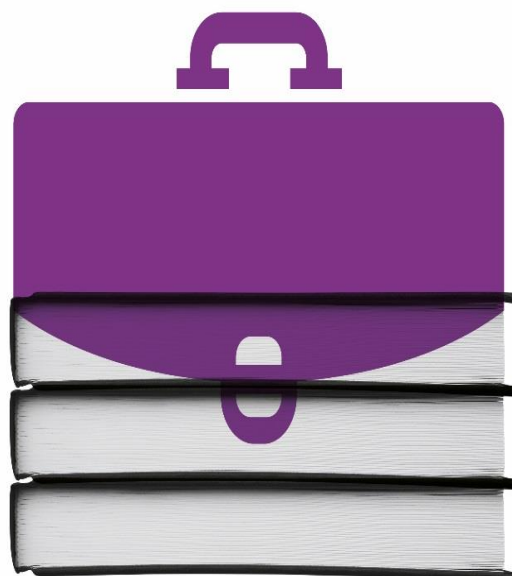


National Independent Safeguarding Board
Advice note

November 2018



Background

Advice has been sought by the National Independent Safeguarding Board (“NISB”) on a number of queries concerning the legal status of Regional Safeguarding Boards (“RSBs”) and governance issues arising in connection with Adult Practice Reviews and Child Practice Reviews which they undertake.

This request for advice arises as a consequence of the death in 2011 of Dylan Seabridge, an 8 year old home schooled boy, in Pembrokeshire. In accordance with the statutory framework, the local RSB was required to undertake a Child Practice Review (CPR) in these circumstances. The case received much media attention, resulting in multiple FOI requests being made to the Regional Safeguarding Board relating to the CPR. Difficulties arose around handling the FOIs, specifically relating to the status of draft versions of the Regional Safeguarding Board’s CPR.

As a result of these difficulties, questions arose regarding the status of Regional Safeguarding Boards - multi agency boards usually chaired by a Director of Social Services at a local authority, with staff being employed by local authorities.

Advice

Eversheds Sutherland has been commissioned to advise on a number of specific questions relating to these issues. Dealing with each question in turn:-

1. **In law what is the legal status of a Regional Safeguarding Board?**

Section 134(1) of the Social Services and Well-being (Wales) Act 2014 (“the Act”) provides that “Regulations must set out those areas in Wales for which there are to be Safeguarding Boards (“Safeguarding Board areas”).”

The Safeguarding Boards (General) (Wales) Regulations 2015 set out the relevant Safeguarding Board Areas as being the principal local government areas (regulation 3 and Schedule 1), namely, Cardiff and Vale (covering Cardiff and the Vale of Glamorgan), Cwm Taf (Merthyr Tydfil and Rhondda Cynon Taf), Gwent (Blaenau Gwent, Caerphilly, Monmouthshire, Newport and Torfaen), Mid and West Wales (Carmarthenshire, Ceredigion, Pembrokeshire and Powys), North Wales (Conwy, Denbighshire, Flintshire, Gwynedd, Isle of Anglesey and Wrexham) and Western Bay (Bridgend, Swansea and Neath Port Talbot).

An RSB is constituted of a number of “Safeguarding Board partner[s]” under section 134(2) of the Act:

“(2) Each of the following is a Safeguarding Board partner in relation to a Safeguarding Board area—

(a) the local authority for an area, any part of which falls within the Safeguarding Board area;

(b) the chief officer of police for a police area, any part of which falls within the Safeguarding Board area;

(c) a Local Health Board for an area, any part of which fall within the Safeguarding Board area;

(d) an [NHS Trust] providing services in the Safeguarding Board area;

(e) the Secretary of State to the extent that the Secretary of State is discharging functions under sections 2 and 3 of the Offender Management Act 2007 in relation to Wales;

(f) any provider of probation services that is required by arrangements under section 3(2) of the Offender Management Act 2007 to act as a Safeguarding Board partner in relation to the Safeguarding Board area.”

One of these partners is to be designated a “lead partner” in relation to children and in relations to adults, in the relevant area (section 134(3)).

The function, practice and procedures of Safeguarding Boards (namely, RSBs) are detailed in sections 135 to 139 of the Act, The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015 and The Safeguarding Boards (General) (Wales) Regulations 2015.

Therefore, RSBs are created under, and have their functions prescribed by, the Act and its underlying Regulations.¹ Their legal status is that of statutory bodies.

2. **Are Regional Safeguarding Boards legal entities?**

Beyond being a statutory body (see above) an RSB does not have its own legal personality. Rather, it comprises its constituent “Safeguarding Board partner[s]” under section 134(2), each of whom has its own legal personality.

However, in accordance with its statutory functions, and by analogy with local safeguarding children’s boards², RSBs are susceptible to judicial review³ and capable of bringing applications for public interest immunity⁴.

It would also appear that for the purposes of the Freedom of Information Act 2000 (“FOIA”), RSBs are to be treated as legal persons (see section 4 below).

3. **Does Freedom of information apply to Regional Safeguarding Boards?**

RSBs are not listed in Schedule 1 of the Freedom of Information Act 2000 (“FOIA”) as being public authorities for the purpose of the FOIA (under section 3(1)), nor have RSBs been added to Schedule 1 by any order made by the Secretary of State under sections 4 or 5 of the FOIA (unlike the NISB, which is identified as a public authority in accordance with the Freedom of Information (Additional Public Authorities) Order 2018/173).

¹ Similarly, the NISB is created under section 132 of the Act and its functions prescribed in The National Independent Safeguarding Board (Wales) (No. 2) Regulations 2015

² Created under s.13 of the Children Act 2004 (repealed by the Children and Social Work Act 2017).

³ see R(Mohammed) v Local Safeguarding Children’s Board for Islington [2-14] EWHC 2966 (Admin) and R. (Maguire) v Assistant Coroner for West Yorkshire [2018] EWCA Civ 6 in which Leeds Safeguarding Children’s Board was named as an Interested Party.

⁴ Worcestershire CC v HM Coroner for Worcestershire [2013] EWHC 1711 (QB).

On this basis, the "General right of access to information held by public authorities" (section 1, FOIA) does not apply to RSBs.

4. **What is the status of data held by Regional Safeguarding Boards?**

Information in the possession of RSBs does not, in our view, come within the FOIA, as considered above.

Nor are constituent Safeguarding Board partners, whilst themselves being public authorities within the meaning of Schedule 1, FOIA, liable to disclose information which they possess on behalf of RSBs. This is because such information does not come within section 3(2) of the FOIA, namely:

"For the purposes of this Act, information is held by a public authority if –

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority."

This analysis is supported by decisions of the Information Commissioner in respect of English Safeguarding Children's Boards:

4.1 In 2010 Doncaster Metropolitan Borough Council resisted a FOIA request for disclosure of the Edlington Serious Case Review produced by the Doncaster Safeguarding Children Board, as upheld by the Information Commissioner ([reference: FS50368110](#)).

4.2 In 2015 the Information Commissioner upheld a refusal by Stoke-on-Trent City Council to disclose minutes of its representatives who had attended meetings of the Stoke-on-Trent Safeguarding Board ([reference: FS50566663](#)). This decision was upheld by the First-Tier Tribunal (General Regulatory Chamber Information Rights) in a decision dated 14 April 2016 ([Michael J Barnes v Information Commissioner EA/2015/0222](#)).

The above decisions concerned English safeguarding boards, with differing applicable regulations⁵ at the time, particularly in terms of the extent of information required to be disclosed following a Serious Case Review (SCR). The 2006 Regulations in England provided under section 5:-

(1) The functions of an LCSB in relation to its objective (as defined in section 14(1) of the Act are as follows-

.....

(e) 'undertaking reviews of serious cases and advising the authority and their Board partners on lessons to be learned.'

⁵ The Local Safeguarding Children Boards Regulations 2006 applied in England, compared to the Local Safeguarding Children Boards (Wales) Regulations 2006 in Wales.

In England, the Statutory guidance⁶ relating to SCRs initially provided that only executive summaries of SCRs should be published once the SCR had been completed; this guidance was subsequently changed on 10 June 2010⁷ when overview reports were also ordered to be provided.

By way of contrast, the Welsh Regulations provided:-

4.—(1) *A Board must undertake a review (a "serious case review") in accordance with this regulation in any of the following cases where, within the area of the Board, abuse or neglect of a child is known or suspected, and—*

(a) a child has died, or

(b) has sustained a potentially life-threatening injury, or

(c) has sustained serious and permanent impairment of health or development.

(2) A Board may undertake a serious case review in accordance with this regulation where a child within its area suffers harm which does not fall within paragraphs 1(a)(b) or (c).

(3) The purpose of a serious case review is to identify steps that might be taken to prevent a similar death or harm occurring.

(4) In carrying out a serious case review, a Board must—

(a) ask each representative body to provide the Board with a written report of its involvement with the child who is the subject of the review, unless the Board is of the opinion that such a report is unnecessary in the circumstances;

(b) following receipt of each report referred to in sub-paragraph (a), produce a written report (referred to in these Regulations as an "overview report") that—

(i) identifies steps to be taken to reduce the risk of a similar death or harm occurring; and

(ii) recommends the time by which, and identifies the persons by whom, those steps should be performed;

(c) produce an anonymised summary of each overview report and make it available for inspection at the Board's principal office.

(5) The Board must provide the National Assembly for Wales with a copy of—

(a) each report provided by a representative body in accordance with paragraph (4)(a) above;

(b) each anonymised summary; and

⁶ Working Together to Safeguard Children (2010), since revised in 2013, 2015, 2017 and 2018

⁷ Letter from Tim Loughton MP to all LSCB Chairs dated 10th June 2010

(c) each overview report.

(6) The Board must provide each representative body with a copy of—

(a) each anonymised summary; and

(b) unless the Board considers it inappropriate, each overview report.

These were the regulations in force when both decisions referred to above were made by the Information Commissioner. The decisions both considered the extent to which the Safeguarding Boards were public authorities for the purposes of the FOIA, and whether or not the Safeguarding Board partners held the information for the purposes of the FOIA.

Despite the differences in the regulations, both the Welsh and English versions effectively recognise that the reports are provided to the Board Partner/representative body in order for lessons to be learned. This point was specifically addressed in the Doncaster MBC case referred to above – i.e. the complainant in that case argued that the SCR is not just held for safe keeping but *'as a document to learn lessons from and as a record of the council's own culpability'*⁸. This argument was rejected by the Information Commissioner who was satisfied that the information was not held for the Council's own purposes, and as such was not held for the purposes of the FOIA.

One further difference in the English and Welsh regulations is regulation 7 of the Local Safeguarding Children Boards (Wales) Regulations 2006. This provides as follows:-

'(1) A children's services authority must provide a member of its staff to provide administrative services to the Board.

(2) The records of a Board (in whatever form) are to be treated as if they were records of the children's services authority'.

One construction of Regulation 7(2) is that this brings all of the records of the Local Safeguarding Children's Board within the scope of FOIA. However, it is far from clear whether the definition of 'records' extends to a serious case review given that this is not defined. Regulation 4 also contains very prescriptive terms concerning serious case reviews, including for example anonymity provisions protecting the contents of the same, and the requirement for overview reports, which is not reflected within Regulation 7(2) .

We are also conscious that Regulation 7 was repealed on 6 April 2016 (upon the Safeguarding Boards (General) (Wales) Regulations 2015 coming into force), which contain no equivalent provision to regulation 7(2).

The regulatory appraisal⁹ document in relation to the Local Safeguarding Children Boards (Wales) Regulations 2006 provides some assistance here. It is clear that costs were an

⁸ Para 13, FOIA Decision Notice reference: FS50368110

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[http://www.assembly.wales/laid%20documents/ld5702%20-%20the%20local%20safeguarding%20children%20boards%20\(wales\)%20regulations%202006%20regulatory%20appraisal-06062006-20254/bus-guide-n0000000000000000000000044936-english.pdf](http://www.assembly.wales/laid%20documents/ld5702%20-%20the%20local%20safeguarding%20children%20boards%20(wales)%20regulations%202006%20regulatory%20appraisal-06062006-20254/bus-guide-n0000000000000000000000044936-english.pdf)

issue in relation to the establishment of the Local Safeguarding Children Boards, with the main area of costs anticipated to arise in the provision of administrative support. This was an issue that was raised during the consultation phase, and which was agreed would be dealt with through guidance.

Having reviewed the scrutiny undertaken of the draft legislation by the committee¹⁰, no discussion was held regarding whether or not the 'records' of the individual boards should be subject to the FOIA. The Minister for Health and Social Services at the time did however comment that the outcome of any investigation would be made available at the Local Safeguarding Children Board office, and would be a 'public domain' document; he also made the point that this document should 'be made more widely available. It will go to all the organisations that make up the local safeguarding children board. However we would expect it to be available on the internet as the system matures'. This is consistent with the provisions of Regulation 4.

The guidance subsequently issued by Welsh Government¹¹ provides further details regarding the operation of the Local Safeguarding Children Boards, specifically financing and administration. Again, there is no reference to all records being within the scope of the FOIA, merely to arrangements being in place (specifically funding from each local authority) for each board to be able to function effectively.

In our view, regulation 7(2) does not bring all of the records of the Local Safeguarding Children's Board within the scope of FOIA. In our view this regulation was intended to reflect the need for administrative services, including record keeping services, to be provided by the relevant local authority in a manner consistent with their own, albeit that the wording is clearly subject to interpretation. Given that the 2015 Regulations also contain no equivalent provision to regulation 7(2) we infer that this was an anomaly which has now been corrected. Even if we are wrong in this interpretation, in our view the reference to 'records' would not include serious case reviews and their reports which are dealt with distinctly as part of regulation 4.

The Children Act 2004 underpinned both sets of regulations, establishing Safeguarding Boards in both jurisdictions; sections 13-14¹² of that Act applied to England, and sections 31-32¹³ to Wales. Both of these provisions are materially identical. Whilst the regime in Wales has since been superseded by the Social Services and Well-being Act (Wales) Act 2014, which established RSBs in place of predecessor local safeguarding children boards, by analogy, the same principles are likely to apply in the case of RSBs.¹⁴

If so, this would mean that RSBs are to be treated as a legal person ("another person") for the purpose of section 3(2) FOIA¹⁵.

¹⁰ The Health and Social Services Committee, 11 May 2006

¹¹ Safeguarding Children: Working Together under the Children Act 2004

¹² Since repealed by the Children and Social Work Act 2017 following the abolition of LCSB's in England

¹³ Repealed by Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016/413

¹⁴ RSBs would, in any event, be able to rely on the exemptions under Part II, FOIA

¹⁵ Save for where RSBs are otherwise required to disclose documentation in accordance with their statutory duties, for example, making 'practice review report[s] publicly available' pursuant to regulation 4(5)(I) of the Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015.

Presumably therefore, the information provided by RSBs to the NISB (which is a public authority for the purposes of the FOIA) under section 139(1) of the Act, does not amount to information held by that public authority in accordance with section 3, FOIA. Information held by a Safeguarding Board partner is being held on behalf of the third party RSB, such that the information is outside the scope of the FOIA.

The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015 have since come into force along with the Safeguarding Boards (General) (Wales) Regulations 2015, the 2006 Welsh Regulations having since been repealed. The former Regulations now deal with the functions¹⁶ of Safeguarding Boards and the requirement to undertake practice reviews¹⁷. There is also an obligation on each RSB (whether it be a Safeguarding Children Board or a Safeguarding Adult Board) when undertaking a practice review to make a practice review report publicly available¹⁸. The content of these Regulations and the additional obligations upon RSB's with regard to undertaking practice reviews does not however change our advice with regard to the general application of the FOIA set out above.

Clearly, there remains scope for an individual Safeguarding Board partner to be challenged in terms of the information it holds following serious case reviews/practice reviews. Whilst our advice is that they will be able to rely on the legal position set out above, the manner in which the information provided to them is used within their organisation will be a relevant factor in determining whether or not information is being held for their own purposes (and thereby disclosable under the FOIA) as well as those of the RSB. This will of course be a factual matter to be considered in individual cases. We are conscious that the NISB is currently considering guidance on this area, which we think eminently sensible in order for there to be a co-ordinated approach to such matters.

In contrast to the position under the FOIA, the Data Protection Act 2018 and General Data Protection Regulation (GDPR) apply to data held by RSBs.

Section 137 of the Act empowers RSBs to request 'specified information' from a 'qualifying person or body'. As set out in the Explanatory Notes to the Act:

"Section 137 – Supply of information requested by Safeguarding Boards

385. Section 137 provides that a Safeguarding Board may ask a person or a body to provide information to it or another person or body that it specifies. The information request must be made to a "qualifying person or body" and must be for the purpose of assisting the Safeguarding Board in the exercise of its functions. A "qualifying person or body" is defined in subsection (7) and means a person or body whose activities or functions are considered by the Safeguarding Board to be such that the person or body is likely to have information relevant to the exercise of a function of the Safeguarding Board.

386. This section provides a statutory gateway to enable persons to lawfully provide information to Safeguarding Boards when requested. The processing of personal data in compliance with a legal obligation to which the data controller is subject, other than an obligation imposed by contract, can provide a lawful basis for processing data under

¹⁶ Regulation 3

¹⁷ Regulation 4

¹⁸ Regulation 4(l)

the Data Protection Act 1998 (see Schedule 1 (paragraph (a) of the first data protection principle) and Schedule 2, paragraph 3 of that Act).¹⁹

387. The qualifying person or body is under a duty to comply with a request for information made by a Safeguarding Board under this section, unless the qualifying person or body considers that doing so would be incompatible with their own duties or have an adverse effect on the exercise of their powers or duties. A qualifying person or body who decides not to comply with the request must provide the Safeguarding Board which made the request with written reasons for their decision."

5. **Who owns CPR and Adult Practice Reviews if Regional Safeguarding Boards are multi agency boards not legal entities?**

Practice reviews are undertaken by RSBs in accordance with regulations 3 and 4, The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015.

Therefore RSBs, as opposed to their constituent "Safeguarding Board partner[s]", own them in the sense that:

- a) They have been produced by the RSB in the exercise of its statutory duties,
- b) To the extent that the information contained therein is in the possession of a relevant partner, it is held by that partner on behalf of the RSB (as considered at paragraphs 14 to 17 above).

6. **How do Regional Safeguarding Boards delineate between a board complaint and an agency complaint?**

This query relates to whether a complaint is to be treated as directed at the RSB itself or at one of its constituent "Safeguarding Board partner[s]".

Delineation would depend on whether the complaint relates to a matter undertaken by the RSB in the discharge of its statutory functions or by one of its partners in a capacity unrelated to the RSB.

The subject of the complaint is key. Where the complaint relates to one of its partners acting on behalf of the RSB, then this should be treated as a complaint against the RSB rather than the partner acting.

7. **What are the legal liabilities of a Regional Safeguarding Board member acting in that capacity as opposed to representing their own agency?**

The potential legal liability of a constituent "Safeguarding Board partner" (section 134(2)) remains that of the individual partner itself, for example the local authority or Chief Officer of Police.

As set out in the statutory guidance, "Working Together to Safeguard People, Volume I – Introduction and Overview" under the heading, "Accountability":

¹⁹ Replaced by the Data Protection Act 2018

"252. Safeguarding Boards are accountable as individual Safeguarding Board members through their individual agency role to their organisation and to any relevant organisational inspectorates."

In practical terms, we would not anticipate any difficulty with this proposition as it is difficult to conceive of a situation in which an individual partner might contend that potential liability attaches to the discharge of its functions on behalf of the RSB, but not in its own capacity. It would obviously be a defence for a Safeguarding Board partner to point to the fact it was acting in compliance with the RSB's statutory functions under the Act and underlying Regulations.

8. **What is the status of historic information held by the now ended local boards and newly formed Regional Safeguarding Boards?**

For the reasons rehearsed under questions 3 and 4 above, this historic information, whether as originally held by the local boards or now held by the RSB, is not susceptible to disclosure under the FOIA.

Whilst the statutory framework has changed, given that the information would not have come within FOI during the existence of the local boards as referred to above, we cannot see how it can now do so following their replacement by RSBs given the content of the Act and The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015.

Whether or not information is treated as belonging to the RSBs or remaining within the local board, in the absence of either entity being identified as a public authority within the FOIA, our advice in respect of points 3 and 4 above remains.

9. **What would a model Regional Safeguarding Boards complaints procedure look like? Who would have the right to complain?**

In terms of the contents of a model complaints procedure for an RSB we would note the following points of general application:

- A complaints procedure should be available to any person affected by the exercise of an RSB's functions – i.e. those affected by any step taken by the RSB would potentially have the right to complain.
- An RSB's complaints procedure could be devised under regulation 5 of The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015, by which an RSB can determine its own procedures and make the same publicly available.
- A complaint could be directed to the "lead partner" whether in relation to children or adults (section 134(3)).
- If a complaint is directed at an individual "Safeguarding Board partner" (section 134(2)) using that organisation's own complaints procedure, and if that complaint in fact relates to an RSB in the exercise of its functions, such complaint should instead be treated by the RSB under its own complaints procedure. A communication should be sent to the individual concerned advising them of this.

- Similarly, a complaint directed to an individual “Safeguarding Board partner” which does not relate to the RSB’s exercise of its functions, should be dealt with under that organisation’s own complaints procedure.
- In our view, the content of the complaints procedure itself can be fairly standard, and modelled on any used by any local authority or Local Health board.

We trust that these responses have dealt with your questions in full; we are more than happy to discuss these in more detail once you have had an opportunity to digest its content.

Eversheds Sutherland

November 2018