

IHRD Implementation
Department of Health
Room D1.1
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By email only: IHRD.Implementation@health-ni.gov.uk

31 August 2021

Dear Department of Health,

RE: Public consultation on the introduction of a statutory Duty of Candour in Northern Ireland

Thank you for inviting the Information Commissioner's Office (ICO) to respond to the above consultation.

As you will be aware, the Information Commissioner's role includes the regulation of the Data Protection Act 2018, the UK General Data Protection Regulation (UK GDPR) and the Freedom of Information Act 2000 (FOIA), among other pieces of legislation. Given our role as a regulator, it would not be appropriate for us to respond with a view on the different questions and options proposed within the consultation document. However, there are data protection and information governance implications in the proposals which we have raised below for your consideration.

Data protection law provides individuals with a number of rights, including the rights to be informed about and access information held about them by organisations (known as a subject access request, or SAR). The Freedom of Information Act provides access other types of information held by public sector organisations in order to aid transparency and support democratic accountability. The Duty of Candour would require organisations providing health and social care to respond openly to questions and tell people involved if an incident has taken place in the course of their care or treatment that has caused physical or psychological harm.

The proposed Duty of Candour appears to enhance transparency for people in relation to their care and the principle is welcomed accordingly. As the regulator for FOIA we are keen to see public authorities being open and transparent about

the decisions they take. Introducing a duty of candour builds on the transparency requirements of FOIA.

UK GDPR – Article 36(4) Statutory Requirement to Consult ICO

Given the statutory nature of the proposals, it is important to firstly draw your attention to Article 36(4) of the UK GDPR which requires government departments and other public sector bodies to consult with the ICO on policy proposals for legislative or statutory measures relating to the processing of personal data. As your policy proposals are for a Duty of Candour, it is highly likely that this will trigger the need for consultation with us under Article 36(4). The DCMS guidance on the consultation process under Article 36(4) is available [here](#), alongside the Article 36(4) [Enquiry Form](#) which will need to be submitted to our legislation consultation mailbox: [REDACTED] Your Departmental Data Protection Officer will be able to guide you through the process.

If, having reviewed your Enquiry Form, we decide that further consultation with you is required, we may ask to view your Data Protection Impact Assessment (DPIA) regarding the policy proposals. Please note that the DPIA published as part of the consultation documentation would not suffice in this regard as it is a DPIA specifically on the consultation exercise, rather than an assessment of the personal data implications of your policy proposals.

In the meantime, below we have briefly set out a few key data protection related considerations pertaining to the current consultation documentation:

- **Duty of Candour and disclosure of personal data**

In depth consideration will need to be given in development of the Duty and associated guidance on how and when it will be appropriate to process and publicly release personal data.

It is worth noting at this point that Data Protection laws only apply to data about living individuals. The Duty of Confidence is also likely to apply to much health and social care data, and this may continue beyond death.

Other considerations of disclosure relevant to this consultation include:

Right of access -UK data protection law provides individuals with a number of rights, including the [right to obtain a copy of their personal information](#) held by an organisation (commonly referred to as subject access).

The rights under data protection are not absolute, and a limited number of exemptions may apply to the right of access. Organisations processing health data may, in narrow circumstances, rely on the [serious harm exemption](#) to withhold disclosing an individual health data where it would be likely to cause serious harm to the physical or mental health of the data subject or another individual.

Third party data- When considering an individual's right of access and potential disclosures, you must consider the [third party data](#) and individual rights of those persons. In the practical application of a duty of candour, it is likely the names or job titles of health and social care colleagues could be disclosed. Furthermore, the Data Protection Act 2018 clarifies that in response to a valid SAR, it is reasonable to disclose the identity of health / social care professionals who have contributed to the health record or been involved in the care of the individual.

A record should be kept by the controller of any decision to disclose or withhold information about a third party.

Appropriate [privacy information](#) should be provided to health and social care staff where their personal information, such as name or job title, is likely to be disclosed in the release of personal information by way of subject access request or fulfilling the requirements of the duty of candour.

- **Access to relevant records and documents**

Section 5.26 of the consultation document outlines the processes to be followed when a serious incident has occurred and harm or death has been caused. One of the steps is to ensure that the service user or their next of kin have "access to relevant records and documents" to afford them an opportunity to participate in any subsequent investigation or review of the incident. It will be important to clarify the legal access route by which such information will be provided, for example, the Duty of Candour legislation should be written to explicitly set out what individuals are entitled to by way of records and documents as part of this process to ensure there is no ambiguity over the legal route of access being relied upon for this data sharing.

- **Proposed criminal offences regarding handling of information**

Sections 4.30 and 4.31 on Alternative Proposal (B) outline a statutory individual Duty of Candour without criminal sanctions for breach, and with separate criminal offences for withholding information, destroying information, or providing false or misleading information, and separate criminal offences which relate to the destruction of personal data within health records or deliberately falsifying personal data within health records. Consideration should be given to how these offences interact with the existing provisions contained within [Section 148 of the Data Protection Act 2018](#) which pertain to destroying or falsifying documents and also carry criminal sanctions.

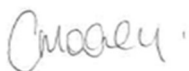
- **Guidance for Organisations**

It will be important for any supporting guidance about the Duty of Candour to help organisations understand the data protection and Freedom of Information implications for them. Ensuring organisations are clear whether they are data controllers or data processors is a vital step, plus alerting them to any risks that you have identified in your DPIA for local mitigations.

We hope the above feedback will be useful to look forward to receiving your Article 36(4) enquiry form as soon as convenient to ensure the consultation process is as meaningful as possible.

If you have any further queries in relation to the comments above, please feel free to engage with our Northern Ireland Regional Office.

Yours faithfully



Caroline Mooney
Regional Manager, ICO – Northern Ireland