

The Campaign for Freedom of Information

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**Briefing for Lords 2nd Reading of
The Health Service Safety Investigations Bill
on 29 October 2019**

The statutory prohibition

1. **The Campaign for Freedom of Information is concerned about the prohibition on the disclosure of information contained in the Health Service Safety Investigations Bill. We think it is disproportionate and - given the substantial protection for sensitive information in the Freedom of Information (FOI) Act - unnecessary.**
2. Under the bill, the Health Service Safety Investigations Body (HSSIB) would investigate selected NHS patient safety accidents or incidents and publish a report on each investigation.¹ But it would be prohibited from making public any other information held in connection with its functions, except in limited circumstances.² The prohibition would remove the right of access under the FOI Act³ and the right of individuals to see their own personal data under data protection legislation.⁴ Moreover, disclosure of protected information, other than in limited circumstances, would be an offence.⁵
3. The prohibition is said to be necessary:

‘to create a ‘safe space’ within which participants can provide information for the purposes of an investigation in confidence and therefore feel able to speak openly and candidly with the HSSIB.’⁶
4. If the purpose was to provide a safe space for *participants* it might be thought that what would be protected would be information likely *to identify* such a person, whether by name or position or indirectly from the content of what was said. In fact the prohibition on disclosure is not limited in this way. It applies to:

¹ Clause 22

² Clause 13(1)

³ Clause 18(1)

⁴ Department of Health & Social Care, The Government response to the Report of the Joint Committee on the Draft Health Service Safety Investigations Bill, December 2018

⁵ Clause 20

⁶ Health Service Safety Investigations Bill [HI], Explanatory Notes (hereafter ‘Explanatory Notes’), paragraph 49.

‘any information, document, equipment or other item which is held by the HSSIB in connection with its function under section 2(1)’⁷

5. The function referred to is the investigation of incidents that may have implications for NHS patient safety.⁸
6. **The scope of this prohibition is remarkable. It applies to *any* information held ‘in connection with’ the HSSIB’s function that is not already published,⁹ whether or not it relates to an *identifiable individual*, whether or not it relates to an *identifiable investigation* and whether or not it is capable of *detering participants from speaking frankly to investigators, inhibiting investigators in reaching their conclusions or causing any other adverse effect at all.***
7. Disclosure to the public would be permitted only as part of a published report into an investigation.¹⁰ The Chief Inspector could authorise disclosure to those who needed the information to address a serious and continuing safety risk.¹¹ Other exceptions to the prohibition on disclosure would be permitted in limited circumstances, for example, to coroners¹² or with the permission of the High Court.¹³

Information which would be withheld

8. Examples information whose disclosure would presumably be prohibited include:
 - why HSSIB had decided not to investigate a particular incident¹⁴
 - how many requests or investigation it had received from patients, organisations or NHS staff about a matter which it had not gone on to investigate
 - what type of person or body and how many had made the representations which had led HSSIB to open a particular investigation

⁷ Clause 13(1)

⁸ Clauses 2(1) and 2(7)(c)

⁹ Clause 13(2)

¹⁰ Clause 22(4)

¹¹ Clause 15

¹² Clause 19

¹³ Clause 17

¹⁴ Although the criteria for deciding which incidents to investigate would be published under clause 3(1)(a) the reasons for any particular decision would involve the release of information held in connection with HSSIB’s function of investigating safety incidents.

- whether and if so why it had failed to follow its own published investigation procedures in a particular case¹⁵
- the length of any delays which had occurred in contacting key witnesses to an incident
- whether and how a shortage of staff with particular skills had affected the conduct of a particular investigation
- any internal HSSIB report examining its compliance with its own procedures or time limits for carrying out investigations
- whether specified published studies had been consulted in connection with an investigation
- what statistics HSSIB holds about the occurrence of a particular type of accident or incident in England or elsewhere.

9. The above examples all involve information held by HSSIB ‘in connection with its function’ of investigating safety incidents so would fall within the prohibition. Yet none would be likely to affect the willingness of *participants* in an incident to speak candidly to HSSIB about that incident – which the government says is the purpose. HSSIB is required to avoid attributing *blame* for an incident¹⁶ but none of the examples would lead to any person being blamed for an incident. However, the prohibition would protect HSSIB from legitimate questions about its work, with no corresponding benefit to patient safety.

¹⁵ The procedure to be followed in carrying out an investigation must be published under Clause 3(2)(c)

¹⁶ Clause 2(4)

Disclosure following publication of a report

10. **The prohibition on HSSIB disclosure will not be lifted once an investigation is complete: it will continue indefinitely. If a published report refers to tests carried out by HSSIB on a particular product but does not include the results, they cannot later be obtained (except with the High Court's permission). Indeed, it is not clear that HSSIB could lawfully release the results, even if it had no objection to doing so.**¹⁷ Yet the disclosure of test results generated by HSSIB itself, could not conceivably deter a third party from co-operating with investigators in future. In any event, HSSIB will have the power to compel the provision of information or equipment required for the purpose of an investigation.¹⁸

HSSIB and Parliament

11. The prohibition is not restricted to disclosures to the public: it applies equally to Parliament. The House of Commons Public Accounts Committee played a critical part in documenting the shortcomings of the Care Quality Commission which was the subject of three PAC reports between 2012 and 2018. In the first the committee expressed *'serious concerns about the Commission's governance, leadership and culture'*.¹⁹ The second found that despite substantial progress the CQC was *'not yet an effective regulator of health and social care'*.²⁰ The third found that it had *'improved significantly'* but there were still areas where it *'needs to improve its current performance'*.²¹
12. **If such problems were to affect the HSSIB it is doubtful whether Parliament could play a similar role. HSSIB's ability to disclose information held in connection with its function, other than in an investigation report is limited to disclosures *'necessary to address a serious and continuing risk to the safety of any patient or to the public'*.**²² It has no power to disclose information needed to ensure the effective and accountable performance of HSSIB itself.

¹⁷ Unless the results were needed to address a serious continuing threat to patient safety.

¹⁸ Clause 7

¹⁹ Public Accounts Committee, 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

²⁰ Public Accounts Committee, Care Quality Commission, Twelfth Report of Session 2015–16, HC 501, 2 December 2015

²¹ Public Accounts Committee, Care Quality Commission: Regulating Health and Social Care, Twenty-Fourth Report of Session 2017–19, 28 February 2018

²² Clause 15(1)

The High Court

13. Protected information could be disclosed with the permission of the High Court.²³ The cost and complexity of this option, together with the restricted grounds on which it could be invoked, will severely limit its use. The High Court could only order disclosure if it considered that the *'interests of justice'* outweighed any deterrent effect on the willingness of people to participate in HSSIB investigations or any harm to the Secretary of State's ability to improve safety. **This suggests that the case for access would have to be argued in terms of the rights of a party (such as the relatives of a deceased patient, a dismissed member of staff or a disciplined health professional) in legal or formal proceedings rather than the public interest in knowing how safety investigations have been conducted.**

The disclosure offence

14. Protected information is not merely exempt from disclosure under the Freedom of Information (FOI) Act or otherwise.²⁴ Its disclosure will be a criminal offence.²⁵ **An HSSIB employee who reveals information showing that the organisation was failing to properly discharge its responsibilities would commit an offence if he or she knew or had reasonable cause to believe that it involved prohibited information – as would invariably be the case. The prosecution would not need to show that the disclosure had caused, or been likely to cause, any form of harm. There would be no 'reasonable excuse' defence²⁶ and no protection under whistleblower legislation.²⁷**
15. An injured patient, or a family member, who disclosed information from a draft HSSIB report which had been shown to them would also commit an offence, though in their case a 'reasonable excuse' defence would be available.²⁸ The same would be true of a person to whom information had been disclosed to permit them to address a 'serious

²³ Clause 17

²⁴ Section 44(1) of the Freedom of Information Act exempts any information whose disclosure is prohibited by statute.

²⁵ Clause 20

²⁶ A 'reasonable excuse' defence is available to third parties who disclose information provided to them by HSSIB for specified purposes but not to HSSIB employees (Clause 20(3))

²⁷ The Public Interest Disclosure Act 1998 amended the Employment Protection Act 1996 to protect whistleblowers from employment sanctions for making certain kinds of disclosures. The protection does not apply if the disclosure is an offence (Employment Protection Act 1996, section 43B(3)) nor does it provide a defence to a person charged with an offence.

²⁸ Clauses 20(2)(c) and 20(3)

and continuing risk' to patient or public safety, but who had not been intended to reveal the information to patients or the public.

16. **The fact that an offence could be committed by making a disclosure which may cause no harm to any individual's privacy, any businesses' commercial secrets, deter any witness from speaking frankly, prematurely reveal any tentative HHSIB conclusion or cause any other form of identifiable harm is a return to the discredited ethos of section 2 of the Official Secrets Act 1911.** This made the unauthorised disclosure of *any* official information a criminal offence. It was repealed in 1989 after the Conservative government's white paper on the issue observed:

'Although in practice prosecutions are not brought for the harmless disclosure of minor information, it is objectionable in principle that the criminal law should extend to such disclosure. The excessive scope of section 2 has also led to its public reputation as **an oppressive instrument for the suppression of harmless and legitimate discussion.**'²⁹ (emphasis added)

17. The same may well come to be said of the present legislation.

The Freedom of Information Act

18. The case for preventing the disclosure of information under the FOI Act appears to be based primarily on the precedent of the investigation of air accidents.³⁰ However, fatalities resulting from air accidents involving commercial flights are exceptionally rare. According to the Civil Aviation Authority:

'In the three-year period between 2016-2018 there were no fatal accidents involving UK operators and none involving an EU member state. The UK fatal accident rate in this category has remained at zero since 1999 when a Boeing 757 experienced a heavy landing in Girona, Spain, resulting in one fatality.'³¹

²⁹ White Paper, Reform of Section 2 of the Official Secrets Act 1911, Cm 408, June 1988, paragraph 8

³⁰ Department of Health, Providing a 'safe space' in healthcare safety investigations, Consultation, October 2016. This stated *'In this consultation, the Department of Health is seeking views on the creation of a statutory 'safe space' in healthcare safety investigations, modelling the approach of the AAIB'* (the Air Accidents Investigation Branch of the Department for Transport)

³¹ Civil Aviation Authority, Annual Report and Accounts 2018/19, page 47

19. By contrast, there are estimated to be 12,000 avoidable NHS hospital deaths each year³² and 30,000 serious incidents.³³ A restriction that may go unremarked in relation to rare air accidents may become a focus of controversy and suspicion in relation to a widespread NHS problem.
20. No other case for removing the FOI right 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. None of the background materials preceding the bill cite any examples of actual FOI disclosures that are alleged to have undermined the investigation of NHS accidents.
- 21. In fact, decisions under the FOI Act provide substantial protection for personal information about staff and patients, information provided in confidence and information whose disclosure might deter 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
 - 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) and section 31(2)(e) for information likely to prejudice an authority's regulatory functions including that of ascertaining the cause of an accident
 - 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.

³² Public Administration Select Committee, Investigating clinical incidents in the NHS, Sixth Report of Session 2014–15, HC 886, 27 March 2015

³³ Department of Health, Providing a 'safe space' in healthcare safety investigations, Consultation, October 2016

23. Several of these exemptions are subject to a provision requiring disclosure of exempt information where the balance of public interest favours it.³⁴ **Cases dealt with by the Information Commissioner (IC) and on appeal by the First-tier Tribunal typically treat the public interest in encouraging participants in NHS accident investigations to speak frankly as a *critical* public interest factor.** However, information such as that listed in paragraph 8 above is generally disclosable.

FOI Decisions

24. The following decisions by the IC or tribunal illustrate how rigorously sensitive information relating to NHS investigations is protected under FOI:
- An FOI request asked whether any investigation had been carried out into the death of a named patient. The NHS trust provided mental health and learning disability services and considered that confirming that a patient had accessed these services would be a breach of confidence. The IC upheld the refusal.³⁵
 - 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. The IC upheld the trust's refusal to provide them, finding that the withheld information was the personal information of the staff making the statements and of the patient and other staff members involved.³⁶
 - 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 IC considered and upheld the breach of confidence exemption, which the trust had not cited but which the IC found applied to details of the child's symptoms and treatment. Only one paragraph of the report was disclosed, minus the names of staff involved in investigating the incident.³⁷

³⁴ FOI Act, sections 2(1) and (2)

³⁵ IC decision FS50539478, Southern Health NHS Foundation Trust, 7 August 2014

³⁶ IC decision FS50587046, Derbyshire Healthcare NHS Foundation Trust, 7 January 2016

³⁷ IC decision FS50460861, Mid Staffordshire NHS Foundation Trust, 31 January 2013

- 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 protected under the exemption for breach of confidence. However, he held that the action plan drawn up to prevent recurrence and the identities of senior staff who investigated the incident should be disclosed.³⁸
- 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 staffs' personal information. On appeal, the First-tier Tribunal considered that while parts of these statements did *not* involve personal information the statements were exempt in full under other exemptions including that for prejudice the authority's regulatory functions. It commented: *'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'*³⁹
- A request sought a report into the Trust's provision of women's services, which was disclosed in part. The requester challenged the redactions but the IC upheld them finding that they involved specific accounts of incidents and *'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.'*⁴⁰
- In the above case, the IC also refused to order disclosure of *anonymised* information about Serious Untoward Incidents involving maternity services at a small NHS trust between 2009 and August 2011. The trust comprised only three hospitals. There had been 5, 10 and 3 serious incidents respectively in each of the 3 years. Given the small numbers the IC concluded that publication even in anonymous form might permit some patients' identities to be discovered.⁴¹

³⁸ IC decision, FS50299667, NHS London, 20 December 2010

³⁹ First-tier Tribunal, EA/2008/0036, Galloway & Information Commissioner & Central and North West London NHS Foundation Trust, 20 March 2009.

⁴⁰ IC decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.

⁴¹ IC decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.

- 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 IC found that provided the information was properly anonymised no breach of confidence would occur. In contrast to the preceding case he found 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, times or dates and other distinctive features. In two cases, the descriptions involved medical equipment failures not linked to any individual, and he required fuller disclosure.⁴² **This is precisely the kind of information that would *not* be released by HSSIB.**

25. **The FOI Act's nuanced approach protects the information that the government says this bill is designed to protect, but without the bill's sweeping secrecy. The purpose of the prohibition, and the threat of prosecution, may be to reassure participants that they can assist the HSSIB without jeopardising their own position. But the terms in which this is done will lead to the withholding of information that could be disclosed without undermining that objective and which could contribute both to public understanding of safety issues and the HSSIB's own accountability.**

⁴² IC decision FS50448878, NHS London, 13 November 2012