

Information Sharing

'How To' Guide

Judging capacity to consent



November 2009

www.dcsf.gov.uk/ecm/informationsharing

Version 1

How to judge capacity to give consent to sharing of personal information

This guide describes how to judge capacity to give consent to sharing of personal information. It should be read in conjunction with the other *How To* guides, cross-government *Information Sharing Guidance for practitioners and managers*¹ and any relevant organisational or professional guidance.

This guide is for practitioners and managers who may have to make decisions and share personal information on a case-by-case basis. It does not relate to bulk or pre-planned sharing of information between organisations or systems. This guide describes best practice; however you must make sure you follow your organisation's consent policies and procedures, where available.

Best practice in judging capacity to consent

A young person aged 16 or older is presumed in law to have capacity to consent, unless there is evidence to the contrary. Children aged 12 or over may generally be expected to have sufficient understanding, and younger children may also have sufficient understanding. However, capacity to consent is not simply based on age, it is based on the capacity to understand any consequences of consent or non consent in the particular circumstances and make a particular decision at the time it needs to be made. In judging capacity to consent, you must remember that a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.

When assessing a person's understanding you should explain the issues, and the consequences which arise from their consent or refusal to consent, using their preferred mode of communication and language, in a way that is suitable for them taking into account all you know about them from your work with them, particularly their age, language and likely understanding. If you have just started to work with the person, this will be an integral part of your work with them and getting to know them. You must ensure that they really understand the issues and are not just agreeing to what is proposed.

If you are unsure whether a person has the capacity to consent then you should consult your manager or another professional advisor. The person's parent or carer, another professional working with them, or an advocate, where available, may be able to provide relevant information or advice.

¹ Published by HM Government, 2008. Available at www.dcsf.gov.uk/ecm/informationsharing

Considerations about whether a child has sufficient understanding are often referred to as Fraser guidelines, Fraser competency or Fraser-Gillick competency. For more details see the glossary in the *Information Sharing: Guidance for practitioners and managers*

Judging capacity to consent

The following criteria should be considered in assessing whether a particular individual on a particular occasion has sufficient understanding to consent, or to refuse consent, to sharing of information about them:

Can the person understand the question being asked of them?

For example, are they taking an active part in the discussion? Can they rephrase the question in their own words? How would they explain it to their parent or carer?

Do they have a reasonable understanding of what information might be shared, the main reasons for sharing the information and the implications of sharing that information, and of not sharing it?

For example, what do they say they think would happen if they agree to the information sharing? Why do they think it is important to share the information? Who do they think it might be shared with? What do they think would happen if they say no?

Can they appreciate and consider the alternatives, weighing up one aspect against another and express a clear and consistent personal view?

For example, you could encourage them to say out loud, or write down, their view of the pros and cons. You could recheck these views later or at a later meeting.

Example of judging capacity to consent

Harry is 14 and has recently started to receive support from a children's mental health service (CAMHS). Harry has mild learning difficulties and a statement of special educational needs (SEN). Communicating with Harry is difficult. He can be talkative but rarely responds to direct questions. After 15 minutes it is almost impossible to continue a discussion. He has attention deficit hyperactivity disorder (ADHD). He has been prescribed Ritalin but takes it only erratically. Harry has also been assessed for possible autistic spectrum disorder (ASD). No diagnosis was made, but the SEN statement comments that 'he has some characteristics of the disorder'. Harry is highly distractible, and tends to agree quickly with whatever is suggested to him. Harry's views change from one meeting to the next, and he seems to agree to a proposal because he thinks this will bring a discussion to an end.

The CAMHS worker decides to seek consent to share information about Harry from Harry's mother as - in his opinion - Harry does not currently have capacity to give informed consent to this decision. This decision about Harry's capacity is predominately based on his observations and the advice from other professionals on Harry's inability to concentrate, his tendency to agree with whatever is proposed and to change his views regularly.

With the agreement and help of Harry's mother, the CAMHS worker discusses the proposed information sharing with Harry and double-checks Harry's views to help develop his understanding and ability to participate in making decisions about his future. From *When to share information: Best practice guidance for everyone working in the youth justice sector* (DH, 2008)