



2<sup>nd</sup> November 2022

Dear Colleagues,

### **URGENT – 3<sup>rd</sup> Guidance Update on Patient Access to Records**

On 1<sup>st</sup> November, NHS England published an “update” on the “Accelerating Citizen Access to GP Data” programme.<sup>1</sup> This document from NHSE contains several concerning factual, contractual, and legal inconsistencies. Until now, our guidance has been predicated upon the assumption that NHSE & NHSD would be acting on a valid interpretation of the GMS contract and of Data Protection law. As it has become increasingly apparent that this is not necessarily the case, we feel it important to update practices with further guidance on what action they may choose to take to safeguard themselves and their patients.

To begin, NHSE assert that: *“There is widespread international consensus about the benefits to patients and the effectiveness of the health system to provide digital **on-demand** access to personal health information.”*

Notwithstanding the fact that NHSE provide no evidence base or literary citation in support of the above statement, as any medical professional would expect, and notwithstanding the contemporary literature in the British Journal of General Practice only last month stating the contrary,<sup>2</sup> we draw attention to NHSE’s own words *“on demand”* which describe something that is “opt in,” which is wholly contradictory to NHSE’s proposed roll out. This will be expanded upon in more detail below.

### **Summary of NHS England’s Intended Actions:**

In their document, NHS England have notified of their intention to carry out the following actions:<sup>3</sup>

- Where a practice has instructed the system provider (EMIS or TPP) **by 5pm on 4<sup>th</sup> November** not to enable the proposed change, no changes will take place **until 30<sup>th</sup> November** at which point NHSE state that the system *“will be **automatically enabled**”*
- For all other practices, NHS England state that they will *“implement the change as planned, with prospective data entered into patient records from 1<sup>st</sup> November 2022 **automatically becoming visible in a phased way,**”* presumably commencing after 5pm on 4<sup>th</sup> November

It is not clear from NHS England’s communication how they plan to force system providers EMIS and TPP to breach Data Protection law by forcing them to defy instructions given to them by their Data Controllers. Nor have EMIS or TPP stated how they would respond to such attempted action.

<sup>1</sup> <https://digital.nhs.uk/services/nhs-app/nhs-app-guidance-for-gp-practices/guidance-on-nhs-app-features/accelerating-patient-access-to-their-record/update-from-nhs-england>

<sup>2</sup> <https://bjgp.org/content/early/2022/10/21/BJGP.2021.0720>

<sup>3</sup> [https://www.pulsetoday.co.uk/news/breaking-news/nhs-england-instructs-system-suppliers-to-switch-on-automatic-records-access-by-30-november/?utm\\_source=newsletter&utm\\_medium=newsletter&utm\\_campaign=pulsebreakingnewsletter](https://www.pulsetoday.co.uk/news/breaking-news/nhs-england-instructs-system-suppliers-to-switch-on-automatic-records-access-by-30-november/?utm_source=newsletter&utm_medium=newsletter&utm_campaign=pulsebreakingnewsletter)

It is the firm belief of BBOLMCs that the above proposed actions by NHS England are not in compliance with either the GMS Contract Regulations or Data Protection legislation. The contractual and legal bases for our position are explained below.

### **What the GMS Regulations say:**

The Regs contradict NHSE's proposed actions in several ways:

- 1) **Patient Access to the Prospective Medical Record is on an "OPT-IN" and NOT an automatic basis:**
  - a. **Section 71ZA, Para (2)** states: *"The contractor must, if its computerised clinical systems and redaction software allow, offer to P the facility to access online the information (other than any excepted information) entered onto P's medical record on or after the relevant date (the "prospective medical record")."*
  - b. **Para (3)** of the same section states: *"If P accepts an offer made under paragraph (2), the contractor must, as soon as possible, provide P with the facility to access online P's prospective medical record."*
  - c. In summary, the Regs require a practice to "offer" to the patient the "facility" to access their prospective record, and then only "provide" that facility, "if" the patient "accepts" the offer. Ergo, the provision of the facility of access is contingent on the patient's active acceptance of the offer by the practice.
  - d. "Offer" does not mean forcibly administer something to every single patient automatically. Precedent for the meaning of "offering" of services exists throughout the GMS Regs. For example, the "offering" of examination of children in child health surveillance<sup>4</sup>; the "offering" to administer vaccination<sup>5</sup>; or the "offering" of an appointment.<sup>6</sup> Few people would assert that these definitions define imposing a service without patient consent by force
  - e. NHS Digital's own guidance states: *"There is no requirement within the legislation for access to be offered automatically"*<sup>7</sup> and admits the only reason this is being proposed is because it is quicker, making no reference to the increased risks to practices or patients
  
- 2) **Any such provision of access is dependent upon the practice's ability to provide it safely and not dependent upon some arbitrary deadline or politically motivated "Go Live" date**
  - a. **Para (3) of Section 71ZA** already quoted above states: *"as soon as possible"*
  - b. **Section 71ZA, Para (4), Sub-para (a)** states: *"But the contractor may delay providing the facility to P, if the contractor considers that providing P with it is likely to have an adverse impact on its provision of essential services"*
  - c. The emphasis on redaction of *"excepted information"* is emphasised throughout this section of the Regs (**Paras 1,2, & 7**) and the Regulations clearly therefore lay out and describe a process by which a patient is safely given the correct access in consultation with the practice, and NOT automatically en masse

### **What Data Protection Legislation Says:**

As we have explained before, no contract can compel a contractor to break the law. BBOLMCs has sought advice on this before, for example where Health & Safety legislation takes precedence over what may be required in the contract. Similarly, it remains our view that the Data Protection Act 2018 cannot be overridden

<sup>4</sup> <https://www.legislation.gov.uk/ukxi/2015/1862> Part 1, Section 3, Para (3), Sub-para (b)

<sup>5</sup> <https://www.legislation.gov.uk/ukxi/2015/1862> Part 2, Section 3, Para (7)

<sup>6</sup> <https://www.legislation.gov.uk/ukxi/2015/1862> Part 5, Section 17, Para (5), Sub-para (a)

<sup>7</sup> <https://digital.nhs.uk/services/nhs-app/nhs-app-guidance-for-gp-practices/guidance-on-nhs-app-features/accelerating-patient-access-to-their-record/legal-basis>

or circumvented by contractual requirements (real or perceived) or system “asks.” Notwithstanding the fact that, as per the arguments above, the contract in any case **does not** compel practices to apply automatic mass access, even if it did, the provisions of the DPA 2018 would supersede any such obligations.

As explained in our previous comms, The Act<sup>8</sup> makes it clear in [Section 59, Para \(6\), Sub-para \(a\)](#) that “*the processor must act **only** on instructions from the controller.*” Therefore, to apply changes or act in any way without the instruction of the data controller would be a breach of data protection law.

**Such a breach of data protection law would potentially pose a legal risk not just to the Data Processor but also to the Data Controller (the practice) regardless of whether the Data Controller had consented to the breach.**

### **What NHS England & NHS Digital’s Own Guidance Contradictorily Says:**

NHS Digital’s own guidance contradictorily referred to as “Why it is legal and safe to proceed”<sup>9</sup> ironically only lays out what it believes is the contractual basis to proceed, without due regard to Data Protection law. Bizarrely, the guidance points to the obligations of Data Controllers under GDPR, stating:

*“General practice must demonstrate compliance with all the data protection principles as well as the other UK General Data Protection Regulation (GDPR) requirements.”*

Even more strangely, the guidance then affirms how practices can apply SNOMED code 1364731000000104 to any patients they have concerns about, including their entire patient list, and are required to “*manually offer access to those affected patients and should agree a plan with their local commissioner.*”

### **Summary of Contractual Position:**

- There is no contractual requirement whatsoever to automatically impose prospective online access to all patients unilaterally, but rather there is only a requirement to **offer** this facility and then provide it **if the patient agrees**, in a safe manner with suitable time taken for consent and redaction
- NHS Digital themselves agree with the above contractual interpretation<sup>10</sup>
- NHS Digital themselves confirm practices have the option to bulk code any or all of their patients with SNOMED code “104” to prevent this action taking effect
- The DPA 2018 is abundantly clear that action taken by a Data Processor against the instruction and/or without the consent/direction of the Data Controller would be a breach of GDPR

### **Actions Practices May Need to Take:**

If **ALL** of the following apply to you, then **NO ACTION** is required:

1. You have risk assessed your entire patient list and applied SNOMED code “104” to any at risk patients
2. You have checked the entire medical record and all attachments of all remaining patients for any sensitive, third party, or harmful content and have suitably redacted it
3. You are content that the automatic unilateral granting of access to all such patients on your list poses no medicolegal or GDPR risk to your practice

<sup>8</sup> Data Protection Act 2018 - <https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted>

<sup>9</sup> <https://digital.nhs.uk/services/nhs-app/nhs-app-guidance-for-gp-practices/guidance-on-nhs-app-features/accelerating-patient-access-to-their-record/legal-basis>

<sup>10</sup> <https://digital.nhs.uk/services/nhs-app/nhs-app-guidance-for-gp-practices/guidance-on-nhs-app-features/accelerating-patient-access-to-their-record/legal-basis>

If you do **NOT** meet the above criteria then the LMC advises the following options are available to practices:

1. **Write to the Data Processor:** If you have not already done so, exercise your right as Data Controller to write to the Data Processor (the system provider) instructing them to not turn on prospective online access. **This must be done before 5pm, Friday 4<sup>th</sup> November.** A BMA template letter can be found at the bottom of the BMA guidance page linked here.<sup>11</sup> Such an instruction will only guarantee no action will be taken until 30<sup>th</sup> November, and assuming NHSE/D do not decide to try to force system providers to act before that date; it is unclear what would happen after this date
2. **Bulk "104":** The option remains for practices to apply the **SNOMED code "104" (1364731000000104) to every patient on their list.** This would prevent the automated script set to run by system providers having any effect on any patient's record. Some practices have expressed concern that Bulk 104 may cause increased workload at a later date. However, we reassure practices on the following points:
  - a. As the consensus of the BMA, many LMCs, and the GMS Regs is that this service should be provided on an "opt-in" basis, a default position of the facility being disabled is safest
  - b. The Regs make it clear that patients "accepting" the offer and choosing to opt-in, need only be provided the service "*as soon as possible*" in a safe way with informed consent. No deadline can be imposed under the current contract by which practices would need to "undo" this
  - c. Batch SNOMED codes can be reversed in EMIS up to 7 days after they are put in place. A practice therefore may choose to "bulk undo" the code before 7 days and simply re-run it

Practices are reminded that the designated contact emails for system providers are:

EMIS: [aapostpone@emishealth.com](mailto:aapostpone@emishealth.com)

TPP SystemOne: [recordaccess@tpp-uk.com](mailto:recordaccess@tpp-uk.com)

BBOLMCs remains in constant dialogue with other LMCs and the BMA on this issue. As always, if you have any concerns or queries on this guidance, please don't hesitate to contact the LMC at [assistance@bbolmc.co.uk](mailto:assistance@bbolmc.co.uk)

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<sup>11</sup> <https://www.bma.org.uk/advice-and-support/ethics/confidentiality-and-health-records/accelerated-access-to-gp-held-patient-records-guidance>