



mental welfare
commission for scotland



Data Sharing Agreement
Between
The Scottish Public Services Ombudsman
and
The Mental Welfare Commission



Introduction

1. This agreement covers the sharing of personal data by the Scottish Public Services Ombudsman (SPSO) under section 20 of the Scottish Public Services Ombudsman Act 2002 (the SPSO Act 2002) with the Mental Welfare Commission (MWC). While it is anticipated most of the sharing will be from SPSO to the MWC, the MWC may share information to help SPSO identify relevant data or to confirm that SPSO does not hold relevant data. The agreement does not compel or require the sharing of information but provides a framework for sharing securely and appropriately.
2. This agreement takes into account and should be construed and applied in accordance with relevant Data Protection, Human Rights and Access to Information legislation. The organisation to whom the data is transferred will become the data controller of that information for the purposes for which it is transferred. Nothing in this agreement means that either party is processing data on behalf of the other.
3. Section 20 dis-applies restrictions within the SPSO Act to sharing information. Section 20 does not only apply to the sharing of personal data but also to the sharing of any information obtained by SPSO during the consideration or investigation of a complaint (including a whistleblowing complaint) or a Scottish welfare fund review. This agreement does not generally apply to the sharing of non-personal data but there are situations where sharing non-personal data may increase a risk of identification and this is also dealt with in this agreement.
4. Section 17 (j) of the Mental Health Care and Treatment (Scotland) Act 2003 says the SPSO:

shall afford the Commission, any Commission Visitor, or a person authorised by the Commission, all facilities necessary to enable the Commission, or that person, to discharge the Commission's, or (as the case may be) that person's, functions under this Act. This obligation does not directly refer to information nor does it require SPSO to act in a way incompatible with Data Protection legislation but this agreement recognises that it places a positive duty on the SPSO when requests are made by or on behalf of the SPSO to provide assistance.

Approach to data sharing

5. SPSO and the MWC are committed to sharing in line with the Data Protection Principles. These say personal data should be:
 - 5.1. fairly and lawfully processed in a transparent manner
 - 5.2. processed for limited purposes
 - 5.3. adequate, relevant and not excessive
 - 5.4. accurate and up to date
 - 5.5. not kept for longer than is necessary
 - 5.6. secure, and



- 5.7. the controller must be responsible for, and be able to demonstrate, compliance with the principles.
6. Prior to signing this agreement the MWC and the SPSO will share relevant data protection policies to confirm that they have appropriate measures in place to ensure compliance with the data protection principles. They will share any significant changes to those policies that occur during the life of the agreement. They will also share details of the security measures they have in place to ensure safe transmission, receipt and handling of data.
7. This **does not prevent** either organisation seeking specific, written assurances when the data is particularly sensitive, for example, to protect the identify of a whistleblower.

Minimising data shared

8. Pseudonymisation, anonymisation and redaction should be used to minimise personal data being shared. This approach can be used to test the relevancy of data before sharing any details necessary to ensure that the purposes for sharing can be met.

Protecting the quality of data

9. The organisation sharing data will seek to ensure that it is up-to-date and accurate before it is shared. If it becomes aware of any concerns about the accuracy or quality of the data after it has been shared they should contact the other organisation as soon as possible.

Transparency and traceability

10. Data shared will be stored in a way that clearly identifies the source of the data and information about any restrictions that should apply to how it is handled. Data should not be shared within the organisation nor with any third party without such information.

Protecting individual data rights.

11. As data controllers, the SPSO and the MWC on are responsible for ensuring appropriate information is contained in their privacy notices. When data is being actively shared about an individual data subject under this agreement, they will proceed on the basis that data subjects should be informed of an intention to disclose unless there are good reasons not to do so.
12. In addition when the data to be disclosed is special category or a similar type of data (for example, data that could identify or will identify a whistleblower), they should consider whether the data subject should have the opportunity to make representations so their individual rights and any concerns can be fully considered before data is disclosed.
13. SPSO and the MWC will consult with each other before informing a data subject or giving them a chance to make representations in connection with a proposed disclosure of data.
14. Decisions to inform or not should be made on an individual basis but examples of circumstances when it would not be appropriate to inform or give a data subject an opportunity to make representations include:
 - 14.1. legal restrictions (for example SPSO must investigate in private)



- 14.2. it would conflict with or undermine the purpose for sharing
 - 14.3. it would cause unnecessary distress
 - 14.4. it would increase risk to a third party
 - 14.5. there are time constraints which mean it is not possible to inform before sharing
15. Reasons for sharing or not with data subjects should be noted and recorded by the relevant data controller. These should be shared with the organisation receiving the data.
 16. When sharing special category or other sensitive personal data and the data subject is either not being informed or being informed but not given an opportunity to make representations, the reasons should identify actions taken to respect the rights of those individuals. This may include consideration of what concerns they may have raised if they had been given the chance to make representations when making our decisions.

Handling requests for information, complaints or concerns from data subjects

17. The data held by SPSO may be subject to legal exemption from certain data rights and would not normally be disclosed under FOI or EIR requests. SPSO should be contacted for comment before information is disclosed and if any complaints or concerns are raised by data subjects. If information has been shared by the MWC, SPSO will also ensure that they contact the MWC if they receive any requests for that information or concerns or complaints from data subjects.

Data breaches

18. The SPSO or the MWC will notify the other as soon as reasonably practicable following a suspected or actual data breach relating to data that was shared with them or that occurred during the process of sharing.

Identifying purposes and lawful bases for sharing

General

19. Section 20 allows but does not require SPSO to share information with the MWC when it is:
 - “1. An investigation under section 11 or 12 of the Mental Health (Care and Treatment) (Scotland) Act 2003
 - “2. Circumstances of a kind mentioned in paragraph (a) or (d) to (f) of section 11(2) of that Act”.
20. The powers extend to investigation of any case or a general enquiry where it appears to the Commission there may be ill-treatment, deficiency in care or treatment, or improper detention of any person or persons who may be suffering from a mental disorder. This power includes situations where someone has died while or shortly after receiving treatment or being detained.
21. In 2019 a policy document, approved by the Scottish Parliament identified specific reasons why it would be of benefit for SPSO to share information with named organisations under section 20. The reasons identified were to:



- 21.1. support the SPSO to more effectively help organisations fulfil their statutory functions, building in best practice and greater efficiency at the point of delivery
 - 21.2. reduce the likelihood of multiple, overlapping complaints by being able to share information about the SPSO's findings at any stage, not just the outcome, and
 - 21.3. support inspections that are more efficient by ensuring they are targeted and that organisations have access to all relevant information.
22. SPSO consider it may be necessary and proportionate to share personal data to achieve those purposes and, alongside these, to note the positive obligation to provide assistance in section 17 of the Mental Health (Care and Treatment) (Scotland) Act 2003 which means SPSO should, unless there are any compelling reasons not to provide assistance to the MWC when requested to assist them with fulfilling their functions.
23. In terms of data protection legislation we have identified that these purposes may, in individual cases, meet the following lawful bases:
- 23.1. performing a task in the public interest
and when the information contains special category data
 - 23.2. protection of vital interests and
 - 23.3. substantial public interest.

Individual cases

24. It is not envisaged that this agreement will lead to the sharing of identifiable categories or types of personal data held by either organisation on a regular or routine basis. Instead sharing will be on an individual basis. This means that there will be a need for the data controller who is sharing information to identify the purposes for sharing and lawful basis on each case. It is, though, possible to give some general guidance about when relevant data is likely to be held and the types of personal data that it may be proportionate and necessary to share.
25. The SPSO is most likely to hold relevant personal data when it is considering or investigating complaints (including whistleblowing complaints) closely related to areas of interest to the MWC (see paragraph 20 above). The following types of data may be held and may be considered for disclosure:
- 25.1. The names and contact details of:
 - 25.1.1. an individual who is a provider of a service
 - 25.1.2. individuals delivering care or treatment
 - 25.1.3. individuals receiving care or treatment
 - 25.1.4. individuals raising concerns about care or treatment
 - 25.1.5. the names and contact details of employees of a relevant service
 - 25.2. Details of the care or treatment provided including data about any relevant health conditions
 - 25.3. Details of a complaint made to the SPSO



- 25.4. Details of action taken prior to an investigation by SPSO
- 25.5. Professional advice received by SPSO relating to the care or treatment received
- 25.6. Details of the investigation undertaken
- 25.7. Details of actions taken in response to an SPSO recommendation
26. **NOTE:** the decision whether or not to share is one for the holder of the personal data (the data controller) and they should ensure that all decisions are appropriately noted and recorded.
27. When considering sharing special category information it is important to note the lawful bases are “substantial public interest” and “vital interest requires protection”. These are high standards and that should inform what and how much is shared. Information relating to criminal convictions is covered by rules similar to special category data and it is good practice to treat *any* sensitive personal data with the same level of care as special category data.

The data sharing process

Initiating sharing and requesting data

28. Data sharing may be initiated by either the SPSO or the MWC. Each organisation will provide the other with, and keep up to date details of, the appropriate contacts, including a secondary contact if the primary contact is out of office for data sharing requests. These contacts should not be a generic email box and should include phone contact as well as electronic contact details. The method of contact should be secure and appropriate for sharing sensitive personal data.
29. When making a request to SPSO to search for information they hold and for relevant data to share with them, the MWC should, if possible, provide details of:
 - 29.1. the reason they are seeking data
 - 29.2. the statutory function it relates to
 - 29.3. why they consider it possible the SPSO may hold the data
 - 29.4. any personal data required to ensure identification (if, for example, they are seeking data relating to a named person or an issue they have a reasonable belief was raised by a named person).
 - 29.5. what type of data they are seeking.
30. When SPSO is considering sharing personal data they should first share with the MWC on a pseudonymised basis:
 - 30.1. the general nature of the data they are considering sharing
 - 30.2. why they consider it may be relevant to the MWC.
31. The SPSO and the MWC may, after this initial contact request and share additional information to confirm that the data being considered for sharing is relevant and the



specific categories of data that will be necessary. At this stage only the minimum amount of personal data necessary to identify the data should be shared.

Data sharing

32. Data will be shared only in a secure manner appropriate to the category of data being shared.
33. The data will be shared with a statement which sets out:
 - 33.1. the purposes for which it is being shared
 - 33.2. whether and how any data subjects have been informed about the data sharing
 - 33.3. details of any special requirements or reasons to take extra care when handling the data
 - 33.4. contact details for any questions.
34. The MWC will confirm safe receipt as soon as reasonably practicable.

Other

35. SPSO and the MWC will provide each other with a key point of contact for general questions about this agreement.
36. Disagreements about the application of this agreement in any specific case should be escalated to the Director at SPSO and the MWC Caldicott Guardian.
37. This agreement can be reviewed at any time on the request of either party.
38. Either Party shall be entitled to terminate this agreement by giving no less than three months written notice of such termination or by such shorter period as maybe agreed in writing by the parties.

Scottish Public Services Ombudsman

Mental Welfare Commission for Scotland

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Signature

Signature

Rosemary Agnew
Scottish Public Services Ombudsman

Julie Paterson
Chief Executive

Agreement date: 06/04/2021