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Dear Karen, Clare

This letter offers our view on whether the NHS Commissioning Board (NHSCB) and the Health and Social Care Information Centre (HSCIC) are data controllers solely, jointly or data processors in relation to the data obtained by the HSCIC under direction of NHSCB from health bodies for the first stage of Care.data.

The NHSCB clearly determines the purpose for information which it directs the HSCIC to obtain and process and therefore the NHSCB is a data controller. Given that the HSCIC has a considerable degree of independence as to how it is to carry out its processing functions and the HSCIC is exercising a statutory function in processing personal data, it does not appear likely that the HSCIC is merely a data processor in relation to the personal data it handles and is therefore a joint data controller with NHSCB.

We have based our approach on our reading of the Health and Social Care Act 2012 which has informed our view as to the DPA responsibilities of these bodies. We appreciate that there is a considerable amount of new legislation in this area and we would want our analysis to be based on the fullest understanding of the provisions affecting the bodies within the new NHS structure. If you believe we have misunderstood any of the legislative provisions in the HSCA 2012 or if there is further legislation affecting our findings of which we should be aware, we should be most grateful for your assistance in directing us to the relevant provisions.

Information obtained by HSCIC

Whilst the HSCIC is to collect information on instruction (direction) from the NHSCB, once it has obtained the data it is to have considerable freedom in

how it records and uses the data (per The Health and Social Care Act 2012 (HSCA) Section 255, 257, 258 and 261).

It would appear that the HSCIC determines the manner in which, and to a certain extent the purpose for which, personal data is processed. The Secretary of State or NHSCB must consult with the HSCIC before making a direction. Input from the HSCIC (presumably as to how data is to be collected and managed is therefore required before the direction is given). The HSCIC therefore contributes to determining the manner and the purpose for which personal data is processed and is therefore a data controller in respect of such data. In addition, section 1(4) DPA provides that, where an organisation processes personal data only for purposes for which they are required by or under any enactment to be processed, the organisation is the data controller of such data.

When a third party determines the purpose of processing

Where a third party determines the purpose for which the data is to be processed, for example, as the NHSCB may, but the HSCIC determines the manner in which the processing to take place, the HSCIC and the third party are likely to be joint data controllers in respect of the relevant data.

It is our view that this will be the case in respect of the data to be obtained by the HSCIC from general practitioners in response to the proposed direction from the NHSCB.

Although a third party (either the NHSCB in making a direction or another party making a request) may determine the broad purpose for which the HSCIC is to process the data, the disclosure of such data by the HSCIC to the third party is to be 'treated as a dissemination of that information to that person'. Applying our above view that the NHSCB and HSCIC would be joint data controllers, it may appear odd to describe sharing between them as a 'dissemination', which implies a disclosure to a wider group.

However, we are reading this provision as simply a means of ensuring that all the requirements for the dissemination of data by the HSCIC are followed, even where the dissemination is to the party that directed/requested the processing in the first place.

Therefore, on this interpretation, the provision does not affect the determination of the roles of the parties in relation to the data for the purposes of the DPA as joint data controllers.

How further processing affects data controller status

Where the HSCIC 'disseminates' the information it has obtained and processed in accordance with the first direction to the NHSCB, if the NHSCB then processes the returned data for its own purposes it will be the sole data controller in respect of the returned data. The HSCIC will however continue to be a joint data controller with the NHSCB in respect of any copy of such data it continues to process in accordance with the original NHSCB direction to obtain and process the data.

In the context of performing a statutory function

Where the NHSCB carries out, or instructs others (e.g. the HSCIC) to carry out on its behalf, any processing of personal data in connection with the exercise of its statutory functions, the NHSCB will be the data controller in respect of the data being processed.

The HSCIC also has statutory functions involving the processing of personal data. The HSCIC will process personal data in accordance with its statutory obligation to establish and operate information management systems.

The HSCIC will also process personal data in accordance with its statutory obligation to comply with directions made by the NHSCB. The HSCIC will therefore also be a data controller in respect of the personal data which it is obliged by statute to process. The NHSCB and the HSCIC will be joint data controllers in respect of the personal data processed by the HSCIC in response to the direction by the NHSCB.

If the HSCIC process data at the request of a party other than NHSCB

Where, in accordance with a statutory obligation, the HSCIC processes personal data at the request of a third party other than the NHSCB, the HSCIC may be a joint data controller with that party (rather than the NHSCB) in respect of the data processed in response to the request.

Practical implications of joint data controller status

Where two bodies are joint data controllers, they are both liable for compliance with the data protection principles. However, they may, where appropriate, agree between themselves which party is to satisfy which of the data protection obligations of a data controller in connection with the processed data.

Responsibility for compliance with data protection obligations should be determined between the joint data controllers in accordance with their respective functions. For example, issues of unfairly obtaining or unlawfully processing could be the responsibility of the NHSCB who will have determined the purposes for which the data is obtained and processed, whilst responsibility for the security of data and for handling subject access requests could fall to the HSCIC who has physical control of the data.

Such arrangements should reflect the reality of the relationship between the parties (e.g. who physically holds the data and who has the appropriate expertise or resources to satisfy data protection obligations) and should provide clarity as to respective responsibilities for both the joint data controllers and data subjects. When these practicalities are decided, it may be appropriate to include reference to such responsibilities in any memorandum of understanding between NHSCB and the HSCIC.

We hope you find this letter has adequately explained our view on this matter.

Yours sincerely

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