

Briefing

Data protection when selling a practice or retiring



The sale or purchase of a practice involves a process of due diligence on the part of the purchaser

Due diligence will include a process of checking what contracts and related paperwork say in respect of the transfer of any property interest, whether leasehold or freehold, in respect of employees and associates plus equipment and suppliers.

Care should be taken to extend the due diligence process to cover the transfer of any personal data the practice holds including patient records, reception and marketing databases, and compliance with the legal requirements in relation to data processing.

If there is to be a transfer of any of the existing data processing contracts to the purchaser, for example where a third party manages the practice's electronic patient record system, the purchaser will need to consider the terms of those contracts and undertake appropriate checks in respect of the processors to make sure they are compliant with relevant legal requirements.

Particular care needs to be taken in respect of any marketing database and in relation to the use by the new controller of personal data for marketing purposes. That topic is beyond the scope of this briefing.

Changes of Data Controller when a practice is sold or transferred

The data controller is the person(s) or company who owns the business. Where patient records are transferred as an asset of the business this will involve a change in the identity of the data controller - the seller is the current data controller and the new owner will become the data controller.

The seller's privacy notice ought to have included a provision alerting data subjects to the possibility that their personal data may be transferred in the context of the sale of all or part of the business. If the seller has included commitments to never sell or transfer personal data, real difficulties may arise.

The seller's privacy notice and practices in respect of patient records will need to be considered. Purchasers should be vigilant for evidence of the lawful basis relied upon by the seller when collecting personal data.

If the seller purports to rely on consent for GDPR purposes (which would be unusual) the purchaser would need to scrutinise the seller's documentation to ascertain whether it meets the requirements for consent under the GDPR and the scope and extent of the consent which has been obtained.

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If the seller has committed to transferring records only with the patients' consent the purchaser will want to see evidence that such consent has been obtained and documented to the standard required by the GDPR.

Prior to completion the purchaser will not have access to the names and contact details of the patients and so will not be able to communicate with them directly. Sellers should be alert to the sort of issues which might present a barrier to the transfer of records and seek to address those well in advance of the proposed sale.

The seller should notify the patients of the intended transfer providing them with details of the new owner's name and relevant contact information.

Patients should also be afforded an adequate and accessible opportunity to object to having their data transferred. Additional considerations may apply where the seller has relied on consent for GDPR purposes.

The seller will need to consider what arrangements are necessary to transfer copies of records to alternative clinicians if the patient chooses to leave the practice.

In respect of any patients who object to having their records transferred to the purchaser, the seller will need to put appropriate arrangements in place for the secure storage of those records for the duration of the relevant retention period followed by their secure and confidential destruction as per College Standards on Record Keeping.

The seller will also need to consider putting contractual arrangements in place to ensure that they will continue to have access to records in the future should the need arise e.g. for the purpose of establishing or defending legal rights.

The purchaser is also under an obligation to notify data subjects of the new arrangements for processing their data. In practical terms, a single notification sent by the seller on their own behalf and on behalf of the purchaser should be sufficient.

When a practitioner retires

Where a practitioner simply retires from practice without selling - on the goodwill of the practice, they will need to make arrangements for all of their clinical records to be securely stored in accordance with the relevant retention periods, to be accessible to patients during that period and to be securely and confidentially destroyed at the end of the applicable retention period.

These arrangements could be put in place with a document management company - subject to the necessary written data processing agreement. The retiring practitioner will continue to be a data controller with all of the associated responsibilities. Retiring practitioners should give their patients fair notice of their retirement so that they can make appropriate alternative arrangements for their care.

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When a practitioner is incapacitated

Leaving aside the issue of practice sales or retirement, all practitioners should consider what would happen to their patients' records in the event that they were to be suddenly prevented from practising through death or serious injury. The potential problems are particularly acute for sole practitioners.

Ideally, a policy should be kept in the practice explaining what to do with the patient notes and data if the practitioner is incapacitated or dies, to ensure continuity of access for patients and continued security of the records.

Where the seller or purchaser is a limited company

Where the seller is a limited company and the purchaser is purchasing the limited company through a purchase of the shares, there will be no change in the identity of the data controller.

That is significant for a variety of reasons, not least that the purchaser will be taking on the liability for historic breaches of data protection rules. Those risks will need to be explored as part of the due diligence process and consideration will need to be given to appropriate contractual provisions allocating those risks.

If the limited company has provided services in a manner where there has been an exclusive, or near exclusive, relationship between any given patient and a particular practitioner, and that practitioner is moving on, then the patient should be advised of the intended change in clinical staff.

Practitioners should be alert to the fact that changes in the identity of the data controller can also occur where a practitioner establishes a limited company and operates their practice via that limited company.

Although the same individual may ultimately be in control, the new company is treated as a third party and the transfer of records to the control of that third party raises the same issues as would a transfer to any other third party.

Similarly, where the data controller is a company which sells its business through an asset sale, rather than a share sale, there will be a change in data controller. It should also be borne in mind that the lawful grounds for processing which are available may differ depending on whether the controller is a limited company or a registered healthcare professional.

Conclusion

This article has sought to highlight some of the areas of risk relating to personal data which arise in the context of retirement or practice sales. Purchasers must take real care in undertaking due diligence across a variety of domains and sellers should prepare for that process by pre-empting problems before going to market. Both parties should consider the terms of the sale/purchase and consider obtaining independent legal advice early in the process i.e. seeking advice from a solicitor.

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