



# **Protocol for the Consultation, Co-operation and Disclosure of Information between the Northern Ireland Public Services Ombudsman and the Regulation and Quality Improvement Authority**

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## **1. INTRODUCTION AND BACKGROUND**

### **The Northern Ireland Public Services Ombudsman**

The powers of the Northern Ireland Public Services Ombudsman (the Ombudsman) in respect of health and social care (HSC) complaints are set out in the Public Services Ombudsman Act (Northern Ireland) 2016 ('the 2016 Act'). Section 5 of the 2016 Act provides the Ombudsman with the power to investigate a complaint made by a person aggrieved who claims to have sustained an injustice if the requirements of that section are met. The Ombudsman may also investigate a complaint which has been referred to her by a listed authority under section 6 of the 2016 Act. The Ombudsman's power to investigate alleged maladministration through action taken in the exercise of administrative functions by a HSC body is provided for in section 15 of the 2016 Act. That section also provides the Ombudsman with the authority to investigate the merits of a decision of a HSC body to the extent that it was taken in consequence of the exercise of professional judgment in connection with the provision of health or social care.

The Ombudsman has a statutory duty to consult RQIA in accordance with the provisions of section 51(3)&(4)(k) of the 2016 Act. Section 51(3) of the 2016 Act provides that the Ombudsman may also co-operate with RQIA:

- a. by way of disclosure of information relating to the complaint or investigation,
- b. in the conduct of the investigation,
- c. in the form and content and publication of a report

Otherwise than stated in this protocol, the Ombudsman has no general power to share information with the RQIA.

### **Health and Safety**

Section 49(2)(j) provides for the Ombudsman to disclose information to any person to whom she thinks it should be disclosed in the public interest where the information is to the effect that a person is likely to constitute a threat to the health and safety of one or

more persons. The Ombudsman may therefore also disclose information to RQIA where this information relates to the provision of health and social care.

The Ombudsman has developed a Practice Note *'Disclosure of Information under the provisions of Section 49(j) of the Public Services Ombudsman Act (NI) 2016 in the interests of Health and Safety or a Person at risk'* which sets out her approach to the disclosure of information obtained where the information is to the effect that a person (the subject) is likely to constitute a threat to the health or safety of one or more persons to any person to whom the Ombudsman thinks it should be disclosed in the public interest. A copy of that Practice Note is attached at appendix one to this Protocol.

### **Ombudsman's Reports**

By virtue of section 43 of the 2016 Act, the Ombudsman must send a report of an investigation, the reasons for discontinuing an investigation or not investigating a complaint to:

- a. the person aggrieved, [article 43(2)a]
- b. the listed authority investigated, or which it was proposed be investigated, [article 43(2)b]
- c. any other person alleged to have taken the action to which a complaint relates, and [article 43(2)c];
- d. any other person that the Ombudsman considers appropriate.

The Ombudsman may consider in a relevant case whether or not to send a report (or any part of a report) of the results of her investigation to RQIA for the purposes of its functions, in support of her findings and to ensure compliance with her recommendations.

### **The Ombudsman's Recommendations**

Where the Ombudsman finds maladministration, she may recommend to a HSC body that specific action should be taken to ensure improvements for the public in future. The Ombudsman requires confirmation from the HSC body that her recommendations have been complied with. However, the extent to which the Ombudsman can monitor the

level and extent of compliance is limited. That is because the primary purpose and function of her office is to investigate complaints and the role of RQIA is to ensure compliance and encourage service improvement in the HSC sector.

## **2. THE REGULATION AND QUALITY IMPROVEMENT AUTHORITY (RQIA)**

RQIA is the independent body responsible for monitoring and inspecting the availability and quality of HSC services in Northern Ireland, and encouraging improvements in the quality of those services.

The Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003, created the enabling legal framework for raising the quality of HSC services in Northern Ireland, and extended regulation and quality improvement to a wider range of services. In April 2005, the RQIA was established as a non-departmental public body of then Department of Health Social Services and Public Safety (now the Department of Health).

RQIA inspects a range of health and social care services. Its inspectors visit nursing and residential care homes and children's homes to examine all aspects of the care provided, to guarantee the comfort and dignity of those using the facilities, and ensure public confidence in these services.

RQIA is also responsible for the inspection of a range of other bodies including hospitals, clinics, and nursing agencies.

RQIA reviews provide assurance to the public about the quality, safety and availability of health and social care services in Northern Ireland. Its reviews aim to encourage continuous improvements of health and social care services and ensure the rights of service users are safeguarded.

Since April 2009, under the Health and Social Care (Reform) Act (Northern Ireland) 2009, RQIA undertakes the functions previously carried out by of the Mental Health

Commission. RQIA has specific responsibility to assess the health and social care services provided to people with mental ill health or a learning disability.

The Guidelines and Audit Implementation Network (GAIN) joined RQIA in 2015. GAIN's role is to promote leadership in safety and quality in health and social care.

More information on what we do is available at <https://www.rqia.org.uk/what-we-do>

### **3. PURPOSE OF THE PROTOCOL**

This Protocol sets out the agreement between the Ombudsman and RQIA (the Parties) of the circumstances in which consultation, co-operation and disclosure of information between the Parties will occur. This Protocol outlines the principles that will inform these functions and the limitations on any further use by RQIA of disclosed information. The intention of the Parties to this Protocol is to work in co-operation, while recognising that their respective roles and responsibilities are different but complementary. The purpose of this Protocol is to meet the Ombudsman's duties under Section 51 of the 2016 Act and ensure the improvement and safe and effective functioning of the HSC service in Northern Ireland in the interests of service user health and wellbeing.

This Protocol sets out how and in what circumstances relevant consultation, co-operation and sharing of information between the Ombudsman and RQIA will take place. This Protocol also identifies the purposes for which and the manner in which the RQIA can use the disclosed information.

This Protocol will be effective from 1 June 2017 and will be reviewed by the Parties, as deemed necessary (by either party.) For the avoidance of doubt, amendments to this Protocol may be made at any time by the agreement in writing of the Ombudsman and the Chief Executive of the RQIA.

## 4. DEFINITIONS

In this Protocol unless otherwise stated words and phrases shall have the meaning outlined below:

**HSC Complaint:** shall mean any complaint received by the Ombudsman which contains allegations of injustice in consequence of maladministration in relation to the actions taken by on behalf of a HSC body or, an independent provider of health and social care who is the subject of an arrangement with a HSC body.

**HSC Body:** shall mean those HSC bodies listed in schedule 3 of the 2016 Act as bodies subject to investigation.

**Regulated Establishments and Agencies:** are defined in the Health and Personal Social Services (Quality Improvement and Regulation) (Northern Ireland) Order 2003, Article 8.

**Relevant information in the case of a disclosure from the Ombudsman to RQIA can include:**

- the name of the HSC body concerned,
- a summary of the Ombudsman's findings, recommendations and contextual information<sup>1</sup> to support those recommendations which may be required to enable monitoring by RQIA in terms of compliance,
- a copy of Independent Professional Advice (IPA) or a full or redacted copy of the Ombudsman's report. This will also include disclosure of any action plans given to the Ombudsman by a HSC body in response to the recommendations contained within the investigation results report.

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<sup>1</sup> In this protocol 'contextual information' may include anonymised information relating to persons or bodies not within RQIA's jurisdiction

**Ombudsman's Report:** shall mean a report under Part 4 of the 2016 Act.

**Relevant Information** in the case where the Ombudsman may require RQIA to provide information to inform an investigation of a complaint shall include but not be limited to:

- inspection, review and/or enforcement information in respect of regulated services,
- incident notifications and
- safeguarding Vulnerable Adults and Children information, including joint protocol investigations and any related RQIA reports.

**Use:** shall mean the processing of such information to include receiving, holding, storing, deleting and retention of such information.

**Disclosure:** shall mean the provision of relevant information in any form for the purposes of this Protocol.

## **5. CONSULTATION AND CO-OPERATION**

The Ombudsman and RQIA agree that, where the functions and actions of one organisation affect the functions and actions of the other, they will share appropriate information, maintain effective channels of communication, consult each other and generally co-operate together in order to inform and improve the work of the bodies. This will enable them to fulfil their respective responsibilities as fully, effectively and efficiently as possible.

Where the Ombudsman forms the opinion that a matter being investigated as part of a complaint could be the subject of an investigation by RQIA, the Ombudsman will consult and may co-operate with the RQIA in accordance with section 51 of the 2016 Act.



Within available resources, the Ombudsman and RQIA will invite representation from each organisation to relevant meetings or project groups etc where both bodies believe there would be advantage in cross-representation and stakeholder engagement.

The Ombudsman and RQIA will encourage formal and informal contacts between their staff to raise awareness of the roles and responsibilities and working methods of each organisation. The parties will aim to meet as required and at least once a year.

## **6. DISCLOSURE OF RELEVANT INFORMATION**

From the date of this Protocol, and in line with section 51 of the 2016 Act, the Ombudsman will:

- (i) consult RQIA about a complaint where it appears that this could be a matter RQIA have or could have investigated;
- (iii) when making recommendations in her Report to a HSC body, disclose to RQIA the relevant information as soon as possible from the date of issuing the final investigation report, and, where applicable, receipt of an action plan from a HSC body; and
- (iv) identify in her report that she intends relevant information to be disclosed to RQIA.

RQIA agrees to:

- (i) consult and co-operate with the Ombudsman in relation to any matter in her jurisdiction,
- (ii) take appropriate action in accordance with its statutory functions in respect of the relevant information;

- (iii) keep the relevant information confidential,
- (iv) use the information only for the purposes of its statutory function,
- (v) provide to the Ombudsman such information as she requires in relation to/compliance with her recommendations and
- (vi) provide any information required by the Ombudsman under the 2016 Act<sup>2</sup>.

### Exchange of information

Cooperation between RQIA and the Ombudsman will often require the exchange of information. All arrangements for collaboration and exchange of information set out in this Protocol, and any supplementary agreements will take account of and comply with the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA) (any amendments to those Acts) and any RQIA and the Ombudsman Codes of Practice, frameworks or other policies relating to confidential personal information.

This Protocol will be supplemented by a Data Access Agreement which sets out the detailed arrangements for sharing information between the parties. Both the RQIA and the Ombudsman are subject to the FOIA 2000. If one organisation receives a request for information that originated from the other, the receiving organisation will make the other aware before responding. However, the ultimate decision on the disclosure of information will remain with the information owner (the organisation that has been requested to release it).

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<sup>2</sup> Subject to compliance with the DPA, FOIA, 2003 Order and caveats in the 2016 Act.

## 7. CONFIDENTIALITY AND PRIVILEGE

The Ombudsman's investigations are conducted in private and the information obtained is confidential. However, the Ombudsman may publish reports in the public interest, anonymised case summaries of her investigations, special reports, an annual report, and any other report she thinks fit.

RQIA is authorised to take prescribed action when following up on information obtained from the Ombudsman including but not limited to inspection, review and enforcement. This can result in the publication of inspection and review reports and updates on enforcement activity all of which are made available on the RQIA website. Any complaints about the disclosure of information by the Ombudsman under this Protocol should be made in the first instance to the Ombudsman by way of request for an internal review. If the requestor remains dissatisfied following the completion of an internal review, he/she can ask the Information Commissioner's Office to assess their complaint under the Information Acts (Data Protection Act 1998, Freedom of Information Act 2000 and Environmental Information Regulations 2004) and any amendments to those Acts.

## 8. SIGNATURE OF THE PARTIES TO THE PROTOCOL

Signed: Marie Anderson

Marie Anderson, Northern Ireland Public Services Ombudsman

19 May 2017

Signed: Olive Macleod

Olive Macleod, Chief Executive, RQIA

19 May 2017

# **Disclosure of Information under the Provisions of Section 49(2)(j) of the Public Services Ombudsman Act (NI) 2016 (the 2016 Act) in the interests of Health or Safety of a Person at Risk**

## **Practice Note for Health and Social Care Complaints**

The Law

Our Current Practice and Approach to Disclosure

Timing of the Disclosure

The Actual Process of Disclosure: extent of information to be disclosed and to whom

Conditions on Disclosure

The Ombudsman's Investigation

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### **Preamble:**

The Northern Ireland Public Services Ombudsman (NIPSO) is unable to disclose 'information obtained' by her or her officers in deciding whether to begin an investigation or in the course of an investigation or in the alternative resolution of complaints except in certain circumstances specified in Section 49 of the 2016 Act. This practice note deals with the Ombudsman's powers to disclose information obtained in the circumstances outlined in Section 49 where the Ombudsman or her officers have obtained information which does not fall to be disclosed for the purposes of the investigation or any report to be made in respect of it. Section 49 allows for the disclosure of information obtained where the information is to the effect that a person (the subject) is likely to constitute a threat to the health or safety of one or more persons, to any person to whom the Ombudsman thinks it should be disclosed in the public interest.

This practice note has been developed in order to explain the legal context in which the Ombudsman may make a decision to disclose and to outline the extent of her discretion. The note also is an aid to deciding in what circumstances information obtained may be disclosed under Section 49. The note also provides criteria for deciding the extent of the information obtained which may be disclosed in any particular case. The Ombudsman will exercise her discretion under the above provision in each case.

The Ombudsman is mindful of the purposes for which the statutory bar on disclosure of information obtained in Section 49 was created, namely to protect

the integrity of her investigation process and to protect the confidentiality of the information obtained in deciding whether to begin an investigation and in the course of a investigation.

The Ombudsman is also mindful that some of the information obtained will comprise personal data (including sensitive personal data) and that she is obliged to process that information in accordance with the Data Protection Act 1998. She is particularly aware of the first Data Protection principle and the requirement that the processing of personal data must be fair and lawful. The Ombudsman is satisfied that any disclosure of personal data is lawful if it complies with the provisions of Section 49. In order to comply with the requirement of fairness the Ombudsman will inform the individual who is the subject of the personal data as soon as the disclosure has been made.

In developing this practice note the Ombudsman has had regard to all of the Data Protection principles and the common law of confidence.

## **The Law**

Disclosure of information obtained by Ombudsman under the Public Services Ombudsman Act (NI) 2016 states that:

*49.—(1) The information to which this section applies is—*

*(a) information obtained by the Ombudsman—*  
*(i) in deciding whether to begin an investigation,*  
*(ii) in the course of an investigation,*  
*(iii) in resolving a complaint under section 10,*

*(b) information obtained by the Ombudsman which is obtained from a person mentioned in section 51(4),*

*(c) information obtained by the Ombudsman which is obtained from the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (disclosure between Information Commissioner and ombudsmen).*

*(2) The information must not be disclosed except—*

*(j) in the case of information to the effect that a person is likely to constitute a threat to the health or safety of one or more persons, to any person to whom the Ombudsman thinks it should be disclosed in the public interest,*

## **Our Current Practice and Approach to Disclosures**

To date there has been no disclosures of information obtained made by the Ombudsman under Section 49. The Ombudsman in exercising her discretion under that provision will do so reasonably and consider all circumstances before making a disclosure.

The legislation does not prescribe to whom the Ombudsman might disclose information obtained under Section 49. In terms of health and social care, the bodies to whom the Ombudsman might disclose include, but are not limited to, the employer of the individual, or in the case of an Independent Contractor the holder of the contract, and the individual's professional regulatory body.

Where the Ombudsman considers it necessary to disclose the name of the patient/complainant she will also inform the patient/complainant of the disclosure and will do so as soon as is practicably possible.

### **Timing of Disclosure**

The disclosure should occur as soon as practicable after the Ombudsman becomes aware, and is herself satisfied, that the information is to the effect that any person (the subject) is likely to constitute a threat to the health or safety of one or more persons. The Ombudsman has interpreted 'likely' as meaning more than a mere chance of a threat and she may exercise this discretion where there is a real or substantial threat; such circumstances may include but are not limited to:

- poor or unreasonable professional practice has been noted in the information obtained (Independent professional Advisors' reports);
- the poor or unreasonable professional practice has occurred on one or more occasion;
- there has been no acknowledgement of the poor or unreasonable practice by the 'subject' or where applicable their employer; and
- there is no plan in place to ensure improved practice in the future.

Where the information concerned comprises the personal information of an individual such as a named GP or Consultant, Data Protection legislation requires that that person be informed as soon as practicable after the decision to disclose has been made. Where there is concern over the reaction of the named individual to the proposed disclosure (for instance they might destroy relevant information) compliance with Data Protection obligations will be met by informing that individual of the decision to disclose at the same time as the disclosure to

the body concerned is made. The Ombudsman will also remind listed authorities of the possibility of disclosures in the circumstances specified under Section 49.

### **The Process of Disclosure**

In disclosing the information with any person or body it is important that only that information which is necessary be shared which would allow the body to understand the alleged potential risk to the health and safety of one or more persons and to allow the body to take action. It will also be necessary to alert the body to the fact that whilst the information is being shared the body will need to consider the limitations of the use of the disclosed information in any future proceedings that may arise as a result of its investigation or consideration of the matter. The Ombudsman should draw to the body's attention that her officers and her advisors shall not be called to give evidence in any proceedings other than:

- Any proceedings for an offence under the Official Secrets Act 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman;
- Any proceedings for an offence of perjury alleged to have been committed in the course of an investigation.

Where appropriate, the Ombudsman should alert the body, by telephone, who will be receiving the information once she has decided to exercise his discretion under Section 49. This will be followed by a letter confirming disclosure of information obtained.

The letter and the information being disclosed will be sent recorded delivery.

The envelope enclosing the letter and the disclosed information will be marked 'STRICTLY PRIVATE AND CONFIDENTIAL' 'FOR THE PERSONAL ATTENTION OF'.

### **Conditions on Disclosure**

A body or organisation that receives information obtained is bound by the restrictions on disclosure outlined in Section 49 of the 2016 Act. The information disclosed is confidential and where it comprises personal data, the receiving body must comply with the Data Protection principles particularly in relation to the retention and security of the personal information.

## **The Ombudsman's Investigation**

The Ombudsman's investigation will continue regardless of any resultant investigation undertaken by the employer, contracting body or professional regulatory body.