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Dear colleague

On 24 March 2020, a letter about the national agreement between NHS England and NHS Improvement and independent sector (IS) providers[1] was disseminated.

Daily situation reports (SITREP) and weekly activity data collections of in-contract IS facilities were subsequently launched on 26 March and 1 May respectively. These capture aggregate data on key metrics for each IS site with beds available for NHS patients.

To provide a comprehensive picture, the returns must cover all activity on IS sites, including what has been undertaken by either the IS provider or an NHS trust and subsequently recorded on either the IS or NHS systems. Where activity is only recorded on NHS systems, the IS provider should liaise with the relevant NHS trust to obtain counts of patients to include in their totals.

Please make these data – either in aggregate or at record level (subject to local agreement) – available to IS providers where requested. You can release these data in accordance with information governance requirements, and the wording of the national contract between IS providers and NHS England and NHS Improvement.

The information governance requirements will depend on whether the data is identifiable or not (see Appendix 1).

Provided the relevant safeguards are applied, then information governance should not be an obstacle to sharing the data.

The exact process and timing of data sharing is for local determination. SITREP reports are submitted by IS providers daily. Activity reports are submitted every Thursday for data pertaining to the previous week (Monday – Sunday).

[1] https://www.england.nhs.uk/coronavirus/publication/partnership-working-with-the-independent-sector-providers-and-the-ihpn/

If there are any outstanding concerns about sharing aggregate data with IS colleagues, please contact england.iscoordination@nhs.net.

Kind regards

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Appendix 1: data sharing and information governance requirements

a) Release of aggregate data

The GDPR and common law duty of confidentiality does not apply to information from which individuals cannot be identified, whether directly or indirectly. Personal data that have been appropriately and fully anonymised and/or aggregated fall outside the scope of the GDPR and common law duty of confidentiality. Therefore, sharing patients counts (eg '10 patients this week underwent chemotherapy treatments') required to complete these returns between NHS trusts and IS providers is not subject to the GDPR (subject to the caveat below relating to small patient counts).

The GDPR and/or common law duty of confidence does not, therefore, prevent the disclosure of anonymised/aggregated data.

Trusts must ensure that due care and attention is given to ensure that individuals cannot be identified, with particular focus on instances where the patient numbers are low and/or unique identifiers are ascribed to individual patients such that no individual is identifiable at face value, but could be identified when combined with other information.

b) Release of identifiable data

Where an individual may be indirectly identifiable, both the GDPR and the common law duty of confidentiality would apply, and the information should only be disclosed if it would be lawful to do so. In broad terms, there are sufficiently permissive lawful bases available under the GDPR to enable the information to be shared.

There are also specific COVID-19 policies which cover the sharing of medical information between relevant organisations that further support this proposed information sharing. In particular, a notice from the Secretary of State (known as a 'COPI Notice') can be found here which says that 'processing' (which could include information sharing) confidential patient information is lawful where it is required solely for a "Covid purpose", including:

- to understand information about patient access to health services and adult social care services and the need for wider care of patients and vulnerable groups as a direct or indirect result of COVID-19, and the availability and capacity of those services or that care.

- to monitor and manage the response to COVID-19 by health and social care bodies and the Government, including providing information to the public about COVID-19 and its effectiveness, and information about capacity, medicines, equipment, supplies, services and the workforce within the health services and adult social care services.

There are some limitations on the effect of the COPI Notice. In particular, it requires that:

- information is processed no more than is necessary for the COPI purpose in question.

- as far as is practical to do so, any identifying particulars are removed which are not required for the COPI purpose.

Provided that trusts adhere to these principles then the COPI notice provides a legal gateway to share the information.

Further information is on the Information Commissioner's Office (ICO) website.

c) Contractual information governance provisions for record-level data

Each of the IS providers involved in the COVID-19 response arrangements will shortly be entering into a written contract with NHS England, substantially in the form of the full-length NHS Standard Contract 2020/21, which includes the data protection and information governance provisions of that Standard Contract.

An information governance framework for participating independent sector hospitals sits alongside the contract, as well as a data sharing agreement (DSA) that can be entered between independent sector providers and trusts locally. If you would like a copy, please email england.iscoordination@nhs.net. In summary:

- for the duration of the pandemic, the processing of personal data under the DSA will supersede all existing local personal data processing arrangements between providers and clinical commissioning groups and/or NHS trusts.

- the DSA sets out details likely to be processed, the potential lawful bases for doing so, how data quality and minimisation will be achieved and data retention requirements.

- although there will be multiple personal data flows between the NHS, trusts and the providers, the NHS trust and the provider will be controllers when sharing personal data under the arrangement.

- the DSA does not, of itself, legitimise the sharing of personal data but instead sets out a framework for doing so. Provided that trusts have followed the principles set out above then the information can be shared, whether there is a DSA or not.