

# Adult Social Care and Health Directorate

## Business Delivery Unit: Information Governance

### Implementation and how to apply the National Data Opt Out Policy

#### Document details

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## Introduction

This document describes the implementation and how to apply the National Data Opt Out Policy where confidential patient information (originated within the health and adult social care systems in England) will be processed, used, and shared for purposes beyond individual direct care.

The National Data Opt Out Policy was set by the Department of Health and Social Care (DHSC) who directed that from 25<sup>th</sup> May 2018, NHS Digital must operate an opt-out system to enable health and social care organisations to check for and apply opt-outs.

The service enables patients who have set a national data opt-out preference to opt out of their confidential data being used for purposes beyond individual care.

This follows recommendations from the National Data Guardian in her [Review of Data Security, Consent and Opt Outs](#). All health and social care organisations including local authorities and organisations under contract with local authorities must comply with the National Data Opt-Out and the associated [information standard](#).

## Scope

This policy applies to any processing activity that does not meet the definition of individual care.

For example, it would include purposes such as planning for the provision of local services, managing, and running NHS and adult social care services, commissioning, invoice validation, national clinical audits, and research etc.

This document applies to all projects within the ASCH directorate or undertaken by other directorates and / or teams that result in the processing, use and sharing of ASCH confidential patient data for purposes beyond individual care.

This could include projects internal to the ASCH directorate or joint projects across other directorates and / or teams and projects involving third parties, for example.

## Definitions

This document uses the following terms:

- **NHS Digital** – the organisation responsible for implementing the National Data Out Opt Policy for all health and social care organisations to comply with.
- **National Data Opt Out Policy** – the national policy introduced by DHSC which requires NHS Digital to implement the data opt out service following recommendations from the National Data Guardian.
- **Data opt out or opt out** – a patient who wishes to opt out of their data being used for purposes beyond direct care.
- **Patient** – a person who is actively seeking receiving social care services. A patient could also be referred to as a (social care) client.
- **NHS number** – the unique 10-digit reference number given at birth or when a person first registers to a Public Health service in England.

- **MESH** – Message Exchange for Social Care and Health service which enables organisations to establish a secure link to NHS Digital to provide and receive lists of NHS numbers. ASCH Directorate has the MESH client service installed.
- **ASCH directorate** – the teams / divisions who make up the whole of ASCH.
- **Third parties** – refer to external organisations who have been contracted by KCC team(s).
- **Performance Officers** – ASCH Directorate staff who sit within the Performance Team and who have access to the MESH service.
- **Project Lead** – the person who is responsible for the secondary care project / the person who is responsible for the purpose change of the project

## Definition of Confidential Patient Information

Confidential patient information is defined in sections 251(10) and (11) of the National Health Service Act 2006 as a legal term that refers to information about a patient (alive or deceased) that meets the following 3 requirements:

- it is identifiable or likely to be identifiable, e.g. data likely to be held by the person or organisation receiving the data (if a patient could be identified from it),
- it was given in circumstances where an individual is owed an obligation of confidence
- conveys some information regarding the mental or physical health, condition of an individual, diagnosis of their condition, or information on their care or treatment

The definition of patient specifically includes individuals who receive adult social care from or arranged by a Local Authority.

It is important to identify at the start of each project if the data in scope is confidential patient information. For example, demographic information e.g., name and address, would not usually be classed as confidential patient information unless this gives an indication of a patient's medical condition such as: care home for patients with dementia.

## How will the National Data Opt Out Policy will be implemented

Checking for the data opt outs will be carried out by three Performance Officers (part of ASCH's directorate Performance Team) on an ad-hoc basis. That is, as and when it is required to do so where a project involves processing, using, and sharing confidential patient information for secondary care purposes.

The Performance Officer(s) will extract a list of NHS numbers from Mosaic (using Structured Query Language (SQL) and the criteria in the Project Lead's email) and securely send these to NHS Digital via the Message Exchange for Social Care and Health (MESH). The MESH enables the ASCH directorate to securely send and receive large files, up to 20GB, via a mailbox to maintain the security of the data being sent and reviewed. NHS Digital have released a [user guide](#) on using this service that all three Performance Officers will follow.

Upon receiving this list, NHS Digital will use their national data opt out repository on the NHS Spine to check if a social care client has opted out. Only NHS numbers will be

returned where social care clients agree for their data to be used for secondary care purposes. This returned list will then form the cohort for each project and any additional, relevant information will be added to this list.

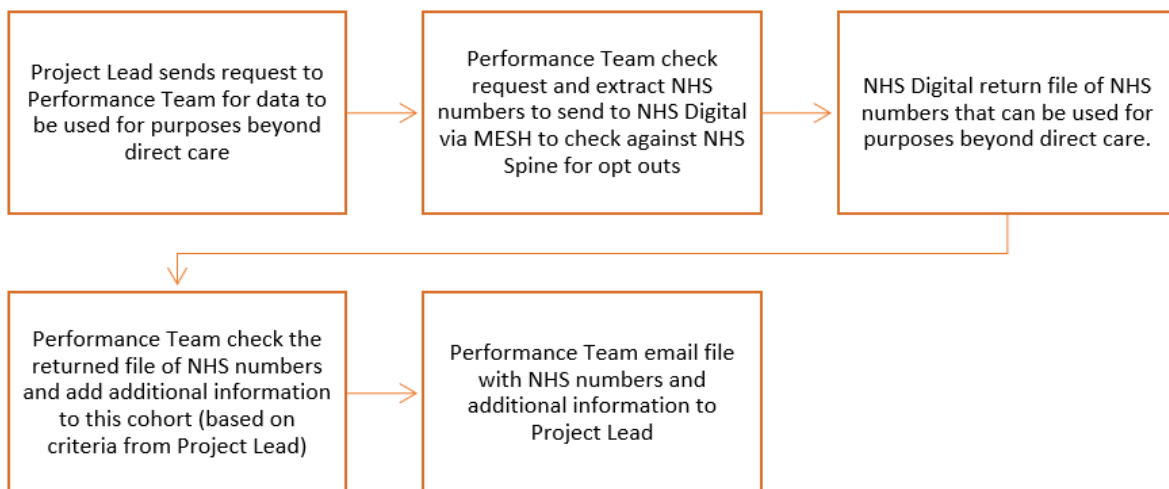
### When to not apply the National Data Opt Out Policy

The following list of data disclosures do not require the National Data Opt Out Policy to be applied:

- data being disclosed is anonymised in line with the ICO Code of Practice on Anonymisation,
- consent has been obtained from the individual for their data to be used for the specific purpose,
- the organisation only uses confidential patient information for individual care.
- information required by law or court order,
- Mandatory legal requirement for the data disclosure that sets aside the common law duty of confidentiality,
- where there is an overriding public interest in the disclosure (exceptional circumstances only and KCC Policy on how to apply the public interest test must be followed),
- Statutory authorisation process exemptions for the use of data under Section 251 NHS Act 2006. As set out in The Health Service (Control of Patient Information) Regulations 2002. (E.g., under Regulation 3 for communicable diseases and other risks to public health). (Approval to rely on this is by application to Public Health England).

### When to apply the National Data Opt Out Policy

The following flow diagram describes the process on how the National Data Opt Out Policy will be implemented. Please also refer to the additional guidance covered in 'how to request data', 'applying NHS numbers to a project' and 'using the data for a project'.



## How to request data

It needs to be identified at the start of a project that confidential patient information, that has originated from a health or social care system, will be processed, used and share for purposes beyond individual care.

The Project Lead will need to inform the ASCH directorate's Performance Team by completing the [ASCH Performance Products](#) (internal link only) data request form so the national data opt out can be applied. The data request form should include:

- The reasons why this data needs to be processed
- The criteria for the processing cohort e.g., age, gender, social care clients who live in East Kent for example. As well as identifying any key fields also needed to be extracted from Mosaic e.g., start date, primary client type etc.

The Project Lead will need to confirm that all relevant IG arrangements are in place and there is a clear basis in law for this information.

Please note that Performance Officers may need to clarify project details with the Project Lead before applying the National Data Opt Out Policy.

## Applying NHS numbers to a Project

Once NHS Digital have returned the list of approved NHS numbers, the Performance Officers will ensure the right data has been returned. If there are any anomalies or incorrect data has been sent, the data will be deleted from the MESH service, any emails or any files or shared folders, and NHS Digital contacted. No data will be processed further (because receiving it, checking it, and deleting it are all processing activities) until NHS Digital have confirmed the accuracy and validity of the NHS numbers. The Performance Officer(s) will keep the Project Lead(s) updated on development.

Any data disclosures must ensure that where a client has opted out, their entire record (not just the identifiers) are removed from the prepared data before it is closed. To mitigate this risk, when the data (NHS numbers) have been verified, the Performance Officer(s) will only use this identified cohort to apply any additional data. This information will then be sent to the Project Lead via email as a password protected file. The Performance Officers will also remind the Project Lead of the intended use of this data, what to do if there is a purpose change, and any limitations as set by the [License Agreement](#). Data should not be removed from the client's original record. A summary of license conditions are:

- You are licensed to receive data via the service for the purpose of enabling you to comply with the National Data Opt Out Policy.
- When you receive the data from the service, you are the data controller for the service data.
- The service data may only be accessed for the purposes of applying national data opt-outs or where there is a legal or statutory reason for the data to be accessed
- The service data must not be explicitly added to a patient's record

- The service data must not be shared with any other organisation unless it is for the express purpose of the other organisation being able to apply national data opt-outs on your behalf (however also see the Caching the service data section below as to how long the service data may be retained by the other organisation)
- The service data must not be used to explicitly provide those staff who are performing a clinical role (clinicians or care staff) with a view of a patient's national data opt-out preference. The only exception to this is if the member of staff performs multiple roles and as part of their non-clinical role, they are responsible for disclosing service data when it is cached
- The service data must be stored securely with appropriate access controls. This includes any cached and superseded cached data.

ASCH will not be caching the service data, however for restrictions of this function, please see the License Agreement for more information.

Upon receiving a delivery receipt, the Performance Officer will delete the email and attached password protected file from their KCC email and then will send the password for the protected file in a separate email. Again, a delivery receipt will also be asked for.

If a delivery receipt is not generated for either of the emails, the Performance Officer will recall the emails and notify the Project Lead via other means e.g., MS Teams, Skype to verify their email address details.

### Using the Data for a Project

The Project Lead will be responsible for ensuring the password protected file is used following the terms and conditions of the National Data Opt Out Policy. The Project Lead will also be responsible for ensuring the password protected file and any subsequent workings will be deleted and disposed of at the end of a project's life cycle in accordance with GDPR and Data Protection Act 2018 and in accordance with KCC's published retention schedule available on Knet.

It will also be the Project Lead's responsibility to ensure any of the password protected files contents are processed, used, and shared in accordance with any relevant ASCH directorate disclosure rules. That is, numbers of 10 or less should be removed and replaced with either an asterix or <=10.

In the unlikely event of a data breach occurring, Performance Officers and the Project Lead will follow KCC's [Data Breach Policy](#) (internal link only) and notify the Information Resilience and Transparency Team of this breach.

### **Patient Communication Channels**

All patients should have been informed by NHS Digital of the [National Data Opt Out Policy](#) and have been given the opportunity to object to their confidential patient information being used for purpose beyond direct care.

A patient can opt out (or opt in) at any time by either registering their opt out choice via online, by phone or by post. More information on these services can be found out at:

<https://www.nhs.uk/your-nhs-data-matters/manage-your-choice/>.

It is each health and social care organisations responsibility to ensure any new patients are informed of the National Data Opt Out Policy and are reminded they are able to change their opt out choice at any time.

Social care clients should also be signposted to the [ASCH General Notice](#) (available on [kent.gov](http://kent.gov)) which provides information on how social care clients can register their opt out choice.

Please be aware it is not possible for the ASCH directorate to note a social care clients' data opt out choice. Social care clients will need to inform NHS Digital of this choice so that it can be implemented at a local level e.g., ASCH.

### **Information Governance Considerations**

When using, processing, and sharing confidential patient information it is important to remember to comply with the General Data Protection Regulation 2016 and the Data Protection Act 2018. In particular, ensuring all projects for secondary care purposes adhere to and met the fundamental data protection principles in [Article 5](#):

- (a) lawfulness, fairness and transparency
- (b) purpose limitation
- (c) data minimisation
- (d) accuracy
- (e) storage limitation
- (f) integrity and confidentiality

and (2) accountability. [ASCH's privacy notices](#) must also be adhered to and followed. That is, the type of information being processed and the reasons why it is being processed must already be covered by one or more of the relevant privacy notices.

It is also important to remember that the National Data Opt Out Policy also covers deceased individuals and their data, however GDPR only applies to living individuals.

ASCH directorate staff must also bear in mind agreed disclosure rules on Mosaic data (numbers of 10 or less should be marked as an asterix (\*) or "<= 10"). Other internal teams who require use of social care client data must also bear in mind any applicable disclosure rules when processing, using, or sharing this type of information.

ASCH directorate staff or other internal teams are required to ensure they have completed a DPIA (where applicable) prior to requesting this policy to be applied to confidential patient information. They are also required to ensure they have permission from the Caldicott Guardian in-line with the [Information Sharing Policy](#) (internal link only), or any necessary [applications to the Confidentiality Advisory Group](#) to obtain approval to disclose confidential patient information without consent for research or non-research purposes before starting to process any data.



## Policy Review

This document will be reviewed on a yearly basis and the next review date will be August 2022. Any changes or updates will be reflected within the version control and circulated thereafter as soon as possible.

## Useful Links

NHS Digital have produced guidance for health and social care organisations on the following:

- <https://digital.nhs.uk/services/national-data-opt-out> - general information about the National Data Opt Out Policy including how patients can find out more information and how to register their opt out choice.
- <https://digital.nhs.uk/services/national-data-opt-out/understanding-the-national-data-opt-out/confidential-patient-information> - more information about the legal term 'confidential patient information' and how this applies to data opt outs.
- <https://digital.nhs.uk/services/national-data-opt-out/compliance-with-the-national-data-opt-out/check-for-national-data-opt-outs-service> - information about the technical solution (Message Exchange for Social Care and Health).
- <https://digital.nhs.uk/services/message-exchange-for-social-care-and-health-mesh/mesh-guidance-hub> - the MESH guidance hub for health and social care organisation staff.
- [Information Standard](#) detailing a set of requirements to ensure health and social care organisations comply with the National Data Opt Out Policy.
- [Operational Policy Guidance](#) detailing an understanding the application of the National Data Opt Out Policy.