16 years may presumably consent to the release of specimens if they are 'Gillick competent'.

The situation pertaining to parental responsibility (PR) may also be complex. Mothers have PR by right, as do fathers, but only if married to the mother at the time of birth of the child or if named on the child's birth certificate (for children born on or after 1 December 2003) or have acquired PR by formal application. Other parties, such as social services, may also have PR. Any disputes over consent by children should be referred to the court for resolution.

If the patient is dead

- The officer should be either:
 - acting on the instructions of a coroner or procurator fiscal **or**
 - presenting an order from a judge.
- A copy must be taken of any judge's order.

a) Actions to be taken once lawful authority for seizure is established

- The specimen and/or other material should be handed over in a safe package. A record of the following information should be made, preferably on a proforma designed for the purpose:
 - date and time of seizure
 - the name, police station and badge number of the officer (or equivalent information for other agents)
 - sample/material details (including specimen type, date and time of collection, type of sample collection tube, glass or plastic and batch number, patient identifiers and laboratory accession number).
- The proforma must be signed and dated by the receiving officer and the person handing over at the time of handover, or as soon as reasonably possible afterwards, and kept in a safe place together with any copies of consent or judge's order.

b) Action to be taken when lawful authority is NOT established

- If the officer is unable to present the patient's consent, or judge's order, the request for seizure should be politely refused.
- The officer should be politely reminded of the provisions of Section 11 of PACE and offered the facilities to contact a supervisory police officer.
- The officer should be reassured that the sample or material will be safely stored until the issue of authority is resolved.
- All necessary immediate steps to preserve any sample should be taken.
- The clinical director and/or consultant should be informed immediately.
- A member of senior management from the employing organisation should be informed as soon as practicable.
- The medical director should be informed as soon as practicable.

c) Action to be taken when an officer insists on seizure without lawful authority

- Officers should not be obstructed. However, unless they are purporting to be using their powers under Section 19 of PACE, they have no right to demand either to search for and/or seize excluded material. To do so, they would not be acting in the execution of their duty and cannot, therefore, be obstructed in the course of their duty.
- The officer should be politely discouraged and asked to wait until contact can be made with a higher authority within the employing organisation, e.g. the medical director or chief executive.
- If, despite this, the officer still insists on seizure, they should be asked to document the protest and reasons for it in their pocket book. The sample or material should be packaged safely and handed over.
- An immediate account of the events should be written, signed, dated and timed, and filed safely.

- The handover of samples or other material without the proper authority being presented may still be in the interests of the patient (e.g. in establishing the identity of a dead body as being that of the patient). Such decisions and their reasons must be documented and filed safely as soon as possible after the event.
- In all events, the medical interests of the patient must be considered and it is advisable to inform the consultant under whose care the patient is, of any handover of samples.

4.2 Outside working hours

The guidance detailed in Section 4.1 above applies in this situation too.

It is particularly important that biomedical science staff, who may be working on their own, do not feel intimidated by the circumstances. This is best achieved through training. Such training must include the development of an understanding that the patient's rights are usually paramount and that, for criminal investigations, successful prosecution is dependent on proper, lawful procedures being carried out. Immediate referral to the appropriate consultant must be made.

Appendix 1

THE LAW IN SCOTLAND

Statutory Legislation in Scotland deals mainly with the taking of samples from arrested persons at police stations (the Criminal Procedure (Scotland) Act 1995). Applications for search warrants and rules governing their execution are covered by common law.

Scottish law does not have any statutory provisions dealing with excluded material equivalent to Section 11 of PACE. Powers to search are all governed by common law. The police are not entitled to search without a warrant except in cases of urgency, which has been widely interpreted as in favour of the police. The need to obtain a warrant to search is of course obviated by the consent of the person concerned.

Warrants to search can be applied for by the police *ex parte* or 'on notice' by what is called Notice of Appearance, which is served by the procurator fiscal. Warrants are signed by the sheriff who grants them. They are normally granted to named police officers on the basis of information sworn by them.

Importantly, the procurator fiscal can apply for a search warrant by way of an unsworn petition craving warrant search for articles in order to determine whether there is sufficient evidence to bring a charge against anyone.

Warrants to search premises must be specific as to purpose and limitations. A wide and indefinite warrant is illegal. A police officer executing a search warrant must be aware of the terms of the warrant, as otherwise their search will be a random search, and therefore illegal.

To summarise, applications to search or seize are embedded in the common law. Access to medical data, records and samples require the procurator fiscal to serve a Notice of Appearance or the appropriate person so that they can be legally represented at any hearing. The question of urgency may circumvent the rule depending on the circumstances at the time.

Appendix 2

THE LAW IN NORTHERN IRELAND

The relevant statute is The Police and Criminal Evidence (Northern Ireland) Order 1989 (Statutory Instrument 1989 No. 1341(NI 12) [PCEO]. This follows a similar pattern of legal rights and obligations as PACE in England and Wales. Similarly medical data records and samples constitute “excluded material”.

Section 12 (1)(b) states that “excluded material” means “human tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence.” The Order goes on to stipulate that “a person holds such material in confidence for the purposes of this Article if he holds the subject:

- (a) to an express or implied undertaking to hold it in confidence
- (b) to a restriction on disclosure or an obligation of secrecy contained in any statutory provision, including a statutory provision passed or made after the making of this order.”

There is as yet no case law or relevant authorities in this area. However, it is clear that the court’s view of the scope of the Act is to protect an individual’s right to privacy.

In order for the police to gain access to “excluded material” they must adopt a similar approach to that set out in PACE. Under Northern Ireland law Section 11(1) of PCEO states that “a constable may obtain access to excluded material for the purposes of a criminal investigation by making an application under Schedule 1 and in accordance with that schedule”.

It is important to bear in mind that the Northern Ireland legislation follows a very similar approach to that of PACE. The use of such powers is restricted to matters that assist in obtaining evidence with a view to criminal proceedings. The seizure powers do not extend to matters that are subject to legal privilege but do include “excluded material” such as the matters here.

Section 19(4) of PCEO requires a constable to obtain a warrant in order to enter and search premises without the consent of the occupier.

Section 17(2) requires a constable to state “(1) the ground on which they make the application and (2) the statutory provision under which the warrant would be issued”. Section 17(3) requires the warrant to be supported by a complaint in writing and substantiated on oath. The warrant must specify:

- i. the name of the person who applies for it
- ii. the date on which it is issued
- iii. the statutory provision under which it is issued
- iv. the premises to be searched
- v. shall identify, as far as is practicable, the articles or persons to be sought.

Section 20 allows a constable to enter and search premises occupied or controlled by a person who is under arrest for an arrestable offence, if he has reasonable grounds for suspecting that there is on the premises, other than items subject to legal privilege, that relates to “(a) that offence; (b) to some other arrestable offence which is connected or similar to that offence”. In the same fashion as applies to English law a constable may seize anything that has been obtained in consequence of the commission of an offence and that is necessary to seize in order to prevent it being concealed, lost, damaged, altered or destroyed.