Protocol on Public Access to Information and Evidence

1. Introduction

1.1 Section 18 of the Inquiries Act 2005 (the "2005 Act") provides that the Chair must take such steps as he considers reasonable to secure that members of the public (including reporters) are able to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry and to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel.

1.2 This Protocol sets out the Scottish Hospitals Inquiry's (the Inquiry) general approach to these matters. In addition, it sets out the Inquiry's approach to the ways in which the Inquiry may limit public access to information it has received. This is likely to arise in three situations:

1.2.1 where information held by the Inquiry is subject to legal privilege or other legal restriction such as confidentiality;

1.2.2 personal data where disclosure would be inconsistent with the Inquiry's legal obligations or its Data Protection Policy; and

1.2.3 where information is covered by a restriction order.

These are dealt with more fully below. Please note that this is not intended to be a definitive list of the circumstances in which the Inquiry may limit access to information, and other circumstances may arise in which the Inquiry chooses to do so.

1.3 This Protocol should be read in conjunction with the Protocol on Receipt and Handling of Evidence and the Statement of Intent: Redaction of Personal Data.

2. Definitions

A "document" is any thing in which information of any description is recorded, whether in digital form or hard copy and includes documents submitted to the Inquiry by a Provider of Documents and all witness statements given to the Inquiry.

"Provider of Documents ("PoD")" means any person, institution (including public bodies), organisation or corporate body which has been asked to provide, or has provided, documents to the Inquiry.

"Redaction" is the removal of information from a document, usually by obscuring text.

3. General Approach

3.1 Access to hearings of the Inquiry will primarily be via a livestream of proceedings on the Inquiry's YouTube channel. Further information regarding viewing proceedings of the Inquiry by this means will be published on the Inquiry's website from time to time. This is the recommended means of access to the Inquiry's proceedings. While the Inquiry does have facilities to allow members of the public to attend hearings in person, available space is very limited. There will accordingly be a requirement for booking a space in the area reserved for the public in advance. Please note that public access to hearings via either livestream or in person (including access for the media) may not be permitted where the evidence being given is subject to a restriction order (see further section 6 below).

3.2 Recordings of previous hearings will also be available via the Inquiry's YouTube channel.

3.3 Access to documents held by the Inquiry will be given by means of formal bundles of documents prepared by the Inquiry in relation to each set of hearings that it holds. These bundles will contain all material held by the Inquiry that it considers relevant to the subject matter of the hearing to which the bundle relates. This means that the bundles may contain material that is not explicitly referred to at the hearing. For example, where the Inquiry has taken a number of witness statements in relation to a particular hearing but subsequently decides that some of those giving those statements will not be called to give evidence in person, their witness statements will still be included in the bundle. These bundles will be released to the legal representatives of core participants at least two weeks ahead of the hearing to which they relate. They will also be published on the Inquiry's website ahead of the hearing to enable members of the public and the media to follow proceedings where documents are referred to.

3.4 The bundles of documents will be issued in electronic format only. They may be issued either as a single document or as a number of individual documents depending on, for example, the volume of documentation.

3.5 While distribution of bundles of documents for hearings is likely to be the main method by which the Inquiry makes information available, it will not necessarily be the sole means. The Inquiry anticipates, for example, releasing documents and other material to core participants from time to time for comment and to enable them to more effectively contribute to the work of the Inquiry. In some cases, it may make those documents (or others) more widely available via its website. Information about availability of documents and how to access them will be published from time to time on that website.

3.6 The Inquiry will generally proceed on the basis that any document submitted to it is not subject to any restrictions and that the Inquiry may deal with documents on that basis. This may include (for example) disclosure of the documents to core participants, witnesses, and other participants in the Inquiry for the purposes of preparation for Inquiry hearings or evidence gathering.

3.7 However, as noted above there are a number of circumstances in which the Inquiry may limit access to information, both by core participants and the wider public. The following sections of this Protocol set out the principal circumstances in which the Inquiry will not routinely make disclosure of documents in its possession.

4. Documents Subject To Section 22 Claims

4.1 Section 22 of the 2005 Act provides that the Inquiry cannot require production to it of evidence or documents that the PoD could not be required to disclose if the proceedings of the Inquiry were civil proceedings in a court, or disclosure would be incompatible with a retained EU obligation. In general terms, in the context of this Inquiry, a claim will most likely be made under section 22 :

4.1.1 where the prospective PoD is subject to a legally enforceable obligation of confidentiality in respect of the document; or

4.1.2 where the document is protected by legal professional privilege.

4.2 Notwithstanding the terms of section 22, in the interests of assisting the Inquiry to fulfil its role, a party may be prepared to submit documents that it considers would be exempt from any notice requiring its production but subject to a retention of the status that would give rise to a claim under section 22. The procedure for notifying the Inquiry that a PoD intends to submit a document subject to retention of a claim under section 22 is set out in full in the instructions that are provided to those to whom the Inquiry sends a request for information under rule 8 of the Inquiries (Scotland) Rules 2007.

4.3 Where documents have been submitted to the Inquiry subject to retention of a claim under section 22, and the Inquiry accepts that, on the basis of the information provided to it, the claim may be well founded, the Inquiry will acknowledge that the supply of those documents does not in and of itself constitute a waiver of any status that the document may have.

4.4 Accordingly, in general the Inquiry will only use such documents in a way that is consistent with that status. In particular, the Inquiry will not release the document to, or discuss its contents with, any third party without the permission of the party submitting it. Such documents will therefore not be released by the Inquiry in the manner set out in section 3.

4.5 It should be noted however that the status of documents subject to a claim under section 22 may change. A PoD may subsequently waive its claim that section 22 applies to the document. The Inquiry may at a later stage seek to review the status of the document further with the PoD if it wishes to reconsider its initial view on the status of the document. The Inquiry may issue a further formal request under rule 8 of the 2007 Rules or a notice in respect of those documents under section 21 of the 2005 Act. It is therefore possible that such a document may, at some stage, become one that is released in accordance with section 3.

5. Personal Data

5.1 Broadly speaking, the Inquiry will seek not to put any personal data into the public domain unnecessarily. In particular, the Inquiry will review all documents before disclosure by it to ensure that it complies with its own obligations under the General Data Protection Regulation and the Data Protection Act 2018. Please refer to the Inquiry's Data Protection Policy.

5.2 The Inquiry's approach to redaction of personal data is governed by the relevance of that data to the Inquiry and the necessity of its disclosure. For example, in terms of constructing the narrative of particular events, the sender of a particular email and the recipient(s) may be of crucial importance; in other cases, a lengthy list of copy recipients may be of limited, if any, importance. As this illustrates, it is difficult for the Inquiry to give hard and fast guidance about whether certain information will or will not always be removed.

5.3 In general, the approach taken with personal data that is not to be disclosed will be by way of redaction – that is to say, the document will still be disclosed but under redaction of personal data. In some cases this may be wider than the mere obscuring of names, addresses, email addresses, and telephone numbers – it will require wider obscuring of text to avoid the disclosure of information that may tend to identify particular individuals.

5.4 While the Inquiry may take its own view on the redaction of some personal data, this does not remove the responsibility of those submitting evidence, or giving a witness statement, to identify details that they would wish redacted if the Inquiry agrees that such redaction is appropriate. The Inquiry will not always be in a position to assess whether or not specific personal data should be removed as it will not necessarily know all the circumstances. *Accordingly, where material submitted to the Inquiry contains what may be sensitive personal data, the PoD should draw this to the Inquiry's attention and, if necessary, make a formal application for redaction* (see section 7 below). Please note however that the decision as to whether to redact information from a document prior to release is one for the Chair, and the making of a request for redaction does not necessarily mean that redaction will be made.

5.5 Please note also that if the Inquiry itself has proposed a redaction of material, and the person supplying the document or witness statement does not wish it to be redacted, then unless that redaction relates to someone other than the PoD, or is required by reason of a claim under section 22 of the 2005 Act, a restriction order or some other rule of law, the Inquiry will generally comply with the wishes of the PoD.

5.6 For more guidance on the approach that will be taken to redaction of personal data, please refer to the Statement of Intent: Redaction of Personal Data which is published on the Inquiry's website.

6. Restriction Orders

6.1 A restriction order is an order made by the Chair under section 19 of the 2005 Act that places restrictions on attendance at a hearing of the Inquiry or disclosure or publication of any evidence given to the Inquiry. Restriction orders may, for example,

exclude the public from hearings of the Inquiry, limit disclosure of documents or witness statements to particular people or groups of people or prevent publication by the Inquiry or anyone else of documents or parts of documents.

6.2 Such orders may be made by the Chair either on his own initiative or on application by an interested party. The restrictions imposed must be:

6.2.1 required by law;

6.2.2 conducive to the Inquiry fulfilling its Terms of Reference; or

6.2.3 necessary in the public interest.

6.3 Restriction orders made by the Chair normally continue in force unless and until they are varied or revoked. The Chair can decide to vary or revoke a restriction order himself or on application of an interested party.

6.4 Everyone must comply with a restriction order. That includes the media, members of the public, witnesses, core participants, legal representatives, and all members of the Inquiry team. It follows from this that the Inquiry will not release any material that is subject to a restriction order other than as may be permitted by, and subject to any conditions specified in, the terms of that restriction order. Restriction orders made by the Chair will be published on the Inquiry's website.

6.5 Where a restriction order has been granted and is in force, the Court of Session has the power to impose a fine for any breach of an order.

7. Redactions

7.1 As indicated above, the Inquiry's principal means of dealing with (irrelevant) personal data that is contained within otherwise relevant material will be to redact that personal data from the material prior to publication. Redactions may also be made to comply with the terms of a restriction order where the restriction order allows the publication of documents subject to the removal of certain information, or where certain information contained in a document may be subject to a claim under section 22 of the 2005 Act.

7.2 This is not necessarily a comprehensive list of circumstances in which the Inquiry may redact material from documents that are made available by it; nor is personal data the only kind of material that may be redacted. A similar approach may be taken to other kinds of data that are sensitive or confidential on grounds prospective harm to commercial interests for example.

7.3 It has been noted above that the Inquiry is not best placed to assess whether specific material need be redacted. The onus is, therefore, on PoDs where there is material that they would wish to be redacted to highlight this to the Inquiry and to make application in accordance with the following provisions where they would wish material redacted ahead of publication by the Inquiry.

7.4 However, it must be stressed that the Inquiry expects the PoDs to adopt a proportionate approach when seeking redactions. The Inquiry will redact documents only where the case for redaction is properly made out. For example, the fact that material was once commercially sensitive does not of itself provide justification as to why it is now commercially sensitive. Mere assertion of commercial sensitivity will not suffice by way of explanation; specific and current potential harm will need to be shown.

7.5 Applications for redactions should be made in writing to the Solicitor to the Inquiry by email to legal@hospitalsinquiry.scot. Applications must clearly state the specific information that the applicant proposes should be redacted and provide an explanation of the facts and circumstances giving rise to the request.

7.6 The Chair will consider all requests for redaction of materials. If he does not consider that grounds for redaction have been made out, he will notify the PoD before the document in question is disclosed to any third party. In coming to his decision, the Chair will have regard to the terms of section 18 of the 2005 Act and whether the grounds set out to justify for redaction are sufficient to displace the general approach set out there.

8. Further information

8.1 If you have any questions about any of the above, or any other matter related to public access to information, provision of information to the Inquiry or the Inquiry's approach to handling information, please email the Solicitor to the Inquiry at legal@hospitalsinquiry.scot.

9. Version control

9.1 This version of the Protocol on Public Access to Information is dated 18 August 2021 and is issued under the authority of the Chair of the Scottish Hospitals Inquiry. It is the first version of this Protocol.