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Convener
Health and Sport Committee
The Scottish Parliament
Edinburgh
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BY EMAIL

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Dear Convener

Health and Sport Committee consideration of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill

Thank you for your invitation to provide input to the Committee's deliberations in respect of the above legislation. I am sorry that I was unable to provide a substantive response within the requested timeframe and hope that the Committee is understanding of the extent of activity in which we are engaged as a result of the current health crisis.

In your letter you indicate that the Committee would be keen to hear the Information Commissioner's Office's (ICO's) views on the issues highlighted and topics discussed during the evidence session held on 9 June, at which, evidence was taken from the Law Society and Police Scotland. I have focussed, therefore, on the following broad areas:

- Retention;
- Differentiating between data and samples;
- Anonymised DNA data base; and
- Informed choice

Retention

I note that the Bill confers on Health Boards a duty to establish a retention service for evidence gathered from examinations and that the specific period will be provided for via secondary legislation, subsequent to a formal consultation process. Data protection legislation does not provide set timeframes for retention but takes a principled approach that can be adapted for every circumstance. The fifth data protection principle requires that personal identifiable information must only be retained for *as long as is necessary for the specified purposes* for processing. The specified purposes in this case are the detection of crime and the apprehension and prosecution of offenders and the ICO understands that the timeframe for this will differ on a case by case basis with some perhaps

necessitating several years. While it is not the place of the ICO to state how long this should be, consideration should be given to a fixed number of years beyond the closure of the case.

For individuals that self-refer, in the opening question you asked whether victims in such cases should be able to request that evidence that has been collected for forensic medical examination be destroyed and no longer retained. Data protection rights include the right to have personal data *erased* where they are no longer necessary for the purpose for which they were collected, or where either consent or legitimate interests is relied on as the lawful basis¹. However, this right is qualified and the question put by Mr Stewart regarding DNA samples being analysed without the victim reporting the offence, highlights the dilemma of a scenario where some information may have to be handed to the police in the wider public interest, for example, when other victims are involved. I would agree with Gillian Mawdsley, of the Law Society of Scotland, in that it will come down to balancing the rights of the individual against those of the state and is dependent upon the circumstances of each case and a determination of the greater need.

You went on to ask whether such individuals should be able to request that samples be retained, even if they have not reached the point of saying that they want to pursue a criminal case. Once again, another data protection right must be considered here: the right to *restrict* processing. It is particularly relevant in this context as one of the scenarios in which someone may exercise this right includes when their data are no longer needed by the controller but the individual needs them to be kept in order to *'establish, exercise or defend a legal claim'*².

Differentiating between data and samples

Mr Cole-Hamilton asked Gillian Mawdsley whether she foresaw any issues relating to processing or storing of personal data. In her response and in written evidence, the Law Society has raised concerns about the lack of clarity in both the Bill and the Data Protection Impact Assessment on this matter.

Misconceptions around what constitutes personal data for the purposes of data protection often lead people to believe that only something that explicitly identifies the individual would come within its meaning. This is not always the case. As was highlighted during the course of discussions, evidence may include articles such as clothing, bedding, crockery, cans, etc. While all of these would not, in and of themselves, constitute personal data, in combination with other data, such as the address from which they were obtained or tagged with a reference number unique to an individual's complaint, they may then be capable of identifying that individual and could, as a result, constitute personal data.

¹ Article 17, paragraph 1(a-c), of the General Data Protection Regulation 2016

² Article 18, paragraph 1(c) of the General Data Protection Regulation 2016

However, this would only be the case when they were held by an organisation that can make the connection: i.e. holds the items of evidence and has access to information that relates it to the complainant. This would not in any way prevent that organisation from holding the evidence, it would simply require a realisation that the items may constitute personal data and must be handled accordingly.

Anonymised DNA data base

Some discussion took place around the appetite for the construction of a database for anonymised DNA samples. When asked if Police Scotland would welcome an anonymised DNA data base, Detective Superintendent Capaldi said:

Although there are benefits, there are ethical issues around the storage and retention of that information for individuals, and it might cause more problems than it would solve.

I would absolutely concur with this response. Some Committee members may recall a nationwide debate some years ago about retention issues in respect of the national DNA database. The ICO was at the forefront of that debate, advocating for the rights of individuals to have their biometric data deleted from the system when they were no longer required. Moreover, although it may seem that this is about unidentified DNA, that would only be the case if the holder of the database did not have access to any other system that could identify those data. The fact that Police Scotland has access to the national DNA database would render the anonymisation invalid if it was held within its own systems.

Informed choice

I realise that data protection is often considered to be complex but this relatively simple concept is the cornerstone of the regime. In data protection terms, this is about making sure that individuals are fully aware of what will happen to their personal information so that their expectations can be managed and they are able to make informed choices about how their information may be used. It is imperative, therefore, that complainants are fully informed about with whom their data are to be shared and for which purposes. Even when not relying on consent for such sharing, it is still a fundamental requirement that individuals know what to expect. In circumstances that necessitate a forensic medical examination to be carried out, whether via self-referral or not, individuals will be in the most vulnerable of states. Therefore, to ensure that they not only receive the information they need to make informed decisions, but also understand what this means, Health Boards must consider carefully how this can be done effectively and meaningfully to fulfil their duty under section 4 of the Bill.

Although in response to a question on retention, Gillian Mawdsley expresses this in her evidence when she stated:

... it is fundamental that the victim or the person from whom samples are being obtained is clear about what is being obtained, why it is being obtained and what it will be used for...There are many issues, but I stress the importance of the information and support that must be given at the first point of self-referral.

Indeed, when asked about what information should be given to individuals when they self-refer, Detective Superintendent Capaldi in his evidence summed up the foregoing when he said: "It is a question of having choices and options." One cannot make informed choices without adequate information being provided.

I hope you find this helpful in your deliberations but do please get in touch if you need any clarification.

Yours sincerely

Dr Kenneth Macdonald
Head of ICO Regions