

## **Children's and Young Person's Data Sharing Scenario**

**Subject: Safeguarding and transfer of personal data when abuse is suspected.**

**December 2021.**

You have been consulted by Sara Khan, who is a nurse based in a doctor's surgery in England. She is seeking your advice as to whether she should share information about one of the practice's patients with children's services.

You are told that one of the practice's patients, Charlotte Lock, came to see Sara this morning. Charlotte attended for a routine smear test and checkup. Whilst at the surgery, Charlotte made a number of comments which suggested that Charlotte was the victim of domestic violence. Sara also noticed a number of significant bruises on Charlotte arms and legs. When Charlotte was asked how the bruising had occurred, she became reticent and refused to answer. Sara Khan is concerned that Charlotte has a two-year-old daughter, Milly who may be at risk of violence, or at risk of witnessing violence to her mother.

Sara Khan has asked you whether she is legally able to share information with children's services, in order to protect Charlotte and Milly. In advising Sara you should consider in particular whether:

- (a) Sara Khan might have legal authority to share information about Charlotte and Milly with children's services
- (b) Sara Khan might be able to share information with children's services without breaching the General Data Protection Regulation and the Data Protection Act 2018
- (c) Any duty of confidentiality arises, and if so whether Sara Khan might, nonetheless, be able to share information
- (d) Any potential claims for breach of human rights might be brought by Charlotte if information is shared, or alternatively might be brought by Milly if she is injured because Sara Khan decides not to share any information

## Review of case.

1.1 In reviewing this case I have established a legal gateway for the surgery<sup>1</sup> who as Data Controller can legally share<sup>2</sup> this information. I determined ;

- an express legal authority exists as defined in the Children Act 1998<sup>3</sup> & 2004<sup>4</sup> and other legislation including the Data Protection Act 2018<sup>5</sup> (DPA2018) & GDPR<sup>6</sup>.
- the obligations and mitigations under the Common Law duty of confidentiality<sup>7</sup> to both Charlotte & Milly.(C&M)
- a determination of the Human Rights Act 1998<sup>8</sup> considerations which include some of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>9</sup> therein.

1.2 I refer to legislation, case law and the ICO guidance on children<sup>10</sup>, Government guidance on safeguarding children<sup>11</sup> GMC guidance on protecting young people<sup>12</sup> and the most helpful guidance<sup>13</sup>, was from Nottingham Council<sup>14</sup>. All other guidance guided practitioners to sharing information without reference to a full legal pathway and made passing references to Human Rights, at odds with the law.<sup>15</sup> This evidenced of *Working Together to safeguard children 2018* which advised practitioners to “report immediately”<sup>16</sup> implying, report and ask questions later!

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<sup>1</sup> The Surgery is the “Data Controller” and assume the full responsibilities as outlined General Data Protection Regulation [2016] OJ 2 119/01 Art.4 (7).

<sup>2</sup> Sharing in this context means the same as “processing” as outlined in General Data Protection Regulation [2016] OJ 2 119/01 Art.4 (2).

<sup>3</sup> Children Act 1989 c.4.

<sup>4</sup> Children Act 2004 c.3.

<sup>5</sup> Data Protection Act 2018.c12.

<sup>6</sup> General Data Protection Regulation [2016] OJ 2 119/0.

<sup>7</sup> 'Legal Annex - Duty Of Confidentiality' (Gmc-uk.org, 2020) <<https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality/legal-annex#sources-of-law-on-confidentiality-data-protection-and-privacy>> accessed 4 May 2020.

<sup>8</sup> Human Rights Act 1998 c.42.

<sup>9</sup> See section 1 Human Rights Act 1998 c.42 s.1 for details.

<sup>10</sup> 'Children' (ico.org.uk, 2020) <<https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/children/>> accessed 8 April 2020.

<sup>11</sup> 'Working Together To Safeguard Children' (Assets.publishing.service.gov.uk, 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779401/Working\\_Together\\_to\\_Safeguard-Children.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779401/Working_Together_to_Safeguard-Children.pdf)> accessed 8 April 2020.

<sup>12</sup> 'Protecting Children And Young People: The Responsibilities Of All Doctors' (Gmc-uk.org, 2018) <<https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/protecting-children-and-young-people>> accessed 8 April 2020.

<sup>13</sup> It was the only practitioner guidance I found that supported establishing a full legal gateway.

<sup>14</sup> 'Best Practice Guidance – Domestic Violence - Multi Agency Risk Assessment' (Equation.org.uk, 2017) <<https://www.equation.org.uk/wp-content/uploads/2018/01/EQ-LIB-197.pdf>> accessed 6 April 2020.

<sup>15</sup> 'Working Together To Safeguard Children' (Assets.publishing.service.gov.uk, 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779401/Working\\_Together\\_to\\_Safeguard-Children.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779401/Working_Together_to_Safeguard-Children.pdf)>

<sup>16</sup> 'Anyone who has concerns about a child's welfare should make a referral to local authority children's social care and should do so immediately if there is a concern that the child is suffering significant harm or is likely to do so. Practitioners who make a referral should always follow up their concerns if they are not satisfied with the response'.

I also refer to the Caldicott principles<sup>17</sup> alongside the review and guidance of the original principles of 1997<sup>18</sup>.

## 2. Matters for consideration.

2.1 In my review, before addressing the four questions I have determined the following:

(a) The information that Sara wishes to share, is the personal data of C&M as outlined in Article 4 (1) GDPR and therefore as patients, a lawful basis as outlined in Article 6 (1.e) GDPR<sup>19</sup> exists to process their data as the information relates to their “direct care”<sup>20</sup> The information will be processed electronically, in scope for GDPR.

(b) The bruising represents health data as defined in Article 4 (15) GDPR this is special characteristic data as defined in Article 9.1. The lawful basis for processing exists in accordance with Article 9.1 (2.h)<sup>21</sup>

(c) The definition of “direct care” includes the bruising of Charlotte’s and potential harm to Milly. This would not require an additional lawful basis within GDPR for sharing with a MASH<sup>22</sup>. However, in this instance I have decided that an additional GDPR lawful basis to share will be needed in accordance with GDPR recital 50<sup>23</sup>. You will find this in section 4 of this report.

(d) The surgery as a statutory member of the Central Commissioning Group (CCG) and providing services as outlined in the Health and Social Care Act 2012<sup>24</sup> is therefore

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<sup>17</sup> 'Caldicott2 Principles' (lgt.hscic.gov.uk, 2020)

<<https://www.igt.hscic.gov.uk/Caldicott2.aspx?tk=439295420261820&cb=04e92b40-620b-4057-b658-eed5b423ba0d&Inv=18&clnav=YES>> accessed 10 April 2020.

<sup>18</sup> 'Information: To Share Or Not To Share? The Information Governance Review' (Static.ukcgc.uk, 2013)

<<http://static.ukcgc.uk/docs/caldicott2.pdf>> accessed 10 April 2020.

<sup>19</sup> General Data Protection Regulation [2016] OJ 2 119/01 Art.6 (1.e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

<sup>20</sup> Dame Fiona Caldicott in Caldicott2 defined direct care as:

“A clinical, *social or public health* activity concerned with the prevention, investigation and treatment of illness and the alleviation of suffering of an identified individual. It includes supporting individuals’ ability to function and improve their participation in life and society”

'Information: To Share Or Not To Share? The Information Governance Review' (Static.ukcgc.uk, 2013)

<<http://static.ukcgc.uk/docs/caldicott2.pdf>> accessed 10 April 2020.

<sup>21</sup> General Data Protection Regulation [2016] OJ 2 119/01 Art.9 (2.h) 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.

<sup>22</sup> Local Authority Multi Agency Safeguarding Hub delivering the local authority statutory duty to collect and share information under section 10, Children Act 2004.

<sup>23</sup> General Data Protection Regulation [2016] OJ 2 119/01 Art.6 Recital 50.

<sup>24</sup> Health and Social Care Act 2012 c.7 s.13 & 28.

deemed a public body and requires express or implied statutory powers to share C&M information. These powers are shown in section 3.

(e) The surgery as a member of the (CCG) is a “relevant agency” as defined in Section 11, Children Act 2004 and Section 16.e(3) of the Children’s & Social Work Act 2017 and has a statutory duty to cooperate in all matters safeguarding with the local authority as defined in Section 10 of the Children Act 2004 act and section 17 of the Children 1989 Act.

(f) That the concerns of SK are not unfounded. Milly can be considered at risk from “*harm and is in need*”<sup>25</sup>. as defined in Children Act 1989. This is further supported by the definition of “*Child Cruelty and ill-treats*”<sup>26</sup> in Part 1 (1) of the Children and Young Persons Act 1933 and further strengthened in Section 66 of the Serious Crime Act 2015<sup>27</sup>.

(g) Milly being 2 years of age means that she has no capacity or capability to give consent for matters about her data or well-being<sup>28</sup> and where possible the surgery will consider, obtaining the consent of Charlotte before sharing. However, refusal of Charlotte’s consent shall not be barrier to sharing if the risk to Milly exists. I have also considered the direction given by the House of Lords in JD (v. East Berkshire Community Health NHS Trust and others) This giving me confidence that the overriding interest should be for the child in all cases of this type.

The well-being of innumerable children up and down the land depends crucially upon doctors and social workers concerned with their safety being subjected by the law to but a single duty: that of safeguarding the child's own welfare.

Brown LJ (Para 138)<sup>29</sup>

Whilst guidance<sup>30</sup> points to gaining consent from Charlotte if safe to do so, I have established that the risks to Milly could be considerable. The risk of consent being

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<sup>25</sup> Children Act 1989 S31 (9) “*harm*” means ill treatment or the impairment of health or development. “*Development*” means physical, intellectual, emotional, social or behavioural development, “*Health*” means physical and emotional health “*ill-treatment*” includes sexual abuse and forms of ill-treatment, which are not physical.

<sup>26</sup> Children and Young Person Act 1933 s.1.

<sup>27</sup> Serious Crime Act 2015 c.9 s.66.

<sup>28</sup> 'Appendix 1 - Assessing The Capacity Of A Child Or Young Person' (Gmc-uk.org, 2020) <<https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/protecting-children-and-young-people/appendix-1--assessing-the-capacity-of-a-child-or-young-person>> accessed 8 April 2020.

<sup>29</sup> JD (FC) (Appellant) v. East Berkshire Community Health NHS Trust and others (Respondents) and two other actions (FC) [2005] UKHL 23.

<sup>30</sup> 'Best Practice Guidance – Domestic Violence - Multi Agency Risk Assessment' (Equation.org.uk, 2017) s.6.1 pg.11 <<https://www.equation.org.uk/wp-content/uploads/2018/01/EQ-LIB-197.pdf>>.

withdrawn at anytime<sup>31</sup> this could compromise an investigation. Charlotte seems reticent to discuss the matter with SK. Therefore, I used the guidance from domestic abuse agency *Somerset Survivors* whose guidance<sup>32</sup> supported a legal gateway that did not involve consent. Their guidance ensures and full review of a legal pathway which includes statute, data protection, breach of confidentiality and human rights. This was persuasive in reaching my conclusion on the matter of consent.

I now respond to the four questions in turn.

### **3. Legal authority to share information considerations**

3.1 The surgery is a public body. To share information with the MASH a statutory gateway must exist. I will address the statutory gateway here.

3.2 In 2 (e) I outlined the implied obligations exist under the various acts to participate and co-operate in child protection measures maintained by the Local Authority under section 10 of the Children Act 2004. Section 11 of the same act expressly shares that responsibility with all relevant agencies.

3.3 Section 11 (4) Children Act 2004 requires:

Each person and body to whom this section applies must in discharging their duty under this section have regard to any guidance given to them for the purpose by the Secretary of State.

It is made clear in the *Working Together to Safeguard Children 2018*<sup>33</sup> that this guidance fulfils the obligation of section 11(4) of the Children Act 2004 and is therefore statutory. In that guidance information sharing is a requirement where a child is deemed at risk<sup>34</sup>.

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<sup>31</sup> 'Consent - The Law Society' (*Lawsociety.org.uk*, 2020) <<https://www.lawsociety.org.uk/support-services/practice-management/gdpr/gdpr-for-solicitors/consent/#>>.

<sup>32</sup> Somerset Survivors, 'Sharing Information In Cases Of Suspected Domestic Abuse' (*Somersetsurvivors.org.uk*, 2017) <<http://www.somersetsurvivors.org.uk/EasySiteWeb/GatewayLink.aspx?allId=126066>>.

<sup>33</sup> 'Working Together To Safeguard Children' (*Assets.publishing.service.gov.uk*, 2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779401/Working\\_Together\\_to\\_Safeguard-Children.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779401/Working_Together_to_Safeguard-Children.pdf)> section 7.

<sup>34</sup> 'Working Together To Safeguard Children' (*Assets.publishing.service.gov.uk*, 2020) para 17. *Anyone who has concerns about a child's welfare should make a referral to local authority children's social care and should do so immediately if there is a concern that the child is suffering significant harm or is likely to do so. Practitioners who make a referral should always follow up their concerns if they are not satisfied with the response.*

3.4 The surgery has a further obligation under Section 115 Crime and Disorder Act 1998,<sup>35</sup> which expressly provides a legal power to share information for the “prevention and detection of crime and disorder” with the Police. In this case Charlotte’s injuries could be from domestic abuse, a crime as defined within legislation, and the risk to Milly will mean the prevention of harm to her is relevant to determining an express lawful power under this act.

#### **4. General Data Protection Regulation and the Data Protection Act 2018 considerations**

4.1 The surgery can confidently share the information with regard to C&M to the MASH as an express statutory requirement exists as outlined in Section 3 and in particular 3.3 and 3.4

4.2 The surgery is subject to statute which requires them to report the risk to Milly which means that they can safely share this information using the following GDPR lawful basis.

- *GDPR Article 6 (1.c)*<sup>36</sup>
- *GDPR Article 9 (2.b)*<sup>37</sup>

The surgery could also, have claimed an exemption under DPA 2018 Schedule 1<sup>38</sup> under the auspices of the prevention of detection of crime, providing exemptions from parts of the GDPR<sup>39</sup>.

4.3 In addition to defining a lawful basis the surgery would also need to ensure that it met the principles laid out in GDPR Article 5 (a to f) GDPR recital 39<sup>40</sup>, and as a surgery those within the 2013 Caldicott review<sup>41</sup> these being:

- That a lawful basis to share exists – **Proven**
- That the surgery has discharged its obligation to transparency in GDPR articles 13 & 14<sup>42</sup> through advance privacy information.

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<sup>35</sup> Crime and Disorder Act 1998 c 37 s115.

<sup>36</sup> General Data Protection Regulation [2016] OJ 2 119/01 Art.6 (1.c) *processing is necessary for compliance with a legal obligation to which the controller is subject;*

<sup>37</sup> General Data Protection Regulation [2016] OJ 2 119/01 Art.9 (1.b).

<sup>38</sup> Data Protection Act 2018.c12 Schedule 2.Part 1 (2.1).

<sup>39</sup> This would have exempted the need to meet the requirements of GDPR Articles 13 to 21, the requirement to inform Charlotte that they had shared information under GDPR Article 34 (1) & (4). The exemption allows sharing with the need to meet the requirements of Article 5.1(a)<sup>39</sup> and 5.1(b).

<sup>40</sup> General Data Protection Regulation [2016] OJ 2 119/01 Article 5 & Recital 39.

<sup>41</sup> 'Information: To Share Or Not To Share? The Information Governance Review' (*Static.ukcg.c.uk*, 2013) <<http://static.ukcg.c.uk/docs/caldicott2.pdf>> s.14.2.

<sup>42</sup> General Data Protection Regulation [2016] OJ 2 119/01 Articles 13 & 14.

- That is only shares facts and not opinion and the minimum required to meet its legal obligation and a “need to know” basis.
- It transfers the information to the MASH securely and is only held on the surgery systems for as long as required by law.
- A record is kept of this and subsequent activities to demonstrate compliance.

4.4 I did not consider consent as a legal GDPR basis, this covered in section 2 (g). However, the consent of Charlotte as the parent of Milly is an important consideration when considering the duty of confidentiality.

## 5 *Duty of confidentiality considerations*

5.1 In assessing the duty of confidentiality I have applied the test for confidentiality as defined by Margarry J in *Coco v, A. N. Clark (Engineers)*<sup>43</sup> Ltd to ascertain the position. The conditions are:

- **The information must be of confidential nature** – in this case the bruising on the arm is confidential to SK and Charlotte.
- **That the information imports an obligation of confidence** – in this case SK as a clinician has an obligation upon her, although not absolute.
- **That there has been unauthorised disclosure** – in this case there is yet to be disclosure.

5.2 There are three situations where making disclosure of this information lawful, two of which are relevant in this case.

These are:

- (a) where disclosure is necessary to safeguard C&M, or others, and/or is in the public interest;** - This case could meet the lawful criteria and the protection of Milly is supported in the judgement by *W v. Edgell* [1989]<sup>44</sup> whereby a doctor could share information without consent of the patient in certain circumstances. The case outlined a number of criteria, however in terms of the public interest Bingham LJ said:

Rarely, disclosure may be justified on the ground that it is in the public interest which, in certain circumstances such as,

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<sup>43</sup> *Coco v A N Clark (Engineers) Limited* [1969] FSR 415, 419

<sup>44</sup> *W v. Edgell* [1989] EWCA Civ 13.

for example, investigation by the police of a grave or very serious crime, might override the doctor's duty to maintain his patient's confidence.<sup>45</sup>

I determined earlier that child abuse to be a serious crime.

This is supported by *Confidentiality: NHS Code of Practice Supplementary Guidance: Public Interest Disclosures 2010*;

Examples of where public interest can be a defence include:

Releasing relevant confidential information to social services where there is a risk of significant harm to a child". (Paragraph 11.)<sup>46</sup>

- (b) In addition, **where there is a legal obligation or instruction from a court** a defence can be made. In Edgell this was defined as the requirement to "satisfy a specific statutory requirement."<sup>47</sup>
- (c) where the individual to whom the information relates has consented; **Consent is not required by the surgery.**

In the case of Milly both defences as outlined 5.2 (a & b) are applicable and therefore the surgery may share without a breach of confidentiality.

## 6. *Human rights considerations*

6.1 The surgery has obligations under the Human Rights Act 1998<sup>48</sup> which as stated earlier enshrined some of the obligations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter "the convention") into UK law.

6.2 Both Milly and Charlotte through Article 8.1 of "the convention" have the right to "respect for his private and family life, his home and his correspondence" These rights create a conflict between the balance to keep Charlotte details private and Milly's right to safety. In Charlotte's case the sharing of information without her consent could be deemed as a breach of the obligations in Article 8.1 for "her private and family life". In parallel Milly has a right for a "private and family life" as defined in Article 8.1 but also Milly should have

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<sup>45</sup> W v. Edgell [1989] EWCA Civ 13 in 81(g).

<sup>46</sup> Confidentiality: NHS Code Of Practice Supplementary Guidance: Public Interest Disclosures' ([Assets.publishing.service.gov.uk, 2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216476/dh_122031.pdf)).<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/216476/dh\\_122031.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/216476/dh_122031.pdf)>

<sup>47</sup> W v. Edgell [1989] EWCA Civ 13 in 81(e).

<sup>48</sup> Human Rights Act 1998 c42.

protection under Article 2 *the right to life* and Article 3 which states “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

6.4 In weighing up this potential conflict “to breach or to share” I am minded to say that sharing can take place. My reasons are as follows:

- Article 8.2 of the “convention” states that “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law .....and is necessary in the interests of public safety.....for the prevention and detection of crime” I earlier held the position that sharing is for the protection of Milly and the prevention and detection of crime therefore I hold the same position on any potential Human right claims by Charlotte, share because you are legally obliged to do so and it is in the public interest.
- My position is supported in *Z v Finland*<sup>49</sup> where the court held that Finland had not violated Article 8 of the Convention. It recognised the balance between confidentiality of medical records verses the need to investigate and prosecute a crime. In this case the “prevention and detection of crime” outweighing the rights in Article 8.

6.5 The obligations on the surgery to protect Milly from harm under Article 3 of “the convention “and any potential from harm were made clear in *Z and others v United Kingdom* [2001]<sup>50</sup> A local authority knew as early as 1987 that 4 children were at risk but despite the local authorities statutory powers to protect the Children, they were only taken into care in 1992 some 4.5 years later. The court held there had been a violation of Article 3 on the basis of:

States which had ratified the European Convention on Human Rights were bound to ensure that individuals within their jurisdiction were not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable people and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge<sup>51</sup>

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<sup>49</sup> *Z v Finland* (1997) 25 EHRR 371

<sup>50</sup> *Z and others v United Kingdom* [2001] 2 FLR 612

<sup>51</sup> HUDOC - European Court Of Human Rights' (Hudoc.echr.coe.int, 2001) Section 5 – Article 3 accessed 10 April 2020.

6.5 The judicial remedy for compensation to Milly would be available under Section 8 of the Human Rights Act 1998. I therefore conclude that failure to escalate this case to the MASH could infringe Milly's freedoms under the Act.

## **7. Conclusion**

7.1 I am content that the surgery can share the information legally as it has in place:

- A lawful purpose and reason for sharing with the Local Authority.
- Has satisfied the requirements of the DPA2018 & the GDPR.
- Has evidenced defences for breaches of confidentiality.
- Has in place mitigations claims arising from breaches of the Human Rights Act 1998.

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