

IN THE MATTER OF INFORMATION SHARING ARRANGEMENTS ACROSS THE FRIMLEY ICS AND THE BUCKINGHAMSHIRE, OXFORDSHIRE AND BERKSHIRE WEST ICS

Processing of identifiable personal data from the Secondary Uses Service

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 lawfulness of the use of identifiable SUS data (processed under an agreement with NHS Digital) within the Graphnet CareCentric-based analytics environments covered by the Regional ISA.

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.

NHS Frimley ICB receives identifiable SUS data so that the SUS data can be linked to the local shared care record which allows risk stratification to be carried out across a more complete dataset. NHS Digital insists that this processing needs to be expressly authorised under s.251 of the NHS Act 2006.

NHS Frimley ICB understands that presenting elements of the SUS data through the local shared care record for direct care purposes would conflict with the NHS Digital DSA. Specifically, NHS Frimley ICB has been advised by NHS stakeholders that using SUS data for direct care purposes would be unlawful unless expressly authorised under s.251. NHS Frimley ICB disagrees with this view, given that the data which comprises the SUS is collected for direct care purposes in the first instance.

The processing of SUS data for direct care purposes

NHS Frimley ICB considers that aside from the contractual restrictions imposed by NHS Digital the proposed use of SUS data for direct care purposes is lawful and (a) would allow more thorough risk stratification to take place to understand individuals' care and needs, and (b) would supplement the data received from other sources, so as to provide a more complete and therefore safer picture of individuals' care needs in a direct care setting.

Aside from the contractual restrictions imposed by NHS Digital, the processing as described would in Counsel's view be lawful and fair and compatible with the purposes for which it was first obtained. Counsel notes that the additional processing of the SUS data is focused on the requirements of individual patients and would be seen as direct care. Given that the processing would be for direct care purposes, implied consent can be used to satisfy the common law duty of confidentiality. If the common law duty of confidentiality is satisfied on the basis of implied consent, then there is no need to rely on section 251 authorisation, the purpose of which is to allow the duty of confidentiality to be overridden for cases where there is no consent to the proposed use. As far as data protection is concerned, UK GDPR art.6(1)(e) and 9(2)(h) are respectively appropriate legal bases for the processing.

Application of the National Data Opt-out

The scope of the National Data Opt-Out extends to secondary purposes and as a consequence NHS Frimley ICB requires that the National Data Opt-Out is applied to SUS data where the purpose of the processing is secondary.

However, the scope of the National Data Opt-Out does not extend to direct care purposes and as a consequence thereof NHS Frimley ICB considers that the National Data Opt-Out does not need to be applied to SUS data where the purpose of the processing is direct care.

Aside from the contractual restrictions imposed by NHS Digital, the processing as described by NHS Frimley ICB would in Counsel's view be lawful and fair. There would be no need for the NDOO to be applied. The NDOO permits individuals to opt out of the secondary use of their data, in various circumstances; it does not purport to limit the use of patient data for direct care.

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

13 March 2023