

23 February 2018

Dear Dr Wollaston,

Thank you for your letter of 29 January relating to the Memorandum of Understanding in place between NHS Digital, the Department of Health and Social Care (“DHSC”) and the Home Office on the sharing of data in support of Immigration Enforcement work. We have also received a copy of the letter from Ministers at the DHSC and Home Office to you dated 23 February (hereinafter referred to as the “Ministers’ Letter”).

Let me start by saying that, in common with the DHSC and Home Office, maintaining public trust in a confidential health service is a key concern of NHS Digital. As the National Data Guardian has said, it is critical that people feel they can share information in confidence with doctors and other NHS staff caring for them. We wholeheartedly support this position. Our decision to provide the Home Office with data has been taken with care, after detailed review and consideration of the public interest position. The Ministers’ Letter confirms the government’s support for these judgements.

Your letter indicates that some misunderstandings have arisen during your brief inquiry into this activity. I want to address these misunderstandings first before coming to the matter of the public interest assessment which I know is at the heart of your concern.

### **“Undocumented” migrants**

We would like to confirm the points made in the Ministers’ Letter that there appears to be a misunderstanding of the scope of the service: NHS Digital only performs a trace where the person is a suspected immigration offender who is known to, and has ceased contact with, the Home Office. The data is not used to “track down, arrest and deport undocumented migrants”. As explained in the Ministers’ Letter, the Home Office makes enquiries to NHS Digital for the purpose of re-establishing contact with migrants without lawful status who are already known to the Home Office but who have lost touch with the immigration system, so their cases can be concluded. The Ministers’ Letter sets out the circumstances in which such enquiries are made and the policy objectives delivered by this activity. The tracing involves looking up non-clinical data on individuals specifically identified to us by the Home Office and requires that the Home Office informs us what immigration offence they suspect the individual of having committed. Migrants who have not already had contact with Home Office Immigration Enforcement are unaffected by this activity.

A number of the examples cited by NGOs in the evidence provided to the 16 January hearing – for example, of hospital Trusts seeking to establish residency status – are in no way related to the MoU. Rather they are a consequence of action taken by local NHS organisations in accordance with regulations on how to recover the cost of chargeable care from overseas visitors.

## **Involvement of NHSD clinicians in assessments of Home Office requests**

Your letter, and Dame Fiona's recent letter to you, suggests that we (NHS Digital) do not involve clinicians within our organisation in individual decision-making on these requests in order to protect them from the risk that in so doing they would be acting in conflict with the General Medical Council's confidentiality guidance. This is not correct.

As I explained at the 16 January hearing, for Category 1 applications (which constitute over 99% of all the requests to which NHS Digital respond – see Table 1 of our briefing to the Health Select Committee), we have assessed that if the Home Office requests meet a strict set of criteria set out in the MoU (which includes: the request must identify the individual of interest by name, detail the specific crime under section 24/24A of the Immigration Act 1971 which they suspect has been committed, show that there has been a reasonable period of investigation during which the Home Office has sought to trace the individual through other channels, no reasonable explanation for the lack of contact, etc), then the disclosure is considered by NHS Digital to be justified in the public interest. There is no requirement, therefore, for consultation with clinicians in these circumstances. No clinical data is investigated, no clinical data is shared, and no clinical judgement is involved at any point.

A Category 2 application (where a request is made for welfare purposes) may, depending on the circumstances, require escalation within NHS Digital, and this may require advice from the Caldicott Guardian or Deputy, both of whom are clinicians. To date this has not occurred, as the limited number of Category 2 requests that we have responded to (less than 1%) have not in practice required this escalation.

## **Consultation with third parties**

The Ministers' Letter references the broad engagement with users and stakeholders during the NBO Review. Further context and detail were provided by Sir Ian Andrews, Senior Independent Director of NHS Digital and Chair of the Goddard Review after Professor Maria Goddard completed her term as a Non-Executive Director, in his letter to you of 19 January.

Sir Ian explained that, whilst a number of workshops were planned and subsequently cancelled during the process of that review, which he acknowledges led to disappointment for a number of parties, the consultation was nevertheless extensive, including the receipt of 60 survey responses and a large number of one-to-one meetings, extensive legal advice and consultation with multiple third parties.

## **Advice from Public Health England**

Duncan Selbie's letter to your Committee on 6 March 2017 states *"Whilst there is a wealth of statistical evidence about migrant health behaviours there is no robust statistical evidence about the impact of knowledge of data sharing on deterring immigrants from accessing healthcare treatment"*.

Our understanding is that there is a significant amount of anecdotal evidence of anxiety about use of health services amongst migrant communities, and that confidentiality is likely to be one causal factor of that anxiety, but it is not the only factor. As Professor Newton stated at the 16th January hearing: *"We know that, internationally, migrants are dissuaded from seeking care for a variety of reasons, of which confidentiality is one. It is often linked to concerns about eligibility. In fact, one of the primary reasons is the sheer inaccessibility of services for migrants and the lack of information and support. We need to see these factors that provide barriers to care-seeking behaviour, including stigma—that is the other one, from our point of view, when it*

*comes to things like TB and HIV.” So the factors which impact on healthcare seeking behaviour of the migrant community are complex, and as Professor Newton explicitly stated (also on 16th January) “there is no direct evidence linking the MoU to care-seeking behaviour.”*

The Ministers’ Letter speaks to the importance of evidence-based decision-making and this is exactly the approach NHS Digital has taken.

We intend to review the planned research from Public Health England thoroughly when it is available, and we stand ready to reappraise our public interest assessment if that research concludes that there is, in fact, significant evidence linking the MoU and this specific data sharing to healthcare-seeking behaviour of the migrant community.

### **Effectiveness of our Public Interest Assessment**

We do not pretend that the task of balancing the public interest in maintaining a confidential health service against the public interest in supporting effective immigration management and control is straightforward. Having studied some of the history of my organisation, I am aware that my predecessors have worked hard to ensure the appropriateness of the judgement made since this data sharing started, and have periodically reviewed and reassessed the arguments, including as part of the NBO Review. I also independently reviewed the MoU last year, shortly after taking up my role. These assessments have all taken into consideration the fact that the data being shared with the Home Office is at the low end of the scale of confidentiality (consisting predominantly of address data, and never of clinical data) and relates to individuals known to and previously in contact with Immigration Enforcement and who are therefore aware of their immigration status and the requirements imposed on them by the state with respect to their UK residency. The consistent conclusion has been that the public interest in supporting the effective enforcement of immigration law outweighs concerns that this minimal level data sharing in relation to this very tightly defined set of individuals might genuinely impact broader public trust in a confidential health service.

When I wrote to the National Data Guardian a few weeks ago, prior to the hearing of the Health Select Committee on 16 January, I suggested that she and her team might provide an independent review of our public interest assessment. I am very keen to ensure that the Health and Care system is able to place trust in NHS Digital’s assessment of the public interest in this matter. She has written to me since to say that she and her panel are considering this request.

### **Confidentiality concerns**

As I said at the 16 January hearing, I share your concern that there is a difference between i) the legal bases for disclosure in the Health and Social Care Act 2012, ii) the guidance for disclosure contained in the NHS Code of Practice: Confidentiality (2003), and iii) the General Medical Council’s Guidance on Confidentiality (2009 and updated 2017). The key area of concern is that these guidance documents advise that information may be disclosed in relation to the detection, investigation or punishment of *serious* crime, whereas the Health and Social Care Act 2012 (section 261(5)(e)) permits disclosure where it is made “in connection with the investigation of a criminal offence” (not requiring an assessment of the ‘seriousness’ of that offence). Your committee noted that NHS England is undertaking a review of the NHS Code of Practice: Confidentiality which may result in greater alignment of the Code of Practice with the statute.

Nevertheless, NHS Digital has considered the matter carefully, concluding that the data sharing is lawful and proportionate in relation to the immigration offences. Case law confirms that the common law right to

confidentiality is not absolute, and the law recognises the need for a balancing exercise between this right and other competing rights and interests. In the Court of Appeal case of W, X, Y and Z [2015] EWCA Civ 1034, one of the reasons for weighing the balance in favour of disclosure was that the nature of the information in question was considered by the court to be “low on the spectrum of confidential information” (para 85). Our view is that the Home Office requesting disclosure of non-clinical administrative information such as address details (or simply confirmation of information it already has) falls at the less intrusive end of the spectrum. This is one of the factors leading us to conclude that the Home Office’s request is proportionate.

### **Factors considered in our assessment of the public interest**

The Ministers’ Letter sets out clearly the ways in which the data received from NHS Digital supports the work of the Home Office and how it benefits the British public.

Our public interest assessment is our independent assessment of these factors weighted against consideration of the public interest in non-disclosure. The Ministers’ Letter shows clearly that the government view and the bases of our assessment are aligned.

Our assessment of the public interest for Category 1 applications (those made on the basis that the Home Office suspects an individual of having committed an Immigration Offence) considers the factors in favour of acceding to the Home Office’s requests for data sharing, namely:

- Maintenance of law and order, specifically immigration control
- Reduction of the adverse economic impacts of uncontrolled and illegal migration
- Maintenance of contact with government authorities to reduce the harm to individuals
- Reduction of abuse of public services, including ensuring that health services and resources are allocated to those entitled to receive them.

Balancing against the above public interest factors supporting disclosure, we carefully consider the following public interest factors pointing against disclosure of non-clinical data to the Home Office:

- Maintenance of a confidential NHS
- Public health risk from change to health seeking behaviour.

The public interest assessment for Category 2 applications (those made on the basis that the Home Office has welfare concerns about an individual or other individuals) relate to an assessment of the welfare impact and the risk of harm in question, with the secondary arguments supporting disclosure being similar to the above. Category 2 applications account for a very small proportion of overall requests (less than 1% of those responded to).

We also concur with the assessment in the Ministers’ Letter that the sharing is proportionate:

- No clinical data is shared. The data that may be shared is limited demographic data, which means that disclosure is less intrusive, and a lower threshold for disclosure applies
- The Home Office must confirm that it has checked all usual sources of information and has taken reasonable steps in accordance with normal Home Office procedures to locate and re-establish contact before making a request to NHSD

- The individual who is the subject of the request has already been in contact with Immigration authorities and knows (or should know) that they are required to remain in contact.

Our assessment for Category 1 applications concluded that the benefits that could result from disclosure outweigh the obligation of confidentiality to the individual, given the data shared is at the low end of the spectrum of confidentiality and the individual is aware of their immigration status (and responsibilities to keep in touch with Immigration Enforcement). We further conclude that the potential benefits of disclosure outweigh the broader public interest in the provision of a confidential health service, given the small and very specific population of individuals involved and their immigration status. As stated above, these are complex emotive issues, and this is not straightforward. However, when we have reviewed our approach on public interest assessment, we have considered the policy and approach of Government generally in this area and the importance placed on the Home Office function (as shown most recently in the current draft of the Data Protection Bill).

### **Ongoing operation of the MoU**

I hope that the details above provide greater clarity and eliminate some of the confusion that may have arisen. We will continue to share this very limited set of data with the Home Office, in respect of this tightly defined population of individuals previously in contact with Immigration Enforcement, but who they can no longer locate. We do not believe it is in the public interest for us to frustrate the Home Office's function of immigration enforcement by suspending this activity. We note from the Ministers' Letter that the government's position is in support of this approach.

We recognise that this is an issue of significant public concern, although we believe that is, to a significant extent, due to misunderstandings about the scope of the data sharing activities, and the lack of a balanced debate on this in which commentators consider, as we are required to, the arguments for as well as the arguments against the provision of this support.

We stand ready to reappraise our assessments if the work commissioned by the Department of Health and Social Care on confidentiality or the Public Health England research on healthcare-seeking behaviours create new standards or yield new evidence about the societal impact of this activity.

If I can provide any further details, please let me know.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Sarah', written over a light blue circular stamp.

Sarah Wilkinson  
CEO, NHS Digital

**Copied:**

Lord O'Shaughnessy, Parliamentary Under Secretary of State for Health (Lords), Department of Health and Social Care

Caroline Nokes, Minister for Immigration, Home Office

Sir Ian Andrews, Non-executive Director, NHS Digital

Jonathan Marron, Interim Director General Community Care, Department of Health and Social Care

Hugh Ind, Director General of Immigration Enforcement, Home Office

Duncan Selbie, CEO, Public Health England

Professor John Newton, Director of Health Improvement, Public Health England

Dame Fiona Caldicott, National Data Guardian