

Data Sharing Review

Richard Thomas and Dr Mark Walport

Consultation paper on the use and sharing of personal information in the public and private sector

List of questions for response

We would welcome responses to the following questions set out in this consultation paper. Please follow the question order as set out in the consultation paper, leaving a blank response box for any questions not answered.

Please email your completed form to contact@datasharingreview.gsi.gov.uk

Alternatively you can send a hard copy response to:

Data Sharing Review Secretariat
5.26 Steel House
11 Tothill Street
London
SW1H 9LJ

Thank you.

Section 1: Background

Question 1.

Comments: The Welsh Assembly Government has responsibility for a wide range of devolved functions in Wales. Broadly, these fall into the fields set out in Part 1 of Schedule 5 of the Government of Wales Act 2006. The Welsh Assembly Government includes bodies like the Care and Social Services Inspectorate Wales (CSSIW) and CAFCASS CYMRU which have significant operational independence. The Welsh Assembly Government collects and holds a large quantity of personal data for a wide range of purposes. Examples include information relating to persons applying for grant payments of various kinds, persons registered with the CSSIW as a provider of personal care, family proceedings involving CAFCASS CYMRU, appellants and respondents in statutory appeals to tribunals such as the Special Educational Needs Tribunal for Wales, nominations for honours, persons on lists to receive information relating to a particular subject matter, persons writing to the Welsh Assembly Government to make a general enquiry or complaint, persons responding to consultation exercises and persons submitting comments relating to planning applications. Where a need to share personal information with an external organisation for a specific purpose on a regular basis has been identified, information sharing protocols have been developed to establish arrangements for sharing that information within the specific legal context. Where a need to

share information is identified on a one-off basis, we determine whether it is 'necessary' and legal to share the information within the terms of the DPA. CSSIW share personal information with local authorities in circumstances where a risk to someone's personal interests has been identified and we have shared information with other public authorities to enable them to fulfil statutory functions (e.g. we provided a local authority with contact details for a person who owns a specific piece of land so that the authority could arrange for a bird-scarer to be silenced and we have provided copies of figures provided by companies on grant application forms to HMRC so that it can investigate suspected instances of tax evasion).

Section 2: Scope of personal information sharing, including benefits, barriers and risks of data sharing and data protection

Question 2.

Comments: The benefits of sharing information will vary in each case but, when shared with other individuals, the openness and transparency can sometimes lead to increased understanding and trust for individuals (e.g. for CAFCASS CYMRU service users). Unless the information relates to a person's public life or relates to the expenditure of public money, it is difficult to see what the benefits of sharing the information with society at large would be. We recognise that there are benefits of sharing personal information, which relates to an individual's private life, with another public authority where it is necessary to do so in order to protect a person's vital interests or where the public authority needs the information in order to fulfil a statutory function.

Question 3.

Comments: If personal information relates to an individual's private life, there is a higher risk of breaching the principles of the DPA if it is shared. If the personal information relates to somebody's public life, there might be a risk in some circumstances to their health and safety if the information is shared. If the information does relate to an individual's private life but the fair processing information provided to the individual says that the information will be shared, it is less likely that the DPA will be breached but there is a risk that people will be reluctant to engage with organisations if they think that their engagement will result in many people/organisations being aware of details relating to them. Also, in relation to family proceedings involving CAFCASS CYMRU - which are mainly held in private - disclosing personal information to society without leave of court could lead to contempt of court. There would also be risks to the wellbeing and relationships of a data subject when dealing with access to information relating to CAFCASS CYMRU cases.

Question 4.

Comments: The development of information sharing protocols pose the greatest opportunities because data subjects can be made aware of the arrangements which will apply before the need for sharing information arises. The greatest risks seem to arise where it seems sensible to share personal information but a clear legal basis for doing so does not exist. Whilst the ICO has indicated that it will take a pragmatic view in such situations, it is still open to data subjects to pursue matters through the courts. Also, sharing information with third parties

can lead to ambiguity for the third party about the appropriate retention period for the information.

Question 5.

Comments: Sometimes public authorities receive personal information which they do not really need and have not asked for, yet should not really destroy until it has been retained as a public record for an appropriate period of time. Also, it is sometimes difficult to ensure that personal information is destroyed in accordance with fair processing information as people's roles and priorities tend to change over time. Where a third party's information is held by several organisations, greater clarity about retention periods across the organisations would be helpful..

Question 6.

Comments: The Welsh Assembly Government would not wish to comment in detail on this point but welcomes efforts being made to ensure that private sector organisations process personal information in an appropriate way.

Question 7.

Comments: We have always found a basis for sharing personal information where it is considered necessary for us to do so for the exercise of our functions. However, where the purpose of the data sharing is to enable another public authority (e.g. HMRC or DWP) to fulfil its functions, then we frequently face the issue of whether or not we have the vires to share the information. Therefore, it might be helpful to consider the appropriateness of bringing forward legislation to confer upon public authorities generally a vires to share personal data where it is in the public interest to do so. CAFCASS CYMRU believes that in certain circumstances legislation needs to be revised to ensure that relevant organisations share information to safeguard the welfare of children as at times some organisations use the DPA as a basis for attempting to delay or not disclose relevant information.

Question 8.

Comments: CAFCASS CYMRU's position has on rare occasions been compromised when other public authorities have used their statutory powers to request personal data relating to its service users. The relationship which CAFCASS CYMRU has with its services users is important for it to be able to undertake its functions effectively and being required to share personal information that is not related to its statutory duties of safeguarding the welfare of children can sometimes undermine relationships.

Section 3: The legal framework

Question 9.

Comments: When understood, the DPA generally provides a sound framework for handling personal information. However, it is a complex piece of legislation and can result in people acting inappropriately through a lack of understanding. The Welsh Assembly Government supports the attempt to obtain clarification of the definition of personal data contained in Section 1(1) DPA which the MOJ is seeking in the House of Lords case of Common Services Agency v Scottish

Information Commissioner. We believe that the lack of clarity around the definition originates from the wording in EC Directive 95/46 and we would support any attempt to seek a revision to the Directive. CAFCASS CYMRU believes that there needs to be detailed legislation covering how organisations should deal with the issue of releasing a child's information to a parent/guardian – including clarity about the age at which a child should be deemed to have sufficient capacity to make decisions about its personal data (i.e. to make a Subject Access Request or to provide consent for processing).

Question 10.

Comments: The Welsh Assembly Government believes that there is an ambiguity which arises out of the first and second data protection principles and their relationship with each other. The first principle appears to require data controllers to specify the purposes for which they will be processing personal data. Similarly, the first part of the second principle says that when personal data is obtained, the data controller must specify the purposes. It could be assumed from that that a data controller cannot subsequently do anything with the data which is significantly different from the purposes specified in the fair processing information. However, the second part of the second principle only prevents data controllers from processing the data in a manner incompatible with the specified purposes. According to this latter part the subsequent processing of personal data could, therefore, go significantly beyond the original specified purposes before it reached the threshold of incompatibility with the original purposes. Ultimately, this seems to bring into question the value of specifying processing purposes in the fair processing information.

Question 11.

Comments: The technical nature of the DPA causes misunderstanding and fear of the legislation. The Welsh Assembly Government has comprehensive staff guidance in place but recognises that key messages need to be simplified and made more prominent for staff. The distinction between personal data relating to people's private lives and that relating to public lives, which has emerged within the context of FOI, might have added a further degree of complexity as people cannot now follow one set of rules for personal information as a class. People are perhaps reluctant to destroy personal information in a timely manner because they believe that it is necessary to retain information for a considerable period of time in case it is needed for audit purposes etc.

Question 12.

Comments: We would welcome a change which results in the subject access provisions of the DPA having the effect of not requiring organisations to supply information in response to a Subject Access Request where disproportionate effort is required or where the requester is vexatious. At the moment, a request can only be refused on the basis of disproportionate effort where this would be required to provide a copy of the information and this has caused difficulties in a recent case where a large effort and expense is required to obtain personal information from back-up tapes. Also, CAFCASS CYMRU believes that there is a need greater clarity, through further statutory powers and guidance, for dealing with requests for children's personal information from parents/guardians.

Question 13.

Comments: See comments elsewhere, particularly in response to Question 10.

Question 14.

Comments: CAF/CASS CYMRU believes that in 'live' family proceedings, there should be statutory guidance requiring that the courts make decisions about the disclosure of personal information relating to any party to the proceedings, or any other information in case files.

Question 15.

Comments: See comments in response to Question 12.

Section 4: Consent and transparency

Question 16.

Comments: Although it is often difficult to decide whether consent is required or whether some other condition in Schedule 2/3 is met, it is possible to do so. We have sought to obtain consent whenever possible and appropriate. Difficulties often arise when two people's personal data cannot be separated and one person objects to the other receiving the data in response to a Subject Access Request. Also, Ministers are often keen to investigate matters arising in correspondence to them which concern public authorities for which they are responsible but often feel unable to pass on key information without express consent. Obtaining consent in such circumstances can make Ministers' actions appear slow and the process appears bureaucratic to those raising concerns. Further guidance in this area would be welcomed. There is also a need to review the arrangements which apply when elected representatives request personal data on behalf of a constituent. Whilst there is a provision in the Data Protection (Processing of Sensitive Personal Data) (Elected Representatives) Order 2002 for sensitive personal data to be provided, non-sensitive personal data is not covered.

Question 17.

Comments: If all of the conditions in Schedules 2 and 3 were removed, other than the consent conditions, this would severely impede data sharing where it is necessary. Data sometimes needs to be shared urgently to safeguard people's interests so obtaining consent would be problematic in such circumstances. Also, in some circumstances relying on consent to be able to share personal information would be likely to prevent a public authority investigating concerns about an individual's activities. Importantly, gaining consent in child protection cases would not be required or appropriate in cases where child protection concerns are suspected or apparent. Also, difficulties would arise if the personal data relates to a child or person without capacity to provide consent..

Question 18.

Comments: It is difficult to see how rights of access under the DPA could be widened in any manageable way. There is already an obligation under the DPA in the form of fair processing information for data controllers to notify data subjects about the processing of their personal data. We believe that the ambiguity

described in response to Question 10 needs to be addressed before any further obligations are introduced.

Question 19.

Comments: The ICO's Framework Code of Practice on Sharing Personal Information is useful to the extent that it sets a broad framework but does not really help with the detailed legal complexities which often arise in relation to data sharing. It tends to be the case that guidance is either too general or too legalistic. Practitioners need guidance which takes them through the considerations which need to be made when considering the appropriateness of sharing information. Also, a clear strategic direction needs to be established in terms of the extent to which data sharing within the public sector should be maximised or minimised. The IC should have a key role in ensuring that organisations are held accountable for their handling of personal information.

Section 5: Technology

Question 20.

Comments: The impact of technology has been very significant. Vast amounts of data can now be shared with ease at a rapid pace and there is perhaps still a culture of using e-mail more informally than hard copy written communications. This can be dangerous in relation to personal data and people's assumption that transmission via e-mail is secure is not always correct because it can be fairly easy to intercept the channel unless an approved transport mechanism (e.g. the GSI network) is used. The storage of vast amounts of information in people's personal e-mail folders and on back-up tapes can make timely destruction difficult and retrieval time-consuming.

Question 21.

Comments: Perhaps the law should say that sensitive personal information cannot be stored on portable IT devices (e.g. laptops) without the data being encrypted. Also, perhaps the law could say something to prevent the downloading of information from secure systems onto non-secure devices without senior authorisation. As it is unlikely to be reasonable to criminalise the activities of junior staff, perhaps a better approach would be to require organisations to update systems so that this is prevented.

Question 22.

Comments: Further guidance would be helpful.

Section 6: International comparisons

Question 23.

Comments: No comments

Question 24.

Comments: No comments

Question 25.

Comments: No comments

Question 26.

Comments: No comments

Section 7: Additional questions

Question 27.

Comments: In the light of the Information Commissioner's recent decision involving the Assembly Government (FS50085782), it would be helpful if the review could consider the circumstances in which fair processing information can be overruled by public interest factors which favour the release of personal information in response to FOI requests.
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Question 28.

Comments: No comments
