

The Campaign for Freedom of Information

c/o Article 19
Free Word Centre
60 Farringdon Road
London EC1R 3GA
Tel: 020 7324 2519
Email: admin@cfoi.org.uk
Web: www.cfoi.org.uk



Response to the Department of Health consultation:

Providing a 'safe space' in healthcare safety investigations

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The proposed statutory restriction

1. The consultation document sets out proposals for new system of investigating NHS patient safety incidents.¹ We are extremely concerned at one aspect of this: the proposal that a new statutory prohibition on disclosure should apply to all information generated during the investigations. This would prevent its release under the Freedom of Information (FOI) Act or at the discretion of the investigating body. Parliament would have no power to obtain this information either. The only accessible source of information about such an incident would normally be the published investigation report.
2. The vast majority of investigations will continue to be carried out by the NHS body concerned though some will be carried out by the new Healthcare Safety and Investigation Branch (HSIB).
3. The statutory prohibition would mean that where the published report itself is flawed by poor investigation or self-interest or is excessively delayed or uninformative it would be impossible to look behind it to the underlying information. The only exceptions would be where the High Court orders disclosure or where the high level of continuing risk requires disclosure to the police or a statutory regulator.
4. The new regime is designed to allow staff to speak to investigators frankly knowing that the inquiry is designed to uncover the cause of the accident not to attribute blame. The consultation document refers to substantial evidence that the main problem is a 'blame culture' in the NHS in which staff fear they will face 'punitive reprisals' by employers shifting the blame onto them. However, neither the consultation document nor the various supporting reports referred to in it provide any evidence that the FOI Act contributes to this.
5. We are particularly concerned at the scope of the proposed statutory bar. It would apply not just to statements from staff involved in or witnessing the incident but to *all* evidence generated by the investigation. This may include information provided by participants who are *not* at risk of reprisal. Depending on the circumstances this might include the patient affected, a family member, a visitor to the hospital, a retired health professional, a whistleblower who has already spoken out or a member of staff whose only contribution is to explain how and when a policy was drawn up and is intended to operate. Some may

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560522/Safe_spaces_cons.pdf

prefer their contributions to remain private – others may feel motivated to speak out. The proposed restriction would not allow any such contributions to be disclosed, even with their consent.

6. The proposed restriction would be modelled on that applying to the Department of Transport's Air Accident Investigation Branch (AAIB). It would not be limited to the evidence of individuals. It would also apply to evidence submitted by the authority itself, contemporaneous records of communications between those involved, records relating to equipment used in the patient's treatment, the analysis of data and opinions expressed in relation to it, information about the patient's medical condition and information about the actions of staff involved in the incident.²
7. It is likely to prevent the disclosure of even fully anonymised information derived from information obtained during investigations. This has been the result of a similar prohibition applying to safety reports made to the Civil Aviation Authority under an EU Regulation which came into force in November 2015.³
8. The prohibition would not last merely while an investigation was taking place: it would be permanent and indefinite. If, years after the incident, subsequent events cast doubt on the officially published account, the original evidence could still not be revealed. It would have to be kept secret even if the participants had died or had no objection to disclosure, the authority itself wanted to disclose it for sound public interest reasons or it showed that those who may subsequently have been blamed had not been at fault.⁴

The operation of the FOI Act

9. There is no evidence that those who have devised this scheme have examined how requests for information about NHS accident investigations are actually dealt with under the FOI Act. In fact, the Information Commissioner (IC) and the First-tier Tribunal dealing with FOI appeals ensure that potentially harmful disclosures do *not* take place.

² This draws on the definition of the records to be withheld from disclosure in regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 which in turn draws on a definition contained in Annexe 13 of the Chicago Convention on International Civil Aviation.

³ EU Regulation No 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation.

⁴ Under the proposed system, the investigation report itself would not allocate blame but later proceedings might do so.

10. A number of FOI exemptions come into play when such information is requested. They include:
- a. section 31(1)(a) and (b) for prejudice to law enforcement
 - b. section 31(1)(g) for prejudice to an authority's regulatory functions including those relating to accident investigations, health and safety and professional competence
 - c. section 36(2) for information likely to inhibit the free and frank provision of advice or exchange of views for the purpose of deliberation or the effective conduct of public affairs
 - d. section 40(2) for personal information
 - e. section 41 for information whose disclosure would be a breach of confidence.⁵
11. These exemptions take account of the public interest in disclosure.⁶ However, the invariable outcome has been to withhold (a) information whose disclosure might deter witnesses from coming forward or speaking frankly to investigators and (b) personal information about patients and staff.
12. The following cases illustrate the substantial protection for such information already provided under FOI:
- a. An FOI request was made for an internal report into the death of a child at Mid Staffordshire NHS Foundation Trust. The trust withheld the report citing a number of exemptions which the IC found did not apply. At his own initiative the Commissioner considered and upheld the section 41 exemption for breach of confidence, which the trust had not cited. He found that the information largely involved confidential details of the child's symptoms and treatment and that any public interest in its disclosure *'does not outweigh the very considerable, and in his opinion, compelling public interest in preserving the confidential nature of a patient's medical records.'* Only one paragraph of the report was not exempt. This was disclosed minus the names of two junior members of staff who had been involved in investigating the incident.⁷
 - b. The Commissioner refused to order disclosure of *anonymised* information about Serious Untoward Incidents involving maternity services at a small NHS trust

⁵ This exemption also serves to protect information from the medical records of a deceased person. The section 40(2) exemption for of personal information can only apply to a living individual.

⁶ Sections 31 and 36(2) are subject to the public interest test in section 2 of the FOI Act. Section 41 is subject to a public interest test under the common law on confidentiality. Section 40(2) involves a balancing test under paragraph 6(1) of Schedule 2 of the Data Protection Act which indirectly takes account of public interest factors.

⁷ ICO decision FS50460861, Mid Staffordshire NHS Foundation Trust, 31 January 2013

between 2009 and August 2011. The trust comprised only three hospitals. There had been 5, 10 and 3 serious incidents in each of the years concerned. Given the small numbers and the existence of some media interest, the IC concluded that publication even in anonymous form might permit some patients' identities to be discovered. He found the information was protected by the exemption for personal information.⁸

- c. NHS London was asked for the number of reported Serious Untoward Incidents in 2011 involving surgical errors, equipment failures and drug incidents and for a description of each. It disclosed the figures but withheld the descriptions on the grounds that these would involve a breach of confidence. The Commissioner found that provided the information was properly anonymised no breach of confidence would occur. In contrast to the case in paragraph (b) above he held that the numbers, covering the whole of London, were so large that no individual could be identified even by a determined person with local knowledge. He ordered descriptions to be released minus the names of patients, staff, hospitals, geographical locations and any times or dates. Where the cases had other distinctive features he required further redactions. But he allowed job titles to be disclosed finding that the numbers of staff and incidents involved across the whole of Greater London meant that no-one could be identified from them. In two cases, the descriptions involved medical equipment failures not linked to any individual, and he required fuller details to be disclosed.⁹ We doubt whether this information could be disclosed under the present proposals.
- d. The request described in paragraph (b) above also sought a report into the Trust's provision of women's services, which it disclosed in part. The requester challenged the redactions. The IC found that the information had been properly withheld under sections 36(2) and 40(2). It involved specific accounts of incidents involving staff together with *'frank and honest statements'* about them. The balance of public interest favoured withholding these accounts as *'staff need to be confident that they can have a safe space to openly and frankly discuss and exchange ideas internally and away from public scrutiny. This aids internal service scrutiny and a robust decision making process so that difficult and sensitive decisions can be reached.'*
- e. A request was made for Serious Untoward Incident report into the death of a patient who had received a non-matching lung transplant. The IC found that the majority of the report fell within three classes of information: the patient's medical records, information about the circumstances of the death and information about the staff involved in the patient's care – all of which he found to be exempt under section 41. However, he held that other information including

⁸ ICO decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.

⁹ ICO decision FS50448878, NHS London, 13 November 2012

the action plan drawn up to prevent recurrence and the identities of senior staff who investigated the incident should be disclosed.¹⁰

- f. The IC endorsed the withholding of the same three classes of information above from a Serious Untoward Incident report into the highly controversial death of Baby P. However, he allowed some disclosure of information already in the public domain. He protected the identities of junior staff who had not been involved in the events, on the grounds that the emotive context might lead some blame being unfairly attached to them. But he permitted disclosure of some identifying information about senior staff who had analysed information about the incident but not been involved in the child's care.¹¹
- g. An NHS trust was asked for information relating to a murder which occurred on the its premises as well as emails about the case sent to the Chief Executive on specified dates. A number of emails were disclosed with the sender's personal information redacted under s.40(2). An internal investigation report was withheld under section 31, as criminal investigations which might be prejudiced were being carried out by the Health & Safety Executive and the police. The Information Commissioner found that the exemptions had been correctly applied.¹²
- h. The widow of a man who had died while in hospital, following a fall from his bed, asked for witness statements that had been taken during a Serious Untoward Incident investigation. The requester appealed against the IC's decision that these had been correctly withheld as the personal information of the staff making them. The First-tier Tribunal questioned whether that exemption covered the statements in full but found that disclosure would prejudice the authority's regulatory functions (section 31(1)(g)) and the frankness of advice or discussions or the effective conduct of public affairs (section 36(2)) and that the balance of public interest favoured their withholding. The tribunal observed that the confidentiality *'leads to a level of trust between the staff and investigators, resulting in confidence that the majority of statements are accurate, detailed and candid. We accept that were the staff to consider that their statements would be disclosed to the public, they may become guarded and not provide a complete picture which is necessary for the investigators to perform their function'*¹³

13. These cases show the weight given under the FOI Act to protecting the identity and contributions of staff making statements to safety investigators. It raises the question of why a new statutory prohibition on disclosure should be required.

¹⁰ ICO decision, FS50299667, NHS London, 20 December 2010

¹¹ ICO decision FS50441777, NHS London, 28 January 2013

¹² ICO decision FS50575957, 2gether NHS Foundation Trust, 9 July 2015

¹³ First-tier Tribunal, EA/2008/0036, Galloway & Information Commissioner & Central and North West London NHS Foundation Trust, 20 March 2009.

14. Even under the FOI Act as it stands, the level of protection for such information is likely to frustrate, and fuel suspicion of cover-ups by, those seeking information. The arrangement is at least subject to the independent supervision of the Information Commissioner and tribunal.
15. The proposed statutory prohibition would replace what in most cases is a modest level of background disclosure, for example of fully anonymised incident data, with an absolute prohibition. It would prevent the release of information about, say, faulty equipment, where no member of staff may conceivably be held to be at fault. It would indicate that even the most compelling case for openness would be ignored regardless of its merits. That can only fuel mistrust.
16. Moreover, the present arrangement allow the prospect of more significant disclosure where the circumstances may genuinely merit it. There would certainly be a powerful case for disclosure on public interest grounds where, for example, it was apparent that the maker of a statement had lied or deliberately misled investigators.

Secrecy in the air

17. The implications of adopting the AAIB's type of statutory prohibition can be seen by examining the AAIB's response to FOI requests and that of the Civil Aviation Authority (CAA), which is subject to a similar prohibition.
 - a. In 2014 the AAIB refused to reveal the source of information which led it to state that a particular model of RAF Tornado aircraft would in future be fitted with a collision warning system. The AAIB explained that the disclosure of this information, was prohibited under a EU regulation unless it was required for the purposes of a improving safety.¹⁴ The information is likely to have come from the Ministry of Defence or the Royal Air Force. It is difficult to believe that any purpose, either in protecting defence interests or promoting a blame-free investigation culture, could have been served by the AAIB's answer.
 - b. Also in 2014, the AAIB refused to release satellite data about the Malaysian Airlines Flight which had disappeared en route from Kuala Lumpur to Beijing. One of the reasons cited was the same statutory prohibition on disclosure. When challenged it acknowledged that it did not hold the information anyway.¹⁵

¹⁴ https://www.whatdotheyknow.com/request/aaib_report_32000#outgoing-344306

¹⁵ https://www.whatdotheyknow.com/request/9m_mro75008f_aes_exchange_iq_sni#incoming-536372

- c. The CAA has refused to reveal the number of drone incidents occurring at each UK airport in 2015, citing the statutory bar on disclosing information obtained during safety investigations unless the disclosure is for a safety purpose.¹⁶
 - d. For the same reason, the CAA has refused to disclose the number of drink related incidents involving passengers reported by staff in 2014 and 2015.¹⁷
18. This is the kind of indiscriminate secrecy which it is now proposed should be extended to NHS safety investigations. We doubt whether any of the supposed benefits will compensate for the shock people will experience at such an unwelcome development in the NHS.
19. A greater degree of scepticism about the suitability of the AAIB's arrangements as a model for the NHS may be called for. In 2014 the AAIB was involved in 30 'field' investigations in the UK¹⁸ and 38 investigations of incidents involving UK aircraft overseas. There were just 10 fatal accidents in the UK involving 16 deaths.¹⁹
20. There are estimated to be 12,000 avoidable hospital deaths every year.²⁰ The consultation paper states that there are 30,000 serious incidents requiring investigation annually. Arrangements which may not appear contentious in relation to air safety because of the tiny numbers of people directly affected may have an entirely different impact in the NHS.

Statutory prohibitions and safety

21. In the 1997 white paper which preceded the FOI Act the government indicated that it would, where appropriate, amend or repeal statutory restrictions which interfered with the FOI right of access.²¹ A series of statutory bars on the disclosure of safety information were later relaxed. These included provisions which prevented the Health and Safety Executive and the medicines licensing authorities from disclosing third party information unless it was for the purpose of their functions.^{22,23}
22. The move recognised that the FOI exemptions provided an suitable level of protection for sensitive information and could be relied on in place of statutory restrictions. The same is true in the present context. We are dismayed to see the government now proposing to move in the opposite direction. We urge it not to proceed with this proposal.

¹⁶ <https://www.whatdotheyknow.com/request/323755/response/791947/attach/html/3/20160405Reply.pdf.html>

¹⁷ <https://www.whatdotheyknow.com/request/309106/response/759291/attach/html/5/20160126Reply.pdf.html>

¹⁸ This excludes cases which were dealt with purely by correspondence

¹⁹ AAIB, Annual Safety Report 2015.

²⁰ Public Administration Select Committee, Investigating clinical incidents in the NHS, Sixth Report of Session 2014–15, HC 886 27 March 2015

²¹ 'Your Right to Know: the Government's Proposals for a Freedom of Information Act', Cm 3818, December 1997, paragraph 3.20

²² Health and Safety at Work etc Act 1974, section 28; Medicines Act 1968, section 118.

²³ See the Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure of Information) Order 2004

Consultation questions

Our responses to the formal consultation questions are as follows:

Question 1 - Do you consider that the proposed prohibition on disclosure of investigatory material should apply both to investigations carried out by HSIB, and to investigations conducted by or on behalf of NHS Trusts, NHS Foundation Trusts and other providers of NHS-funded health care?

We do not believe the proposed prohibition is necessary or desirable either for investigations carried out by the HSIB or by NHS bodies.

Question 2 - for those investigations undertaken by or on behalf of providers and commissioners of NHS-funded care, should the proposed prohibition on disclosure apply only in relation to investigations into maternity services in the first instance or should it apply to all investigations undertaken by or on behalf of such bodies?

See answer to Q1

Question 3 - Do you have any comments about the type of information that it is proposed will be protected from disclosure during healthcare investigations?

Any information for which protection is required is already adequately protected by FOI exemptions.

Question 4 - Do you agree that the statutory requirement to preserve the confidentiality of investigatory material should be subject to such disclosure as may be required by High Court order?

Should a statutory restriction on disclosure be introduced, it should be capable of being overridden with the approval of the High Court.

We note that the balancing act which it is proposed that the High Court should undertake is structurally similar to the public interest test applied by the IC and Tribunal under the FOI Act. The High Court would balance the case for disclosure in the interests of justice against the possible harm to the investigatory process, bearing in mind the importance of eliciting frank and candid evidence.

The Information Commissioner considers whether the public interest in maintaining an exemption such as section 36(2) outweighs the public interest in disclosure.²⁴ Section 36(2), expressly refers to the interest in avoiding likely inhibition to '(i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation' or otherwise prejudicing 'the effective conduct of public affairs'.

We believe the wider public interest balancing test under FOI should continue to be applied and be adjudicated on by the IC, subject to the existing right of appeal to the First-tier Tribunal and, on a point of law, the Upper Tribunal, which has the standing of the High Court.

In relation to NHS investigations, this public interest test has already produced the kind of clarity which the consultation paper hopes over time would be developed by the High Court.

²⁴ See section 2(2)(b) of the FOI Act.

Question 5 - Do you agree with the proposed elements of the test to be applied by the High Court in considering an application for disclosure?

See answer to Q4.

Question 6 - Do you have any views on the proposed exceptions that would apply to the prohibition on disclosure of material obtained during investigations by the HSIB and by or on behalf of providers and commissioners of NHS service?

We think that any exception to the prohibition should be substantially wider than proposed. The FOI public interest test allows disclosure on *any* public interest ground, yet the weight given to the interests of protecting the investigatory process is very substantial.

The existing system already satisfies the objective that the new system is intended to meet, despite wide public interest grounds on which disclosure may be permitted.

Question 7 - Do you have any views on where the bar should be set on passing on concerns to other organisations whose functions involve or have a direct impact on patient safety?

We have no comment on this.

Question 8 - Do you consider that the exceptions proposed could undermine the principle of 'safe space' from the point of view of those giving evidence to investigations?

We question whether the 'safe space' concept as set out is attainable. The possibility of disclosure to the police or a professional regulator is appropriate but means those giving evidence cannot be reassured of absolute confidentiality. Under the proposed system, health professionals and staff may fear that their evidence will be disclosed as a result of being unfairly judged to present a serious and continuing risk to patients or as a result of a High Court order.

Question 9 - Do you support the principle of a 'Just Culture' (that would make a distinction between human error and more serious failures) in order that healthcare professionals might come forward more readily to report and learn from their mistakes without fear of punitive action in circumstances that fall short of gross negligence or recklessness?

We support the 'Just Culture' principle but question whether the removal of FOI rights is the way to attain it.

Question 10 - If you consider that the prohibition on disclosure should be subject to an exception allowing for the disclosure of certain information to patients and their families, what kind of information do you consider should be able to be disclosed in that context? And when would be a sensible, workable point for patients/families to have access to information - eg, should they see a pre-publication draft report for comment?

We have no comment on this.

Question 11 - Do you see any problems in a requirement that investigatory bodies (such as professional regulators, coroners and the police) must apply to the High Court if they wish to gain access to information obtained during investigations by the HSIB or by or on behalf of providers or commissioners of NHS-funded care?

No comment on this.

Question 12 - Do you have any concerns about the use of the phrase "safe space" in relation to this policy; and, if so, do you have an alternative preference?

We don't think the term is the problem

Question 13 - Do you see any problems in exempting information obtained during healthcare investigations from access under the Freedom of Information and Data Protection regimes?

Clearly yes, in relation to FOI.

The right of subject access under the Data Protection Act 1998 implements an EU directive and is also required to comply with Article 8 of the European Convention on Human Rights. We question whether the right could lawfully be withdrawn in the way proposed.

Were this to be done it might, for example, permit an authority to wrongly attribute responsibility for an incident to a patient, based on an inaccurate and unfair account of the patient's behaviour, in the knowledge that the patient could not see or challenge it. This could exacerbate a 'blame the patient' culture.

Question 14 - Do you agree that guidance, or an alternative source of support, should be developed?

No comment on this.

Question 15 - Do you think it would be helpful for NHS staff to be supported by a set of agreed national principles around how they would be treated if involved in a local safety incident investigation; and, if so, do you have any suggestions for the areas that such a set of principles should cover?

Question 16 - Do you have any concerns about the impact of any of the proposals on people sharing protected characteristics as listed in the Equality Act 2010?

No comment on this.

Question 17 - Do you have any concerns about the impact of any of the proposals on families? If you envisage negative impacts, please explain.

No comment on this.
