

Dr Paul Thornton^{MPH, FRCGP}

12 September 2008

Mr Richard Thomas
Information Commissioner
The Office of the Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

390 Cromwell Lane
Burton Green
Kenilworth
Warwickshire
CV8 1PL

Phone 024 7646 2927
Mobile 07711 698918
Email paulthornton@doctors.org.uk

Your reference FS50201819

Dear Mr Thomas

I refer to my prior correspondence in respect of the above appeal under the Freedom of Information Act seeking publication of the counsel's opinion obtained by the Department of Health with regard to the proposals for the national NHS databases.

I enclose parliamentary written answers from Mr Ben Bradshaw, Minister of Health dated 25 June 2008 accessible on line at

<http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmhansrd/cm080625/text/80625w0017.htm>

I would be grateful if these could be included for consideration as part of that appeal.

I trust that the Department of Health have now released the opinion to you. You will be able to establish whether these responses derive from the counsel's opinion. As discussed in the prior correspondence, you recognise that claims of legal privilege can no longer be sustained if there has been partial release of the legal advice.

Otherwise, these written answers provide further evidence of the need for publication in the public interest. They reinforce the need to clarify the claimed support in law for the proposed NHS database(s).

As you are aware, section one of the Data Protection Act defines a "data controller" as "a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed".

In reply to questions [212186] and [212185], Mr Bradshaw claims, on the basis of this definition, that the Secretary of State for health is *already* a data controller for detailed patient records. This claim is unsustainable in terms of established custom and practice. Publication of the counsel's opinion is required to determine if this claim is at all sustainable in law.

The Department of Health can only become a data controller if and when such records are transferred to the control of the Department of Health by the true data controller who generates that detailed record. That does not currently occur. At most under

current practice the Department of Health might be regarded as the Data Controller for an extract of some of the data that is transferred to it from detailed care records that are otherwise exclusively under the control of the legal entity providing care.

The Ministers reply is predicated on the assumption that such transfer to the control of the Secretary of State will be automatic, complete and without patient consent through the process of simply adding data to the new computerised record. That assumption is the fundamental design flaw in the Connecting for Health proposals. It is an assumption which is incompatible with previous ministerial reassurances to the public and to parliament that patients would not be obliged to have their records placed on the NHS database.

Questions with regard to the lawfulness of exactly these matters in this system design provoked the request for the counsel's opinion by the BMA and others. They remain unanswered because that opinion has not been published.

It is further noteworthy that the Minister seeks to justify the Secretary of State's role as a data controller because "*the Secretary of State has taken on certain responsibilities, for example for ensuring that the network is operated in a secure manner, by virtue of holding the contract for the new systems.*" Such roles do not require the SoS to be a data controller for the detailed care records, even if national infrastructure has to be used for detailed care records. Such technical responsibilities can and should be exercised on the basis that contractors function as data processors, solely to the mandate of the legitimate original data holder for each detailed care record. Similarly, there is no justification for the Secretary of State to be deemed a data controller in respect of information about a patient that is being legitimately transferred directly between the detailed care records of separate data controllers that are providing care.

Clearly, various agencies, including the Department of Health will need to be independent data controllers in respect of information if it has been lawfully transferred to them from care records but this is distinct from such third party entities being controllers, even in common, for the entirety of the "raw" electronic clinical records.

I recognise the resource constraints placed upon you and your staff as described in your report written with Dr Mark Walport. However, you will appreciate that your clarification is needed urgently as components of the database are already resulting in the dissemination of data beyond the legal entities by whom it has been first recorded in confidence.

Yours sincerely,

Dr Paul Thornton

25 Jun 2008 : Column 361W—continued

Medical Records: Data Protection

Mr. Stephen O'Brien: To ask the Secretary of State for Health who the data controller in respect of information stored on the secondary users database will be. [212184]

Mr. Bradshaw: By reason of the relevant definition at Section 1 of the Data Protection Act 1998, the data controller for information held within the secondary uses service is currently the Secretary of State.

Mr. Stephen O'Brien: To ask the Secretary of State for Health for what reasons he has been designated as data controller in relation to personal data contained in a detailed care record. [212185]

Mr. Bradshaw: Data Controller responsibilities are a matter of fact determined in any particular case in accordance with the relevant definition contained in the Data Protection Act 1998.

In relation to the NHS care records service, the Secretary of State is a data controller for detailed care records in common with national health service organisations, which remain data controllers for information they hold about the patients for whom they provide care.

The Secretary of State has taken on certain responsibilities, for example for ensuring that the network is operated in a secure manner, by virtue of holding the contract for the new systems.

Mr. Stephen O'Brien: To ask the Secretary of State for Health who the data controller will be in respect of information recorded in a patient's (a) summary and (b) detailed care record in cases where the record contains information provided separately by the patient to distinct legal entities which have different independent data controllers. [212186]

25 Jun 2008 : Column 363W

Mr. Bradshaw: Data Controller responsibilities are a matter of fact determined in any particular case in accordance with the relevant definition contained in the Data Protection Act 1998.

The data controller for the summary care record is currently the Secretary of State. With regard to detailed care records, the Secretary of State is currently a data controller records in common with national health service organisations, which remain data controllers for information they hold about the patients for whom they provide care.

Mr. Stephen O'Brien: To ask the Secretary of State for Health if he will bring forward legislative proposals to provide that the Secretary of State shall not be a data controller in relation to personal data processed on a detailed care record. [213315]

Mr. Bradshaw: By reason of the relevant definition at Section 1 of the Data Protection Act 1998, the Secretary of State is already currently a data controller for detailed care records, in common with the national health service organisations which create the records in providing health care to patients.