Written evidence submitted by The Campaign for Freedom of Information (HSC0980)

About the Campaign for Freedom of Information

The Campaign for Freedom of Information was set up in 1984 and played a key part in persuading the government of the day to introduce the Freedom of Information Act 2000 and securing improvements to it during its Parliamentary passage. Since the Act came into force in 2005 the Campaign has monitored and sought to improve the Act's operation, provided assistance to requesters and training for both requesters and public authorities.

Summary

1. **The Campaign for Freedom of Information's main concern with the White Paper proposals is the prohibition on the disclosure of information that will apply to the Health Service Safety Investigations Body (HSSIB). We think the prohibition is disproportionate and unnecessary. The Freedom of Information Act (FOIA) provides substantial protection for the kind of sensitive information which the government says the provision is designed to protect. The main effect of the prohibition will be to prevent the disclosure of other information that could be disclosed without harm of any kind.**

The prohibition

2. The HSSIB was to have been established by the Health Service Safety Investigations Bill which had its second reading the House of Lords on 29 October 2019 but which fell with the subsequent general election. The HSSIB will now be established by the Health and Social Care Bill which will incorporate the earlier bill's prohibition on disclosure.[1] This submission refers to contents of the relevant clauses as they were in the Health Service Safety Investigations Bill at second reading.

3. Under that bill the HSSIB would investigate selected NHS patient safety accidents or incidents and publish a report on each investigation.[2] But it would be prohibited from making public any other information held in connection with its functions, except in limited circumstances.[3] The prohibition would remove the right of access to such information under the Freedom of Information Act[4] and the right of individuals to see their own personal data under data protection legislation.[5] Disclosure of protected information, other than in limited circumstances, would become an offence.[6]

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1 'Integration and Innovation: working together to improve health and social care for all. The Department of Health and Social Care's legislative proposals for a Health and Care Bill', February 2021, CP 381 paragraph 5.142
2 Clause 22
3 Clause 13(1)
4 Clause 18(1)
5 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 (hereafter 'White Paper')
6 Clause 20

4. The prohibition was 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.'[7]

5. If the purpose was to provide a safe space for *participants* it might be thought that the prohibition would apply information likely *to identify* such a person, whether by name, job title or context. In fact the proposed prohibition on disclosure is not limited in this way. It would apply to:

> 'any information, document, equipment or other item which is held by the HSSIB in connection with its function under section 2(1)'[8]

6. The function referred to is the investigation of incidents that may have implications for NHS patient safety.[9]

7. The scope of this prohibition is remarkable. It would apply to *any* information held 'in connection with' the HSSIB's function that is not already published,[10] whether or not it relates to an *identifiable individual*, whether or not it relates to an *identifiable investigation*, whether or not it is capable of *deterring participants* from speaking frankly to investigators, *inhibiting investigators* in reaching their conclusions or *causing any other adverse effect* at all.

8. Disclosure to the public would be permitted only as part of a published report into an investigation.[11] The Chief Inspector could authorise disclosure to those who needed the information to address a serious and continuing safety risk.[12] Other exceptions to the prohibition on disclosure would be permitted in limited circumstances, for example, to coroners[13] or with the permission of the High Court.[14] The white paper states that additional exceptions to the prohibition may be made by regulations.[15]

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7 Health Service Safety Investigations Bill [Hl], Explanatory Notes, paragraph 49.
8 Clause 13(1)
9 Clauses 2(1) and 2(7)(c)
10 Clause 13(2)
11 Clause 22(4)
12 Clause 15
13 Clause 19
14 Clause 17
15 White Paper, paragraph 5.146

Information which would be withheld

9. Examples of information whose disclosure would presumably be prohibited include:

- why HSSIB had decided not to investigate a particular incident[16]
- how many requests for an 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
- whether and if so why it had failed to follow its own published investigation procedures in a particular case[17]
- 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.

10. 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 incident[18] but none of these examples would lead to any person

[16] 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.

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

being blamed for an incident. However, the prohibition would protect HSSIB from legitimate questions about its work, with no corresponding benefit to patient safety.

Disclosure following publication of a report

11. The prohibition on HSSIB disclosure will not be lifted once an investigation is complete. Under the 2019 bill it would continue indefinitely. If a published report refers to tests carried out by HSSIB on a particular product but does not include the results, they could not later be obtained (except with the High Court's permission). It is not even clear that HSSIB could lawfully release the results, even if it wanted to.[19] 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.[20]

HSSIB and Parliament

12. 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 e PAC reports between 2012 and 2018. In the first, the committee expressed *'serious concerns about the Commission's governance, leadership and culture'*.[21] The second found that despite substantial progress the CQC was '*not yet an effective regulator of health and social car*e'.[22] The third found that it had '*improved significantly*' but there were still areas where it *'needs to improve its current performance'*.[23]

13. 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 would be limited to disclosures '*necessary to address a serious and continuing risk to the safety of any patient or to the public'*.[24] It would have no power to disclose information needed to ensure the effective and accountable performance of HSSIB itself.

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[18] Clause 2(4)
[19] Unless the results were needed to address a serious continuing threat to patient safety.
[20] Clause 7
[21] 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
[22] Public Accounts Committee, Care Quality Commission, Twelfth Report of Session 2015–16, HC 501, 2 December 2015
[23] Public Accounts Committee, Care Quality Commission: Regulating Health and Social Care, Twenty-Fourth Report of Session 2017–19, 28 February 2018
[24] Clause 15(1)

The High Court

14. Protected information could be disclosed with the permission of the High Court.[25] 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 whether the HSSIB was properly discharging its obligations.**

The disclosure offence

15. Protected information would not merely be exempt from disclosure under FOIA or otherwise.[26] Its disclosure would be a criminal offence.[27] **An HSSIB employee who revealed 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 they invariably would. The prosecution would not need to show that the disclosure had caused, or been likely to cause, harm. There would be no 'reasonable excuse' defence[28] and no protection under whistleblower legislation.**[29]

16. 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.[30] The same would be true of a person to whom information had been disclosed to permit them to address a 'serious and continuing risk' to patient or public safety, but who had not been intended to reveal the information to patients or the public.

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[25] Clause 17

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

[27] Clause 20

[28] 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))

[29] 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.

[30] Clauses 20(2)(c) and 20(3)

17. 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 HSSIB 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.'[31] (emphasis added)

The same criticism may come to be made of the Health and Social Care Bill. The implications of threatening to prosecute a bereaved relative for disclosing information about the circumstances in which a family member had died after NHS treatment can be imagined.

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.[32] However, fatalities resulting from air accidents involving commercial flights are exceptionally rare. According to the Civil Aviation Authority:

> 'In the three-year period between 2017-2019 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.'[33]

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

[32] 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)

[33] Civil Aviation Authority, Annual Report & Accounts 2019/20, page 40

19. By contrast, the former Health Secretary Jeremy Hunt has indicated that in NHS hospitals there are:

> 'about 150 preventable deaths every single week—the equivalent of an aircraft falling out of the sky every single week'[34]

20. A restriction that may go unremarked in relation to air accidents, so rare that virtually no-one in the UK has any direct experience of them, may become a source of controversy and suspicion in the context of widely experienced NHS problems.

21. 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, including the police, *are* subject to FOI without any such prohibition and rely solely on FOI exemptions to protect sensitive information. None of the background materials describing the case for the HSSIB cites any examples of actual FOI disclosures alleged to have undermined the investigation of NHS accidents.

22. 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.

23. 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 which, in the reasonable opinion of a specified senior person, would be 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

[34] Hansard, House of Commons debates, 16 January 2020, col: 1201

- 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.

24. These exemptions (other than that for personal information) are subject to a provision requiring disclosure of exempt information where the balance of public interest favours it.[35] Cases dealt with by the Information Commissioner (IC) and on appeal by the First-tier Tribunal typically attach substantial weight to the public interest in encouraging participants in NHS accident investigations to speak frankly. However, information such as that listed in paragraph 9 above is generally disclosable.

FOI Decisions

25. 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.[36]

- 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 full statements of the interviewed staff. 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. [37]

- 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

[35] The public interest test in section 2 of FOIA applies to the exemptions in sections 31 and 36. A public interest test is incorporated into the common law of confidence and would be taken into account when considering the section 41 exemption.
[36] IC decision FS50539478, Southern Health NHS Foundation Trust, 7 August 2014
[37] IC decision FS50587046, Derbyshire Healthcare NHS Foundation Trust, 7 January 2016

treatment. Only one paragraph of the report was disclosed, minus the names of staff involved in investigating the incident.[38]

- 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 breach of confidence exemption. 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.[39]

A request sought details about patient safety incidents involving deaths at a Health Board in Wales referred to in the NHS National Reporting and Learning System database. The board disclosed certain information but withheld information about the circumstances of each case and the dates of death. The IC found that the information had been derived from patient health records or other confidential sources and had been correctly withheld under the breach of confidence exemption.[40]

- 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 while parts of these statements did *not* involve personal information the statements were exempt in their entirety 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'*[41]

- 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.'*[42]

[38] IC decision FS50460861, Mid Staffordshire NHS Foundation Trust, 31 January 2013
[39] IC decision, FS50299667, NHS London, 20 December 2010
[40] IC decision, FS50784963, Betsi Cadwaladr University Health Board, 23 April 2019
[41] First-tier Tribunal, EA/2008/0036, Galloway & Information Commissioner & Central and North West London NHS Foundation Trust, 20 March 2009.

- 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.[43]

- 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.[44] This is precisely the kind of information that would not be released by HSSIB.

- In September 2017 the North Devon Healthcare NHS Trust had asked the Royal College of Obstetricians and Gynaecologists (RCOG) to review its maternity services. It later published the RCOG's executive summary which found that consultants *'seemed reluctant to follow guidelines, unwilling to cooperate with each other and unhappy to accept (even constructive) challenge from midwifery colleagues'*. In contrast, the majority of midwives *'seemed driven to act as advocates for women, in the attempt to guarantee their safety.'* However, in response to an FOI request the trust refused to release the full RCOG report.

  The IC found that the exemption for free and frank advice or discussion applied to the report. Although there were *'strong and compelling arguments in favour of disclosure'* she held that the public interest was best served by withholding the report and allowing the trust a 'safe space' to discuss the RCOG's findings.

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[42] IC decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.
[43] IC decision FS50423411, Mid Yorkshire Hospitals NHS Trust, 29 August 2012.
[44] IC decision FS50448878, NHS London, 13 November 2012

Disclosure would be likely to discourage participants from continuing to help and hinder the trust's ability to review its services and implement necessary changes.

The requester appealed to the tribunal. He pointed out that the RCOG had recommended that its full report be widely disseminated to staff, but that had not been done, an indication of its failure to comply fully with recommendations addressing safety. The RCOG told the tribunal that when undertaking such reviews it warned the NHS body that its reports might reach the public under FOI or otherwise. The tribunal also noted that the professional bodies governing both the medical and nursing and midwifery professions required staff to cooperate with safety reviews.

The tribunal gave particular weight to the trust's history of failing to address its problems. The shortcomings observed by the RCOG had been identified in a previous RCOG report four years earlier but had not been addressed. An October 2017 Care Quality Commission (CQC) inspection had identified deficiencies in the trust's maternity services, some of which resulted in harm to babies. Yet some of the same failings had been identified in *two* earlier CQC reports, in 2014 and 2015, but not rectified.

The tribunal said it would normally give significant weight to an authority's need for a 'safe space' but the trust's repeated failure to correct its problems was decisive. *'Perhaps on this occasion the safe space has not served to facilitate clear thinking, but to enable an unsatisfactory state of affairs to continue. The public interest in understanding the difficulties of this unit is substantial. The difficulties had gone on for too long and the public interest in disclosure of the report at the start of 2018 outweighed any likely good that protecting the safe space could achieve.'* It ordered the report's disclosure. This is a rare outcome in relation to such reports but one which the FOI Act's public interest test makes possible.

26. **The FOI Act's nuanced approach gives substantial weight to the interests the government says the prohibition is designed to protect but without its blanket secrecy. The prohibition may be intended to reassure participants that they can assist the HSSIB without jeopardising their own position. But it is expressed in unacceptably broad and inflexible terms**.

27. **In 1993 John Major's government proposed that future disclosure offences should incorporate harm tests, so that a prosecution could only succeed where 'harm or damage is likely to result from the disclosure'.[45] By proposing not only to override the FOI Act but**

to criminalise disclosures which the Act might otherwise require the government is moving in the opposite direction. The measure will lead to the withholding of information that could be disclosed without harm at the expense of public understanding of safety issues and the HSSIB's own accountability.

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[45] The Open Government white paper of July 1993 (Cm 2290) stated: 'One option is to require the inclusion of harm tests in a wider range of these offences. A harm test is a way of ensuring that no-one is penalised for disclosing information if it is not genuinely confidential. It does this by asking whether harm or damage has resulted, or is likely to result, from the disclosure. If the answer is 'no', then a prosecution for unauthorised disclosure of information will not succeed…The Government proposes to assess the case for harm tests in all future legislation on disclosure, and to review existing provisions as and when legislative opportunities arise. The presumption will be in favour of inclusion of a harm test unless there are compelling public interest arguments against it.' (paragraphs 8.37 and 8.40)