

Data Sharing Guidance - Financial Harm

Introduction

We are committed to working collaboratively to prevent and minimise the risks posed to adults at risk of financial harm in Scotland. This Guidance is aimed at organisations who may be asked, in the interests of protecting a vulnerable, including incapable, person from financial harm or abuse, to share, with a third party, personal data they hold about that vulnerable person.

This Guidance is not a replacement for that of the UK Information Commissioner, who has produced a [Code of Practice](#), as well as a comprehensive [Guide](#) to data sharing, which both contain a wealth of extremely helpful information to assist your decision making.

So why have we decided to do our own guidance?

Generally personal data will be shared in a pre-planned and routine way, which is governed by established rules and procedures currently in place to facilitate any sharing.

This Guide focusses on data sharing not covered by any routine agreement i.e. one-off, exceptional, ad hoc, requests, which can be made in unexpected conditions, or even with urgency.

On receiving an impromptu request to disclose information it can be difficult to determine whether information can/should be shared, or not given the legal obligations imposed by both data protection legislation and the duty of confidentiality that an organisation has in respect of their client/customer/patient (the data subject). We wanted to try to offer some guidance to help navigate the decision making process in relation to whether you should share or not under the presenting circumstances.

What data is included here?

This Guide applies only to personal data and special category data which is captured under the General Data Protection Regulation 2016 (GDPR) and exemptions found under the Data Protection Act 2018 (DPA).

Definitions:

Personal Data

'Personal data' means any information relating to an identified or identifiable living person ('data subject' see below).

An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that living person.

Data Subject

Data subject means 'an individual who is the subject of personal data'. A data subject must be a living individual.

Data Controller

Data controller is defined as 'a person (or organisation) who (either jointly or in common with other persons) determines the purposes for which, or the manner in which, any personal data are, or are to be, processed'.

Data Processor

The data processor means any person (other than an employee of the data controller) who processes the data on behalf of the data controller.

Processing

Processing is defined as any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

Special Category Data

This is personal data consisting of information relating to any of the following:

- Racial or ethnic origin
- Political opinions
- Religious or philosophical beliefs
- Trade union membership
- Genetics
- Biometrics (where used for ID purposes)
- Health
- Sex life
- Sexual orientation

Special category personal data is subject to much stricter conditions of processing.

Personal data relating to criminal convictions and offences are not included within special category data per se but similar extra safeguards apply to its

processing.

To Share or not to Share: How to decide?

The lawful basis for processing (using) personal data are set out in the GDPR. At least one of these must apply whenever the Council processes (shares) personal information:

- Consent: the data subject has given clear consent for the Council to process his/her personal data for a specific purpose.
- Contract: the processing is necessary for a contract that the Council has with the data subject, or because the data subject has asked the Council to take specific steps before entering into a contract.
- Legal obligation: the processing is necessary for the Council to comply with the law (not including contractual obligations).
- Vital interests: the processing is necessary to protect someone's life.
- Public interest: the processing is necessary for the Council to perform a task in the public interest or in the exercise of official authority vested in the Council.
- Legitimate interests: the processing is necessary for the purposes of legitimate interests pursued by the Council or a third party unless there is a good reason to protect the data subject's personal data which overrides those legitimate interests. However, this basis is not available to processing carried out by the Council in the performance of its official tasks: it can only apply to the Council when it is fulfilling a different role.

So if you are sharing information it must fall under one of these categories and for most lawful bases be able to show that processing is in fact 'necessary'

If you are processing special category data or criminal conviction data then you must consider the further conditions for processing. It is recommended that in the case when processing involves special category or criminal data, advice is sought from the Information Governance Team.

You should also document your reason for sharing so that it can be justified at a later date if challenged.

Duty of Confidentiality

A duty of confidence may be stated, or it may be implied by the content of the information or because it was collected in circumstances where confidentiality is expected.

Does a duty of confidence prevail? This should be a separate consideration which may lend weight to what your lawful basis for processing the personal data or if you can in fact share the information.

There is a sense that we too readily rely on 'duty of confidentiality' as a reason for not sharing data; but equally, organisations involved in the protection of vulnerable people, we have a duty of care to ensure such individuals are safeguarded.

We may meet our duty to maintain the individual's confidentiality whilst correspondingly failing in our duty of care to ensure they are protected from abuse.

There may be certain information, financial information would be an example, over which confidentiality is considered absolute or, at least where it was expected by the person providing the information that it would be treated as confidential. So if you are being asked for disclosure of such sensitive data how do you ensure you balance what are then the competing requirements of duty of care and duty of confidentiality?

Sadly there is no easy, or short, answer; much will depend on the specific circumstances of the case.

Adopting the good practice recommendations in the Information Commissioner's Code will help you to collect and share personal data in a way that is fair, transparent and in line with the rights and expectations of the people whose information you are sharing. The Code will help you to identify the issues you need to consider when deciding whether to share personal data. It should give you confidence to share personal data when it is appropriate to do so, but should also give you a clearer idea of when it is not acceptable or in breach of data protection to share personal data.

The checklist within the UK Information Commissioner's [Code of Practice](#), has been condensed below to provide you with a useful quick reference guide (but it is strongly recommended you avail yourself to the information and best practice guidance contained in the [Code of Practice](#)).

If you are still in doubt?

As well as potential tensions between duty of confidentiality and duty of care there may be tensions between various Acts, for example – GDPR, and the Adult Support and Protection (Scotland) Act 2007 and the Adults with Incapacity (Scotland) Act 2000 – and in which case the obligations of which takes priority?

The Adult Support and Protection Act 2007 gives greater protection to adults at risk of harm. The Act defines adults at risk as those aged 16 years and over who:

- are unable to safeguard their own wellbeing, property, rights or other interests

- and are at risk of harm
- and because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected

It places a duty on local councils to inquire and investigate cases where harm is known or suspected. They have powers to visit and interview people, arrange medical examinations, examine records, and issue protection orders. They must also consider if there is any need for advocacy and other services, such as help with medication, or support services.

Section 10 of the 2007 Act states that a Council Officer may require any person holding health, financial or other records (in any format) relating to an individual whose safety is deemed to be at risk, to give records or copies of them to the officer. This means that all relevant information can be gathered from partner agencies and public bodies via adherence to authorisation protocols. Requests for information, if not required immediately, should be made in writing, using the specified forms which will be on your local ASP

Section 49 of the 2007 Act states it is an offence for a person to fail to comply with a requirement to provide information under Section 10 unless that person has a justifiable reason not to do so.

Adults with Incapacity (Scotland) Act 2000:

The Adults with Incapacity (Scotland) Act 2000 creates provisions for protecting the welfare of adults who are unable to make decisions for themselves because of a mental disorder or an inability to communicate. It allows other people to make decisions on behalf of these adults about things like:

- arranging services;
- managing finances; and
- property and medical treatment.

The provisions of the Act include the granting of Powers of Attorney, Financial Intervention and Welfare and/or Financial Guardianship. The Act enables a legally appointed third-party to act on behalf of, or in the best interests of, an individual who lacks capacity to make decisions for themselves. Such reduced decision-making ability may also mean that an individual is unable to give consent to an intervention or the sharing of information.

If there are any concerns about an individual's capacity to make decisions for them, a check should be made with the local social work services who will be able to advise if there are any Powers of Attorney or Guardianships in place.

People who are most likely to be subject to the provisions of the Act include those with a learning disability, dementia, mental ill health, head injury or a physical disability that prevents them from communicating.

If you have given due consideration to what you believe are all the relevant, competing, factors and are still at a decision impasse, you use your organisation's escalation procedure to have the decision made, or at least reviewed, at a more senior level. You may even need to seek your own legal advice on the matter. Be alert too, that any delays in arriving at a decision can leave the vulnerable person exposed for that period- so adds a further element to the duty of care side of the debate.

What if I have concerns of abuse?

- Where you are aware that a financial intervention is in place, for example - Power of Attorney, Financial Guardian or Withdrawer under the Adults with Incapacity (Scotland) Act 2000, the concerns should be passed to the Office of the Public Guardian (OPG). The Public Guardian has responsibility for investigating issues where powers may be being misused or neglected in some way. Telephone: 01324 678300 Or Email OPG@scotcourts.gov.uk
- Where the issue appears to relate to a company or trader operating in an unethical or illegal manner then contacting the [South Ayrshire Trading Standards department](#) covering the registered address of the company or if unknown the Trading Standards department local to the person about whom the concerns exist may be appropriate. Contact details can be found at [Trading Standards Scotland](#)
- Where a crime is thought to have been committed then Police Scotland should be contacted on 101.
- Where the person is 16 or over and it is suspected that they are unable to safeguard their own well-being, property, rights or other interests and appear more vulnerable because of a disability, illness or infirmity, they may be an adult at risk of harm in terms of the Adult Support and Protection (Scotland) Act 2007. In such cases an Adult Protection referral should be made to [South Ayrshire Adult Support and Protection](#) or e-mail ASP@south-ayrshire.gov.uk; if the person at risk lives out with South Ayrshire, contact Adult Support and Protection in their local area - contact details can be found on the [Act Against Harm website](#).
- If bank staff suspect a customer is *in the process* of being defrauded of funds they should deploy the [banking protocol](#)

To Share or Not To Share – Checklist

Please note: these lists are not prioritised; all matters are equally as important and should be given equal consideration

With specific reference to the circumstances of the case

Is the sharing justified?

The overarching question is - Does the duty to protect outweigh the duty of confidentiality?

- What are the benefits to the individual to sharing, or not sharing?
- Is the individual at risk from sharing, or not sharing?
- Are there any other risks from sharing, or not sharing?
- Do the benefits outweigh the risks?
- Are there any exemptions in the DPA to the sharing of the information requested?
- Are there other relevant statutory requirements, or restrictions to disclosure?
Consider possibly Section 10 of the Adult Support and Protection Act, Local Authority or Office of the Public Guardian remit and powers under the Adults with Incapacity Act, any relevant police powers, or court orders
- Does your duty of confidentiality align or conflict with any statutory responsibilities?
- Where two Acts are involved which one has priority?
- Is sharing the information requested necessary and proportionate?
- Is there an organisational / in house protocol to be respected?
- Are there other similar, relevant, cases which ought to be considered?

Do you have the power to share?

- What is the nature of the information you have been asked to share?
- Is the information requested relevant to the functions or powers of your organisation?
- Is there a legal obligation to share (for example a statutory requirement or a court order).
- Are you authorised within your Organisation to make the decision
- Do you need to take legal advice?

If you decide to share

- Do you need consent, for example -of the person, an attorney or guardian, or another third party?
- Do you need to inform any other person before, or after, sharing?
- What information do you need to share?
- What is necessary and what is not necessary?
- What is fact and what is opinion.

How should the information be shared?

- Information must be shared securely.
- Ensure you are giving information to the right person.

Record your decision

- Record your decision and your reasoning – whether you shared the information, or not.

If you share information you should record:

- What information was shared and for what purpose.
- Who it was shared with.
- When it was shared.
- Your justification for sharing.
- Whether the information was shared with or without consent.

Some Working Examples

Police

A Local Authority is undertaking an adult protection inquiry and is aware that the Police may have relevant information – they ask the Police for disclosure of this, can the Police offer this?

Answer:

Yes – under the Adult Support and Protection (Scotland) Act 2007 there is a duty to provide information required for an adult protection inquiry or investigation. This duty applies to a range of public bodies, including Police Scotland.

Office of the Public Guardian

The OPG is undertaking an investigation into alleged abuse of a power of attorney and requires financial information from the relevant High Street bank; this is requested – can the Bank provide this?

Answer:

The OPG has legal authority to command such information as may be required to assist them in their statutory inquiry function.

Bank

A bank staff member has noticed that one of their customers is making more regular and larger withdrawals. When approached about it the customer seems distressed and declines to offer any explanation stating it is their money and they can do what they like with it. Should the staff member:

- a. Accept the customers response and take no further action
- b. Continue to monitor the situation and attempt to engage the customer
- c. Seek advice around their duty of care and whether a referral should be made under adult support and protection or to the OPG

Answer:

Having noticed the issue and receiving no explanation the staff member should follow up as per b and c above.

Inquiries/Investigations

A social worker receives a referral from a Bank and together with the information they already hold sees the need to move toward protection planning. An inquiry is required under the Adult Support and Protection (Scotland) Act 2007. What contact should the social worker have with the Bank, if any?

- a. Proceed with protection planning without further contact with the bank
- b. Advise the bank that they will take appropriate action.
- c. Contact the bank to provide them with relevant and proportionate information that may assist the bank to protect the individual

Answer:

In line with local protocols and taking consideration of issues of consent in relation to GDPR, the social worker should provide the bank with relevant and proportionate information to assist in protecting the customer/service user. Remember that under section 10 of the 2007 Act, a Council Officer may require any person holding health, financial or other records relating to an individual who is believed to be an adult at risk, to give them the records or copies of these. It may therefore be relevant to consider whether the bank or other body holds other information which is relevant to the inquiry/investigation

Social Work

A woman is concerned that her neighbour, Jean, who lives alone and has dementia, is being taken advantage of by her daughter. Jean's daughter collects her mother's pension from the cash-machine and buys her shopping. However, her neighbour regularly sees that there is little food in the house and it's always really cold. This is confirmed by the formal carers who support Jean three times a week. When asked about her situation, Jean seems really grateful that her daughter takes such good care of her and she doesn't the neighbour to say anything to anyone. Can the neighbour pass on her concerns?

Answer:

The neighbour can, and should, pass on her concerns to social work – she wouldn't require Jean's consent or permission to do so. Social Work services may consider her to be "an adult at risk of harm" and therefore have a duty to investigate and to share information and concerns with relevant partner agencies. Without such a duty clear consideration would need to be given to what information, if any, could be shared.