



## Data sharing - individual patient information Summary of implications of the Covid-19 – Notice

- The Covid-19 – Notice (“the Notice”) issued by the Secretary of State for Health and Social Care on 20 March 2020 **requires** organisations to process confidential patient information for the purposes set out in Regulation 3(1) of the Health Service (Control of Patient Information) Regulations 2002 (“the COPI Regulations”) to support the response to Covid-19.
- The **overall aim** is to ensure that confidential patient information can be processed and shared appropriately and lawfully for purposes related to the COVID-19 response.
- The Notice requires the processing – including sharing of – confidential patient identifiable information with **persons employed or engaged for the purposes of the health service and persons employed by the government or public authorities in the task of communicable disease surveillance**, where required for a **Covid-19 purpose**.
- In doing so we must **comply with the restrictions and exclusions** given in the COPI Regulations and data protection law.
- The Notice **does not, in itself**, permit sharing beyond the persons set out above.
- For the purposes of sharing patient identifiable information with other persons not specified in the COPI Regulations, the General Data Protection Regulation 2018 (“**GDPR**”) is **relevant**.
- The **GDPR** and Data Protection Act 2018 (“DPA”) **provide a lawful basis for the sharing of confidential patient information (including someone’s COVID-19 status) – classed as special category data** – under the following Articles:
  - **Article 9(2)(i)** – permits **processing necessary for reasons of public interest in the area of public health**;
  - **Article 9(2)(h)** – permits **processing necessary for the purposes of preventive or occupational medicine**, for the assessment of the working capacity of the employee, **medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services**; and
  - **Article 9(2)(g)** – permits a body (e.g. the Council) **to share data if it meets the DPA’s definition of “substantial public interest” and one of the conditions in the DPA Schedule 1, part 2, in this case Statutory etc or government purposes (the exercise of a function conferred on a person by an enactment or rule of law)**. For this there needs to be a **wider public benefit to share the data**, not just to the Council or to the individual, but this would **include responding to pandemics or public health monitoring/statistics**. Any processing undertaken in reliance on this must be governed by a policy document.



**A lawful basis for processing data, in Article 6, must also be identified. The “public task” basis (Article 6(1)(e) is very likely to be satisfied in these circumstances.**

- Additional assurance for any decision to share patient identifiable data comes from the recent Information Commissioner’s Office (“ICO”) **statement** regarding data protection and the Coronavirus (COVID-19). The statement recognises that public bodies “**may require additional collection and sharing of personal data to protect against serious threats to public health**” i.e. an overriding public interest in sharing this data.

## Detailed Position

### A. Background

1. **Confidential patient information** is defined in **section 251(11)** of the **National Health Service Act 2006** as information about any patient, alive or dead, that meets the following 3 requirements:
  - A person is identifiable or likely to be identifiable, for example from other data likely to be held by the person or organisation receiving the data - if a patient could be identified from it;
  - The information was given in circumstances where the individual is owed an obligation of confidence; and
  - The information conveys some information about the physical or mental health or condition of an individual, a diagnosis of their condition, or information on their care or treatment.
2. Under **regulation 3** of the **COPI Regulations**, confidential patient information **may** be processed, including dissemination of confidential patient information to persons and organisations permitted to process confidential patient information, with a view to certain defined purposes.
3. This provision is subject to a number of regulations, including definitions of the:
  - **Purpose** - Regulation 3 (1)
  - **Processing** - Regulation 3 (2)
  - **Persons or organisations permitted** to process - Regulation 3 (3), and with
  - **Restrictions and exclusions** - Regulation 7.
4. In particular, Regulation 3 (3) provides that processing of confidential information may be undertaken by **a limited range of persons**:
  - Persons employed or engaged for the purposes of the health service;
  - Other persons employed or engaged by a Government Department or other public authority in communicable disease surveillance.

## B. What has changed?

5. On 20 March 2020, the Secretary of State for Health and Social Care issued the Notice on individual healthcare organisations, arm's length bodies and local authorities to support the processing and sharing of information to help the COVID-19 response.
6. The **Notice requires** that confidential patient information can be processed and shared for purposes related to the COVID-19 response, subject to the safeguards contained in the COPI Regulations.
7. The **purpose** of the Notice **is to require** organisations to process confidential patient information for the purposes set out in Regulation 3(1) of the COPI Regulations to support the Secretary of State's response to Covid-19.

## C. What is this for?

8. The Government envisages that action to be taken for purposes related to the COVID-19 response **will require the processing and sharing** of confidential patient information **amongst health organisations** and **other bodies** engaged in disease surveillance for the purposes of research, protecting public health, providing healthcare services to the public and monitoring and managing the Covid-19 outbreak and incidents of exposure.
9. The Notice makes clear that the organisations to whom the Notice has been issued are **only required** to process such confidential patient information:
  - Where the confidential patient information to be processed is **required for a Covid-19 Purpose** and will be processed solely for that Covid-19 Purpose in accordance with Regulation 7 of the COPI Regulations; and
  - From the date of the Notice **until 30th September 2020**.
10. A **Covid-19 Purpose** is described in the Notice as including a number of scenarios, but the list is specifically **not exhaustive**. It includes:
  - understanding Covid-19 and risks to public health, trends in Covid-19 and such risks, and controlling and preventing the spread of Covid-19 and such risks;
  - identifying and understanding information about patients or potential patients with or at risk of Covid-19, information about incidents of patient exposure to Covid-19 and the management of patients with or at risk of Covid-19 including: locating, contacting, screening, flagging and monitoring such patients and collecting information about and providing services in relation to testing, diagnosis, self-isolation, fitness to work, treatment, medical and social interventions and recovery from Covid-19;
  - understanding information about patient access to health services and adult social care services and the need for wider care of patients and vulnerable groups as a direct or



indirect result of Covid-19 and the availability and capacity of those services or that care;

- monitoring and managing the response to Covid-19 by health and social care bodies and the Government including providing information to the public about Covid-19 and its effectiveness and information about capacity, medicines, equipment, supplies, services and the workforce within the health services and adult social care services

11. The Notice also requires that a record should be kept of all data processed under the Notice.

#### D. What this means for NCC

##### NHS, Local Authorities and care providers

12. For the purposes of our sharing patient identifiable information with **persons employed or engaged for the purposes of the health service and persons employed by the government or public authorities in the task of communicable disease surveillance**, there is now, **in addition** to the existing statutory provisions:

- A **requirement to process**, rather than a permission.
- Including the **sharing confidential patient information** where required for a **Covid-19 purpose. Regulation 4 of the COPI Regulations makes it clear that any sharing of information in accordance with the regulations is lawful, notwithstanding any obligation of confidence owed in relation to it.**
- This sharing involves **the persons** specified in COPI Regulations at regulation 3 (3) and the bodies on which the Notice was served (organisations providing health services, General Practices, Local Authorities and Arm's Length Bodies of the Department of Health and Social Care).
- That in doing so we continue to **need to comply with the restrictions and exclusions** given in COPI Regulation 7. These include that use of the confidential patient information is limited to what is necessary for the purposes outlined in the Notice, and further that as far as is reasonably practical individual identifiers are removed to the extent that they are not required for the purpose.
- The Covid-19 Notice **does not**, in itself, permit sharing beyond the entities set out above.

##### Non-health and social care agencies

13. For the purposes of sharing patient identifiable information with persons not employed or engaged in the health service or communicable disease surveillance - such as other agencies not directly providing health or social care support (e.g. the police) - and in particular, in relation to an individual with Covid-19 or who has symptoms, the **following existing statutory provision is relevant.**



14. The **GDPR provides a lawful basis for the sharing of confidential patient information – classed as special category data, including someone’s COVID-19 status** under the following:

- **GDPR Article 9(2)(i) – permits processing necessary for reasons of public interest in the area of public health**, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;
- **Section 10 of the DPA adds a caveat** to this, in that that the processing will only meet the requirement of Article 9(2)(i) if **it the processing meets the requirement of paragraph 3 of schedule 1, namely that the processing is “necessary for reasons of public interest in the area of public health**, and is to be carried out (i) by or under the responsibility of a health professional, or (ii) by another person who in the circumstances owes a duty of confidentiality under an enactment or rule of law.” While this potentially limits decision-making and supervisory responsibility to specified class of people, it is not necessarily a narrow class, encompassing both health professionals (as defined by DPA) who have a professional obligation of confidence, and any person (not necessarily a health professional) who may owe a common law duty of confidence in respect of the data in question.
- **GDPR Article 9(2)(h) permits processing necessary for the purposes of preventive or occupational medicine**, for the assessment of the working capacity of the employee, **medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services** on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in Article 9(3), namely that the processing must be carried out under the responsibility of a professional or other person subject to an obligation of professional secrecy under UK law.
- **GDPR Article 9(2)(g) is not subject to the same caveats as the above exemptions** (although it needs to be applied proportionately and respectfully of the data subject’s rights) and the Council through this exemption is **able to share data if it meets the DPA’s definition of “substantial public interest” and one of the conditions in the DPA 2018 Schedule 1, part 2. The most likely condition in this case will be the condition relating to statutory etc or government purposes (the exercise of a function conferred on a person by an enactment or rule of law).** For this there needs to be a **wider public benefit to share the data**, not just to the Council or to the individual, but this would **include responding to pandemics or public health monitoring/statistics.**



- Any processing undertaken in reliance on this must be governed by a policy document, outlining how the council will comply with the data protection principles and explaining its policies on retention and erasure of data processed in reliance on this condition.

15. It is worth bearing in mind that the GDPR does not apply to anonymous information. Where information does not relate to an identified or identifiable natural person, or it has been rendered anonymous in such a manner that the data subject is not or no longer identifiable, this data should be capable of being shared more freely. This might include, e.g., statistical information.

### Other assurance

16. Additional assurance for any decision to share patient identifiable data with another body comes from the **statement** on 12<sup>th</sup> March 2020 from the **ICO** regarding data protection and the Coronavirus (COVID-19).
17. The statement recognises that public bodies “**may require additional collection and sharing of personal data to protect against serious threats to public health**” i.e. an overriding public interest in sharing this data
18. The ICO has stated it is a reasonable and pragmatic regulator and that regarding compliance with data protection, it 'will **take into account the compelling public interest in the current health emergency**'.
19. It goes on to state that this is **not to diminish data protection rights and our obligations in regard to those rights**, which as an overriding requirement to the policy described here, we shall comply with.
20. In carrying out and complying with the data sharing and applying the exemptions set out above we will document:
- Any data sharing carried out (logging time, content, lawful basis for sharing, recipient(s));
  - Basis for compliance with applicable COPI or GDPR exemption; and
  - Any additional safeguards exercised (for example applying anonymity, limiting data to that which is adequate, relevant and necessary for the purposes for the processing).



## Definitions

### 1. COPI Regulation 3 (1): Purpose

Subject to paragraphs (2) and (3) and regulation 7, confidential patient information may be processed with a view to:

- (a) diagnosing communicable diseases and other risks to public health;
- (b) recognising trends in such diseases and risks;
- (c) controlling and preventing the spread of such diseases and risks;
- (d) monitoring and managing:
  - (i) outbreaks of communicable disease;
  - (ii) incidents of exposure to communicable disease;
  - (iii) the delivery, efficacy and safety of immunisation programmes;
  - (iv) adverse reactions to vaccines and medicines;
- (v) risks of infection acquired from food or the environment (including water supplies);
- (vi) the giving of information to persons about the diagnosis of communicable disease and risks of acquiring such disease.

### 2. COPI Regulation 3(2): Processing

Under Regulation 3(2) of the COPI Regulations, processing means:

- the recording and holding of information;
- the retrieval, alignment and combination of information;
- the organisation, adaption or alteration of information;
- the blocking, erasure and destruction of information.

It also includes the dissemination of information to other organisations that require it for the same purposes.

### 3. COPI Regulation 3(3): Permitted bodies

The processing of confidential information may be undertaken by **a limited range of bodies as set out in reg 3(3)**. These are:

- The Public Health Laboratory Service;
- Persons employed or engaged for the purposes of the health service;
- Other persons employed or engaged by a Government Department or other public authority in communicable disease surveillance.

### 4. COPI Regulation 7: Restrictions and limitations

**The processing needs to comply with the restrictions and exclusions given in regulation 7** which include that:



- In so far as it is practical to do so, remove from the information any particulars which identify the person to whom it relates which are not required for the purposes for which it is, or is to be, processed
- No person shall process confidential patient information under these Regulations unless he is a health professional or a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional

## 5. Covid-19 – Notice – A Covid-19 purpose

A Covid-19 Purpose **includes but is not limited** to the following:

- Understanding Covid-19 and risks to public health, trends in Covid-19 and such risks, and controlling and preventing the spread of Covid-19 and such risks;
- Identifying and understanding information about patients or potential patients with or at risk of Covid-19, information about incidents of patient exposure to Covid-19 and the management of patients with or at risk of Covid-19 including: locating, contacting, screening, flagging and monitoring such patients and collecting information about and providing services in relation to testing, diagnosis, self-isolation, fitness to work, treatment, medical and social interventions and recovery from Covid-19;
- Understanding information about patient access to health services and adult social care services and the need for wider care of patients and vulnerable groups as a direct or indirect result of Covid-19 and the availability and capacity of those services or that care;
- Monitoring and managing the response to Covid-19 by health and social care bodies and the Government including providing information to the public about Covid-19 and its effectiveness and information about capacity, medicines, equipment, supplies, services and the workforce within the health services and adult social care services;