In the Matter of:

Workforce Minimum Data Set (WMDS)

–Guidance for Practices

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1. Thank you for these instructions. I am asked to advise and/or comment on a email of advice dated 27 March 2015 issued by Londonwide LMCs ("the LLMC email") which in turn contains a letter issued by LMC Law Ltd dated 26 March 2015 ("the LMC Law letter").

2. The LLMC email indicates that it is a response to a high number of queries received from practices regarding a request to supply data on their staff, to the Health and Social Care Information Centre ("HSCIC"). The data requested includes information relating to recruitment, vacancies, absences as well as personal details such as name, gender, date of birth and national insurance number.

3. The LLMC email suggests that practices can exert pressure on the NHSE/HSCIC to prevent them processing the workforce data they provide. The email, also asserts that once information is received by HSCIC it becomes the data controller and will not be able to process the data provided to it until matters raised as detailed in a letter issued by LMC Law have been resolved.

4. The LLMC email concludes with four steps which it suggests practices "need" to take.

    1. Collect and submit the required data.

    2. Inform all affected practice staff that this is taking place.

    3. Share the LMC Law letter with all affected staff so that they are informed of their rights and what action they can take as individuals.

    4. Encourage everyone whose data is shared to send a section 10 objection to HSCIC along suggested lines.

5. The LLMC email also includes a link to the LMC Law letter to the Chief Executive of HSCIC dated 26 March 2015. In that letter LMC Law make the following assertions:-

    1. Individual employees will be entitled to prevent the HSCIC from processing their personal information by issuing an objection to the Information Commissioner pursuant to section 10 of the Data Protection Act 1998.

    2. Exemptions relied upon by the HSCIC for the purposes of collation of the data will "no longer be operative" and the individual whose personal data you are processing has the right under section 10 of the Data Protection Act to prevent the processing causing damage and distress.

6. LMC Law state that it is not the intention of its clients to cause an obstruction in the administrative working of the NHSE but "we are strongly of the opinion that the detail of data required goes beyond that which is necessary for HSCIC/NHSE to carry out its duties."

7. As I understand it and by way of background, LMC Law initially advised that it was strongly arguable that the HSCIC was acting unlawfully in requiring the above-mentioned information from GP practices. LMC Law have now (rightly) conceded that HSCIC are acting within and pursuant to statutory authority and direction in requiring and requesting the information in question. Although it does not say so explicitly in its most recent letter it appears that LMC Law accept that in providing the requested information GP practices are complying with their legal and contractual obligations and will not fall foul of the data protection regime.

8. As a data controller the HSCIC would have to have legitimate grounds falling within Schedule 2 and where necessary Schedule 3 of the Act for the processing of personal data and sensitive personal data in any particular case. "Processing" is broadly defined in the Act and includes "the disclosure of the information or data by transmission, dissemination or otherwise making it public." However, there is no explicit duty on the data controller to identify or to record the grounds for processing personal data.

9. If processing of data can be said to be necessary for any of the grounds at paragraphs 2-4 of Schedule 2, an individual does not have power to object to that processing by relying on the provisions of section 10(1) of the Act and serving a notice: section 10(2)(a).

10. Paragraph 3 of Schedule 2 is of relevance here. It permits processing where it is necessary to comply with any legal obligation to which the data controller is subject, other than an obligation imposed by contract. It provides that:-

> "The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract."

11. For the reasons which I set out below I consider that it is strongly arguable that any processing of personal data in this exercise would be covered by the statutory requirements to which HSCIC is subject.

12. The Health and Social Care Act 2012 (Commencement No.4 Transitional Savings and Transitory Provisions) Order 2013/160 which came into force on 28 January 2013 brought into force sections 250-277 and Schedule 18 of the 2012 Health and Social Care Act.

13. The HSCIC is established by section 252 of the Health and Social Care Act 2012.

14. Schedule 18 of the Act deals with the constitution of the HSCIC. Paragraph 12 (3) of the Schedule provides that:

> "(3) The Information Centre must provide the Secretary of State with such other reports and information relating to the exercise of the Centre's functions as the Secretary of State may require."

15. Section 253 of the Act sets out the general duties of the HSCIC.

16. Section 254 provides the Secretary of State or the NHS Commissioning Board with powers to require the HSCIC to put in place systems for collecting or analysing information by directing it to establish and operate a system for the collection or analysis of information. Such a direction can only be given if the information obtained by complying with the direction is necessary or expedient in relation to the Secretary of State's

functions in connection with the provision of health services or of adult social care in England or the Secretary of State otherwise considers it to be in the interests of the health service in England or of the recipients or providers of adult social care in England for the direction to be given.

17. Section 254(4) defines "NHS Services" as services the provision of which is arranged by the NHS Commissioning Board or a clinical commissioning group under the NHS Act 2006 or section 117 of the Mental Health Act 1983 (after-care).

18. Regulation 9 of the 2013 Transitional Order concerns the HSCIC.

    In particular regulation 9 subsection (6) provides that any system established, developed, operated or managed or any information collected or disseminated by the Centre pursuant to a direction of the Secretary of State before 1 April 2013 is to be treated on and after the relevant date as if it were a system that the Secretary of State or the Board had directed the Centre to establish under section 254 of the 2012 Act.

19. The WMDS is not a new workforce data collection exercise. The workforce data collection exercise was previously known as 'the GP census' and was carried out annually by the NHS Information Centre prior to the introduction of the Health and Social Care Act.

20. I advise that by virtue of regulation 9(6) of the Transitory Order the system established, developed, operated or managed to facilitate the annual GP census pursuant to a direction of the Secretary of State is to be treated as if it were a system that the Secretary of State had directed the HSCIC to establish under section 254 of the 2012 Act.

21. Accordingly, I consider that the HSCIC is subject to a legal obligation which falls within paragraph 3 of Schedule 2 of the Data Protection Act 2010. As such an individual would not be entitled to prevent the processing of personal information by issuing a notice of objection pursuant to section 10(1) of the Act (see paragraph 9 above.)

22. If contrary to my clear view this is a situation which is not covered by section 10(2), the individual concerned must write to the data controller describing the data involved, setting out the precise processing to which s/he objects and which s/he requires to be changed. The individual's letter should state that the processing in question is causing or is likely to cause

substantial damage or substantial distress to the individual or to some other person; and that the damage or distress would be unwarranted. Reasons for these assertions should also be given. Finally, the letter should specify a period of time within which the data controller is required to cease processing the data or take other specified action. A minimum of twenty eight days is likely to be considered a reasonable period.

23. The data controller is then required to consider the objection. This requires balancing the reasons for processing the data against the grounds for objection to that processing. The principle of proportionality applies so that a public authority would be expected to demonstrate that any processing of personal data and/or sensitive personal data is the minimum necessary for the purposes of achieving the legitimate aim in question. Here that aim has been identified as allowing the Department of Health, NHSE and Health Education England to understand the current NHS Workforce and plan for future workforce planning and education commissioning needs.

24. Of course, the time at which this balancing exercise is carried out may be material but at least prima facie there are likely to be strong public interest grounds to override the ordinary objections of individuals. Indeed having considered this issue the HSCIC in its consultation document on the Workforce Information Architecture ("WIA) Privacy Impact Assessment suggests: "the likelihood of an individual employee being able to demonstrate substantial damage or substantial distress due to the disclosure of this type of data in this format is practically zero."

25. A data controller must respond to a section 10(1) notice within twenty one days indicating whether and to what extent s/he intends to comply with the data subject notice. If s/he regards the notice as unjustified then reasons for that view must be given.

26. It is only after these steps have been taken that an individual may apply to the court and seek an order compelling compliance with any notice. Any proceedings will of course have costs implications for the individual(s) concerned.

27. Whilst there has been a rowing back from earlier advice which may have placed practices in breach of contractual and other obligations there is

still therefore some cause for concern in regards to the LMC Law letter. I would suggest that the letter of advice fails to recognise the legal statutory underpinning of the HSCIC's function in this exercise and fails to recognise the potential consequences of that legal framework. As a result the letter of advice offers an analysis which understates or ignores the legal complexities of the current situation as it affects individuals and GP practices.

28. By way of example although the LMC Law letter expressly disavows an intention to obstruct the administrative working of NHSE, it might be argued that its letter of advice urging those whose data is shared to lodge a section 10(1) DPA objection will have precisely that effect. Furthermore the LLMC email states that the course of action is to "prevent [the HSCIC] processing this workforce data".

29. In addition, GPs and GP practices who have a contractual relationship with NHSE in relation to the provision of services will owe both express and implied duties and obligations to the NHSE including to perform the tasks agreed reasonably and in good faith. The Department of Health and/or NHSE might well argue that one of the duties on GPs is an implied duty not to frustrate the work of the Department and its non-departmental bodies such as the HSCIC having regard to the stated purpose of this data collection exercise.

30. To fail to expressly consider in its advice to members how that advice might impact on GPs' contractual obligations, in circumstances in which LLMC clearly recognises that obstruction in the administrative working of NHSE may result, is surprising.

31. If there are any matters arising from my advice which my instructing solicitor would like to discuss he should not hesitate to contact me by telephone.

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