

Anonymisation and pseudonymisation of personal data

On behalf of the subscribing members of the Regional Health and Social Care Information Sharing Agreement, Timothy Pitt-Payne KC (of 11KBW Chambers) was asked by NHS Frimley ICB to review and give an assessment of the anonymisation and pseudonymisation policies set out below.

This document explains the issues on which Counsel was asked to advise, and provides a summary of Counsel's opinion. The sections in *italics* summarise Counsel's view. This document has been reviewed and approved by Timothy Pitt-Payne KC.

Compliance with the common law duty of confidentiality and ECHR right to privacy

Within the Graphnet CareCentric based analytics environment utilised by the controllers, personal data is anonymised and pseudonymised by automated means without any natural person having sight of the personal data in question. As a consequence the controllers believe:

1. That because the processing is carried out by automated means, it falls outside the scope of the common law duty of confidentiality
2. Therefore the controllers do not need to establish a basis on which the common law duty of confidentiality is satisfied (whether under s.251 of the NHS Act 2006 or otherwise).

Counsel confirms that where the purposes for the processing of the pseudonymised data fall within the definition of direct care (and therefore UK GDPR art.9(2)(h) the common law duty of confidence is satisfied by implied consent.

For anonymisation, Counsel further confirms that the common law duty of confidence is not engaged in circumstances where the purpose of the processing is anonymisation and the anonymisation process is itself carried out in a wholly automated manner without any natural person having sight of the data. Counsel also confirms that s.251 authorisation is not required for this processing.

Counsel also notes that any interference with the Article 8 right to privacy as a result of the anonymisation process seems very modest indeed and is easily outweighed by the benefits to the patient's privacy flowing from the anonymisation process itself.

Compliance with the UK Data Protection Act 2018 and the UK GDPR

Within the Graphnet CareCentric based analytics environment the anonymised data processed by the controllers is for purposes covered by UK GDPR art.6(1)(e) and art.9(2)(i) and the National Data Opt-out is applied so that data subjects with an active opt-out are excluded from the processing.

However, where the pseudonymised data processed by the controllers is for purposes covered by UK GDPR art.6(1)(e) and art.9(2)(h), then because the pseudonymised data is processed for direct care purposes National Data Opt-out is NOT applied to the processing.

This processing is not subject to UK GDPR art.22 as it does not result in decisions about data subjects having legal or similarly significant effects.

Counsel agrees that UK GDPR art.22 (automated decision-making) does not apply, since the anonymisation process does not give rise to legal or similarly significant effects for data subjects. Counsel notes that the processing needs to be lawful, fair, transparent and limited and also agrees that UK GDPR art.9(2)(i) is an appropriate legal basis for the anonymisation.

In relation to the pseudonymisation (and the subsequent processing of the pseudonymised data) the applicable processing condition in Article 9(2) UK GDPR would vary, depending on the proposed use of the pseudonymised data. Either Article 9(2)(h) or Article 9(2)(i) would be likely to cover any proposed use. The National Data Opt-out should be applied where the latter condition is relied upon, but not where the former is relied upon. The processing as described is in Counsel's view fair and is compatible with the purposes for which it was first obtained. In Counsel's view the processing does not constitute a misuse of the data.

Counsel encourages the controllers to ensure that the fact of anonymisation and the nature of the anonymisation process (including that the data to be anonymised is not visible to natural persons) is described in any patient-facing privacy notices and related communications to satisfy the requirement for transparency.

Counsel also encourages controllers to ensure that documentation remains consistent with the requirements of Part 4 of Schedule 1 to the UK Data Protection Act 2018 ("Appropriate Policy Document").

This summary has been reviewed and approved by Timothy Pitt-Payne KC

13 March 2023