

Integration and Service Development Division
The Scottish Government
2ER, St Andrew's House
Regent Road
Edinburgh
EH1 3DG

11 September 2012

Dear Sir/Madam

Integration of Adult Health and Social Care in Scotland - Consultation

The Information Commissioner's Office (ICO) welcomes the opportunity to respond to the above consultation as Regulator of the Data Protection Act 1998 (the Act).

The ICO recognises the many benefits that can accrue from integrated service provision. However, in complex organisational relationships involving the processing of personal data it is often difficult to determine which party is a data controller and which is a data processor for the purposes of the Act. Although Chapter 4 of the consultation document sets out the governance and accountability arrangements envisaged in the new structures, the ICO is concerned that they are not sufficiently clear in respect of data controller/data processor liability.

The Act defines a data controller as '*a person who (either alone jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed*'. A data processor is defined as '*any person (other than an employee of the data controller) who processes the data on behalf of the data controller*'.

Paragraph 4.26 states that the proposals are based upon joint and equal governance and accountability between Health Boards and Local Authorities. This would imply either a joint data controllers or data controllers in common relationship. If this is the case, it is likely that the Health and Social Care Partnerships (the Partnerships) would be data processors for the Health Boards and Local Authorities and, as such, would require the roles defined via written contract as required under Schedule 1:12 of the Act. However, paragraph 4.26

goes on to state that decision-making authority in relation to delivering outcomes will rest with the Partnerships, without the need to refer back up the line within each partner organisation. This degree of autonomy could mean that the Partnerships are data controllers in their own right.

In addition, the options mooted in Chapter 5 perpetuate the ambiguity by allowing each Partnership to be established either as a body corporate or via delegation of function. Allowing Partnerships to be established on differing legal bases could have the effect of some being data controllers and others data processors, which will be confusing for individuals seeking to exercise their rights under the Act and not being sure in which organisation the obligations reside. Being established as a body corporate and therefore a legal entity in its own right, Partnerships would, quite clearly and unambiguously, be data controllers.

Whatever the final structure and relationships that ensue, data sharing will be fundamental to the effective operation of the Partnerships. It is imperative, therefore, that any data sharing is carried out in a safe and secure manner, fully underpinned with an agreed Information Sharing Protocol to outline the broad aims and extent of sharing with a robust Data Sharing Agreement to define the detail. Reference should be made to the ICO's [Data Sharing Code of Practice](#) when formulating such protocols/agreements. Any data sharing must be undertaken in a safe and secure environment. The seventh Data Protection Principle requires that '*appropriate technical and organisational measures are in place to prevent the unauthorised or unlawful processing of personal data, or the accidental loss, destruction, or damage to personal data*'. Often more weight is given to the technical fixes to the extent that paper files and physical security are on the periphery. However, this can be the area of greatest vulnerability as can be seen from some of the breach cases on the ICO's website: [Taking Action - Undertakings, Enforcement and Monetary Penalties - ICO](#)

The importance of identifying correctly the extent of liability for data protection is paramount as such liability cannot be abrogated or delegated and the Partnerships will be processing personal data considered to be *sensitive* for the purposes of the Act. In the event of a serious breach of any of the Data Protection Principles, the Information Commissioner now has the power to impose on a data controller a Civil Monetary Penalty of up to £500,000.

In advance of the Partnerships being established, and in light of the above, the ICO believes that it would be of benefit to meet with the Scottish Government to clarify where these relationships exist and we look forward to hearing from you in

this regard.

Yours sincerely

Dr Ken Macdonald
Assistant Commissioner (Scotland & Northern Ireland)

ENC – Respondent Information Form