**EMIS Viewer – Consent Changes**

Following the enactment of new Data Protection (DP) legislation (the EU General Data Protection Regulation and the UK Data Protection Act 2018), there need to be changes made to the functionality of the EMIS viewer in relation to questions on consent to share.

**Consent To View The Record – This Is Being Removed, Why?**

Consent has always been one of a number of basis on which data can be lawfully processed. GDPR has changed the position of consent as a basis on which to lawfully process data. Article 7 of the GDPR sets out the conditions for consent as a basis for processing data.

In short article 7 requires any consent based processing to utilise an ‘explicit’ consent basis. It also allows any consent to be withdrawn and requires that any use of consent is a ‘freely given’ consent. The use of consent also engages other rights for data subjects, such as the right for data to be forgotten.

These changes have been analysed by the Information Commissioner’s Office and the NHS & Social Care Information Governance Alliance (National body providing authoritative guidance on data processing).

Both the ICO and the IGA have issued clear guidance that for the use of data for provision of care, that consent (under GDPR) is NOT the appropriate lawful basis for processing data.

The reasons for this are:

* When care is delivered to an individual in a professional setting, a minimum record of the care delivered must be made and retained for numerous reasons, including ensuring that care delivery is effective, but also in case of any legal challenge to the care delivered. These records must not be subject to the ‘right to be forgotten’ as they serve a dual purpose of supporting the individual’s care and the service’s effective practice.
* It is not possible to effectively care for an individual unless core data is recorded and shared between relevant organisations.
* Therefore the individual does NOT have ‘genuine choice and control’ over the use of their data for provision of care to them. In short, if they want care services, then the minimum relevant data must be recorded and shared where required.

The ‘agreement’ of an individual to receiving a service is not consent for their data to be processed as even if they withdraw their agreement to the service, the records of care delivered still need to be kept for evidence purposes if required.

So there need to be other lawful basis for processing of the data required to deliver care. Fortunately there are, these are detailed in the ICO and IGA guidance documents. In short they are:

* When conducting a task ‘in the public interest’ and/or where your organisation has ‘official authority’ to undertake the tasks that require the data to be processed. (Article 6(1)e). This relates to public services and in simple terms legitimises the processing of data where it is necessary to provide the services that the organisation is required to provide.
* In addition for the ‘special category’ (aka ‘sensitive’) health data, there is a provision in Article 9(2)f that permits the processing of data for the ‘provision of health or social care or treatment’

So it is now generally accepted that under GDPR consent is NOT the basis for processing data when delivering care and sharing data across care agencies. Hence why the functions asking about patient consent in EMIS viewer are being turned off.

**Does This Mean The Patient Has No Influence On The Use Of Their Data At All?**

No, the individual still has the rights to restrict or object to how their data is being used, but they need to raise these on an individual basis and each circumstance would have to be judged on it’s own merits.

**Does The Removal Of Consent Mean Patients Will Not Be Aware Of This Data Being Used In This Way?**

No, DP legislation requires that individuals are informed how their data is used. This is in relation to ensuring they are able to exercise their rights if they feel the need to. On this basis, there are posters and other materials we are providing for you to use to inform patients about this data sharing.

**In Summary:**

The GDPR articles illustrated above permit the processing of data for the provision of care to the individual, including sharing relevant data between services providing health and social care services.

The general approach in practical terms should be to ensure patients are aware (either in general, or where required specifically informed) how their data is being used in their care pathway so if they have any concerns they can raise them. That meets the requirements of the common law of confidentiality and data protection legislation. Phrases such as the following can be used:

* I’ll refer you to ‘X’ service and tell them what we’ve talked about today.
* I will just take a look at your record on ‘X’ system, which includes information from ‘Y’ (i.e. GP record, hospital record as appropriate).