NHS England Response dated 3 April - Legal Advice

1. Breadth of request

As I understand it the "relevant function" from which the JHOSC request for information under Regulation 26(1) derived, was the review and scrutiny of the temporary closure of the Children's Congenital Cardiac Surgery Service at LTHT in March/April 2013, and specifically Sir Bruce Keogh's role in that closure. This should have been obvious to NHS England from the e-mail exchanges and from discussions at the JHOSC, that this was the subject matter.

2. "Reasonably" required

It appears NHS England have not raised any issue about whether, once the relevant function has been identified, it can also be said that the information is "reasonably" required. However, I think to be on the safe side, and given that NHS England's lawyers may take the point later on, this should still be covered at the JHOSC meeting. This can be done by Cllr Illingworth explaining briefly why having the full details of the key redactions is important to understanding the reasons for the closure, its timing etc. and Members of the JHOSC confirming that they require this information.

3. Redactions

In relation to NHS England redacting the information requested, I think their response misstates or misunderstands the legal position in a number of ways. To help guide Members I have set out my understanding of the position below.

3.1 There is indeed the exemption for "confidential information which relates to and identifies a living individual" in Regulation 26(3)(a), except where one of the conditions in (4) applies. However, in deciding whether this exemption applies, the key issue is whether the information is "confidential" in the first place, and as I've said before I think it must be the case that "confidential" in this context means that the legal test of confidentiality must be satisfied. The reference in Regulation 26(3)(a) simply to "confidential" information is perhaps less specific than the equivalent FOIA exemption which provides that the exemption applies where disclosure would constitute a "breach of confidence" which is "actionable". However, given that 26(3)(b) provides an exemption for information where disclosure is prohibited by statute, I think it must be the case that 26(3)(a) is intended to cover those other circumstances where disclosure can be prohibited by common law rules, in other words where a common law duty of confidentiality applies.

3.2 To satisfy the legal test, information must have the necessary quality of confidence, and must be given in circumstances imposing a duty of confidence. In this context, it is difficult to see how any of the requested information could be regarded as intrinsically confidential. For example, in what way could Sir Bruce Keogh's e-mail messages about these matters to other colleagues in NHS England (or its predecessors), be construed as

creating a duty of confidence either on the recipients of the messages or by extension, on the "responsible person"?

3.3 In any event though, I think the courts would take the view that the burden of proving that information was legally confidential must be on the "responsible person". So it would be up to NHS England to explain how and why they considered specific redactions to be confidential.

3.4 There's also a well-established principle that a duty of confidence which might arise, can also be overridden by a countervailing public interest. In this context, given the significance of the decision to close the Service, and the powers and duties to scrutinise health bodies conferred on local authorities under the Health and Social Care Act and the Regulations, there will plainly be a very strong public interest in disclosure.

3.5 As mentioned above, Regulation 26(3)(b) provides an exemption in relation to "any other information the disclosure of which is prohibited by or under any enactment", unless 26(5) applies. Although the response from NHS England says very little about this, they may take the point that this would exempt "personal data". However, I think it's clear that this exemption will only apply to the extent that the Data Protection Act itself would prohibit disclosure.

3.6 This in turn will require an examination of whether the information is "personal data" in whole or in part, and if so whether disclosure could be made without breaching the data protection principles, or in accordance with one or other of the exemptions from the "non-disclosure" rule in the DPA itself.

3.7 The first data protection principle provides that personal data shall be processed fairly and lawfully, and in particular shall not be processed unless at least one of the conditions in Schedule 2 is met. Condition 6(1) of Schedule 2 permits processing where this is "necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject". If processing would involve an interference with the data subject's right to respect for his private life, then the requirements of Article 8.2 of the ECHR must be fulfilled. The result achieved by the balancing exercise required by Condition 6(1), must be compliant with Article 8.2 – South Lanarkshire Council v The Scottish Information Commissioner. This balancing exercise is also required to assess the general fairness of processing.

3.8 Generally, "the guiding principle is the protection of fundamental rights and freedoms of persons, and in particular their right to privacy and respect to the processing of personal data" - Commons Services Agency v Scottish Information Commissioner. However, the position is different where public officials are concerned and where the purpose for which the data are processed arise through the performance of a public function. In Corporate

Office of the House of Commons v IC and Norman Baker MP, the Tribunal decided "….where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives".

3.9 Again, I think the onus would be on the "responsible person" to show why this information was personal data, and why disclosure would be prohibited by the DPA. However, it's difficult to see how Sir Bruce Keogh's e-mails about the closure of the Service could be regarded by their nature as being personal or private, or that he could have any reasonable expectation that these e-mails were beyond public scrutiny in some way. In carrying out the balancing exercise referred to above, there would of course be the "rights and freedoms" of the JHOSC, and by extension the wider public to weigh against what (little) weight could reasonably be given to those individuals whose personal data was incorporated in the information requested. It would seem however, that the "legitimate interests" or "rights and freedoms" to be taken into account are if anything, more significant and weighty than would be the case if this information were requested under the FOIA. Under the FOIA, a requester might point to the general interest in the transparency and accountability of public authorities, but under Regulation 26 there is the additional public interest in the proper and effective working of the scrutiny function entrusted to local authorities by the 2012 Act and the Regulations. There is also the public interest in the proper planning, provision and operation of the health service which should in turn be enhanced by the proper exercise of the scrutiny function.

4. Next Steps

In view of the response from NHS England, it seems the next steps should be as follows. Firstly, confirm formally that the subject matter of the e-mails, correspondence, and associated letters and reports requested, was the temporary closure of the Service, and specifically Sir Bruce Keogh's role in that process. At the same time, I would suggest it is confirmed to NHS England that if they are proposing to make any redactions, our understanding is they need to explain how these redactions can be justified under Regulation 26(3)(a) or (b). Second, it might assist if we had a dialogue with NHS England's lawyers about these matters, in the hope that a common understanding could be reached on at least some of the points mentioned above. Third, if it appears no progress can be made with NHS England, then I would recommend that we get confirmatory advice from Counsel on the matters mentioned above. Again, this may help to achieve a common understanding both on this request, and on future requests under Regulation 26.

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