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Upholding information rights

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The Information Commissioner's Response to Crown Prosecution Service consultation on Guidance on Pre-Trial Therapy

Introduction

The Information Commissioner is responsible for promoting and enforcing data protection law in the UK including the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA). She is independent of government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. She does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

In June 2020, the Information Commissioner's Office (ICO) published a report[1] ("our report") of its investigation into the practices used by police forces in England and Wales when extracting data from mobile phones in the context of criminal investigations. In addition, the ICO has a separate ongoing investigation looking more broadly into the path data relating to victims of rape and serious sexual offences takes through the criminal justice system from allegation, through disclosure, prosecution and compensation. The findings from both these investigations have implications that are directly applicable to this consultation.

Much has been written recently about the diminishing confidence victims have in coming forward to report serious sexual crimes and being confident that they will be treated with dignity and without undue intrusion into the most intimate aspects of their lives. It is essential when they seek therapy, following an offence committed against them, that they are able to focus on obtaining the help that they require by speaking openly with their therapist in the knowledge that the notes of their sessions will be treated with the respect for privacy that they deserve.

The draft guidance could do significantly more to address the privacy and data protection issues arising when undertaking pre-trial therapy, especially in circumstances where the police may seek access to records of therapy sessions.

[1] https://ico.org.uk/media/about-the-ico/documents/2617838/ico-report-on-mpe-in-england-and-wales-v1_1.pdf

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In the following sections, we set out general principles and points we feel should be taken into consideration in drafting the revised guidance, before responding to the specific questions posed in the consultation.

The nature of pre-trial therapy notes

The GDPR sets out key data protection principles, rights and obligations in relation to processing of personal data. The ICO has developed guidance[2] to assist in the understanding of this legislation.

Article 5 GDPR sets out six principles that underpin lawful processing, and therapy providers, as controllers of data on their clients, should ensure they are familiar with these and pay particular attention to the Article 6 requirements to identify the lawful basis for their processing.

In addition to the general requirements mentioned above, there are particular characteristics of pre-trial therapy notes that require special attention to be given to their processing.

First, of significance to this consultation is the processing of '**special category data**' and the particular conditions and safeguards required to be in place in order that such processing may be lawful. Included within the definition of special category data in Article 9 GDPR is "data concerning health or data concerning a natural person's sex life or sexual orientation". By the very nature of the engagement, pre-trial therapy notes relate to health, and it is quite conceivable that other relevant issues may be engaged.

Therefore, in addition to the lawful basis requirement for general processing, this special category processing requires therapy providers to identify a basis in Article 9 and also a corresponding condition from Schedule 1 DPA.

For example, Article 9(2)(h) GDPR permits the processing of special category data if the "processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in

[2] https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/

paragraph 3". In this context, paragraph 3 refers to the duty of professional confidentiality.

A possible relevant basis in UK law is set out in Schedule 1 condition 2 DPA, and states that the processing must be "necessary for health and social care purposes", which includes the provision of health care or treatment, and the provision of social care.

The other issue of particular relevance is the Article 10 GDPR requirement for special attention be given to **data relating to criminal offences** (including allegations, proceedings or convictions), and this includes data about the victims themselves. The draft guidance under consultation makes it clear that therapy providers may be processing information about such criminal matters whilst engaging with a victim.

Article 10 states that processing of criminal offence data carried out 'under the control of official authority' does not require any further authorisation in UK law. However, in other settings, such as a therapy provider, a Schedule 1 DPA condition will need to be required for the processing to be lawful and, depending on the condition relied upon, an appropriate policy document may be required to be in place.

The ICO has published guidance[3] that aims to assist health and social care providers in understanding their obligations when processing personal information.

Transparency

Article 13 GDPR sets out a range of information that must be provided to persons whose data is going to be processed. Therapy providers will need to consider the capacity of a victim who may still be undergoing trauma to fully understand the information that is being provided to them and ensure they present it in an accessible form. Victims need to be made fully aware of the details of how their data will be processed, including the fact that the information provided by them or recorded about them by the therapist could possibly be disclosed to police and used as evidence under specific circumstances. They should be fully informed and understand exactly what will happen with the information that they disclose.

The victim's information rights should be clearly explained to them from the outset.

[3] https://ico.org.uk/for-organisations/in-your-sector/health/

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Right to object to processing

Of the range of information rights available to all persons whose personal information is being processed, the Article 21 GDPR right "to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her" is worthy of particular note. This applies when the processing is carried out under the lawful bases set out in Article 6 (e) or (f).

Therefore, for example, if the processing is taking place under the Article 6 (f) 'legitimate interests' condition, victims have the opportunity to request that their data is not processed (e.g. stored or shared). The therapy provider would be required to comply with this request unless it was able to demonstrate "compelling legitimate grounds for the processing which override the interests, rights and freedoms" of the victim.

Police use of pre-trial therapy notes in criminal investigations

Unlike therapists, who will be processing data under the GDPR, police will be undertaking processing for law enforcement purposes, which is governed by Part 3 of the DPA.

The processing of data concerning health in such circumstances is classed as "sensitive processing"[4] for law enforcement purposes and is therefore subject to stricter conditions than would otherwise be the case. Our report analysed in detail the conditions necessary for such processing to be lawful.

The requirements underpinning this lawfulness include having an underlying basis in law, namely the obligations of investigators (under the Criminal Procedure and Investigations Act 1996 (CPIA)) to pursue all reasonable lines of enquiry whether they point towards or away from the suspect, and also satisfying a specific condition: either (i) the data subject gives their **consent**, *or* (ii) the processing is **strictly necessary**. In our report, we set out additional safeguards required under the DPA, including that one of the conditions set out in Schedule 8 DPA applies.

Since the publication of our report, the Attorney General's Guidelines on Disclosure have been revised and the draft due to come into force in 31 December 2020 reminds investigators (at paragraph 6) of the requirement for them to consider carefully the questions that arise when "both the right to a fair trial and the privacy of complainants

[4] Section 35(8) DPA 2018

and witnesses are engaged". Further guidance on this issue is provided by the Court of Appeal in *Bater-James and Mohammed* [2020] EWCA Crim 790.

Reasonable lines of enquiry

We do not underestimate the challenges for police, under the CPIA Code of Practice, to pursue all reasonable lines of enquiry whether they point towards or away from the suspect, in identifying proportionate enquiries – and we accept that these may change throughout the course of an investigation.

However, The Attorney General has set out that such enquiries must never be speculative and must always be based on a belief that relevant material exists that will be revealed by the specific enquiry.

There is an obligation to consider the extent to which intrusion into the private life of a person is justified or whether alternative means could be engaged to achieve the same objective of satisfying the line of enquiry.

The 'data minimisation' principle sets out that "personal data being processed for law enforcement purposes must be adequate, relevant and not excessive"[5]. This means that enquiries need to be sharply focused, aimed at areas where there is a belief that material relevant to a reasonable line of enquiry exists. This should never involve the collection of all available information in the hope it may reveal something that may possibly become relevant, nor should large volumes of data be collected in order to generate lines of enquiry.

Sharing personal data with the police

Whilst therapist providers process data under the GDPR and police under the DPA, there is a framework that allows the sharing of personal data *where it is necessary and proportionate to do so* for law enforcement purposes, such as the prevention, investigation and detection of crime.

Where a request is received from the police, therapists must be satisfied that sharing personal data with a law enforcement authority is lawful. This means having an appropriate lawful basis under Article 6 GDPR (along with the Articles 9 and 10 requirements, as applicable) before personal data is shared.

[5] Section 37 DPA

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We note the draft guidance suggests that sharing data with the police is done with the consent of the victim. It is important at this point to draw the distinction between securing the agreement of a victim to allow some of their notes to be shared and the concept of 'consent' in data protection legislation.

One possible lawful basis for sharing the data could be that set out in Article 6(1)(a) – namely that "the data subject has given **consent** to the processing of his or her personal data for one or more specific purposes". However, this may not be practical.

Consent, under GDPR, must be a "freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".[6] Recital 42 GDPR further specifies that "consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment".

As stated in our report, in the specific circumstances of pre-trial therapy notes being passed to police during a police investigation, the duty on police to retain material of relevance to an investigation makes it impractical for the withdrawal of consent to result in the cessation of processing. Also, in the context of a victim wishing their case to be progressed without detriment, it is difficult to envisage how consent would be truly freely given.

A more appropriate lawful basis for the sharing may be that set out in Article 6(1)(f) GDPR ("processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child").

This requires an assessment as to whether the legitimate interests in relation to ensuring a law enforcement authority has all the necessary information for a proper and fair investigation outweighs the rights and freedoms of the victim.

The "purpose limitation" principle in Article 5 GDPR states that "personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a

[6] Article 4(11) GDPR

manner that is incompatible with those purposes". This means consideration needs to be given to whether this new purpose is compatible with the original purpose. When sharing pre-trial therapy notes with the police, therapy providers need to be able to demonstrate that there is a clear legal provision requiring or allowing the new processing in the public interest. They should, therefore, be provided with sufficient information by the police in order for them to be able to make this assessment and potentially challenge the request.

Disclosure of special category and criminal offence data to the police

Whilst the above discussion has covered the considerations necessary for the lawful sharing of personal data with the police, there are further requirements if the personal data being shared consists of special category data (in this case information about the victim's health, sexual orientation or sex life), or criminal offence data (in this case details of an alleged offence), or both.

To share **special category data** with a law enforcement authority, in addition to having a lawful basis under Article 6, it is necessary to identify a specific condition for processing special category data under Article 9(2) GDPR and link this to a corresponding condition from Schedule 1 DPA.

A possible condition that therapist providers could rely upon in these circumstances comes from Article 9(2)(g) GDPR ('substantial public interest'), with the linked condition in paragraph 10 of Schedule 1 DPA ('preventing or detecting unlawful acts').

This condition can be relied upon if the disclosure (i.e. sharing):

- is necessary for the purposes of preventing or detecting an unlawful act;
- must be carried out without the consent of the data subject so as not to prejudice those purposes; and
- is necessary for reasons of substantial public interest.

The difficulties of relying on consent have been discussed above. Because of the challenges associated with the CPIA, consent of the data subject cannot reasonably be achieved.

The term "substantial public interest" is not defined in the GDPR or the DPA. However, the public interest can be taken to cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Substantial public interest

means the public interest needs to be real and of substance, for example the protection of society from further risk of harm by an offender.

As noted previously, **criminal offence data** includes personal data about criminal convictions and offences, or related security measures, and includes information about allegations of an offence and its victim.

Criminal offence data can only be shared with law enforcement authorities if there is a lawful basis under Article 6 GDPR and either:

- the processing is carried out under the control of official authority (for example, public authorities, such as the Driver and Vehicle Licensing Authority; the Disclosure and Barring Service; and the courts, have specific roles which may give them the official authority to process criminal offence data); or
- you have lawful authority under Article 10. The DPA sets out specific conditions providing lawful authority in Schedule 1.

As with special category data, paragraph 10 of Schedule 1 DPA is also likely to provide a condition for sharing criminal offence data for preventing or detecting unlawful acts. You can rely on this condition if:

This condition can be relied upon if the disclosure (i.e. sharing):

- is necessary for the purposes of preventing or detecting an unlawful act;
- must be carried out without the consent of the data subject so as not to prejudice those purposes; and
- is necessary for reasons of substantial public interest.

Unlike special category data, when processing criminal offence data for preventing or detecting unlawful acts, there is no requirement to explicitly demonstrate that the processing is necessary for reasons of substantial public interest, as paragraph 36 of Schedule 1 DPA removes this requirement for criminal offence data.

Key points for therapy providers to consider

1. Therapy notes are classed as special category data, and they may also contain criminal offence data if details of the incident or other criminal acts are recorded.

2. Providers need to be clear about the lawful basis (under Article 6 GDPR) under which they are processing their clients' personal data. This could, for example, be the Article 6(1)(f) 'legitimate interests' condition.

3. They need to understand that they may process special category data on the basis of the Article 9(2)(h) GDPR 'provision of health or social care or treatment' condition linked to Schedule 1 condition 2 DPA that states it is 'necessary for health and social care purposes'.

4. Any criminal offence data may be processed if it is compliant with Article 10 GDPR and a linked condition is identified in Schedule 1 DPA, such as the Schedule 1 condition 2 'necessary for health and social care purposes'.

5. Information compliant with Article 13 GDPR must be provided to any victim or other person whose data is being processed.

6. Providers must understand their obligations under each of the principles set out in Article 5 GDPR.

7. Particular attention should be paid to the 'data minimisation' principle, especially in circumstances where requests are received to disclose data. This may mean restricting which records are shared or redacting information in individual records before they are shared.

8. When receiving a request from police for access to a victim's data, therapists must consider carefully the detail of the request, and:

    a. be clear that the Article 6(1)(f) GDPR 'legitimate interests' condition applies;

    b. to comply with additional requirements around disclosure of special category or criminal offence data, ensure that the sharing is necessary for preventing or detecting unlawful acts and that (in the case of special category data) it is necessary for reasons of substantial public interest;

    c. consider any objection raised by the victim in relation to the sharing of their data;

    d. make an assessment as to whether the requirement for personal data to be disclosed to support the investigation outweighs the rights and freedoms of the victim;

  e. engage with the victim to clearly explain the detail of any proposed disclosure, but do not rely solely on consent as a basis for sharing; and
  f. document their considerations and decisions.

9. Therapy providers should consider whether, depending on which Schedule 1 condition they are relying upon, they require an appropriate policy document to be in place.

Key points for police to consider

1. The sensitivity and confidentiality of pre-trial therapy notes needs to be recognised, and police should only seek access to information contained in them in circumstances where:
   a. they have ascertained that it is strictly necessary in order to satisfy a reasonable line of enquiry, having considered other means and the privacy of the victim;
   b. they are able to explain to the therapy provider why the information is required, and be specific about what is required; and
   c. the request is for the minimum amount of information that is sufficient to discharge the particular line of enquiry.
2. It must be recognised by police that therapy providers have a duty in law to assure themselves that any disclosure to the police complies with data protection legislation.
3. Police must have in place all the safeguards relating to sensitive processing for law enforcement purposes, including an appropriate policy document.
4. Information compliant with Section 44 GDPR must be provided to victims before processing data obtained from a therapy provider.

Concluding remarks

It is recognised that this is a complex area with a range of legislation impacting business processes designed to provide support to traumatised victims whilst allowing criminal investigations to continue.

Data protection law provides gateways for the sharing of therapy data in cases where it is strictly necessary but, as discussed in this consultation response, this must not be a

routine operation and it should never be conducted without due consideration of the rights and freedoms of the victim.

Whilst we have stated that consent should not be relied upon as the lawful basis for sharing sensitive personal information, the needs, concerns and preferences of the victim must be central to the consideration of the extent to which disclosing such information can be justified in the context of a particular investigation.

Above all, there needs to be transparency, and victims need to understand, from the outset of any therapy, how their data will be processed and what their rights are.

We believe there are opportunities to strengthen these points in the proposed revised guidance.

The ICO plans to publish guidance on sharing data with law enforcement authorities before the end of 2020.

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Responses to consultation questions

Question 1 Will the revised guidance and, in particular, the key message that therapy should not be delayed for any reason connected with a criminal investigation or prosecution, encourage victims to obtain the therapy they need in a timely fashion?
This message is clear but, in order for this to be realistic, therapy providers need to ensure that their processing is fair, transparent, and that victims have trust that the data will be used appropriately with due regard for their privacy.

Question 2 Will the revised guidance assist in addressing the perception that therapy will damage the prosecution case?
This does not relate to the application of data processing legislation. Therefore, we are not responding to this question.

Question 3 Will the revised guidance assist in raising awareness of how a traumatised victim may present?
It may assist, but it does not fully cover the issue of the extent to which a traumatised victim will be in a position to provide fully informed, freely given consent at different stages following the incident, and the significant challenges this raises.

Question 4

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Will the revised guidance including the content of Annex A assist in raising awareness about different forms of trauma-based therapy?
This does not relate to the application of data processing legislation. Therefore, we are not responding to this question.

Question 5 Is the revised guidance covering therapies that might cause difficulties at pages 12 and 13 accurate, useful and comprehensive?
This does not relate to the application of data processing legislation. Therefore, we are not responding to this question.

Question 6 Is the revised guidance for therapists at pages 5 and 6 covering discussions with a victim prior to the commencement of pre-trial therapy accurate, useful and comprehensive?
It would be helpful for the guidance to remind therapists of their obligations under the GDPR to be transparent and ensure that they provide victims with information regarding the processing of their data. The specifics of these requirements are set out in Article 13 (in relation to data the victim will be providing themselves) and Article 14 (in relation to data provided by the police), and they include ensuring the victim is fully informed of their information rights, including their right to object to processing at any point.

Question 7

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Does the revised guidance including Annex B provide sufficient clarity to therapists around how to record a disclosure of criminality made by a victim during the course of therapy?
The guidance would benefit from the inclusion of further information to assist therapy providers in understanding their obligations in relation to processing personal data relating to criminal offences, as discussed in the introductory sections of this consultation response.

Question 8 Does the revised guidance provide sufficient clarity to therapists around procedures to follow when called upon to assist with a police investigation?
In relation to disclosure of therapy notes to a prosecutor, your guidance could be clearer in stating that the therapy provider should feel confident in challenging the prosecutor to be explicit regarding their lawful basis for requesting disclosure of the records and their demonstration of why this is strictly necessary, in order that the therapist is able to conduct they own assessment of substantial public interest. The request should be specific (e.g. spanning a specific time period and related to a particular issue) rather than general, and prosecutors must be able to demonstrate the relevance of their specific enquiries. Police should not simply be allowed to speculatively browse patient files in order to decide whether anything might be of interest. Decisions regarding sharing data should be justified and documented. The details of gateways available for sharing are discussed in the introductory sections of this consultation response.

Question 9

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Does the revised guidance provide sufficient clarity around the circumstances when an investigator might seek access to pre-trial therapy notes during the course of an investigation including the importance of avoiding speculative enquiries?
In order to assist compliance with data protection legislation and reduce the likelihood of speculative enquiries it is recommended that the wording of the guidance at sections 5b-5e is reconsidered in light of the preceding discussion in this consultation response.

Question 10 Does the revised guidance provide sufficient clarity around the process that should be followed when an investigator seeks access to pre-trial therapy notes including obtaining the victim's informed consent?
Please see to our earlier discussion in relation to the challenges associated with relying on 'informed consent', particularly in relation to the extent to which this can be freely given and able to be withdrawn at any time. Again, we would recommend sections 5b-5e of the guidance be reconsidered in light of the preceding discussion in this consultation response.

Question 11 Does the revised guidance provide sufficient clarity around the circumstances when an investigator will be required to pass material contained within pre-trial therapy notes to a prosecutor?
The guidance is helpful in that it discussed the disclosure test, and it is hoped that this process will be made easier if a more focused approach to obtaining material from therapy providers is taken in the first instance.

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Question 12 Does the revised guidance provide sufficient clarity around the circumstances when a prosecutor might be required to disclose material contained within pre-trial therapy notes to the defence and how, during that process, consideration is given to the consent of the victim?
The discussion in this consultation response has outlined the difficulties associated with relying on consent in a criminal justice environment (as per Question 10). The guidance could either use an alternative term to indicate the agreement of a victim to comply with the process, or provide a description of how this is different to the term 'consent' as it is applied in data protection legislation. It would be helpful to refer to the victim's right to object to processing in this context.

Question 13 Do you have any other feedback you wish to share around how the revised guidance could be improved?
In its current form, it does not address the concerns expressed by victims about their lack of confidence in how their privacy is respected during criminal investigations. The discussion in this consultation response should be used to improve the draft in this respect.