

Public Health Legislation in Scotland : A Consultation

Introduction

The Information Commissioner's Office (ICO) is pleased to respond to the Scottish Executive's consultation on Public Health Legislation and, as regulators of the Data Protection Act 1998 (DPA), our comments are limited to those proposals which may impact upon the privacy of individuals.

The ICO welcomes the awareness of the importance of Data Protection shown by the Executive in the consultation document and its recognition of the need to balance the public interest against the rights of the individual. We also note the comments regarding the subject matter of the DPA being outwith the competence of the Scottish Parliament (para 10.9); whilst that is correct, legal powers granted by the Scottish Parliament to the relevant bodies would be sufficient to allow processing in accordance with the DPA.

Organisational Authority

Where public sector organisations are processing personal data and sensitive personal data as defined within the DPA, it is important to ensure that the powers and duties are set out clearly and unambiguously. The proposal that local authorities should assume the lead role for the physical side of health protection and NHS Boards have lead responsibility for the "people domain" (para 3.9) appears to be an appropriate allocation of powers and should help ensure that only limited elements of sensitive personal data are processed by the local authorities. Where the sharing of such data is necessary (whether between sectors or within sectors), it is recommended that appropriate protocols are drawn up and we welcome the Executive's recommendation (3.17) that such procedures are included within a "Health Protection Plan". (The Executive may wish to note that the ICO is currently revising its guidance on public sector information sharing and we would welcome an opportunity to contribute to the Executive's further consideration of these procedures.)

Consideration is also being given within the proposals to defining the actions for which professional input is required (3.24). This should be welcomed as providing some further safeguards to the privacy of individuals wherever the relevant professional is subject to a code of confidentiality; it may also provide an appropriate level of reassurance to any professional who may be required to disclose information in the course of a public health incident.

Information and Management

It is proposed that a new set of statutory duties to notify any issues requiring urgent public health action or on-going monitoring be introduced (4.7). Doctors and other relevant professionals will be required to inform their Health Board and their patients of any notifiable condition to enable effective risk-management measures to be implemented. Whilst recognising that it may often be necessary to disclose sensitive personal information within the notification process, we would urge that, if possible, notification is anonymised.

Where notification is required, it is appropriate to give the individual patient detailed guidance concerning the information which will be disclosed, the purpose to which it will be put and their rights of access to it. If the information is disclosed with the consent of the individual, that consent must be freely and fairly given. It should also be noted that consent can be withdrawn by the individual at any time.

Whilst emphasis is put within the document on obtaining individual consent to notify (4.10) and for the inclusion of individuals "at risk" from public health incidents (eg vCJD) on a database (4.20), as noted by the Executive, consent is not necessary if there is a legal requirement to disclose the information. It is misleading to suggest that an individual is giving consent when the disclosure or inclusion in a database will still take place if consent is not granted; consent" should not be sought in such instances but, as indicated above, individuals should be fully informed of the type of data which will be notified and the purposes and uses to which it will be put.

The extended obligations on reporting and the development of a "statutory reportable condition" (4.18) to assist with health service planning is noted and public interest in reporting for this purpose is appreciated. The recognition that a balance must be struck between that interest and individual rights (4.21) is welcomed and, wherever possible, any information provided for this use should be anonymised.

The DPA requires that personal data and sensitive personal data held by organisations should be relevant and not excessive for the purpose; it also should be secure and retained for no longer than is necessary. It therefore may be helpful for guidance on these issues to be issued to Health Boards and local authorities (as well as to other associated public health agencies).

We note that advice should be sought from the ICO before making a condition notifiable (4.22). We would be pleased to assist in any discussions relating to the impact of the decision on personal privacy.

Public Health Investigation

The Executive believes that collection of information during the investigation of public health incidents has previously been compromised by the refusal of individuals and organisations to divulge details which may impact adversely upon them. It is therefore proposed that penalties for not divulging information should be defined (5.5).

The ICO can make no comment on the disclosing of information which does not have personal privacy dimensions. However, we would have concerns if penalties are imposed if personal or sensitive personal information is not divulged: our view is that this may lead to excessive disclosure and consequent breaches of privacy. Instead, we recommend that clear and extensive guidance regarding the type of personal information that is to be disclosed and the use to which it will be put, is given to those who are required to disclose.

Statutory Powers for Health Protection

The ICO understands the need under certain circumstances for quarantine orders to be served under certain defined and exceptional circumstances (6.11). Such orders should be made privately unless there is an overwhelming public interest to do otherwise.

Tasks, Offences and Penalties

All individuals involved in public health issues should be made fully aware of their obligations under the DPA and of the penalties for offences defined within the Act. In particular, they should be advised that the unlawful disclosure of personal or sensitive personal information is an offence under S55 of the DPA and persons breaching S55 are currently liable to unlimited fines on indictment in the Sheriff Court. It should also be noted that, following consultations by both the ICO and the Dept of Constitutional Affairs (the Whitehall department with responsibility for the DPA), it is likely that the penalty will be increased to one of imprisonment.

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