

NHS England Board meeting

Paper Title: Summary of directions issued to NHS England in relation to the functions transferred from NHS Digital since 1 February 2023

Agenda item: 10.1 (Public session)

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Paper type: For information

Organisation Objective:

NHS Mandate from Government	<input type="checkbox"/>	Statutory item	<input checked="" type="checkbox"/>
NHS Long Term Plan	<input type="checkbox"/>	Governance	<input checked="" type="checkbox"/>
NHS People Plan	<input type="checkbox"/>		

Executive summary:

This paper is for the Board's information only to provide an overview of directions issued to NHS England (NHSE) under section 254 of the Health and Social Care Act 2012 (2012 Act) since 1 February 2023, when NHS Digital (NHSD) merged with NHSE and its functions, including under section 254 directions, were transferred to NHSE. There has been one direction issued by the Secretary of State for Health and Social Care (SoS) under section 254 of the 2012 Act since the merger date¹: 'The NHS England De-Identified Data Analytics and Publication Directions 2023' (the Direction). This was issued on 1 February 2023 and is published on the NHSE website².

The purpose of the Direction is to require NHSE to put in place arrangements for the governance of ongoing processing of de-identified data that it previously obtained from NHSD. It also establishes a framework for the future analysis, linkage and de-identification of data NHSE needs to access in the exercise of its functions in connection with the provision of health services. The Direction also varies previously made directions to NHSD to permit NHSE to publish data that NHSD was previously prohibited from publishing in certain circumstances.

An approval process for the acceptance of directions on behalf of the Accounting Officer relating to the NHSD transferred functions has been put in place. It is intended that papers will be brought to the Board providing details of all such future directions to meet requirements set out in statutory guidance to be issued by the SoS to NHSE.

¹ This paper was written on 15 March 2023 and any directions issued after this date will be reported to the Board at the next Board meeting.

² <https://nhs-prod.global.ssl.fastly.net/binaries/content/assets/website-assets/corporate-information/directions-and-data-provision-notice/secretary-of-state-directions/nhs-england-de-identified-data-analytics-and-publication/annex-a---nhs-england-de-identified-data-analytics-and-publication-directions-2023-v1.0-final-310123.pdf>

Action required:

The Board is asked to note:

- The new Direction and the information provided in this Paper regarding its purpose, effect, and requirements.
- The process of approving and notifying the Board of new directions.

Background

1. Under section 254 of the 2012 Act, the SoS may direct NHSE to establish and operate a system for the collection or analysis of information. This is a new power of direction to NHSE following the transfer of NHSD's statutory functions to NHSE under the Health and Social Care Information Centre (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023 (the Transfer Regulations).
2. Prior to the merger, NHSE received de-identified and effectively anonymised data from NHSD, subject to the terms of legally binding Data Sharing Agreements (DSAs). This data was originally collected by NHSD in identifiable form under section 254 directions issued by the SoS or NHSE. It was curated, linked, de-identified and then shared by NHSD using its statutory dissemination powers, so that it could be analysed by NHSE for various purposes in the discharge of its statutory functions in relation to the health services.
3. The DSAs contained a number of safeguards in relation to the purpose for which the data was shared, security requirements, restrictions on re-identification and transparency requirements. There was scrutiny of data access requests, DSAs and disseminations by NHSD by its Independent Group Advising on the Release of Data. This process provided assurance over the dissemination of data to all third parties, including NHSE. From the date of the merger, the DSAs between NHSD and NHSE legally came to an end as both parties to the agreements became the same legal organisation. New arrangements were therefore required to reflect that data was now to be accessed internally from within NHSE and which would involve the processing of personal data.
4. A number of key stakeholders and Peers were concerned there could be a lack of transparency and safeguards over internal access by NHSE to data previously obtained by NHSD. These concerns were raised in the House of Lords when the Health and Care Act 2022 was being debated, and again when the Transfer Regulations were being developed and debated. The Department of Health and Social Care (DHSC) has sought to address many of these concerns through producing draft statutory guidance³, which when finalised, is guidance that will be issued by the SoS and which NHSE will have a duty to have regard to when discharging the statutory functions transferred to it from NHSD.

Purpose of the Direction

5. The Direction is an additional safeguard in relation to NHSE internal data access

³ <https://www.gov.uk/government/publications/draft-guidance-on-nhs-englands-protection-of-patient-data/draft-guidance-on-nhs-englands-protection-of-patient-data>

to support the Transfer Regulations and the statutory guidance and to address concerns raised. It requires NHSE to put in place arrangements for the governance of ongoing processing of de-identified data that NHSE previously obtained from NHSD. It also requires a framework to be put in place for the future analysis, linkage and de-identification of data NHSE needs to access in the exercise of its functions in connection with the provision of health services.

6. Under section 260(1) of the 2012 Act, NHSD had a legal duty to publish information it obtained under directions unless one of the restrictions in section 260(2) applied, in which case NHSD was prohibited from publishing the data. One of these restrictions was when a direction restricted publication. In many previous section 254 directions, NHSD was restricted from publishing data as the data was instead to be published by NHSE. Under the Transfer Regulations, as these previous NHSD directions are treated as if they were issued to NHSE, these restrictions on publication would therefore have transferred to NHSE where this was not intended. The Direction also addresses this issue and amends previous section 254 directions to permit NHSE to publish data in certain circumstances.

Effect and Requirements of the Direction

7. From the 1 February 2023, NHSE has a legal duty to comply with the Direction, which requires it establish and operate systems for:
 - a. analysis and linkage of identifiable data obtained under s254 directions
 - b. de-identification of that data
 - c. further analysis of the de-identified data in de-identified data environments.
8. Data can only be de-identified for analysis under the Direction where the following safeguards apply:
 - a. where the purpose of the processing is:
 - i. covered by a Data Protection Impact Assessment (DPIA) approved by or on behalf of the NHSE Senior Information Risk Officer (SIRO),
 - ii. described in a privacy notice published on the NHSE website, and
 - iii. published in a data use register published on the NHSE website.
 - b. the data to be analysed has been de-identified, such that an individual cannot be directly identified either from the data to be accessed or analysed, or from the results of the analysis carried out;
 - c. the data is held in a secure de-identified data environment under NHSE's control, which is technically and organisationally segregated from:
 - i. the data environments in which any source identifying data is contained, and
 - ii. the data environments in which the source identifying data is de-identified;
 - d. the analysis is for a purpose that:
 - i. is not incompatible with the purpose for which the identifying data was obtained under the relevant directions;
 - ii. does not breach any restriction contained within those directions; and
 - iii. falls within the Purpose described above.
9. The governance and approval processes are currently being developed for

handling internal requests to de-identify and transfer data into de-identified environments for further analysis. These process will be developed to comply with the statutory guidance to be issued by the SoS. In accordance with the draft statutory guidance, all such requests will be reviewed by the Advisory Group for Data (AGD), comprising of a group of internal and independent expert and lay advisers. Details of the advice provided by the AGD will be published in their minutes on NHSE's website.

10. NHSE is directed not to publish information that is obtained by complying with the Direction unless this is the publication of anonymous statistical data:
 - a. which is required by the SoS;
 - b. which NHSE determines is necessary or expedient to publish in relation to its exercise of functions in connection with the provision of health services; or
 - c. which the Chief Statistician of NHSE considers is in the public interest to publish in accordance with the Code of Practice for Statistics.
11. Where previous directions given to NHSD before the merger contained a restriction prohibiting publication of the data, that restriction will not apply to the publication of anonymous statistical data:
 - a. which NHSE determines is necessary or expedient to publish for the purposes of discharging its statutory functions or to improve public accessibility to the information; or
 - b. which the Chief Statistician of NHS England considers is in the public interest to publish in accordance with the Code of Practice for Statistics.

Approval of acceptance of Directions and publication

12. A section 254 direction is reviewed and drafted by NHSE information governance and legal teams in the Delivery Directorate on behalf of NHSE, and by the Joint Unit within the Transformation Directorate and the Government Legal Department on behalf of DHSC. A direction is also reviewed and assured by the Director of Privacy, Transparency and Ethics in the Delivery Directorate on behalf of the SIRO, and by the Chief Data and Analytics Officer before it is recommended to the National Director of Transformation and National Medical Director for acceptance on behalf of the Accounting Officer as set out in the NHSE Scheme of Delegation. Once a section 254 direction is issued by the SoS, it is published on the NHSE website, where all previous directions to NHSD are published⁴. This process was followed for this Direction.

Board oversight of Directions and Transparency

13. It is intended that all directions issued by the SoS in relation to transferred NHSD functions will be reported to the Board for information. This continues the previous practice of NHSD to share information with its Board on directions which had been issued, to ensure the Board had oversight of those directions, and to provide public transparency through publishing information about them in the public Board papers.

⁴ <https://digital.nhs.uk/about-nhs-digital/corporate-information-and-documents/directions-and-data-provision-notice/secretary-of-state-directions>

14. This process also reflects the requirements of the draft statutory guidance which currently requires NHSE to:
- a. *“ensure at least the same degree of protection, level of safeguards and transparency over data use as NHS Digital”*
 - b. *“publish all directions received from the Secretary of State”*
 - c. *“be transparent by publishing information about...directions”*