25 August 2017

Dear Convener

Children and Young People (Information Sharing) (Scotland) Bill & Illustrative Draft Code of Practice

The Information Commissioner’s Office (ICO) is pleased to respond to the Education and Skills Committee’s call for evidence in relation to the above Bill and Illustrative Draft Code of Practice.

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (the DPA) and the Privacy and Electronic Communications Regulations 2003 (PECR), as well as the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) which apply to reserved matters in Scotland. The Commissioner is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

The focus of this submission is solely on aspects of the proposals that relate to the handling of personal data and privacy issues to help ensure compliance with the provisions of the DPA\(^1\). However, the Committee needs to be aware that the current data protection regime will be replaced when the provisions of the General Data Protection Regulation 2016\(^2\) (the GDPR) apply on 25 May 2018. In addition, the UK Government is preparing a new Data Protection Bill which is expected to be introduced to the UK Parliament in September and will include provisions on exemptions and derogations to the new data protection regime which are, at this time, still to be confirmed.

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\(^1\) [The Data Protection Act 1998](https://www.legislation.gov.uk/ukpga/1998/29)

Given the timeframes concerned, the Illustrative Draft Code of Practice (CoP) cannot simply expound on the current data protection requirements but must look to compliance with the new data protection regime. As such, the Commissioner believes that the changes that will come into effect next year will have important implications for information sharing for public authorities. In particular, the CoP as it currently relates to data protection will require a comprehensive review and will require significant redrafting in a number of places.

In relation to the provisions of the Children and Young People (Information Sharing) (Scotland) Bill (the Bill), the Commissioner has no comment to make other than to say that there is nothing on the face of the Bill that contradicts or conflicts with the either the current data protection regime or under the GDPR. However, the Commissioner has a number of concerns about the CoP, some of which relate to the current regime but most of which are in relation to provisions under the new regime. The CoP is in two parts: commentary on Safeguards, followed by a description of the relevant laws, including the DPA.

**Safeguards**

**Legal Basis**
At paragraph 5, the CoP makes reference to seeking the consent of children, young people, parents and/or guardians for the sharing of information in relation to the wellbeing of the child/young person. The issue of imbalance has always been a consideration when assessing consent. The ICO’s current guidance on consent is clear that a particular consent may not be adequate to satisfy the condition for processing if the individual might have had no real choice. The GDPR now explicitly explains that a public authority will not be able to rely on consent as a legal basis for processing in any case where there is a clear imbalance between it and the individual to whom the data relate.

On the matter of imbalance, the Supreme Court judgment commented that: “there must be a risk that, in individual cases, parents will be given the impression that they must accept the advice or services which they are offered...and further, that failure to cooperate...will be taken to be evidence of a

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4 Recital 43 of GDPR states that: “In order to ensure that consent is freely given, consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular were the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation.”
Although specifically in relation to the Child’s Plan, the judgment implicitly recognises the potential for imbalance between the data subject(s) and the data controller in this regard.

While the 1995 Directive from whence the DPA is derived requires that consent should be fully informed and freely given, Recital 32 of the GDPR makes this more explicit in requiring that:

Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data relating to him or her... Silence, pre-ticked boxes or inactivity should not therefore constitute consent.

For some time now, the ICO has been promulgating the message that consent should only be relied on when individuals have meaningful choice. If consent is being relied on, then individuals must have the ability to withhold consent and have that honoured, they must also have the ability to withdraw that consent at any time; Article 7:3 of the GDPR requires such withdrawal to be as easy to do as it was to consent in the first place. However, the current wording of Paragraph 11 of the CoP could give the impression that consent should be sought but that if it is withheld sharing may still take place so long as it is legally compliant.

As the ICO has said consistently, this would be disingenuous and raise expectations of meaningful choice where, in reality, none exist. Recital 42 of the GDPR reinforces this point when it states that:

Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.

As the CoP acknowledges, consent is not the only legal basis for information sharing. The ICO recommends that much greater emphasis is made on transparency and providing fair processing information by, for example, talking to the child or young person and their family as appropriate, and taking their views into account about how the information is to be shared, rather than consent, as the starting point in the Code. Currently, where the processing

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5 Paragraph 95, The Christian Institute and others v The Lord Advocate (Scotland) 2016 UKSC 51
concerns sensitive personal data,\(^7\) and this may include information about wellbeing, at least one appropriate condition for processing must be met from each of Schedules 2 and 3 of the DPA. Only the first of these provides for consent with the rest providing for those circumstances where the processing is \textit{necessary} for specified purposes and/or reliance on consent would be \textit{prejudicial} to the specified purposes. The GDPR defines this type of data as ‘special category data’ and Article 9 sets out a list of specified purposes similar to that of Schedule 3 of the DPA.

The GDPR places strong emphasis on public authorities having clear legal basis to process personal data in relation to public tasks – this area is complex for UK given the common law powers public authorities may rely on, alongside statute. The new Data Protection Bill will provide more clarity on this aspect when it is published.

In summary, if the sharing of personal information in relation to a child/young person’s wellbeing is to be based solely on a consensual model, the matter of imbalance alluded to in the Supreme Court judgment between the individual and the public authority must be addressed. Moreover, the consenting process must provide the individual with confidence that they may withhold consent or withdraw consent at some future date, also without detriment. If the sharing is to be based on any of the other conditions for processing it must first be \textit{necessary} for the public authority’s public tasks.

\textit{Exemptions from the Subject Information Provisions}

The first Data Protection Principle under both the DPA and the GDPR requires that personal data be processed lawfully and fairly and, for the GDPR, carried out in a transparent manner in relation to the individual concerned. Fair processing is all about telling individuals about the processing of their personal information and this requirement may only be set aside where a specific exemption applies in any individual case.

Paragraphs 6, 13 and 16 of the CoP set out specific circumstances where it may be detrimental to inform individuals about the sharing of information in relation to wellbeing. These are:

\begin{itemize}
  \item \textbf{(a)} the prevention or detection of crime;
\end{itemize}

\(^7\) Section 2 of the DPA defines sensitive personal data as data about the data subject, consisting of information as to: racial or ethnic origin; political opinions; religious, or other beliefs of a similar nature; trade union membership; physical or mental health or condition; sexual life; any alleged or actual commission of any offence; or, any proceedings for any alleged or actual offence committed, including the disposal and sentencing for same.
(b) the apprehension or prosecution of offenders;
(c) the health or safety of the child or another person; or
(d) the best interests of the child.

In addition to these circumstances, each of the paragraphs also provide for where ‘there is some other compelling reason not to inform the person’.

Circumstances (a) and (b) above correspond directly to the current Section 29 exemption under the DPA which allows for the individuals concerned not to be informed about the processing where it would be prejudicial to these specific purposes in any given case. The Commissioner expects a similar exemption to be included in the forthcoming Data Protection Bill.

Circumstance (c) alludes to an exemption provided by The Data Protection (Subject Access Modification) (Health) Order 2000 No. 413\(^8\) (SI 2000/413). While Article 4 of SI 2000/413 provides an exemption to the requirement to inform individuals, it is limited to specific court reports and does not apply to all health related information more generally. As for (d) and the additional ‘some other compelling reason’ above, neither of these circumstances provide a compliant rationale for not informing individuals about the processing of their personal information.

In summary, the current and the new data protection regimes provide an obligation on data controllers, and a right for individuals respectively, to inform/be informed about the processing of their personal information, including any sharing between data controllers. While exemptions to the subject information provisions exist within the legislation, they are limited and specific to any given case and do not currently apply to the circumstances listed at (c), (d) or for ‘some other compelling reason’ as set out in the CoP.

**Relevant Law**

**Data Protection**

As stated above, the Commissioner draws the Committee’s attention to the fact that the current data protection regime is to be replaced in May 2018. Assuming the Bill and CoP complete the parliamentary process, the latter is unlikely to be commenced before 2018. If this is the case and given the proximity to the application of the GDPR and the new Data Protection Act, the CoP as it currently

\(^8\) *The Data Protection (Subject Access Modification) (Health) Order 2000 No. 413*
stands must be redrafted in relation to its guidance around reliance on consent for public authorities carrying out their tasks.

In relation to the CoP’s explanation of the current regime, the Commissioner has provided comments to the Scottish Government regarding the wording of Paragraphs 22, 23, 24, 25 and 27. These comments relate mainly to replicating the wording of the DPA and clarifying misconceptions such as the rights referred to in the Sixth Data Protection Principle in Paragraph 22.

In conclusion, the Commissioner understands the difficulties that have surrounded this legislation and in particular how the issue of consent has been central to many of the concerns raised both from the perspective of parents and guardians and also from the perspective of practitioners. It is vital, therefore, that the CoP provides both with assurances that any information sharing is in full compliance with all relevant law. As it currently stands in relation to data protection, this is not the case. However, we are pleased to see the ICO’s Data Sharing Code of Practice being promoted with an obligation to be familiar with its provisions. Indeed, given how embedded information sharing is with data protection, the Committee may wish to consider the inclusion of the ICO as a statutory consultee in sections 26B(5) and 40B(5) of the Bill.

Public authorities are currently preparing for the GDPR and most have project teams looking at compliance across the organisation. By not focussing on the new regime, many will already be reinterpreting the CoP themselves to see how the GDPR provisions will pertain. The issues around the matter of consent are particularly problematic and the potentially tight timeframe between commencements leaves public authorities vulnerable to non-compliance with the new regime.

From the ICO’s work with parents and practitioners, we are aware that all are seeking accessible guidance to assist them in the decision making required under this Bill. A clear and unambiguous understanding of the issue of consent is paramount for both parents and practitioners but the current Illustrative CoP provides information that will apply, at best, for only a short time prior to the introduction of the GDPR. As such, it is essential for the Committee to address the changes that will be necessary under the new data protection regime.
In addition to this written submission, which we are content to be made public, we would be pleased to contribute oral evidence in the Committee’s future deliberations. However, our availability for the proposed oral evidence sessions may be limited due to previously arranged commitments but the morning of 4 October would be most suitable if the Committee wishes.

Yours sincerely

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Head of ICO Regions