ANNEX A

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Chief Executives of NHS Boards
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Copied to:
Child Protection Committee Chairs
Child Protection Committee Lead Officers/Coordinators
National Child Protection Leadership Group

10 September 2018

Dear Colleague,

INFORMATION SHARING – CHILD PROTECTION

I am writing to you with regard to the new data protection law including the General Data Protection Regulation (GDPR), which came into force on 25 May 2018. I understand this may have caused a degree of uncertainty among some frontline staff about the sharing of information in cases where there is a child protection concern.

The Scottish Government sought confirmation of the position from the Information Commissioner's Office. They have noted that:

> "It is important that those whose work brings them into contact with children and young people continue to share child protection concerns in the same way as they did previously. Child protection matters at the *significant harm* level equate to sharing/processing being *necessary to protect the vital interests of the child* where reliance on consent may be prejudicial to that purpose. The same lawful purposes are provided for in Articles 6:1(b) and 9:2(c) of the GDPR for personal and special category data so nothing has changed at that level.
>
> Where the matter is still a child protection matter but does not meet the significant harm bar, other legal bases exist in the GDPR and the Data Protection Act 2018 that data controllers may be able to rely on depending on the circumstances of any given case."

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At the Chief Officer leadership events held earlier this year, I outlined my view that strong leadership is key to effective child protection. Information sharing is a complex area and local leadership on this issue is essential in supporting staff to continue to undertake their roles with confidence.

I understand that in some areas, Chief Officers have written to staff to provide them with updated guidance on information sharing, including providing staff with assurances that they will be supported by their particular agency if they have shared information using their professional judgment. The following link is to a letter issued in January 2018 by Fife's Chief Officers Public Safety Group to staff, as an example of such an approach - http://publications.fifedirect.org.uk/c64_FinalCOPSInformationSharingLetter18.01.20181.pdf I am urging you to consider providing guidance and assurance to staff about sharing information where there are child protection concerns if you have not already done so.

I also understand that some practitioners may be uncertain about sharing information in circumstances where concerns relating to wellbeing are of a lower level than that of child protection concerns. The Scottish Government remains fully committed to Getting It Right For Every Child (GIRFEC) as the way to support and promote children's wellbeing. Appropriate sharing of relevant and proportionate information is a vital part of making the right support available to families at the earliest opportunity.

The Children and Young People (Information Sharing) (Scotland) Bill aims to bring consistency and clarity to the lawful sharing of information for the named person service and child's plan. The GIRFEC Practice Development Panel, independently chaired by Ian Welsh OBE, has been charged with developing a draft code of practice for information sharing for the named person service and child's plan. The panel will work to ensure that the code of practice properly reflects relevant legal requirements and is workable and comprehensive. Panel will shortly launch a consultation and engagement process on the draft code of practice. The Scottish Government will work with Parliament to agree a renewed date for resumption of the Stage One process to take forward Named Person and ensure children and families get access to the right support at the right time from the right people.

Staff across a range of services must be empowered to feel confident in sharing information. This includes professionals, who may not have direct responsibilities for supporting children and their families, but may be interacting with them as part of their role, such as staff working in housing, fire and adult facing services. Accordingly, they may obtain information that would be appropriate to share. They should be supported to have confidence about their role in supporting children and families, and how and when to share information.

I urge you to consider how best to support your staff to continue to share information in a way that complies with the current law, while also ensuring children, young people and families receive the right support at the right time from the right people.

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To Local Authorities, Area Health Boards and Police Scotland

The Children & Young People (Scotland) Act 2014

Introduction

Following the recent judgment[1] by the Supreme Court on the lawfulness of the provisions of Part 4 of the Children and Young People (Scotland) Act 2014 (CYPSA) – the 'Named Person' provisions – the ICO has been asked by a number of bodies for clarification on how the judgment impacts upon current information sharing practice in the child welfare sector in Scotland.

Data Controllers should take their own legal advice following the judgment to ensure that local information sharing practices comply with the ruling. In particular, they should confirm that they have a legal basis for the sharing of information, ensuring relevant conditions for processing under Schedule 2 and Schedule 3 (if appropriate) of the Data Protection Act 1998 (DPA) are met.

Data Controllers should also continue to refer to the ICO's data sharing code of practice for general guidance and good practice advice on data sharing.

Supreme Court Judgment

Data controllers must consider how the deliberations of the Supreme Court contained within the judgment apply to their current practices. In summary, the Court reached four conclusions[2] in relation to information sharing provisions of Part 4, CYPSA as follows:

(a) The provisions do not relate to a 'reserved matter' (namely the subject matter of the DPA and Directive 95/46/EC) and therefore the Scottish Parliament was not (on this basis) acting outside its legislative competence in creating these provisions.

[1] The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51 https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf
[2] See paragraph 106 of the judgment

(b) The provisions are incompatible with the rights of children, young persons and parents under Article 8 (Right to respect for private and family life) of the European Convention on Human Rights (ECHR) in that they are 'not in accordance with the law' as that article requires. Consequently, the provisions are not (on this basis) within the legislative competence of the Scottish Parliament.

(c) The provisions may in practice result in a disproportionate interference with the Article 8 rights of children, young persons and parents through the sharing of private information.

(d) The provisions are not incompatible with EU law otherwise than in relation to their incompatibility with Article 8 ECHR (as referred to at (b) above).

As a result of its conclusion (b), the Supreme Court held that the information sharing provisions of Part 4, CYPSA cannot be brought into force[3]. The Supreme Court was of the view that it should make an order under section 102, Scotland Act 1998 suspending the effect of its decision as to incompatibility with Article 8 so as to allow the Scottish Parliament and Ministers the opportunity to correct the defects in the provisions identified by the Court. Consequently, revocation orders have now been laid before the Scottish Parliament and Parts 4 and 5 of the CYPSA will not be commenced at this time.

Implications of the Judgment on Current Practice

During his statement to the Scottish Parliament on 8 September, the Deputy First Minister indicated that he would initiate a consultation on the information sharing provisions with a view to bringing forward legislative amendments in due course. Pending the revision of the Part 4 information sharing provisions and/or the issue of revised guidance clarifying their relationship with the requirements of the DPA, Data Controllers will need to consider their ability to share information relating to children taking into account the requirements of the DPA (in particular, compliance with the data protection principles in Schedule 1, DPA).

As stated by the Supreme Court at paragraph 40 of the judgment, the DPA is a measure implementing the protections for individuals with regard to the processing of personal data set out in Directive 95/46/EC in the UK. In turn, the Directive provides, in Recital 10, that the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms,

[3] Paragraph 109 of the Supreme Court judgment

notably the right to privacy recognised in Article 8 of the ECHR. Consequently, compliance with the requirements for the sharing of personal data as set out in the DPA is likely to ensure that the sharing of personal data in the child welfare sector will be in accordance with the Article 8 rights of the individuals concerned.

The ICO's data sharing code recognises that obtaining consent for sharing information can be difficult. It should only be sought in circumstances where an individual has real choice over the matter, reflecting the need under Principle 1 of the DPA for processing to be fair to the individual concerned. For a professional to request consent from an individual whilst knowing that sharing will take place nonetheless, raises false expectations and endangers the client relationship. We therefore stress that procedures should be clear about those circumstances which may necessitate processing without consent; the need for such clarity is reiterated in the judgment.

Conclusion

GIRFEC partners should now review existing procedures and policy to ensure that they are sufficiently clear. In particular, they should stress that over-riding the duty of confidentiality owed by GIRFEC partners to children and young people by sharing their personal data without their consent should only occur where such sharing may be carried out on the basis of an appropriate condition for fair and lawful processing under Schedule 2 (and for sensitive personal data, under Schedule 3) of the DPA. The failure to identify appropriate conditions for such sharing may amount to a breach of the DPA as well as a breach of the Article 8 rights of the individual.

The sharing of personal data without the consent of the individual is likely to take place only in very particular and clearly justified circumstances rather than as common practice. It should be exceptional for this to take place for sensitive personal data of children. Nevertheless, if the sharing of information is carried out in accordance with a Schedule 2 (and where appropriate, a Schedule 3) condition other than consent, the sharing is unlikely to be in breach of the DPA provided it is carried out in accordance with the remaining data protection principles.

In view of the above guidance, agencies should reassure themselves that information sharing elements of current schemes are in compliance with the requirements of the DPA, which in turn is likely to ensure compatibility with the Article 8 rights of individuals under the ECHR.

Dr Ken Macdonald
Head of ICO Regions