

Annex D: Delegated commissioning of General Practice: Establishing a legal basis for sharing information

This note contains advice on the legal requirements for sharing information to support delegated commissioning of general practice services. This letter contains a number of technical terms, which are italicised in the text below and defined in Appendix 3.

To date, NHS England has identified no need to share *personal data* or *person confidential data* in support of delegated commissioning. However, we recognise that there may be exceptions. For example, there may be a need to share *personal data* or *person-level information* in a form that poses a risk of being able to identify a person even if the information does not immediately identify them.

The following guidance applies to these exceptional circumstances and is intended to provide assurance that the use of these types of data is lawful.

Delegation Agreement

Schedule 4 of the *Delegation Agreement* defines the requirements for sharing information securely and confidentially. It defines the *specified purposes* for which information may be shared between parties in order to facilitate the exercise of (a) a CCG's *delegated functions*, and (b) CCGs' support for NHS England's *reserved functions*. It includes a template *Personal Data Agreement*, which should be completed for each flow of personal data. This template:

- records the flows of *relevant information* to and from CCGs;
- documents the legal basis for each flow of data; and
- identifies agreed procedures for the secure sharing of information.

The *relevant information* necessary to support the *specified purposes* is not defined in the *Delegation Agreement*. Rather, it is left to CCGs to decide what information is necessary to support the *delegated functions*. Similarly, NHS England will agree with CCGs the information necessary to support the *reserved functions*.

Actions Required

- (1) CCGs should review their information flows in support of delegated commissioning, and identify if and where there is a need for sharing personal data. We have embedded a tool for the identification of information flows in Appendix 1 that you may find useful. Please liaise with your local Information Governance team in mapping your information flows and establishing a legal basis for sharing of personal data.**
- (2) Where there is a need to share personal data the legal basis for doing so must be identified, and the requirements are outlined in Appendix 2.**

Note: where the information is neither *personal data*, and is not person confidential data (NB confidential data includes data relating to the deceased) there is no need to establish a legal basis.

If you have any queries regarding the relevant information required to support delegated commissioning please contact england.co-commissioning@nhs.net

Appendix 1: Information flow mapping tool

Please find the attached tool, which you may find useful to use in conjunction with your established processes for mapping information flows (e.g. in support of IG Toolkit requirements 350 and 232).

<http://www.england.nhs.uk/wp-content/uploads/2015/07/delegated-commissioning-data-flows.xlsx>

Appendix 2: Establishing a legal basis

In order to establish a legal basis for using personal data, a CCG will need to assure itself of compliance with both the Data Protection Act 1998 and the common law duty of confidence (referred to as “confidentiality” in the Template).

Common law duty of confidence

There are four available conditions that meet confidentiality requirements:

1. Consent (implied or explicit);
2. Where it is required or permitted by statute;
3. Where the public interest outweighs the individual’s right to confidentiality; and
4. Where it is required by a court order.

Implied consent can only be assumed for

- direct care purposes;
- where uses and disclosures are obvious; or
- patients have been appropriately informed.

As commissioning is not direct care, implied consent cannot be assumed; therefore, it cannot provide a legal basis for sharing *person-confidential data*. Explicit consent would provide a legal basis, but is generally not practical in support of commissioning, as it involves patients giving specific and positive ‘opt-in’ permission.

Consent is only valid when the data subject has been appropriately informed about what information is to be shared and with whom and the individual having the capacity to give consent and giving it freely.

The NHS Act 2006 (sections 13Z3 and 14Z23) establishes the permitted disclosures of information by NHS England (“the Board”) and CCGs. They are identical for the respective organisations and apply in the context of delegated commissioning.

13Z3 / 14Z23 Permitted disclosures of information by NHS England (the Board) and CCGs

- (1) The Board/CCG may disclose information obtained by it in the exercise of its functions if:
 - a. the information has previously been lawfully disclosed to the public;
 - b. the disclosure is made under or pursuant to regulations under section 113 or 114 of the Health and Social Care (Community Health and Standards) Act 2003

(complaints about health care or social services);

- c. the disclosure is made in accordance with any enactment or court order;
- d. the disclosure is necessary or expedient for the purposes of protecting the welfare of any individual;
- e. the disclosure is made to any person in circumstances where it is necessary or expedient for the person to have the information for the purpose of exercising functions of that person under any enactment,
- f. the disclosure is made for the purpose of facilitating the exercise of any of the Board's/clinical commissioning group's functions;
- g. the disclosure is made in connection with the investigation of a criminal offence (whether or not in the United Kingdom), or
- h. the disclosure is made for the purpose of criminal proceedings (whether or not in the United Kingdom).

(2) Paragraphs (a) to (c) and (h) of subsection (1) have effect notwithstanding any rule of common law which would otherwise prohibit or restrict the disclosure.

These provisions do not create a basis for either CCGs or NHS England to *receive* information other than from each other.

Three of these paragraphs establish a legal basis to disclose information, or statutory gateway that meets common law requirements. These are paragraphs (1) (a)-(c) and (h).

However, for example, neither paragraph (e) ...

“the disclosure is made to any person in circumstances where it is necessary or expedient for the person to have the information for the purpose of exercising functions of that person under any enactment...”

nor paragraph (f)...

“the disclosure is made for the purpose of facilitating the exercise of any of the Board's/CCG's functions;”

...create such a gateway. So the fact that information may be needed for a *delegated function* does not establish a basis in common law for using personal data or confidential personal data.

In order to meet common law requirements for these purposes, *consent* or an established *public interest* must be established. The public interest justification cannot be used to support routine activities but would support the communication of safeguarding concerns; for example (paragraph d) the disclosure is necessary or expedient for the purposes of protecting the welfare of any individual

The Data Protection Act 1998

CCGs are reminded of their obligations in respect of the eight Data Protection principles in Schedule 1 of the Data Protection Act 1998 and to give appropriate consideration of the common law duty of confidence and Human Rights Act 1998. Where necessary, organisations should update their patient engagement, patient communication and fair processing campaigns accordingly.

In order to establish a legal basis under the Data Protection Act, it is necessary to comply with the First Principle, which requires that the use and disclosure must be *fair* and *lawful*. CCGs should ensure that

- the purposes for which personal data are to be used are transparent
- processing must not be outside reasonable expectations of the subjects, and
- processing must not cause unwarranted detriment.
- the common law duty of confidence and other relevant laws are respected.

To meet the *fairness requirement*, information appropriate for processing should be made available (e.g. by publishing privacy notices). These notices should include the identity of the organisation, the purposes for which data are to be processed and any additional information to ensure fairness should be provided to subjects at the outset.

Conditions for fair processing are specified in two schedules, one of which applies only to '*sensitive*' personal data, for example health information. So, in addition to meeting the general requirements for fairness and lawfulness, for health information, one of the conditions in both schedules must be met.

Consent is one of the conditions available in both schedules – explicit consent for sensitive personal data; however, consent is unlikely to be practical in support of delegated commissioning. Selected alternative conditions include:

Schedule 2 of the data protection act 1998

The processing is necessary

- (4) to protect the vital interests of the data subject
- (5b) for the exercise of functions conferred under an enactment

Schedule 3 (sensitive personal data) of the data protection act 1998

The processing is necessary

- (3a) to protect the vital interests of the data subject where consent cannot be given or cannot be reasonably expected to be obtained
- (3b) to protect the vital interests of another person where consent is being unreasonably withheld
- (7b) for functions conferred on any person by or under an enactment
- (8) medical purposes and undertaken by a health professional or a person who in the circumstances owes and equivalent duty of confidence.

In the context of delegated commissioning, should it be necessary to use personal data for the *specified purposes*, the conditions in Schedule 2 (5b) and Schedule 3(7b) (as CCGs are acting in accordance with sections 13Z3/14Z23 of the NHS Act) or 8 (medical purposes) could apply; however, note that these conditions apply *in addition* to common law requirements.

Appendix 3: Definitions of data types relevant to the Template Personal Data Agreement

Technical Term	Definition
Person-identifiable data	For the purposes of the Template Persona Data Agreement this is the same as <i>person-confidential data</i> as defined in the Information Governance Review (Caldicott 2), and below.
Personal confidential data	The definition given in the Information Governance Review is: ‘This term describes personal information about identified or identifiable individuals, which should be kept private or secret. For the purposes of this review ‘Personal’ includes the Data Protection Act definition of personal data, but it is adapted to include dead as well as living people and ‘confidential’ includes both information ‘given in confidence’ and ‘that which is owed a duty of confidence’ and is adapted to include ‘sensitive’ as defined in the Data Protection Act.’ ¹
Person level information	Information in which a record relates to a single individual.
Personal Data	Personal data are defined by the Data Protection Act as any information that identifies a living individual and includes information about them ² . To qualify, personal data must include data that either identify a subject directly (e.g. name), or indirectly by reference to data that the organisation (i.e. the data controller) could have access to (e.g. a local master patient index). Data including date of birth or postcode should be assumed to constitute personal data. Note that the definition of personal data does not include information about the deceased; however, as the duty of confidence persists after death, CCGs should ensure that they have an established legal basis for sharing information about the deceased.
Anonymised data	Anonymised data include no direct or indirect identifiers, and no data item that could lead to the identification of an individual in the context of their use. Such data are therefore not personal data. Aggregate or statistical information is likely to be anonymous but CCGs should assess whether there is a risk of re-identification where statistics include small numbers. Guidance on this issue is has been published by the Information Standards Board ³ and by the Information Commissioner ⁴ .
Pseudonymised Data	Pseudonymised data are data in which individuals are distinguished by using a unique identifier that does not reveal their ‘real world’ identity ⁵ . Provided the organisation holding pseudonymised data does not have access to the key to re-identify the subjects, such data are effectively anonymous and does not constitute personal data.

¹ <https://www.gov.uk/government/publications/the-information-governance-review>, page 130

² Data Protection Act 1998 s 1(1)

³ <http://webarchive.nationalarchives.gov.uk/+/http://www.isb.nhs.uk/library/standard/128>

⁴ <https://ico.org.uk/media/1061/anonymisation-code.pdf>

⁵ <https://www.gov.uk/government/publications/the-information-governance-review>, page 130

Weakly pseudonymised data	<p>Weakly pseudonymised data include one (only one) commonly accessible identifier such as NHS Number, date of birth or postcode. Such data are always assumed to be identifiable and therefore constitute personal data.</p> <p>Weakly pseudonymised may be processed for specified commissioning purposes with approval under the Section 251 regulations within an accredited safe haven, or by one of the HSCIC's Data Services for Commissioners' Regional Offices (DSCROs); however, at the time of writing there is no such approval in place in support of delegated commissioning, and DSCROs do not have a basis for processing data other than as specified in NHS Contracts – not primary care contracts.</p>
Delegation	This means the delegation made by NHS England to the CCG of certain functions relating to primary medical services under section 13Z of the NHS Act 2006 (as amended) ("the NHS Act") and effective from 1 April 2015 (as amended pursuant to the Delegation).
Delegation Agreement	This means an Agreement recording the particulars of the agreement made between NHS England and a named Clinical Commissioning Group that governs the delegation of the functions specified in the Delegation.
Personal Data Agreement	This means an agreement between data controllers for the sharing of personal data made using the Template Personal Data Agreement included in Schedule 4 of a Delegation Agreement.
Specified purposes	The specified purposes of the data sharing initiative are to facilitate the exercise of the CCG's delegated functions and NHS England's reserved functions, further specified in paragraph 2 of Schedule 4 of a Delegation Agreement.
Delegated functions	The Delegated Functions are the functions delegated to a CCG by NHS England using its powers under section 13Z of the NHS Act set out in the first schedule of the Delegation and paragraph 6.2 of a Delegation Agreement.
Reserved functions	The reserved functions are all of NHS England's functions relating to primary medical services other than the delegated functions and including those functions set out in the second schedule of the Delegation and paragraph 8.2 of a Delegation Agreement.
Relevant information	Relevant information means information required to support the specified purposes.

Equality statement

NHS England and CCGs should always work closely together to ensure that policy, service design and any change to the funding arrangements does not cause any adverse implications, and that issues are dealt with in a timely way to ensure patients and staff are supported and have full access to services.

In particular, organisations should take into account the duties placed on them under the Equality Act 2010 and with regard to reducing health inequalities, duties under the Health and Social Care Act 2012. Service design and communications should be appropriate and accessible to meet the needs of diverse communities⁶.

⁶ <http://www.england.nhs.uk/wp-content/uploads/2014/12/hlth-inqual-guid-comms.pdf>