



INFORMATION NOTE COMMISSIONED BY GPDF FOR LMCS TO GUIDE PRACTICES' RESPONSE TO WITNESS SUMMONS OR COURT ORDERS

This note covers questions which are most likely to arise, and is not a substitute for specific legal advice, which should be taken if a practice is unsure of the action it should take in response to a witness summons, court order, or Specification of Documents (Scotland).

1. Is a witness summons, court order, or a Specification of Documents (applicable to Scotland only) requiring practices to produce patient records the same as a Subject Access Request (SAR)?

No, a witness summons, court order or Specification of Documents (Scotland) ordinarily falls outside of the data protection regime which regulates SARs.

However, the practice remains subject to and must comply with the Data Protection Act 2018, the General Data Protection Regulation (GDPR) and privacy laws, or it faces an additional burden of having to comply with a court order to enforce compliance with this legislation.

2. Must practices respond to a witness summons, court order or Specification of Documents (Scotland) to produce patient records?

Witness summons or court orders (applicable in England & Wales only)

Yes, failure to respond to a witness summons, court order or Specification of Documents by the date stated could place you and/or your practice in contempt of court, which could result in a fine, or in the worst case, imprisonment, plus an order to pay the wasted legal costs of the parties involved in the case.

Specification of Documents (applicable in Scotland only)

The Specification of Documents is a court order requesting the practice provide records within 7 days. The practice can choose to either send the records directly to the solicitors or to the court. Records can be provided electronically under GDPR.

If practices do not respond to the Specification of Documents within 7 days, solicitors are entitled to set up a 'Commission' where solicitors would attend the practice and look for the documents requested in the Specification of Documents. Usually, solicitors understand pressures on practices and would allow more than 7 days to receive the records. If the practice requires more than 7 days to produce records, a



request should be made to the solicitor.

3. What should a practice do if it does not understand the terms or scope of the witness summons or court order?

The Data Protection Act 2018, GDPR and privacy laws still apply to the practice, and so careful consideration of what records are covered by the summons, court order or Specification of Documents (Scotland) is necessary to avoid producing documents outside the scope of the order, and as a result, breaching these laws.

If the practice is unclear on the scope of the summons, court order or Specification of Documents, it should promptly ask the court for clarification. The practice can do this by letter to the court.

If a practice has received a witness summons ordering attendance at court on a certain date, a representative of the practice must still attend, even if the practice has written to the court to seek clarification.

4. Should a practice redact third party data appearing in patient records before producing them to the court?

Yes, as mentioned above, the practice remains subject to data protection legislation/privacy laws. Therefore, any identifiable data relating to a data subject who is not the patient, should be redacted before the records are produced (i.e. so that a third party's data is not capable of identification).

5. Can a practice claim its costs of complying with a witness summons, court order or Specification of Documents?

The answer differs depending on whether the practice has received a witness summons or another form of court order. If the practice is in any doubt, it should seek specialist legal advice.

Note: if the court has made an order because the practice has not responded to a SAR within the required timeframe without a legally justifiable reason, it is very unlikely the practice would receive payment of any costs.

(i) witness summons (applicable in England and Wales only)

A witness summons is a court order requiring the individual specified in the order (or a representative in the case of a named practice) to attend court to produce documents on a certain date.

The practice is entitled to reasonable travelling expenses to and from court and compensation for time



spent attending court, at the specified rates, for example¹:

- *Travelling expenses*: the standard or 2nd class fare, or 25p per mile if you drive
- *Meals and refreshments*: £2.25 for up to 5 hours, or £4.50 for 5 to 10 hours
- *Loss of earnings*: £33.50 for up to 4 hours, or £67 for longer (£42.95 or £85.90 respectively if you are self-employed)
- *Child care*: £67 per day²

<https://www.gov.uk/going-to-court-victim-witness/expenses-for-going-to-court> provides further details on costs that can be claimed.

The practice is not ordinarily entitled to its costs of searching, compiling, redacting and copying the records to be produced. However, there have been cases where the court has ordered payment of these costs.

Therefore, it is certainly worth explaining to the court the burden placed on practices when responding to requests for patient records, and asking the court to make an order for payment of the practice's costs of searching for, compiling, redacting and copying the records. It is important that the practice comes across as being reasonable and co-operative throughout, and puts forward a request for costs reimbursement and a figure claimed as early as possible in the process, to maximise the chances of recovering these costs.

(iii) any other court order requiring a practice to produce documents (applicable in England & Wales only)

A court order requiring a practice to send documents to a party by a particular date, but not requiring attendance at court in person, is an order for production of documents, and is subject to different rules. In these circumstances, costs are entirely within the court's discretion. However, the general rule is that reasonable costs of complying with the order are payable, which includes searching for, compiling, redacting and copying records, where necessary.

If, for sound legal reasons, a practice opposes the court order, it may be able to claim reasonable costs of time spent preparing and attending court to oppose the court order (including expenses).

However, as costs are entirely in the court's discretion, if the court believes the practice has acted unreasonably, for instance in opposing the order without legal justification, it could refuse to allow recovery of any costs. The practice should take legal advice before opposing an order, because such a step also puts the practice at risk of paying the other parties' legal costs.

¹ Valid as at the date of this information note

² <https://www.gov.uk/going-to-court-victim-witness/expenses-for-going-to-court>, accessed on 20.09.18



If a practice obtains legal advice in responding to a court order, it may also be able to claim the cost of this advice.

(iii) Specification of Documents (applicable in Scotland only)

Generally practices cannot charge a fee for producing records pursuant to a Specification of Documents. If production of records would be very time consuming or involve a search for records, the practice could ask the court for payment of its costs. However, costs are only awarded in exceptional circumstances. Whilst practices are not entitled to charge a fee, some solicitors will agree to pay the practice and it may be that if invoices are issued they will be paid.