

4 October 2007

Code of Practice for the Use of Powers to Counter NHS Fraud and Security Incidents

Please find below the comments of the Association of Optometrists and the Federation of Ophthalmic and Dispensing Opticians on the draft code of practice mentioned above in relation to England and Wales.

Please note that the comments below relate, according to the numbering of the pages and paragraphs, to the code for England; but they apply also to the code for Wales according to the alternative numbering of the paragraphs.

The only comment specific to Wales concerns the omission of any references to the Business Service Centres (whereas Local Health Boards are mentioned).

INTRODUCTION

- **Page 3, Para 5:** The powers to require the production of documents already exist under the legislation. The Code is simply guidance on good practice, namely on how those powers are expected to be exercised. The Code should make clear whether or not it is enforceable and whether a 'breach' would have any legal consequence either for the CFSMS or for those from whom documents are requested.

GLOSSARY OF TERMS

- **Page 4:** The term 'Clinical Specialists' should be extended beyond registered medical practitioners to include other disciplines. The Code should make clear that the clinical specialist appointed should be appropriate to the nature of the investigation. For example, if the CFSMS is investigating ophthalmic fraud, the clinical specialist should be a registered optometrist or a registered dispensing optician.

PURPOSE OF CODE

- **Page 6, Para 7:** We suggest that this paragraph should be rewritten, for the sake of clarity, as follows:

'It is intended that the code should be used in two principal ways:

- to define the practice that should be followed by the national body and its staff, and to provide them with a point of reference against which their practice can be checked
- to provide those from whom documents are requested with information about the practice which they can expect from the national body and its staff, and to provide them with an assurance that the national body and its staff will use the documents correctly.'

SUMMARY OF KEY FEATURES OF THE HEALTH ACT 2006

- **Page 8, Para 16:** Given the gravity of failing to comply with a notice, it is imperative that the stipulated period on the notice is reasonable. We suggest that there should be a minimum notice period.
- **Page 8, Para 17:** The term ‘knowingly or recklessly’ should be determined by way of an objective, rather than subjective, test. The Code should stipulate how such a determination can be made.

RECEIVING AN ALLEGATION OF FRAUD OR SECURITY INCIDENT OR BREACH

- **Page 9, Para 20:** We suggest that the word ‘diverse’ is tautologous.

SERVING THE NOTICE

- **Page 10 general:** The Code should indicate whether or not more than one notice can be served simultaneously within an organisation, albeit to different individuals.
- **Pages 10-13 general:** There is no reference here to a normal period of notice. For example, is it seven days, seven hours or seven minutes? It would be unfair to leave this entirely in the hands, and at the discretion, of the CFSMS. Some indication of the norm should be included; for example, three days for an urgent investigation and seven days for a routine investigation.
- **Page 10, Para 24:** The definition of an ‘accountable’ person is so broad that there may be occasions when the individual upon whom the notice is served will not necessarily have any actual control and therefore will not have the ability to comply with the notice. In the case of NHS contractors, the notice must be served on the contractor himself. If the contractor is a corporate body, the notice must be served on a director or senior manager.
- **Page 10, Para 25:** In the case of NHS contractors, the notice must be served on the contractor himself. If the contractor is a corporate body, the notice must be served on a director or senior manager.

- **Page 10, Para 26:** What happens if the authorised officer's understanding of what is arranged over the telephone does not correlate with the accountable person's understanding? Notice should not be effective, until the written notice is served. The period stipulated in the written notice must be reasonable; the deadline should post-date the date of the notice.
- **Page 10, Para 27:** What is the definition of the phrase 'proper address'?
- **Page 10, Para 28:** The Code should be made available to the individual concerned at the same time as the notice is served. It is not sufficient to simply advise the individual of where the Code can be obtained, particularly in the event of short notice.
- **Page 11, Para 30:** Any judgement that a case is 'particularly urgent and sensitive in nature', or that there is 'a risk that documents will be destroyed', must be reasonably arrived at. In the event of a disagreement, what right of appeal would the contractor have; to whom would such an appeal be directed; and within which period? In the event of the documents being produced immediately, will the individual concerned still be served with a notice or will it be acceptable for the authorised officer simply to produce evidence of their authority? This should be stated expressly.
- **Page 12, Para 34:** If the request for an extension is refused by the CFSMS, the decision (together with the grounds) should be recorded by the authorised officer, and a copy of the decision given to the contractor.

In the event of a refusal, what right of appeal would the contractor have; to whom would such an appeal be directed; and within which period?

The example of 'during a break during their clinic' suggests that only very short extensions should be granted. This is misleading and should be removed.

The sentence 'However, if **they** extension they request' should read ' ... if **the** extension ...'.

- **Page 12, Para 35:** The Code should provide for the authorised officer to give the person served with a notice a copy of the recorded reason for the agreement to the request for an extension.
- **Page 13, Para 37:** How would the warning be delivered? Would it be recorded in writing and served on the recipient?

PRODUCTION OF DOCUMENTS

- **Page 14, Para 38:** How will the courtesy of the authorised officer be monitored? Will authorised officers be given specific training? If the authorised officer does not act courteously and with respect, what appeal mechanism will be available to the NHS contractor?

- **Page 14, Para 40:** What are the implications, if the person producing the documents either cannot or refuses to provide an explanation of them?
- **Page 14, Para 41:** There is no mention within the Act of 'legitimate business need'.

All documents which are going to be taken away must be copied automatically at the request of the person producing them, not only those documents which the authorised officer feels reasonable. The request and the decision to decline should be documented and copied to the individual concerned. Moreover, documents that have to be taken away for copying should be 'removed to be copied and returned under secure conditions as soon as possible'.

- **Page 14, Para 42:** In the case of NHS contractors, the notice must be served on the contractor himself. If the contractor is a corporate body, the notice must be served on a director or senior manager. Would an 'interested person' include a legal representative? The request and the decision to decline should be documented and copied to the individual concerned.

Furthermore, there is no definition of 'a short delay' in the last sentence. Does the phrase refer to minutes, hours or days? An indication of the norm should be indicated.

- **Page 14, Para 43:** It should be made clear that computers must not be removed from the practice.
- **Page 15, Para 45:** What remedy is offered if documents are lost, damaged or destroyed following their production to an authorised officer?
- **Page 15, Para 46:** The Code should provide for an appeal mechanism, in the event of a dispute between the authorised office and the NHS contractor about whether a document is covered by legal professional privilege. Any such mechanism should indicate the person to whom an appeal can be made and the period.
- **Page 15, Para 47:** The definition of an 'accountable' person is so broad that there may be occasions when the individual upon whom the notice is served will not be able to state where the requested documents are.
- **Page 16, Para 49:** The Code as drafted implies that a failure to comply with a request automatically gives rise to a formal interview. Is this an automatic consequence? Such a consequence would be absurd, if it were clear that the notice had been served on an inappropriate person who was unable to comply. Moreover, would it be expected that the time and location of the interview were mutually agreed?

PERSONAL RECORDS

- **Page 17, Para 50:** In the sentence beginning 'Personal records may also', delete the word 'General'.

- **Pages 17-18, Para 53:** Again, provision should be made for an appeal mechanism, in the event of the NHS contractor disagreeing with the decision of the designated officer.
- **Page 18, Para 54:** Again, it should also be made clear that, in the case of ophthalmic services, the specialist should be an appropriate person, namely an optometrist.

Furthermore, the clinical specialist should be bound by the duty of confidentiality and should be checked for conflicts of interest. We suggest that at the end of the first indent the words 'and confidentiality' should be added.

STORAGE, USE AND RETENTION OF RECORDS

- **Page 19, Para 59:** We suggest that this paragraph is difficult to understand and should be re-written for the sake of clarity.

We also suggest that the words 'using these powers' should be deleted. The identity of the individual in question should be treated as being ascertained, if the individual believes that the information combined with any available information will identify him/her – not simply other information obtained 'using these powers'.

- **Page 19, Para 60:** The last sentence is not clear and should be re-written.

Richard Carswell
Deputy Chief Executive
Tel: 020 7207 2193
Email: richardcarswell@aop.org.uk