

## **Advice on Data Sharing by Information, Advice and Support Services**

### **Introduction – Summary Advice**

1. I am asked to advise the Information, Advice and Support Services Network ('IASSN') on issues relating to data sharing by Information, Advice and Support Services ('IASS').
  
2. In particular I am asked to advise on the following issues:
  - a. Should IASS share data held about children, young people<sup>1</sup> and parents with the local authority?
  - b. Should IASS share data held about children, young people and parents with Ofsted?
  - c. When an IASS changes from being an 'in house' service of the local authority to being provided by a voluntary sector organisation or vice versa, how should the existing data held on children, young people and parents be treated.
  
3. I would stress at the outset that I am only able to provide general advice to IASSN and this advice cannot be relied on individual cases. The issues which are the subject of this advice are heavily fact-sensitive and individual IASS will need to obtain advice on the facts of any particular case. I would of course be happy to advise any individual IASS or the IASSN further on these issues if the need arises.

---

<sup>1</sup> Section 83(2) of the Children and Families Act 2014 defines a "young person" as a person over compulsory school age but under 25.

4. In summary my advice is as follows:

- a. IASS should not share confidential information with the local authority without either informed consent or a clear decision that there is a pressing need to do, for example in relation to child protection concerns. It is likely in my view that all information held by IASS in relation to children, young people and parents is confidential. Furthermore 'personal data' and 'sensitive personal data' concerning children, young people and parents should not be shared unless their informed consent has been obtained or another of the conditions in the schedule(s) to the Data Protection Act 1998 ('DPA 1998') have been met. The requirements of the relevant Code of Practice issued by the Information Commissioner's Office should be followed in every case where data is shared with the local authority.
- b. Ofsted has the legal power to access information held by IASS. As such allowing Ofsted access to IASS files is unlikely to be unlawful in any respect. Consideration should be given to whether data can be shared with Ofsted anonymously and the provisions of the data sharing code should be followed.
- c. Where an IASS provider changes it will be necessary to give children, young people and parents the choice as to what happens to their personal data – for example whether it transfers to the new provider, is returned to the data subject or is securely destroyed.

## **Background**

5. The IASSN is based at the Council for Disabled Children (part of the National Children's Bureau), and supports and promotes the work of IASS across England. Under the Children and Families Act 2014, IASS have replaced former Parent Partnership Services as statutory providers of free, impartial and confidential information, advice and

support on a range of matters concerning disabled children and young people and children and young people with special educational needs. Under section 32 of the 2014 Act each local authority is required to have at least one IASS in its area.

6. Section 32 provides:

**32. Advice and information**

- (1) A local authority in England must arrange for children and young people for whom it is responsible, and the parents of children for whom it is responsible, to be provided with advice and information about matters relating to the special educational needs of the children or young people concerned.
- (2) A local authority in England must arrange for children and young people in its area with a disability, and the parents of children in its area with a disability, to be provided with advice and information about matters relating to the disabilities of the children or young people concerned.
- (3) The authority must take such steps as it thinks appropriate for making the services provided under subsections (1) and (2) known to –
  - (a) the parents of children in its area;
  - (b) children in its area;
  - (c) young people in its area;
  - (d) the head teachers, proprietors and principals of schools and post-16 institutions in its area.
- (4) The authority may also take such steps as it thinks appropriate for making the services provided under subsections (1) and (2) known to such other persons as it thinks appropriate.”

7. In essence, English local authorities are obliged to secure the provision of advice and information to children for whom they are responsible or who are in their area, and their parents, about matters concerning the special educational needs and disabilities of the children concerned, as well as to take appropriate steps to make such services known to specified persons, including the parents and the

children themselves (as well as such other persons as the local authority thinks appropriate).

8. Section 32 of the Act thus contains the key duty pursuant to which IASS are provided ('the section 32 duty'). I understand that while most IASS are provided by local authorities around 25% are provided by voluntary sector organisations. The duty is for local authorities to 'arrange' for IASS to be provided, and not to provide IASS themselves. Essentially, local authorities have an obligation to secure the provision of IASS, but it is left to the judgment of each local authority as to precisely how, and by whom, the services will actually be provided.
9. The Code of Practice ('CoP') for SEN and disability was introduced pursuant to section 77(1) of the 2014 Act. Section 77(4) provides that a range of persons and bodies including local authorities 'must' have regard to the CoP when exercising their functions under Part 3 of the Act.
10. Chapter 2 of the CoP is entitled 'Impartial information, advice and support', and concerns the information, advice and support ("IAS") which local authorities 'must' provide for 'children, young people and parents' covering special educational needs, disability, health and social care.
11. Paragraph 2.4 of the CoP notes that IAS should be provided through a 'dedicated and easily identifiable service'. It refers to the fact that local authorities have 'established Parent Partnership Services to provide information, advice and support to parents in relation to SEN', and that many local authorities provide or commission IASS 'for young people'. Paragraph 2.4 goes on to say that local authorities should 'build on' these existing services, to

provide the IAS detailed in Chapter 2 of the CoP. Such services should be impartial, confidential and accessible, and should have the capacity to handle face-to-face, telephone and electronic enquiries (CoP, para. 2.5, emphasis added).

12. Para 2.8 states that (emphasis added):
  - a. 'The information, advice and support should be impartial and provided at arm's length from the local authority and CCGs
  - b. 'The information, advice and support offered should be free, accurate, confidential and in formats which are accessible and responsive to the needs of users.'
  - c. 'The provision of information, advice and support should help to promote independence and self-advocacy for children, young people and parents.'
13. Para 2.15 states 'Young people **must** have confidence that they are receiving confidential and impartial information, advice and support.'
14. Chapter 2 of the CoP goes on to consider a number of other matters, such as the precise scope of the IAS which local authorities are required to provide.

## **Advice**

### [A. Sharing data with local authorities](#)

15. As set out above, a central aspect of the statutory scheme is that information, advice and support should be confidential. The CoP also stresses that information, advice and support should be provided at 'arms length' from local authorities. It is therefore clear that information given by children, young people and parents to IASS

should not be shared with anyone outside that service without good reason. It is particularly important to keep in mind that the reason information, advice and support has been sought by a child, young person or parent is likely to be that there is a dispute with the local authority. This helps explain why it would be necessary for the information held by the IASS to be kept confidential from the local authority, and why it is necessary for IASS to be an 'arms length' service.

## Confidentiality

16. Although consideration of legal issues in relation to sharing information often begins with the Data Protection Act 1998, in my view the starting point here is the requirement of confidentiality as set out in the CoP. In this respect the data sharing code of practice from the Information Commissioner's Office (see further below) states as follows (emphasis added):

'Before sharing any personal data you hold, you will need to consider all the legal implications of doing so. Your ability to share information is subject to a number of legal constraints which go beyond the requirements of the Data Protection Act (DPA). There may well be other considerations such as specific statutory prohibitions on sharing, copyright restrictions or a duty of confidence that may affect your ability to share personal data.'

17. The duty of confidence is an aspect of the 'common law', i.e. the law derived from court judgments rather than set out in Acts of Parliament. There is a three-stage test for a breach of this duty, stemming from the leading case of *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415:

- a. Does the information have the necessary quality of confidence?
- b. Was the information imparted in circumstances importing an obligation of confidence?
- c. Has there been an unauthorised use of the information?

18. The House of Lords has held that 'the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential'.<sup>2</sup> Given the guidance in the CoP it would seem to me that all information held by IASS in relation to children, young people and parents is likely to meet this test.

19. The nature of the duty in this context is described in various relevant guidance documents, including the guide to confidentiality in health and social care published by the Health and Social Care Information Centre in September 2013<sup>3</sup> ('the HSCIC guide'). The more detailed reference document supporting this guide<sup>4</sup> ('the HSCIC reference document') describes the duty as follows:

'Common law confidentiality is not codified in an Act of Parliament but built up from case law through individual judgments. The key principle is that information confided should not be used or disclosed further, except as originally understood by the confider, or with their subsequent permission. Although judgements have established that confidentiality can be breached 'in the public interest', these have centred on case-by-case consideration of exceptional circumstances. Common law confidentiality can also be overridden or set aside by legislation.'

20. As noted above, information and advice given by IASS is intended to be confidential. Where information is provided by a child, young person or parent relating to disability and/or special educational needs, it is very likely this would be regarded as having the necessary quality of confidence. Similarly, where that information has been provided in the course of a one-to-one, private discussion,

---

<sup>2</sup> *Campbell v MGN* [2004] 2 AC 457 at [14] per Lord Nicholls

<sup>3</sup> Available at <http://www.hscic.gov.uk/media/12822/Guide-to-confidentiality-in-health-and-social-care/pdf/HSCIC-guide-to-confidentiality.pdf>

<sup>4</sup> Available at <http://www.hscic.gov.uk/media/12823/Confidentiality-guide-References/pdf/confidentiality-guide-references.pdf>

it is very likely that those circumstances would impart an obligation of confidence. Accordingly, if the IASS disclosed the information without being authorised to do so, then this would amount to an actionable breach of confidence. In my view the duty of confidentiality is likely to apply to all information relating to children, young people and parents held by IASS, including the fact that they have sought information, advice and / or support.

21. The question of when confidential information can be shared is addressed in government advice on information sharing aimed at practitioners providing safeguarding services to children, young people, parents and carers<sup>5</sup>, reissued in March 2015 ('the information sharing advice'). The information sharing advice deals with this issue in some detail as set out below:

'If the information is confidential, and the consent of the information subject is not gained, then the responder needs to satisfy themselves that there are grounds to override the duty of confidentiality in these circumstances. This can be because it is overwhelmingly in the information subject's interests for this information to be disclosed. It is also possible that an overriding public interest would justify disclosure of the information (or that sharing is required by a court order, other legal obligation or statutory exemption).

To overcome the common law duty of confidence, the public interest threshold is not necessarily difficult to meet – particularly in emergency situations. Confidential health information carries a higher threshold, but it should still be possible to proceed where the circumstances are serious enough. As is the case for all personal information processing, initial thought needs to be given as to whether the objective can be achieved by limiting the amount of information shared – does all of the personal information need to be shared to achieve the objective?

---

<sup>5</sup>Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419628/Information\\_sharing\\_advice\\_safeguarding\\_practitioners.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419628/Information_sharing_advice_safeguarding_practitioners.pdf). There is a helpful summary in the advice of 'seven golden rules to sharing information'. There is also a useful flowchart on when and how to share information.

22. It is therefore clear that if information is confidential and the individual has not given or cannot give valid consent, then it should only be shared if (in short) there is a pressing need to do so – for example the information gives rise to child protection concerns, or there is a specific statutory requirement to share the information (as in the case of Ofsted, see below). The information sharing advice states:

‘Whilst the Data Protection Act 1998 places duties on organisations and individuals to process personal information fairly and lawfully, it is not a barrier to sharing information where the failure to do so would result in a child or vulnerable adult being placed at risk of harm. Similarly, human rights concerns, such as respecting the right to a private and family life would not prevent sharing where there are real safeguarding concerns.’

23. Furthermore the information shared should be limited to that necessary to meet this pressing need. In those serious cases the guidance in the information sharing advice will be particularly helpful.

24. It is important to note that the duty of confidence extends to in-house IASS in relation to passing information to other departments of the local authority. As the HSCIC reference document set out above notes, ‘information confided should not be used or disclosed further, except as originally understood by the confider, or with their subsequent permission’. This means information given in confidence to an IASS should not be disclosed or used for purposes outside of the provision of information, advice and support, unless informed consent is given or there is a pressing need to do so.

### **Misuse of Private Information**

25. It is also possible that sharing information held by IASS may give rise to a claim for ‘misuse of private information’, a newly-recognised cause of action under the common law; see *Vidal-Hall v*

*Google Inc* [2014] EWHC 13 (QB); [2014] 1 W.L.R. 4155.<sup>6</sup> This arises where a person has a reasonable expectation of privacy in the information that has been (or may be) disclosed, and it is not necessary and proportionate to limit that person's privacy rights. Misuse of private information can give rise to a claim for damages to compensate for damage, injury to feelings and distress.

26. Importantly, misuse of private information covers information which is 'private', which goes beyond information which is confidential. As such even if information held by IASS is not strictly confidential (which I doubt) it may nonetheless be private information which should not be shared without justification.

## **Article 8 ECHR**

27. Sharing information with local authorities obtained by IASS in the course of providing information and advice to children, young people or parents is very likely to amount to an 'interference' with their rights protected by Article 8 of the European Convention on Human Rights.<sup>7</sup> However because Article 8 is a 'qualified' right the interference will be lawful if it is justified – meaning that it is in accordance with the law, in pursuit of a legitimate aim and proportionate to that aim. If it is appropriate to disclose or share confidential information it is highly likely that the interference with Article 8 ECHR rights will also be justified and therefore there will be no breach of Article 8. On the other hand, disclosing or sharing

---

<sup>6</sup> Approved by the Court of Appeal, see [2015] EWCA Civ 311; [2015] 3 W.L.R. 409.

<sup>7</sup> Public authorities are obliged to act in accordance with the incorporated ECHR rights, including Article 8, by virtue of section 6 of the Human Rights Act 1998. The difficult question of whether section 6 HRA 1998 extends to voluntary sector providers of IASS is not one which in my view it is necessary to resolve for the purposes of this general advice, as all such providers will no doubt want to respect the human rights of the children, young people and parents they are supporting even if they are not legally obliged to do so. If any voluntary sector provider of IASS wishes to obtain advice on the extent of their legal obligations under the HRA 1998 I would be pleased to advise further.

information in a way which breaches the duty of confidence is also very likely to breach Article 8 ECHR, not least because it will not be 'in accordance with the law'. It is important to note that the privacy of children is afforded particular importance by the courts under Article 8 ECHR.

## **Data Protection Act 1998**

28. Further, information provided to IASS is likely to constitute 'personal data' and 'sensitive personal data' for the purposes of the Data Protection Act 1998. 'Personal data' is data which 'relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller' (section 1(1) DPA 1998). This will include information such as a client's name, address, date of birth and so on. 'Sensitive personal data' is defined in section 2 DPA 1998, and includes information likely to be held by IASS such as a client's racial or ethnic origin and physical or mental health or condition.

29. The DPA 1998 regulates the 'processing' of data. The guide issued by the Information Commissioner's Office<sup>8</sup> ('the ICO guide') states 'The definition of processing is very wide and it is difficult to think of anything an organisation might do with data that will not be processing'.

30. The duties under the DPA 1998 are placed on 'data controllers'. A data controller must be a legal person, defined in the code of practice as 'individuals; organisations; and other corporate and

---

<sup>8</sup> Available at <https://ico.org.uk/media/for-organisations/guide-to-data-protection-2-3.pdf>

unincorporated bodies of persons'. The ICO guide is clear that 'Even if an individual is given responsibility for data protection in an organisation, they will be acting on behalf of the organisation, which will be the data controller.' As such, where IASS are provided 'in house' by local authorities, the local authority is very likely to be the data controller. However in the minority of cases where IASS is provided by an external voluntary organisation, that organisation will be the data controller. The code of practice makes clear that 'Data controllers must ensure that any processing of personal data for which they are responsible complies with the Act. Failure to do so risks enforcement action, even prosecution, and compensation claims from individuals.' Damages can be awarded for breaches of the DPA 1998.<sup>9</sup>

31. The data protection principles are set out in schedule 1 to the DPA 1998. As far as relevant here, they include:
- a. First principle - Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless
    - i. at least one of the conditions in schedule 2 is met, and
    - ii. in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.
  - b. Second principle – Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
  - c. Sixth principle – Personal data shall be processed in accordance with the rights of data subjects under this Act.

---

<sup>9</sup> The Court of Appeal in *Vidal-Hall* held that compensation was recoverable under section 13(1) of the DPA 1998 for any damage suffered as a result of a data controller's contravention of any of the 1998 Act's requirements.

32. Schedule 2 then sets out the conditions for processing of all personal data. Requirements of particular relevance to IASS will be:
- a. The data subject has given his consent to the processing.
  - b. The processing is necessary for the performance of a contract to which the data subject is a party or for the taking of steps at the request of the data subject with a view to entering into a contract.<sup>10</sup>
  - c. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
  - d. The processing is necessary in order to protect the vital interests of the data subject.
  - e. The processing is necessary for the exercise of any functions conferred on any person by or under any enactment.
  - f. The processing is necessary for the exercise of any other functions of a public nature exercised in the public interest by any person.
33. Schedule 3 sets out the further requirements which must be met for the processing of sensitive personal data, including:
- a. The data subject has given his explicit consent to the processing of the personal data.
  - b. The processing is necessary (a) in order to protect the vital interests of the data subject or another person, in a case where (i) consent cannot be given by or on behalf of the data subject, or (ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or (b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

---

<sup>10</sup> This is potentially relevant to voluntary sector IASS providers, depending on the terms of their contract with the local authority.

- c. The processing (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), (b) is necessary for the purpose of obtaining legal advice, or (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.
- d. The processing is necessary for the exercise of any functions conferred on any person by or under an enactment.

34. It can therefore be seen that the DPA 1998 places stringent requirements on the processing of sensitive personal data. As such it would in my view be advisable for IASS always to request explicit consent before sensitive personal data is shared. This will be the most certain defence to any claim that the DPA1998 has been breached, in addition to providing a defence to a claim for breach of confidence / misuse of private information.

35. If it is not possible or appropriate to obtain consent, then sharing sensitive personal data with the local authority will only be permissible as a form of processing the data if one of the other conditions in schedule 2 (personal data) and schedule 2 and 3 (sensitive personal data) are met. For example, it may be that the local authority can establish that processing is necessary for it to exercise its functions under an enactment. It is important though to note the following guidance from the ICO guide:

‘Many of the conditions for processing depend on the processing being “necessary” for the particular purpose to which the condition relates. This imposes a strict requirement, because the condition will not be met if the organisation can achieve the purpose by some other reasonable means or if the processing is necessary only because the organisation has decided to operate its business in a particular way.’

36. It is also important for IASS to note what the ICO guide says about transparency:

'Fairness generally requires you to be transparent – clear and open with individuals about how their information will be used. Transparency is always important, but especially so in situations where individuals have a choice about whether they wish to enter into a relationship with you. If individuals know at the outset what their information will be used for, they will be able to make an informed decision about whether to enter into a relationship, or perhaps to try to renegotiate the terms of that relationship.'

37. This is obviously relevant to IASS; if children, young people and parents are made aware that their information might be shared they may well object and / or decide not to access IAS from the service. It is therefore important that children, young people and parents are made aware of circumstances in which their data may be shared with the local authority. The code of practice gives guidance on how this can be done through a 'privacy notice'.
38. Furthermore the ICO guide notes that 'processing may also be unlawful if it results in a breach of a duty of confidence'. As such breaching the duty of confidence is also highly likely to breach the requirements of the DPA 1998.
39. All the above applies in my view both to 'in house' IASS providers and to IASS provided by voluntary sector organisations. In relation to the latter group, the code of practice makes clear that 'Unless one of these specific exemptions applies, individuals should generally be able to choose whether or not their personal data is disclosed to another organisation'. However any use of data by an in-house service will amount to 'processing' and so in my view needs to be justified in the same way.

## The data sharing code

40. The ICO has produced a code of practice on data sharing<sup>11</sup> ('the data sharing code'). It defines data sharing as 'the disclosure of data from one or more organisations to a third party organisation or organisations, or the sharing of data between different parts of an organisation' (emphasis added). Again therefore it applies to both in-house IASS and IASS provided by voluntary sector organisations. IASS should consider the data sharing code in detail if they are asked to share data with the local authority, or indeed any other body.
41. Section 5 of the data sharing code sets out a series of which ought to be considered before data is shared. The suggested questions include:
- a. What is the sharing meant to achieve?
  - b. What information needs to be shared?
  - c. Who requires access to the shared personal data?
  - d. When should it be shared?
  - e. How should it be shared?
  - f. Could the objective be achieved without sharing the data or by anonymising it?
42. The data sharing code highlights that 'The general rule in the DPA is that individuals should, at least, be aware that personal data about them has been, or is going to be, shared – even if their consent for the sharing is not needed.' The only relevant exception to this is where data is processed for 'the prevention or detection of crime'. If IASS decide to share personal data then the data subject (child, young person or parent) ought therefore at least to be informed outside the criminal context.

---

<sup>11</sup> Published under section 52 of the DPA 1998. Available at [https://ico.org.uk/media/for-organisations/documents/1068/data\\_sharing\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1068/data_sharing_code_of_practice.pdf)

43. Section 7 of the data sharing code gives guidance on the need for data sharing agreements or protocols where data is routinely shared. Further guidance on the content of these agreements is given in section 14. An IASS which is going to routinely share data with its local authority should give serious consideration to putting such an agreement or protocol in place. This may also involve carrying out a privacy impact assessment<sup>12</sup>. Section 7 also provides important guidance on information governance issues, such as ensuring that information is accurate before it is shared. This of course assumes that the IASS has decided that routine sharing of data with the local authority is justified, which in my view is unlikely to be the case given the requirements of confidentiality outlined above.
44. Section 10 of the data sharing code sets out a series of 'Things to Avoid', which may lead to regulatory action. They include:
- a. Misleading individuals about whether you intend to share their information. For example, not telling individuals you intend to share their personal data because you think they may object.
  - b. Sharing excessive or irrelevant information about people. For example, routinely sharing details about individuals that are not relevant to the purpose that the information is being shared for.
  - c. Sharing personal data when there is no need to do so – for example where anonymised statistical information can be used to plan service provision.
  - d. Not taking reasonable steps to ensure that information is accurate and up to date before you share it. For example, failing to update address details before sharing information,

---

<sup>12</sup> Defined in the data sharing code as 'a comprehensive process for determining the privacy, confidentiality and security risks associated with the collection, use and disclosure of personal data.'

leading to individuals being pursued at the wrong address or missing out on important information.

- e. Having inappropriate security measures in place, leading to loss or unauthorised disclosure of personal details. For example, sending personal data between organisations on an unencrypted memory stick which is then lost or faxing sensitive personal data to a general office number.

45. Section 12 of the data sharing code highlights important requirements in relation to notifying the ICO if data is to be shared. IASS will need to check these requirements in relation to their specific situation with the ICO.

46. Finally, section 15 of the data sharing code contains helpful checklists, both for systematic data sharing and for responding to one-off requests.

## **Conclusion**

47. In conclusion therefore, where information is confidential (as in my view will generally be the case with information held by IASS) it should only be shared where consent is obtained or when there is a pressing need to do so, most likely being information which gives rise to child protection concerns. Furthermore personal and sensitive personal data held by IASS must only be shared with the local authority, but only if the requirements of the DPA 1998 are met, in particular the conditions in schedule 2 (personal data) or both schedule 2 and schedule 3 (sensitive personal data). The best way to ensure that these conditions are met is for IASS to obtain explicit informed consent. The detailed guidance in the data sharing code should be followed in every case where information is shared. Failure

to meet these obligations is also likely to result in a breach of Article 8 ECHR.

48. Finally, the most secure basis for any decision to share information<sup>13</sup> will be informed consent, from:

- a. A child who is 'Gillick competent'<sup>14</sup> to make this decision;
- b. A young person who has capacity to make that decision within the meaning of the Mental Capacity Act 2005; or
- c. A parent, if the information concerns the parent or if the information concerns a child or young person under 18 and making this decision is considered to be within the scope of parental responsibility.

49. I would advise that any IASS which is asked to share information with the local authority about a child, young person or parent where it does not have informed consent to do so should obtain specific advice on the facts of that case before agreeing to any such request. Equally, advice should be sought in any situation where an IASS is asked to share information routinely with the local authority. I am very doubtful that routine sharing of information in this way could be lawful for the reasons set out above.

## B. Sharing data with Ofsted

50. The new 'local area SEND inspections' will be carried out under section 20 of the Children Act 2004.<sup>15</sup> This provides for joint area

---

<sup>13</sup> The data sharing code states: 'Consent or explicit consent for data sharing is most likely to be needed where: confidential or particularly sensitive information is going to be shared without a clear legal basis for doing so; the individual would be likely to object should the data be shared without his or her consent; or the sharing is likely to have a significant impact on an individual or group of individuals.'

<sup>14</sup> See my previous advice with my colleague Michael Armitage on the issue of Gillick competence.

<sup>15</sup> This is confirmed in the consultation document, see

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/467416/CONSULTATION\\_DOCUMENT\\_Local\\_area\\_SEND\\_consultation\\_FINAL\\_2015\\_10\\_12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467416/CONSULTATION_DOCUMENT_Local_area_SEND_consultation_FINAL_2015_10_12.pdf)

reviews of children's services in particular local authorities. Section 20(3) provides that 'The purpose of a review under this section is to evaluate the extent to which, taken together, the children's services being reviewed improve the well-being of children and relevant young persons (and in particular to evaluate how those services work together to improve their well-being)'.

51. Section 20(8) allows the Secretary of State to make regulations governing reviews under section 20. The relevant regulations are the Children Act 2004 (Joint Area Reviews) Regulations 2015. Under paragraph 1 of schedule 1 to these regulations, Ofsted has the power to inspect documents provided for in section 140 of the Education and Inspections Act 2006. Section 140(2) provides: 'If the Chief Inspector considers it necessary or expedient for the purposes of the inspection, he may do any of the following (a) inspect, take copies of, or take away any documents which (i) relate to the performance by the local authority being inspected of any function to which this Chapter applies, or to any related activity, and (ii) are on any premises in relation to which he exercises his power of entry under section 139...'. Section 139 allows Ofsted to enter any premises other than domestic premises that are not a school. The provision of IAS seems likely to fall within the definition of the functions to which the power in section 140 applies.

52. It seems to me therefore that the legislation summarised above gives Ofsted the power to inspect, copy and take away documents held by IASS, both in-house services and those provided by voluntary sector organisations. This is likely to mean that sharing information with Ofsted will not result in a breach of the DPA 1998. It is also likely in my view that Ofsted's statutory powers override the requirement of confidentiality at common law; in particular section 140(4) gives Ofsted the power 'to require any person holding or accountable for

any documents kept on the premises to produce them'. It should also be noted that it is a criminal offence to obstruct the exercise of any of Ofsted's powers in this area without reasonable excuse, see section 140(9).

53. As such IASS should inform children, young people and parents that their information may be shared with Ofsted for the purpose of the new local area SEND inspections. IASS may wish to liaise with Ofsted to clarify that confidential information obtained during the inspection will not be published or otherwise disseminated in a way that could identify and child, young person or parent. Furthermore consideration should be given to whether the data can be shared on an anonymised basis. The principles in the data sharing code should also be followed.

54. If there are any concerns in relation to a particular request by Ofsted then specific legal advice should be sought.

### C. Changes in IASS provider

55. The data sharing code provides specific advice on situations where the data controller changes in this way, relevant extracts from which are set out below:

'Where an organisation is taken over, merged, abolished or loses responsibility for carrying out a particular function, personal data might need to be shared in a way that was not originally envisaged by the organisation or individuals themselves. The DPA does not prevent organisations sharing data in these circumstances. The key point is that the use of personal data must continue to be fair.

If you know you are going to be taken over, merged with another organisation or that you are losing responsibility for carrying out a particular function, you should take steps to confirm what personal data you currently hold and establish the purposes for which the information was originally obtained.

When it becomes clear that the takeover or merger is going ahead you should consider when and how you will make individuals aware of what is happening. In some cases publicising the change will be sufficient, for example by taking out an advert in a local newspaper. In other situations it will be appropriate for an organisation to contact individuals directly to let them know what is happening. This might be necessary, for example where you have a customer relationship with individuals or where the data you hold is sensitive. In these cases there may be a particular need to reassure people that the information will still be used for the same purposes and will be kept securely.

The information you provide should identify the new organisation and remind individuals about what you hold and how it is used. This might be achieved by providing individuals with a copy of the privacy notice. The important point is that individuals understand who is holding their data and are reassured that it will continue to be used in the way they have been told about and expect.

In some cases individuals will have no real choice about whether their details are passed onto a new organisation. This might be, for example, when responsibility for providing a service they receive from the Council is passed to another organisation. In other cases individuals will have a choice about whether they continue to deal with an organisation after a merger or takeover. Where individuals do have a choice about their details being used by a new organisation, this should be made clear.

It is important that the new organisation processes individuals' data in line with their reasonable expectations...

On a practical level it can be difficult to manage records after a merger or takeover where an organisation is using different databases, or trying to integrate different systems. It is particularly important in this period that you consider the requirements of the DPA. This will include taking appropriate steps to ensure records are accurate and up to date, that you adhere to a consistent retention policy for all records and that you have appropriate security in place.'

56. There are two points from the data sharing code which are in my view particularly important for IASS which may be moving in-house or taken over by a voluntary sector provider:
- a. This will be a situation where it will be appropriate for direct contact to be made with all children, young people and parents for whom IASS hold data.
  - b. Children, young people and parents should have a choice about whether their records are passed on to the new IASS provider, as there is no requirement for them to continue to access IASS. If they choose not to have their records passed on then they must be returned or securely destroyed in accordance with the relevant sections of the ICO guide.
57. I have seen and agree with the advice that IASSN gives to IASS in these circumstances, although it is not in my view strictly the case that the files 'belong' to the child, young person or parent. The advice that children, young people and parents should be given the choice as to what happens to their data is however in my view plainly correct. It may also be helpful to reiterate that all information held by IASS is likely to be confidential and so must not be shared or disclosed without informed consent, unless there is a pressing need to do so (for example child protection concerns).

## **Conclusion**

58. I hope this advice is helpful in allowing IASSN to provide guidance to its members in this important and sensitive area.
59. I note that IASSN currently provide the following advice to IASS when requests for data sharing are made:
- 'IASS offer a confidential service to parents children and young people and in doing so have responsibilities under the Data Protection Act. Any information

about a parent, child or young person, including whether or not they have been in contact with the IASS must not be shared with anyone outside of the IASS unless: the parent/CYP has given permission for information to be shared or there are strong public interest concerns, i.e. child protection/safeguarding.'

60. It seems to me this advice is a reasonable summary of the legal position set out above, although I would suggest that 'permission' is amended to 'informed consent'. The advice should also note that IASS will share information where there is a specific statutory requirement to do so, for example for the purpose of Ofsted inspections.

61. I note further that IASSN has been given two pieces of advice by the ICO, neither of which (as reported to me) seem to be strictly correct:

- a. 'The IASS is part of the LA 'data set' (i.e. the LA is the data controller – whether outsourced or not) so the information held by the IASS could be accessed by certain people in the LA without specific permission from the parent/CYP (for example for reasons of quality control, investigations of complaints etc).'
- In my view while this is probably correct in relation to personal data it is incorrect in relation to sensitive personal data. Much of the data held by IASS in relation to children, young people and parents will include sensitive personal data to which the higher test set out above applies. Furthermore this advice does not seem to me to recognise the obligations on IASS to keep information held on children, young people and parents confidential. I certainly do not see why local authorities should be able to override the requirements of confidentiality for reasons of 'quality control'. In terms of investigation of complaints, I reiterate my view that information should only be shared in those circumstances with informed consent or if there

is a pressing need to do so, for example child protection concerns.

- b. 'Should a service change hands (either through being outsourced or being brought back in-house) then all case files should be given back to the LA.' My view is this is plainly wrong. As set out above the data sharing code states that in these circumstances data subjects should be notified and given the choice as to what happens to their data. It would not be consistent with the purpose for which the data was obtained (the giving of information, advice and support) if the data was simply transferred to another part of the local authority. It would also not be consistent with the principle in the CoP that IASS is an 'arms-length' service.

62. I would stress the importance that IASS comply with all the data protection principles under the DPA 1998. One of the principles (principle 5) is that 'Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes'. As such records which do not need to be kept for the purpose of providing information and advice ought to be securely destroyed. Ensuring compliance with this principle will help prevent breaches when requests are made for data to be shared.

Dated 29 April 2016

STEPHEN BROACH  
Monckton Chambers