

**Information, Information,
Information: How and when to
collect it, keep it and pass it on.**

**A Briefing for Voluntary Sector
Social Care Service Providers**

Background

Issues around the appropriate handling of information are of great importance to all voluntary sector care providers, whether as part of their contractual relationships with Local Authorities, inspection processes by regulators or as required by legislation and guidance to encourage information sharing.

In recognition of the difficulties faced by providers in making sure that they are able to pass on information which other organisations need, while at the same time protecting the rights of staff and service users to have personal information kept private, CCPS organised an event in late 2005 to discuss issues including: collecting and storing information on service users and staff, information sharing with other organisations and what Local Authorities can reveal about contracts under Freedom of Information. CCPS is extremely grateful to the speakers who attended this event: Sarah Hutchison, Head of Policy and Information, Office of the Scottish Information Commissioner; Kenneth Macdonald, Assistant Commissioner for Scotland, UK Information Commissioner's Office; Kerr Donaldson, Data Standards Manager, Data Sharing and Standards Division, Scottish Executive; Sheila Logan, Operations and Policy Manager, UK Information Commissioner's Office and Dr Kenneth Meechan, Assistant Chief Solicitor, Glasgow City Council Corporate Law Section. This briefing is based on presentations and discussions from the event; any errors in the paper are, of course, CCPS' own.

Freedom of Information (Scotland) Act 2002

The Freedom of Information (Scotland) Act 2002 gives any person the right to information held by Scottish public authorities. The Scottish Information Commissioner's Office reports that so far voluntary organisations have not made much use of the Act, and would encourage them to do so, both to support people who use their services and in their own campaigns.

In addition to their entitlement to use the Act, voluntary organisations should be aware of the fact that public authorities can be asked for any information they hold, including information provided by other organisations (including voluntary

organisations). They should also know that there is a possibility that they themselves could be designated as public authorities for the purposes of the Act under certain circumstances.

Using the Act to access information

“A person who requests information from a Scottish public authority which holds it is entitled to be given it by that authority”ⁱ

Anyone anywhere can ask for information under the Act. Requesters do not have to be connected to the information requested, or explain why they want it.

Any information which is recorded in any form at any location within the public authority is deemed to be held, including information held on behalf of the Authority by, for example, a records management company.

In most cases, a response from the authority should be provided within 20 working days of an information request. The authority can withhold the information on certain grounds laid down in the Act, including where the information requested is held to be personal data or on the basis of cost.

Charges may be associated incurred in requesting information: the first £100 associated with finding and providing the information is free to the person who requests it, but the public authority can charge 10% of anything over £100. If the request would cost over £600 to fulfil, the public authority can refuse to provide the information. In December 2005, the Scottish Executive launched a review of the Act 'One Year On', which includes an examination of the fees charged for requests.ⁱⁱ Questions cover the level of cost at which a request can be declined, whether or not multiple requests should be aggregated (and therefore declined if they reach the maximum cost) and how the costs of fulfilling a request should be calculated.

Information requests should be as specific as possible; this will avoid the costs mentioned above and makes it more likely that the exact information sought will be provided. It is also likely to speed up the process, as large requests are often refused; complaints forwarded to the Commissioner can take up to 6 months to resolve.

Designation as a public authority

The Scottish Executive, the Scottish Parliament, local government, the NHS, educational institutions and the police are all designated as public authorities under the Act. There are 50 or so other public authorities from which information can be requested, including the Scottish Arts Council and Water Industry Commissioner for Scotland. Companies wholly owned by one or more public authorities are also included, for example companies set up by local authorities to explore new transport initiatives.

In addition to the obligation to respond to information requests, designated public authorities must 1) advise and assist requesters and would be requesters and 2) produce and maintain a publication scheme (a list of all information currently available or which they intend to make available and where it can be found).

Scottish Ministers have the power to designate new public bodies under the Act, both those which are already public bodies but are not covered by the Act and those which appear to exercise functions of a public nature or provide, under contract to a Scottish public authority, any service whose provision is a function of that authority. The arrangements for such designations are not yet in place, although the legislation gives power to do so. The Executive consultation issued in December 2005 asks for views on which bodies could be brought within the coverage of the Act and suggests draft criteria for designationⁱⁱⁱ Proposed criteria include the extent of public funding of an activity, whether a body provides public functions which would be carried out by government if the body did not exist, and whether the activity is subject to sufficient regulatory powers to provide the necessary level of openness and transparency with regard to the activities being carried out.

There have been lobbies in the past for housing associations to be designated, and there is the possibility that voluntary organisations providing services on behalf of local authorities could also meet the designation criteria; if the latter were to happen, only the functions carried out on behalf of local authorities (i.e. not, for example, organisations' campaigning arms) would be subject to FOI. CCPS' response to the consultation points out that the information on services carried out by the voluntary sector on behalf of local authorities is already

available under FOI from local authorities, making designation of voluntary organisations unnecessary; mention is also made of the resource implication to voluntary organisations of being designated. Some providers have expressed concern about what effect designation would have on voluntary sector organisations' 'independent' status, but the full implications of this remain to be teased out.

Information on/from voluntary organisations held by local authorities

Most information provided by voluntary organisations to public authorities is likely to be considered held by the public authority for the purposes of the Act and can therefore be requested by any person; this would include information such as grant funding applications, monitoring and annual reports, contracts and any correspondence. Authorities often highlight this in information with grant application forms, but may not inform partners of this possibility in the course of joint projects.

Authorities are discouraged from having unnecessary confidentiality clauses in contracts,^{iv} but may agree with organisations in advance that some information should be kept confidential; it is preferable to justify this in terms of the Act e.g. this is personal information as defined in s.38 of the Act^v. Providers should make any concerns known at the contract stage. Glasgow City Council, amongst others, includes information with its tender documents inviting potential bidders to identify information which they consider may be exempt under the Act. Local authorities and providers may have varying opinions on how sensitive contractual information is, for example, Supporting People contracts do not include a clause seeking exemption from FOI as the Local Authorities Solicitors Group does not regard the sort of information included in the contract to be sensitive.

Authorities are not always required to contact providers when they receive a request for information provided to them, but where providers' views are relevant to a decision on whether or not to release the information they should be consulted; the public authority is ultimately responsible for deciding whether or not to release information.

Note: While the Scottish Information Commissioner oversees the Freedom of Information (Scotland) Act 2002, the UK Information Commissioner (and the

Assistant Commissioner for Scotland North of the border) oversee the Freedom of Information Act 2000. The Freedom of Information Act 2000 gives similar powers to citizens to request information on non-devolved issues from UK public authorities operating in Scotland, for example HM Revenues & Customs, Department of Work and Pensions, the Scotland Office, the BBC and the Forestry Commission.

The Data Protection Act 1998

The Data Protection Act defines personal data and how it should be handled by organisations, and puts in place a system whereby individuals can request data held on them by an organisation. Voluntary organisations should ensure that they are storing and processing information in accordance with the Act, and be aware that people who use services can ask to see any information held on them.

Personal data

Personal data relates to any living individual who can be identified from those data or from those data and other information which is in the possession of the data controller.

Sensitive personal data relates to: race/ethnic origin; political opinions; religious beliefs; Trade Union membership; physical/mental health; sexual life and; criminal offences & proceedings. Stricter rules apply to the processing of such personal data.

Consent should be obtained for organisations to store personal data, and explicit consent is needed before sensitive personal data is collected. No definition is given in the Act as to what consent is;^{v1} explicit consent is taken to mean that time is spent explaining in detail what information is to be gathered and what it will be used for.

Some voluntary sector providers may provide services to people not seen as being able to give consent. While the fact that the Act does not specifically define consent leaves scope for, for example, people with learning disabilities to communicate by non-traditional means that they are happy for their information to be stored, it should also be noted that the Act allows for *either* the individual *or* someone who acts on their behalf (this does not need to be a legal guardian) to give consent. The Assistant Commissioner for

Scotland has undertaken to consult with colleagues in England and find out what has been done in other cases where individuals are unable to give consent, although the situation may be different as Scotland has had longer for Adults with Incapacity legislation to bed in than England and Wales, where it has only recently been introduced. Some organisations including Glasgow City Council use the tests for interventions under the Adults with Incapacity Act to determine whether a proxy consent can be given for data protection purposes

Data management

It is not possible for the UK Commissioner's office to give across the board guidance on model data management systems, as different organisations will have different needs. The Act sets out eight principles of data protection, which, if followed, should help to ensure that organisations have good data management systems in place. Personal data must be:

- Fairly and lawfully processed
- Processed for specific purposes
- Adequate, relevant and not excessive
- Accurate and up to date
- Not kept for longer than is necessary (this will depend on the information - see below)
- Processed in line with individual rights
- Kept secure (for example, where service users or members of the public may be passing through an open office, ensure that information is not visible)
- Not transferred to countries without adequate protection (this includes the USA – the UK Commissioner's office can advise on individual cases)

A particular concern for providers is how long personnel files should be kept for; some providers have been advised by the Care Commission that files should be kept more or less indefinitely. The Data Protection Act, however, does not define how long information should be retained for: this is contained in other legislation e.g. tax law, health and safety law and employment law. It should be noted that the forthcoming Protection of Vulnerable Groups legislation may also result in employers keeping files for longer where they are obliged to or chose to report employees to the lists of those unsuitable to work with children or adults at risk. Organisations are advised by the UK Information Commissioner's office to ensure that they have a suitable retention and destruction policy in place. The Chartered Institute of Personnel and Development has put together a

retention checklist which may be of use in developing a policy (note that this will have to be adapted to take account of other legislation and is a starting point only); the checklist can be found at: <http://www.cipd.co.uk/subjects/hrpract/psnlreocrd/retrecords.htm?IsSrchRes=1>.

It is important to note that where other legislation gives organisations power to share or disclose information, it takes precedence over the Data Protection Act. For example, the Joint Inspection of Children's Services Act 2006 gives explicit powers to inspectors to access personal information, including medical records. Several members came across this situation in relation to Care Commission Safer Recruitment inspections, where provider organisations, as data controllers, felt uneasy about disclosing personal data held in personnel files without staff consent. CCPS worked with the Care Commission, Scottish Executive and Assistant UK Information Commissioner for Scotland to establish that the Care Commission has the right to see limited information from personnel files as stipulated in section 19(2) of Scottish Statutory Instrument 114 of the Regulation of Care (Scotland) Act; providers should not disclose other information from personnel files as part of routine inspections. For further detail, see the CCPS/SFHA information note of 29 August 2006. The SSSC may in the exercise of its functions ask an employer to provide access to documentation it holds about a worker, which could include information held in the worker's personnel file.^{vii}

Notification

Every organisation which processes data (known as data controllers) must notify the UK Information Commissioner that they do so unless they are exempt. Failure to notify is a criminal offence and carries a fine of up to £5000. Exemptions from notification include:

- Processing of personal data for personal, family or household affairs
 - Data controllers who only process personal data for the maintenance of a public register
 - Data controllers who only process personal data for staff administration OR advertising, marketing & public relations OR accounts and records.
- Exemptions also exist for some not for profit organisations, but the Assistant Commissioner for Scotland has suggested that all social care providers would be likely to have to notify.

Subject access requests

Data subjects have the right to request copies of information held about them. Data controllers may charge a fee of up to £10 for this. When someone requests information, data controllers must confirm the identity of the subject and what data they are seeking; data controllers then have 40 days to reply to the request.

The Privacy and Electronic Communication Regulations 2003

The Privacy and Electronic Communication Regulations 2003 apply to direct electronic marketing, including by telephone, fax, email, text message, picture message and automated calling system. Direct marketing is held to include the offer for sale of goods and services, the promotion of a political party's aims and ideals and, of relevance to some CCPS members, the promotion of a charity's aims and ideals. Different guidelines apply to different types of electronic communication and to different types of marketing. Guidance is available on the UK Information Commissioner's website at www.informationcommissioner.gov.uk/eventual.aspx?id=96

The Scottish Executive eCare framework

Recognising the importance of data sharing to effective, joined up service delivery (and as a way to reduce bureaucracy), the Scottish Executive Modernising Government fund financed pilot projects exploring electronic means of recording and sharing information. One of these, the eCare project, has now been assimilated into the core functions of the Scottish Executive.

The key elements of the project are defining and controlling the data which is to be shared. eCare is not just a technical solution to this, it also aims to function as an organisational development tool.

Agencies which may wish to work together and share data include local authorities, police, various branches of the NHS and voluntary and private sector organisations. eCare will act as the framework in the middle of these bodies, providing a secure zone into which organisations can supply defined information.

Organisations will not be asked to abandon their own systems for data management, but agencies without an existing system will be able to use eCart.^{viii}

Different layers of data will be held on each person in the system: core data on the subject and related people and professionals, dynamic data on events, processes and status episodes, and forms. One agency will likely take the lead on compiling initial information, and other organisations will then add their information to the forms. The system will only allow organisations to view data on clients they are involved with i.e. there will be no 'surfing'. A consent framework and national information sharing protocol are being created alongside the eCare system.

Further information on the Scottish Executive's data standards and eCare work can be found at <http://www.scotland.gov.uk/Topics/Government/DataStandardsAndeCare>.

Notes and References

ⁱ Freedom of Information (Scotland) Act 2002

ⁱⁱ One Year On – A Consultation on the Freedom of Information (Scotland) Act 2002, The Scottish Executive, Dec2005

ⁱⁱⁱ <http://www.scotland.gov.uk/Publications/2005/12/1494543/45433>

^{iv} In any case, standard confidentiality clauses are in many cases now ineffectual as they do not refer to the Freedom of Information Act.

^v Briefings on grounds for exemptions can be found on the Scottish Information Commissioner's website at <http://www.itspublicknowledge.info/legislation/briefings/briefings.htm>.

^{vi} "Consent is not defined in the Act. The existence or validity of consent will need to be assessed in the light of the facts. To assist in understanding what may or may not amount to consent in any particular case it is helpful to refer back to the Directive. This defines "the data subject's consent" as: "...any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

The fact that the data subject must "signify" his agreement means that there must be some active communication between the parties. A data subject may "signify" agreement other than in writing."

Legal Guidance for the Private Sector, Information Commissioners Office, p.29, <http://www.ico.gov.uk/documentUploads/Data%20Protection%20Act%201998%20Legal%20Guidance.pdf>

^{vii} While the Care Commission and SSSC are given some powers to access information by the Regulation of Care Act and amendments made to the Regulation of Care Act by the Smoking, Health and Social Care Act, local authority requests to access personnel files, which have been reported by some members, have no such enabling legislation to refer to; the Data Protection Act therefore takes precedence over council requests.

^{viii} eCart is an internet technologies based application provided by the eCare Programme to provide an electronic assessment recording capability to eCare Partnerships that do not already possess such a tool - <http://www.scotland.gov.uk/Topics/Government/DataStandardsAndeCare/eCartArchitectureOverview>

The Executive is keen to engage further with voluntary sector providers in developing and implementing this system. Providers are likely to welcome the opportunity to access valuable information on service users (particularly at the point of referral, where adequate information is not always available) but it should be noted that that, as many organisations are in the process of developing their own data standards, it may be better to do this sooner rather than later. Providers may have concerns about what effect an obligation to share information with other agencies would have on the status of the voluntary sector as independent of statutory services (which encourages some people who use services to be more open in providing information to voluntary organisations).

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