Angus Child Protection Committee

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INTRODUCTION

Information Sharing\(^1\), Confidentiality and Consent to Support Children and Young People’s Wellbeing\(^2\)

All children and young people (including unborn babies) have the right to be cared for; protected from harm and abuse; and to grow up in a safe environment, in which their rights are respected and their needs are met.

Children and young people should get the help they need; when they need it; for as long as they need it; and supporting their wellbeing is always paramount.

Most children and young people (including unborn babies) get all the help and support they need from their parents, carers and families, in addition to the universal services of education and health. However, on some occasions, some children and young people (including unborn babies) may need further help and support to promote their wellbeing.

Within Angus, supporting the wellbeing of all children and young people is everyone’s job and everyone’s responsibility. We consider this a shared responsibility for all practitioners and managers working across the public, private and third/voluntary sectors.

All practitioners working with children and young people must play their part in supporting the wellbeing of children and young people to ensure they are safe, healthy, achieving, nurtured, active, respected, responsible and included.

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\(^1\) For the purposes of this guidance, Information Sharing should be widely defined and interpreted as sharing and/or seeking and/or exchanging personal information and/or sensitive personal information in keeping with the Schedule 2 and Schedule 3 of the Data Protection Act 1998.

\(^2\) For the purposes of this guidance, Wellbeing is defined as the GRFEC Eight Indicators of Wellbeing (SHANARRI) – Safe; Healthy; Achieving; Nurtured; Active; Respected; Responsible; and Included, in which all children and young people need to progress, in order to do well now and in the future.
**Wellbeing and Early Intervention**

The *wellbeing* of children and young people is at the heart of *Getting it Right for Every Child (GIRFEC)*.

This approach uses the eight *Wellbeing Indicators* in which all children and young people need to progress, in order to do well now and in the future. These eight wellbeing indicators defined as – *safe; healthy; achieving; nurtured; active; respected; responsible; and included*; provide a common language for all practitioners.

A focus on *wellbeing* ensures that all practitioners take a holistic view of the child or young person and ensures that all aspects of their wellbeing are supported. The *Wellbeing Indicators* are interconnected. For example, it is difficult to talk about a child or young person *achieving* without relating this to nurture, health and/or how active they are. Similarly, being *safe* will connect with children and young people whose nurture is inadequate, or who are affected negatively by their wider world.

All practitioners must be aware of the impact situations can have on other aspects of a child or young person’s *wellbeing*, as they may lead to long lasting and/or permanent harm.

**Child Protection**

If we are to *get it right for every child and young person’s wellbeing* and intervene early enough (which will involve the appropriate and proportionate sharing of personal information\(^3\) and in some cases sensitive personal information\(^4\)), then there will be a reducing need for child protection interventions. To achieve this we need to change the emphasis from crisis management to early identification, intervention and support.

*However, it is important that we do not separate child protection, or any other intervention, from the *Getting it Right for Every Child (GIRFEC)* policy and practice approach.*

*This remains the overarching policy and practice approach for all matters relating to children and young people in Scotland. Child Protection is a *Getting it Right for Every Child (GIRFEC)* intervention where the emphasis on keeping Safe is the main *Wellbeing Indicator*.*

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\(^3\) Personal Information is defined as Personal Data per Part I Section I of the Data Protection Act 1998.

\(^4\) Sensitive Personal Information is defined as Sensitive Personal Data per Part I Section 2 of the Data Protection Act 1998.
In all cases, the first and most important factor to consider is Safety.

Should there be any concern that the child or young person may be at risk, it is essential that local child protection procedures are followed immediately.

LEGISLATIVE AND POLICY CONTEXT

If you are working with children and young people

It is important that you:

- understand the legislative, policy and practice context parameters when sharing personal and/or sensitive personal information;
- understand the limitations and constraints of confidentiality and consent; and
- understand that you are empowered to share personal and/or sensitive personal information, if you are worried and/or concerned about a child or young person’s wellbeing and nothing whatsoever prevents you from doing so.

This guidance has been informed by and is underpinned by, a legislative and policy framework, further described at Appendix 1.

INFORMATION SHARING

What should I consider first?

First and foremost, you should ask yourself the following five key GIRFEC questions:

1. **What is getting in the way of this child or young person’s well-being?**
2. **Do I have all the information I need to help this child or young person?**
3. **What can I do now to help this child or young person?**
4. **What can my agency do to help this child or young person? and**
5. **What additional help, if any, may be needed from others?**

To answer all of these questions comprehensively, there will be a need for you to share information with other practitioners, working between and/or across a wide range of other services and/or agencies. This is particularly important where the answer to any of these questions is no; or you do not know; or you are unsure of the answer to any one of the above questions.

Please refer to GIRFEC Named Person Checklist –
What should I do now?

Remember, nothing whatsoever, in Scottish, UK and/or European Law and/or in the Scottich child protection legislative, policy and/or practice environments prevents you from sharing personal information and in some cases sensitive personal information where you are worried or concerned about a child or young person’s wellbeing. On the contrary, you are, within certain limitations and constraints, empowered to do so.

This is information sharing in practice.

This approach has been further explained, supported and endorsed by Appendices 2 & 3:

When should I share information?

If you are worried or concerned about a child or young person’s wellbeing, you should share your concerns quickly, efficiently and effectively. You may decide to make more enquiries first. If you do, do so quickly and ensure your focus remains on the safety of the child or young person.

Always remember, whilst there is a duty on you to share information with certain other practitioners, services and/or agencies, equally there is a duty on them to share information with you. It works both ways.

What information should I share?

You should share information which:

• helps you answer the five key GIRFEC questions above;
• clearly identifies the child or young person you are worried or concerned about;
• relates directly to your current worry or concern;
• although historical, you consider to be relevant to your current worry or concern;
• describes their current living and family circumstances; and
• you consider to be relevant.

Only share information that you consider relevant, necessary, legitimate, appropriate and proportionate to your worry or concern.
What if I decide not to share information?

You should also be actively sharing information with the child or young person’s Named Person (and if already appointed and/or known the Lead Professional). You may also be sharing information with certain other practitioners, services and/or agencies involved with the child, or young person and their family. However, in some circumstances, you may decide not to share information, albeit this would be the exception, as opposed to the rule.

If you decide not to share information, then you must ask yourself the following three key questions:

- What are my reasons for deciding not to share information?
- What harm could result if I do not share information? and
- What are the implications for the child or young person, for me and/or my service, agency and/or organisation if I decide not to share information?

This decision not to share information should be properly recorded, in both hard copy case files and/or in an electronic file, for future reference.

Remember – It is a common misconception that data protection legislation prevents you from sharing personal information and in some cases sensitive personal information where you are worried or concerned about a child or young person’s wellbeing. It does not. It actually empowers you.

In these circumstances, you should share information.

CONFIDENTIALITY

If you are worried or concerned about a child or young person’s wellbeing, there will be a need for you to share information. You need to be aware of the limitations and constraints of confidentiality and consent.

Does the need for Confidentiality affect my practice?

Yes. Practitioners must work within the limitations and constraints of Confidentiality. This approach has been further explained, supported and endorsed by Appendices 2 & 3:

The circumstances making the sharing of confidential information lawful are:

- where the individual to whom the information relates has consented;
- where disclosure is in the public interest/function; and
- where there is a legal duty to do so.

It is accepted that where there is a risk to a child or young person’s wellbeing, which may lead to harm, then it is acceptable to share confidential information in the best interest of the child or young person and/or in the public interest.
Does all information have to be kept Confidential?

No. Not all information is confidential. Confidentiality is not an absolute right.

The duty of confidentiality requires that, unless there is a statutory requirement to use information that has been provided in confidence or, a court orders the information to be disclosed, it should only be used for the purposes that the subject (child or young person) has been informed about and has consented to.

This duty of confidentiality is not absolute but should only be overridden if you, as the holder of the information, can justify the information being shared as being in the child's best interest (e.g. to protect wellbeing and/or others from harm).

What should I consider when deciding to share information given to me in Confidence?

In deciding whether it is justified, or not, to share information given in confidence, you should first consider the harm that might result from failing to disclose the information against the harm that could result from a breach of confidence.

Any sharing of information should be relevant, necessary, legitimate, appropriate and proportionate and go no further than the minimum necessary to achieve the public interest objective of protecting a child or young person’s wellbeing.

Do I always need to seek Consent?

No, not always.

Recent advice from the (UK) Information Commissioner’s Office has clarified, what has been a misconception held by many re the Data Protection Act 1998 and lawful processing.

Extract:

“Where a practitioner believes, in their professional opinion, that there is risk to a child or young person that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the Act in such circumstances.

It is very important that the practitioner uses all available information before they decide whether or not to share. Experience, professional instinct and other available information will all help with the decision making process as will anonymised discussions with colleagues about the case. If there is any doubt about the wellbeing of the child and the decision is to share, the Data Protection Act should not be viewed as a barrier to proportionate sharing”.

In such cases, where information will be shared, consent should not be sought, as to do so would give the subject (child or young person and/or their parents/carers) a false belief that they can control the decision, which they cannot.
In such circumstances, the child, young person and/or their parents/carers should be informed of the intention to share information and the reasons why, unless by doing so would further expose the child or young person to risk or hamper a police investigation.

You may be asked to justify that decision later; so best practice would be to record this in the child or young person’s case file notes and/or in an electronic file.

Acting in the child or young person’s best interest and/or in the public interest is a defence to an accusation of breach of confidentiality, provided it can be demonstrated that the information shared was necessary and proportionate.

CONSENT

Consent should only be sought when the individual has a real choice over the matter. If you have a genuine, professional concern in relation to a child or young person’s wellbeing that you believe must be shared with another service, agency and/or practitioner with or without consent, there is no requirement to seek consent and you should rely on one of the other conditions for processing as outlined above.

You need to be aware of the limitations and constraints of confidentiality and consent.

What types of consent should be considered?

There are two key principles involved in consent, as it applies to information sharing between practitioners, services and/or agencies.

Consent should be:

- **Informed** – the individual (child or young person and if appropriate their parent/carer) must understand what is being asked of them and must give their permission freely. Information should be provided of the possible consequences of withholding information; and

- **Explicit** – the individual (child or young person and if appropriate their parent/carer) positively gives their consent for their information to be shared.

In such cases, it is good practice to record the granting of consent, when and why it was supplied, in both hard copy case files and/or in an electronic file, for future reference. Details of refused or withdrawn consent should also be recorded; together with any subsequent reviews of consent.

Implied Consent simply means that the individual (child or young person and if appropriate their parent/carer) has not explicitly said they do not agree to their information being shared; so it is inferred that they do agree to their information being shared.

Who can give consent?

The Age of Legal Capacity (Scotland) Act 1991 makes a number of points regarding children and young people under the age of 16 and their right to give consent.

- A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified
medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.

- A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.

- A person of or over the age of 12 years shall have testamentary capacity, including legal capacity to exercise by testamentary writing any power of appointment.

It is therefore generally understood that a child or young person may give informed consent to sharing of information if 12 years and over, and under 12 if assessed as having maturity and understanding of the implications.

In all other cases consent should be given by parents and carers who have Responsibility and Rights under the Children (Scotland) Act 1995, S1 and 2.

**How should I ask for, obtain and record consent?**

Where you decide it is appropriate to seek consent to information sharing, you should make sure that consent is given on *an informed basis* by explaining:

- the purpose for which the information is to be shared;
- what information is to be shared; and
- with whom it is to be shared.

You should obtain the consent of the child or young person (and if appropriate their parent/carer) to share their information when seeing them for the first time, or when you decide that another practitioner, service and/or agency input is required.

**What should I do if consent to information sharing is refused?**

In some cases, the child or young person (and if appropriate their parent/carer) may refuse to give consent. If consent is refused then, unless there are other factors about the child or young person’s ability to understand the implications of refusal, or risk exists, then in the first instance, the child or young person’s right to refuse must be accepted and recorded.

Where there is doubt about the child or young person’s capacity and understanding, or risks exists, you should weigh up the balance between the child or young person’s right to privacy and their wellbeing. In these circumstances, you should consider whether there remains a need and/or justification to share information without consent, despite permission to share being withheld.

The following indicators may help you decide not to seek consent:

- where there is a perceived risk to a child or young person’s wellbeing, which may, if not addressed, lead to harm;
- when a child or young person is believed to have been abused or at risk of harm;
- when there is evidence of serious public harm or risk of harm to others;
- where there is evidence of a serious health risk to the child or young person;
• for the prevention, detection or prosecution of crime;
• when instructed to do so by the court; and
• where there is a statutory requirement, e.g. where information is required by a Children’s Reporter as part of their investigation of a child or young person referred to them.

What if consent is withdrawn?

Children and young people (and if appropriate their parent/carer) have the right to withdraw consent for information sharing. If they withdraw their consent to sharing their information, the considerations about sharing without consent still apply.

A child or young person (and if appropriate their parent/carer) cannot withdraw consent retrospectively. If wrong information has been shared, the child or young person has the right to ask for that wrong information to be corrected. The receiving practitioner, service and/or agency should be notified accordingly and the information should be corrected.
Practitioners Summary – Key Practice Points

Information Sharing

- The wellbeing of children and young people is everyone’s job and everyone’s responsibility;
- Keep your focus on the wellbeing of the child or young person;
- Ask yourself the five key GIRFEC Questions – if the answer is no or you do not know – find out;
- Use your professional judgment, knowledge and skills;
- Do not delay unnecessarily – act quickly
- Share what you consider only to be necessary, legitimate, appropriate and proportionate
- Always share your worry or concern with the child or young person’s Named Person;
- Consider the alternatives and/or implications of not sharing information;
- Always record your decision and the reasons for it.

Confidentiality

- Confidentiality does not prevent you from sharing a worry or concern about a child or young person’s wellbeing – it actually empowers you to do so;
- Confidentiality is not an absolute right – never promise that;
- Be aware of the constraints and limitations of confidentiality;

Consent

- Do not seek consent in situations where you are likely to share information in any case – wellbeing of a child or young person;
- Consent can be difficult and it should only be sought when the individual has a real choice over the matter;
- Consent should be informed and explicit – implied consent is not enough;
- Children and young people, subject to their age and developmental capacity, can provide consent, if consent is necessary; and
- Consent must always be recorded.


Legislation

- Legislation does not prevent you from sharing information – it empowers you (See Appendices 1 to 3);

- Personal Information is defined as Personal Data per Part I Section I of the Data Protection Act 1998;

- Sensitive Personal Information is defined as Sensitive Personal Data per Part I Section 2 of the Data Protection Act 1998;

- Schedule 2 and Schedule 3 of the Data Protection Act 1998 describes clearly in what circumstances you can share information;

- Legislation provides you with a legal framework within which information can be shared;
Information Sharing in Child Protection: General Principles

**National Guidance for Child Protection in Scotland 2014**

- The wellbeing of a child is of central importance when making decisions to lawfully share information with or about them.

- Children have a right to express their views and have them taken into account when decisions are made about what should happen to them.

- The reasons why information needs to be shared and particular actions taken should be communicated openly and honestly with children and, where appropriate, their families.

- In general, information will normally only be shared with the consent of the child (depending on age and maturity). However, where there is a risk to a child’s wellbeing, consent should not be sought and relevant information should be shared with other individuals or agencies as appropriate.

- At all times, information shared should be relevant, necessary and proportionate to the circumstances of the child, and limited to those who need to know.

- When gathering information about possible risks to a child, information should be sought from all relevant sources, including services that may be involved with other family members. Relevant historical information should also be taken into account.

- When information is shared, a record should be made of when it was shared, with whom, for what purpose, in what form and whether it was disclosed with or without informed consent. Similarly, any decision not to share information and the rationale should also be recorded.

- Agencies should provide clear guidance for practitioners on sharing information for example, the GMC guidance on Protecting Children and young People. This should include advice on sharing information about adults who may pose a risk to children, dealing with disputes over information-sharing and clear policies on whistle-blowing.

- It is not necessary to seek consent when there is legislative requirement to share information; for example when making a referral to the Children’s Reporter, or the prevention and detection of crime.
Information Sharing in Child Protection: Policy Principles

**Protecting Children and Young People: Framework for Standards**

Published on 2004, the Framework for Standards translates key messages from the Children's Charter into child protection practice for all practitioners, services and/or agencies, by providing eight high level generic practice statements, all supported by additional narrative/text. Standard 4 relates directly to Information Sharing, Confidentiality and Consent.

Agencies and professionals share information about children where it is necessary to protect them

1. Professionals discuss any concerns and relevant information about a child or their circumstances with those other professionals or agencies with statutory responsibilities for the protection of children when it is in the child’s best interests to do so;

2. The needs of each child are the primary consideration when professionals decide how best to share information. All decisions and reasons for them are recorded;

3. Agencies actively manage and support the sharing of information recognising that confidentiality does not prevent sharing information where a child is in need of protection;

4. Professionals ensure that parents and children are made aware of, and check it is understood, what information:
   - agencies hold;
   - how it is stored;
   - with whom it may be shared; and
   - under what circumstances information may be shared with others without their consent;

5. Professionals identify what information each child and their parents are content to share freely;

6. Professionals take account of each child and their parent's views when deciding when to share information without their consent and can provide reasons and explain to them when they have shared information without consent; and

7. Agencies and professionals store information securely.

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5  Protecting Children and Young People: Framework for Standards (Scottish Executive 2004)
6  For the purposes of this guidance, Agencies - is widely defined and interpreted as meaning all services and agencies across the public, private and third/voluntary sectors.
7  For the purposes of this guidance, Professionals is widely defined and interpreted as meaning all practitioners, paid or unpaid, working directly with or occasionally with children, young people and their families.
CONSENT FLOWCHART

When to share

Will sharing prevent harm to the individual or to a third party or prevent or detect crime?

Yes → Seek consent

No → Consent given?

Yes → Don't share

No → Will sharing prevent harm to the individual or to a third party or prevent or detect crime?

What to share

Is everything you are sharing directly relevant?

Yes → Remove irrelevant data

No → Are you sharing as little as possible?

Reduce what is being shared

Who to share with

Does the person you are sharing with "need-to-know"?

Yes → Don't share

No → Choose a secure method for sharing, share data and keep a record

How to share
LEGISLATIVE AND POLICY CONTEXT

Information Sharing, Confidentiality and Consent is underpinned by a UK Government and/or Scottish Government, Legislative and Policy Framework.

Practitioners may find the following key electronic links useful:-

Key Legislative Framework

a. The Social Work (Scotland) Act 1968
b. The Children (Scotland) Act 1995
c. The Human Rights Act 1998
d. The Data Protection Act 1998
e. The Freedom of Information (Scotland) Act 2002

Key Policy Framework

f. UN Convention on the Rights of the Child
g. Common Law and Statutory Obligations of Confidence
h. Scottish Executive’s Audit and Review Report (2002) entitled “It’s everyone’s job to make sure I’m alright"
i. Protecting Children and Young People: Children's Charter
j. Protecting Children and Young People: Framework for Standards
k. HMLe Services for Children Unit (2006): Self Evaluation and Quality Indicators Framework: How well are children and young people protected and their needs met?
l. HMLe Services for Children Unit (2009): How good are we now? How well do we protect children and meet their needs? How good can we be? Self Evaluation Using Quality Indicators

o. Getting it Right for Every Child

Useful Links – Key Local Guidance


Acknowledgements

Thank you to Perth and Kinross CPC who kindly agreed to Angus CPC using this document and amending it to suit our needs.
All Community Planning Partnership Managers

08 April 2013

Dear CPP Managers

Information sharing between services – guidance and clarity

The GIRFEC Programme Board recently met with Ken Macdonald, Assistant Commissioner for Scotland with the (UK) Information Commissioner’s Office (ICO). Information sharing in response to wellbeing risks and the matter of consent was discussed. To provide clarity the ICO has produced the attached advice, which specifically relates to information sharing where a child’s wellbeing is at risk and the concern is less than that required to trigger child protection procedures. The GIRFEC approach promotes engagement with the child and family at all stages during which practitioners will want to keep them informed and seek their views obtaining consent to the disclosure of information as appropriate. But where circumstances exist such that consent may not be appropriate or required, the Data Protection Act 1998 provides conditions to allow processing to proceed. Importantly the advice dispels the common misconception that the Act is a reason not to share information.

The advice will be important reading for:
- Professionals who work with children and young people
- Professionals who work with adults who impact on the lives of children and young people
- Senior managers and data controllers

Information sharing between services is vital to ensure that our children’s life chances are maximised and that Scotland is the best place to grow up in.
Whilst the ICO in its capacity as a regulator does issue substantial penalties for breaches of the Data Protection Principles, Ken Macdonald emphasises that these penalties are aimed at systemic failures and not practitioners making good faith decisions to share information in the best interests of children.

Please circulate the attached advice around chief officers, within your Community Planning Partnerships.

If you need further advice, please contact Boyd McAdam, Head of the Better Life Chances Unit at the Scottish Government on 0131 244 5320.

Yours sincerely

Martin Crewe

Martin Crewe
Deputy Chair of the Getting it Right for Every Child Programme Board
C/o Life Chances Unit, Children’s Rights and Well Being
The Scottish Government,
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EDINBURGH
EH6 6QQ

Attached – Information Sharing Advice from ICO
Appendix 3

28 March 2013

Information Sharing Between Services in Respect of Children and Young People

The Information Commissioner’s Office (ICO) is contacted regularly by practitioners seeking advice and guidance on whether they can share professional concerns about their clients/patients and, if so, what level of information may be shared. Often, the Data Protection Act 1998 (the Act) is viewed as preventing such sharing and it can be fear of non-compliance that becomes a barrier, even though there may be a concern about a child’s or young person’s wellbeing. While it is acknowledged that practitioners need to be sure their actions comply with all legal and professional obligations, fear that sharing genuine concerns about a child’s or young person’s wellbeing will breach the Act is misplaced. Rather, the Act promotes lawful and proportionate information sharing, while also protecting the right of the individual to have their personal information fairly processed.

Most practitioners are confident about appropriate and necessary sharing where there is a child protection risk. The problem can be where the circumstances do not yet reach the child protection trigger yet professional concerns exist, albeit at a lower level. Getting It Right For Every Child (GIRFEC) introduced eight indicators of wellbeing: safe, healthy, achieving, nurtured, active, respected, responsible and included (SHANARRI). In many cases, a risk to wellbeing can be a strong indication that the child or young person could be at risk of harm if the immediate matter is not addressed. As GIRFEC is about early intervention and prevention it is very likely that information may need to be shared before a situation reaches crisis. In the GIRFEC approach, a child’s Named Person may have concerns about the child’s wellbeing, or other individuals or agencies may have concerns that they wish to share with the Named Person. While it is important to protect the rights of individuals, it is equally important to ensure that children are protected from risk of harm.

Where a practitioner believes, in their professional opinion, that there is risk to a child or young person that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the Act in such circumstances.

The Act requires that an individual’s data be processed fairly and lawfully and that specific conditions/justifications for processing are met. The Act provides
several conditions/justifications for processing, only the first of which rely on consent and, where required, it should be fully informed and freely given. However, the issue of obtaining consent can be difficult and it should only be sought when the individual has real choice over the matter. Where circumstances exist such that consent may not be appropriate, for example where an assessment under the SHANARRI principles raises concerns, the Act provides conditions to allow sharing of this information, such as ‘for the exercise of any other functions of a public nature exercised in the public interest by any person’ or ‘in the legitimate interests of the data controller or the third party to whom the data are disclosed so long as it is not prejudicial to the child’, and procedures should be clear about those circumstances which may necessitate processing without consent.

It is vital that data controllers put appropriate and relevant protocols in place and that they are conveyed to practitioners to provide them with a support mechanism for the decision making process. It is also vital that a recording process is included in the protocol so that the decision – including the rationale behind making it – is formally recorded. Such protocols will assist in providing confidence to practitioners in the event the decision is challenged.

It is very important that the practitioner uses all available information before they decide whether or not to share. Experience, professional instinct and other available information will all help with the decision making process as will anonymised discussions with colleagues about the case. If there is any doubt about the wellbeing of the child and the decision is to share, the Data Protection Act should not be viewed as a barrier to proportionate sharing.

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