

# The Campaign for Freedom of Information

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**Submission to the**

**Joint Committee on the Draft Health Service Safety Investigations Bill**

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## **The proposed statutory restriction**

1. The Campaign for Freedom of Information is concerned about the prohibition on the disclosure of information contained in in the Draft Health Service Safety Investigations Bill.<sup>1</sup>
2. Under the bill, the Health Service Safety Investigations Body (HSSIB) and accredited trusts would publish reports on their investigations into serious patient incidents.<sup>2</sup> But they would be prohibited from making public any other information held in connection with the investigations. The prohibition would override the right of access under the Freedom of Information (FOI) Act and - it is suggested - the subject access right under the Data Protection Act.<sup>3</sup> This reform would deprive the public of two important rights that they have enjoyed for many years.
3. Prohibited information could be obtained with the permission of the High Court,<sup>4</sup> but the cost and complexity of this procedure, together with the restricted grounds on which it could be invoked, is likely to severely limit use of the option.
4. The prohibition would mean that where a published report failed to properly answer a relevant question, is flawed by poor investigation, lack of frankness, self-interest on the part of an accredited trust investigating itself or is excessively delayed it would be impossible for the public to look at any of underlying information.
5. The purpose of the prohibition is said to be to allow staff to speak to investigators frankly knowing that the inquiry is designed to uncover the cause of the incident not to attribute blame. The Department of Health's October 2016 consultation document explains this approach by reference to the need to move away from an NHS 'blame culture' in which staff fear they will face 'punitive reprisals' for speaking honestly about their role in incidents.
6. The way in which the FOI Act is thought to contribute to this 'blame culture' is not explained. NHS trusts do not rely on FOI disclosures to discover which of their staff have been involved in patient safety incidents. Nor could they, since in practice the names and identifying details of such staff are exempt from disclosure, even in the most serious cases.

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<sup>1</sup> Draft Health Service Safety Investigations Bill (hereafter 'Draft Bill') clause 28

<sup>2</sup> Draft Bill, clause 31(2)

<sup>3</sup> Department of Health, Providing a 'safe space' in healthcare safety investigations, Consultation, October 2016, paragraph 5.39

<sup>4</sup> Draft Bill, clause 30

7. We regard the proposed prohibition as damaging and entirely disproportionate to its stated aim. It would not be restricted to the identity of, or statements from or about staff or patients involved. It would apply to *all* information held in connection with an investigation, much of which could have no effect on the willingness of staff to account frankly for their role. Policy or procedural documents, information about staffing levels, recruitment problems, financial difficulties, lessons learnt from past incidents, information supplied by equipment or product manufacturers and the results of tests commissioned by investigators would all be covered by the prohibition. Even wholly anonymised statistics or accounts of similar incidents at unrelated premises elsewhere will be unavailable: nothing limits the prohibition to information about *identifiable* individuals or premises. So long as the information was unpublished and held 'in connection with the investigation' it could not be disclosed. This substantial increase in secrecy, for information much of which could be disclosed without harm, is in our view wholly unjustified.
8. The prohibition would also apply to information supplied by any patients, family members or staff who are willing for their information to be made public. Their consent to disclosure would not affect the statutory bar.

### **Accountability**

9. The prohibition will be indefinite. If, years after the incident, subsequent events cast doubt on the previously accepted account of the incident, the original evidence could still not be revealed without the High Court's permission. It would otherwise have to be kept secret even if the factual basis of the findings had been shown to be wrong, those who may subsequently have been blamed had not been at fault or if the authority or the HSSIB itself wanted to disclose it for sound public interest reasons.
10. Furthermore, the test that the High Court would apply in any application for disclosure is restrictive. It would require the court to find that 'the interests of justice' served by disclosure outweighed any deterrent effect on the willingness of persons to participate in future investigations. The term 'interests of justice' is likely to refer to the fair determination of legal proceedings or to the protection of a legal right. It is not clear that it would encompass the public interest in holding public authorities to account.
11. It is not unknown for regulators themselves to fall short of expected standards. The prohibition would shield the HSSIB or accredited trusts from scrutiny not just by journalists or campaign bodies but by Parliament. The shortcomings of the Care Quality Commission

have been the subject of two critical reports by the Public Accounts Committee.<sup>5</sup> A select committee would find it extremely difficult to probe concerns about HSSIB's performance. If questions were raised about delays in contacting key witnesses, HSSIB would not be able to tell the committee when it had in fact contacted a particular witness. Unlike other bodies, Parliament would presumably not be able to apply to the High Court for the prohibition to be lifted. For Parliament to seek a court's permission to carry out its functions would contravene the constitutional principle of the separation of powers.

12. The undermining of accountability would be particularly significant in relation to accredited trusts. The trust will be both the investigating and the investigated body. The opportunities for conflict of interest are obvious. Yet *all* information held by the trust about an incident is likely to be treated as held for the purpose of its investigation – and be subject to the prohibition. This information may currently be disclosable under FOI, or at the trust's discretion. This would create a new and unnecessary layer of NHS secrecy.
  
13. The supposed benefits of the 'safe space' arrangements should also be treated with caution. It appears to have been assumed that the guarantee of confidentiality will lead staff to speak openly and frankly to investigators about their contribution to an incident *'in the knowledge that information they provide will not be passed on unless one of the exceptions set out in the legislation applies.'*<sup>6</sup> But the exceptions rightly permit information about misconduct or continuing risk to patients to be passed to professional regulatory bodies or NHS employers who can suspend, strike off or dismiss a health professional. To the health professional who fears that they or a colleague may have made a serious mistake, the consequences of the *permitted* disclosures are likely to be a far greater deterrent to frank admission, than any concern about a possible FOI disclosure.
  
14. The case for preventing information being obtained under the FOI Act appears to be based solely on the fact that such access is excluded in relation to the investigation of air, rail and maritime accidents.<sup>7</sup> No other case for the exclusion has been set out. No account seems to have been taken of the fact that other investigatory bodies *are* subject to FOI without any such prohibition and rely solely on FOI exemptions to protect sensitive information. These include:

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<sup>5</sup> House of Commons Committee of Public Accounts, *The Care Quality Commission: Regulating the quality and safety of health and adult social care*, HC 1779, Seventy-eighth Report of Session 2010–12, 30 March 2012; House of Commons Committee of Public Accounts, *Care Quality Commission, Twelfth Report of Session 2015–16*, HC 501, 2 December 2015

<sup>6</sup> Department of Health, Factsheet 3, 'The Draft Health Service Safety Investigations Bill, 'Safe space': what is it, why we need it and how it will work.

<sup>7</sup> Public Administration and Constitutional Affairs Committee, 'PHSO Review, Quality of NHS Complaints Investigations', First Report of Session 2016-17, HC 94, 24 May 2016, paragraph 57

- The Health and Safety Executive (HSE) and Commission. Since their creation in 1974, these bodies had been subject to a prohibition on public disclosure, except where it was necessary for their functions.<sup>8</sup> The restriction was lifted shortly before the FOI Act came into force with the support of the HSE, to ensure that it did not interfere with FOI disclosures. The investigation of accidents is of course a major HSE function.
- The Medicines and Healthcare Products Regulatory Agency which had also been subject to a statutory bar which was also amended to permit FOI disclosures before the FOI Act took effect.<sup>9</sup>
- Other regulators such as the Care Quality Commission, the Environment Agency, the Food Standards Agency, the General Medical Council, the Nursing and Midwifery Council, the General Dental Council, as well as local authorities in relation to their environmental health, building control, traffic control, planning and other functions.
- Significantly, the police – who deal with information which is often more sensitive than that involved in NHS accident investigations – are fully subject to the FOI Act. They rely on the FOI exemptions to protect witness statements, informants, criminal intelligence, the detection of crime, the prosecution of offenders and personal information about victims, witnesses, suspects and officers.

### **Secrecy in the air**

15. The proposed restriction is expressly modelled on that applying to the Department of Transport's Air Accident Investigation Branch (AAIB). However, the number of passengers affected by air accidents is tiny. The last fatal accident involving a UK registered conventional large passenger aircraft occurred in 1999<sup>10</sup> but there are estimated to be 12,000 avoidable NHS hospital deaths each year<sup>11</sup> and 30,000 serious incidents.<sup>12</sup> A restriction that may go unremarked in relation to air accidents may become a major source of controversy and suspicion when applied to a widespread NHS problem.

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<sup>8</sup> Section 27 of the Health & Safety at Work etc Act 1974.

<sup>9</sup> Section 118 of the Medicines Act 1968

<sup>10</sup> Civil Aviation Authority, Annual Report and Accounts 2016/17, page 36

<sup>11</sup> Public Administration Select Committee, Investigating clinical incidents in the NHS, Sixth Report of Session 2014–15, HC 886, 27 March 2015

<sup>12</sup> Department of Health, Providing a 'safe space' in healthcare safety investigations, Consultation, October 2016

16. The secrecy that is likely to follow can be seen by examining the handling of FOI requests by the Civil Aviation Authority (CAA) after the introduction of a new prohibition on disclosure under an EU regulation in November 2015.<sup>13</sup>
17. In 2015 the CAA published on its website copies of 40 FOI releases about safety which it considered to be ‘in the wider public interest’.<sup>14</sup> During the whole of 2016 (that is, after the prohibition on disclosure came into force) it published *only 4 items* of safety information.<sup>15</sup>
18. Examples of FOI requests refused by the CAA because of the statutory prohibition include:
- The number of cabin or cockpit smoke or fume events in 2014, 2015 and the first 5 months of 2016.<sup>16</sup>
  - The number of drink related incidents involving passengers reported by staff in 2014 and 2015.<sup>17</sup>
  - The number of UFO sightings in British airspace reported by members of the public or commercial aircraft crews in 2015, 2016, 2017 and as of the date of the request in 2018.<sup>18</sup>
  - The number of drone incidents occurring in Sussex.<sup>19</sup>
  - A list of commercial passenger aircraft with permission to operate in UK airspace having previously been involved in an incident in which the aircraft’s tail hit the ground during takeoff or landing.<sup>20</sup>
  - The reasons why a Monarch flight, on which the requester had flown, had aborted its landing at Gatwick when only 8 metres above the runway.<sup>21</sup>
19. These are examples of the kind of damaging secrecy likely to grow in the NHS as a result of the bill.

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<sup>13</sup> Regulation (EU) No 376/2014 of the European Parliament and of the Council on the reporting, analysis and follow-up of occurrences in civil aviation,

<sup>14</sup> <http://www.caa.co.uk/Our-work/Information-requests/Accessing-information-held-by-the-CAA/>

<sup>15</sup> The prohibition on disclosure came into force on 15 November 2015, so was not in force for most of 2015.

<sup>16</sup> <https://www.whatdotheyknow.com/request/333356/response/817926/attach/html/3/20160526Reply.pdf.html>

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

<sup>18</sup> <https://www.whatdotheyknow.com/request/341550/response/834879/attach/html/3/20160706Reply.pdf.html>

<sup>19</sup> [https://www.whatdotheyknow.com/request/number\\_of\\_incidents\\_related\\_to\\_dCAA](https://www.whatdotheyknow.com/request/number_of_incidents_related_to_dCAA)

<sup>20</sup> <https://www.whatdotheyknow.com/request/300732/response/738402/attach/html/5/20151126Reply.pdf.html>

<sup>21</sup> <https://www.whatdotheyknow.com/request/341550/response/834879/attach/html/3/20160706Reply.pdf.html>

## The operation of the FOI Act

20. None of the background materials leading to the draft bill cite any examples of actual FOI disclosures that are alleged to have undermined NHS accident investigations.

21. In fact, decisions under the FOI Act provide substantial protection for information about such matters. Particular prominence is given to the need to protect the personal information of staff and patients, information provided in confidence and the need to avoid deterring participants from speaking frankly to investigators.

22. The relevant FOI exemptions include:

- section 40(2) for personal information
- section 41 for information whose disclosure would be an actionable breach of confidence<sup>22</sup>
- 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 to otherwise prejudice the effective conduct of public affairs
- section 31(1)(g) for information likely to prejudice an authority's regulatory functions. The specified functions include those relating to ascertaining the cause of an accident, securing the health, safety and welfare of persons at work and ascertaining whether any person has been responsible for improper conduct<sup>23</sup>
- sections 31(1)(a) and (b) for prejudice to the prevention or detection of crime or the apprehension or prosecution of offenders. These may be relevant where criminal offences (eg the Harold Shipman murders) may be involved.

23. Several of these exemptions are subject to a provision which may require the disclosure of exempt information where the balance of public interest favours it.<sup>24</sup> Cases dealt with by the Information Commissioner (IC) and tribunal have typically given substantial weight to the public interest in promoting frankness in NHS accident investigations.

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<sup>22</sup> 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.

<sup>23</sup> FOI Act sections 31(2)(b), (e) and (i)

<sup>24</sup> FOI Act, sections 2(1) and (2)

## FOI Decisions

24. The following cases illustrate the extensive protection for such information under FOI:

- (a) An FOI request asked whether any investigation had been carried out into the death of a named patient. The NHS trust concerned provides mental health and learning disability services amongst others and considered that confirming that a patient had accessed these services would be a breach of confidence. The trust refused to confirm or deny whether it held information relating to the individual. The IC found that it had responded correctly and upheld the refusal.<sup>25</sup>
- (b) A member of the public was killed by a mental health patient. The NHS trust provided the victim's family with a copy of its an internal investigation report, redacting some personal information. The victim's daughter then applied for the interviewed staff's full statements, which the trust withheld. The Commissioner found that these were the personal information of the interviewed staff and also contained personal information about other staff and the patient. Disclosure would be unfair to the staff, as they would not have expected them to be disclosed and would be exposed to the risk of stressful attention from the press and critics. Information about the patient's health was also exempt as none of the strict data protection conditions governing the release of such information could be satisfied. The information could not be properly anonymised, as anyone familiar with the events would be able to identify the participants. The IC ruled that the statements were exempt in their entirety.<sup>26</sup>
- (c) 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.<sup>27</sup>
- (d) The Commissioner refused to order disclosure of *anonymised* information about Serious Untoward Incidents involving maternity services at a small

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<sup>25</sup> IC decision FS50539478, Southern Health NHS Foundation Trust, 7 August 2014

<sup>26</sup> IC decision FS50587046, Derbyshire Healthcare NHS Foundation Trust, 7 January 2016

<sup>27</sup> IC decision FS50460861, Mid Staffordshire NHS Foundation Trust, 31 January 2013

NHS trust 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 and was therefore subject to the exemption for personal information.<sup>28</sup>

- (e) 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 preceding case 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 the descriptions to be released minus the names of patients, staff, hospitals, geographical locations and 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 identities could be deduced. In two cases, the descriptions involved medical equipment failures not linked to any individual, and he required fuller disclosure of these.<sup>29</sup>
- (f) The request described in paragraph (d) above also sought a report into the Trust's provision of women's services, which was 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.*'<sup>30</sup>
- (g) 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 information involved the patient's medical records, the circumstances of the death and information about the staff involved – all of which were exempt under section 41 (breach of confidence). However, he held that the action plan drawn up to prevent recurrence and

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<sup>28</sup> IC decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.

<sup>29</sup> IC decision FS50448878, NHS London, 13 November 2012

<sup>30</sup> IC decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.

the identities of senior staff who investigated the incident should be disclosed.<sup>31</sup>

- (h) The IC endorsed the withholding of the same three classes of information featuring in the above case 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.<sup>32</sup>
- (i) 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.<sup>33</sup>
- (j) 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 IC found that these had been correctly withheld as the personal information of the staff making them. On appeal, the First-tier Tribunal considered that parts of these statements did *not* involve personal information but found that the whole of the statements were covered by the exemptions for information likely to prejudice the authority's regulatory functions (section 31(1)(g)) and for information likely to inhibit the frankness of advice or discussions or the effective conduct of public affairs (section 36(2)). 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*'<sup>34</sup>

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<sup>31</sup> IC decision, FS50299667, NHS London, 20 December 2010

<sup>32</sup> IC decision FS50441777, NHS London, 28 January 2013

<sup>33</sup> IC decision FS50575957, 2gether NHS Foundation Trust, 9 July 2015

<sup>34</sup> First-tier Tribunal, EA/2008/0036, Galloway & Information Commissioner & Central and North West London NHS Foundation Trust, 20 March 2009.

25. These cases, which are typical, show the weight given under the FOI Act to protecting the identity and contributions of staff making statements to investigators. The disclosures that were made were of information incapable of harming privacy or the investigatory process. The fact that the ultimate disclosure decisions were made independently of the body seeking to withhold the information, adds significant credibility to the decisions.
26. The question of why a new, largely unchallengeable statutory prohibition on disclosure should replace existing rights has not been properly addressed. It will result in the withholding of information which could be safely be disclosed, including fully anonymised information that contributes to public understanding of safety issues. It will remove the possibility of more detailed disclosures where these would be justified in the public interest following a transparent and independent process. Removing this substantial volume of information from FOI will inevitably fuel the suspicion that shortcomings are being concealed, and may in fact do so. It is likely to significantly undermine public confidence in the new system in return for benefits that - on the evidence presented - may be largely illusory.
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