

## **Briefing: Reviewing processing of patient data under COPI notices issued in respect of Covid 19 pandemic**

### **Background:**

In response to the Covid 19 pandemic, the Secretary of State issued notices under the Control of Patient Information (COPI) regulations 2002, requiring virtually all parts of the health and care system to both record and share data that would aid the overall response to the pandemic. The notices were issued to ensure all relevant organisations were enabled to record and share data to support individual care and also help tackle the disease through research and planning activities. The COPI notices will expire. The date is currently set as 31/03/2021. At that point any data processed on the basis of the support of the notices must either:

- Cease
- Convert to an appropriate legal basis that is not reliant on the support of the COPI notice.

The notices essentially deal with the requirements of the 'common law of confidentiality' as section 4 modifies the 'obligation of confidence', in that *'anything done by a person that is necessary for the purpose of processing confidential patient information in accordance with these Regulations shall be taken to be lawfully done despite any obligation of confidence owed by that person in respect of it'*. This can be interpreted that the notice and any processing it permits is considered a 'robust public interest' in respect of the common law of confidentiality.

It isn't 'open season' on recording and sharing data as the key word in both the COPI regulations and throughout the linked data protection legislation (GDPR and DPA 2018) is 'necessary'. Organisations must be maintaining a log of the processing permitted under the COPI notices.

### **Reviewing processing:**

When reviewing the log of processing, if it is determined that a particular set of processing activities are no longer required, then they must be ceased as soon as they are no longer required, which may be prior to the expiry of the COPI notices.

When ceasing processing, it is critical to ensure all partners that the data has been shared with are aware and that any retention & destruction requirements are considered and agreed between the partners. This is very likely to require identifying all copies of such information and ensuring it is safely and securely deleted or destroyed by all partners. Records management guidance can be found at: <https://digital.nhs.uk/data-and-information/looking-after-information/data-security-and-information-governance/codes-of-practice-for-handling-information-in-health-and-care/records-management-code-of-practice-for-health-and-social-care-2016>

Where an activity has clearly provided benefit and can be shown that the benefit will continue in more normal circumstances, then the lawful basis on which the data is processed needs to be reviewed.

That does not have to wait until nearer the expiry date of the COPI notices. If ongoing benefits are clear then they can be reviewed in advance of the expiry and the required lawful basis set out and agreed between the relevant organisations.

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Many organisations will have used a 'short form' of Data Protection Impact Assessment that was circulated via the National Strategic Information Governance Network towards the start of the Covid 19 pandemic. This form does not require the lawful basis for processing to be set out. Some may have included it, but unlike normal DPIA forms, it is not a specific section.

Any processing that is continuing should look to do a normal DPIA and this will require the identification of the relevant lawful basis.

This briefing is not chapter and verse on how to identify the lawful basis. There is lots of guidance for that already and many organisations will be familiar with that process from business as usual activities. A key guidance document can be accessed at:

<https://digital.nhs.uk/binaries/content/assets/legacy/pdf/3/p/igagdprprocessing.pdf>

So the focus of this briefing is on the 'common law' support aspects that expire with the COPI notices.

### **Common law basis for using confidential patient information:**

The generally recognised basis for processing confidential patient information under the common law duty of confidentiality are:

- A form of consent. This can be explicit (rarely the case and it can cause conflict with GDPR justifications), implied (often the case) or the developing term of 'reasonable expectations' of the individual
- A robust public interest – where satisfying the public interest is more important than the duty of confidentiality to the individual(s). In essence the COPI notice confirms this is the case in respect of the Covid 19 pandemic
- A legal duty – such as the safeguarding of children in child protection circumstances
- Support of S251 of the Health & Social Care Act 2006 (this will require an application to the national Confidentiality Advisory Group and will require specialist support).

The other method of managing the common law duty of confidentiality is to ensure that the processing of data is managed in ways that do not disclose confidential data, such as the removal/reduction of identifiers to the extent that the data is 'effectively anonymised' or 'strongly pseudonymised'.

Processing permitted under the COPI notices is very unlikely to move to any form of 'legal duty'. Some activities could still be argued to be 'a robust public interest', however that option invites much lengthy debate with partners and possible challenges now or later.

The best options to look at are therefore a form of consent/reasonable expectation, or to reduce the identifiers so that the data is no longer considered 'confidential patient information'.

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It's also quite possible that those can be used together in a processing operation where the activity supports both the direct care of the individual and work to manage and plan services.

For more detail on consent in terms of common law: [https://www.nhs.uk/information-governance/guidance/consent-and-confidential-patient-information/#ig\\_professional](https://www.nhs.uk/information-governance/guidance/consent-and-confidential-patient-information/#ig_professional)

For definition of confidential patient information: <https://digital.nhs.uk/services/national-data-opt-out/operational-policy-guidance-document/appendix-6-confidential-patient-information-cpi-definition>