The Campaign for Freedom of Information

Suite 102, 16 Baldwins Gardens
London EC1N 7RJ
Tel: 020 7831 7477
Web: www.cfoi.org.uk

The Rt Hon Andrew Lansley CBE MP
Secretary of State for Health
Department of Health
Richmond House
79 Whitehall
London SW1A 2NS

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Dear Mr Lansley

I am writing to express our concern about the effect of the Health and Social Care Bill on the public's rights to NHS information under the Freedom of Information Act. We think they may be significantly curtailed.

Under the new arrangements, clinical commissioning groups and the NHS Commissioning Board will be subject to the FOI Act. Independent providers with whom they have contracts will not be covered by the Act. However, they will be contractually required to provide information to the commissioning bodies, where this is needed to answer FOI requests made to those bodies.[1]

The basis for this arrangement is set out in the Department of Health's standard contracts. Clause 27.5.1 of the contract for acute hospital services states:

> "the Provider agrees…that this Agreement and any other recorded information held by the Provider on the Commissioners' behalf for the purposes of this Agreement are subject to the obligations and commitments of the Commissioners under the FOIA".[2] (The term "Commissioners" here refers to the commissioning bodies.)

[1] The Minister of State at the Department of Health, Mr Simon Burns, has stated; "Where national health service commissioners contract with private providers for the provision of health care services, the NHS standard contract would require that the provider must acknowledge that the commissioners are subject to the requirements of FOIA and shall assist and co-operate with each commissioner to enable the commissioner to comply with its disclosure obligations under the FOIA." Hansard, Written Answers, 14.7.2011, Col. 441W

[2] The Department of Health, "2011/12 Standard Terms and Conditions for Acute Hospital Services" effective from April 1 2011, paragraph 27.5.1.
www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_124518.pdf

At first sight, this appears to be, and may be intended to be, a wide provision. However, the information which is subject to the FOI Act is qualified in two ways. The information must not only be held "*for the purposes of"* the contract but also on the commissioning body's *"behalf".* But information held "on behalf" of a commissioning body is by law subject to the FOI Act already under section 3(2)(b) of the Act.[3] If the contract's definition is not to be purely circular its purpose must be to identify which *particular* information held on the commissioning body's behalf is subject to FOI. We take the expression to mean that only the information which the commissioning body, by means of the contract, requires the provider to hold, report on or supply to it is subject to the Act.

The information that would be subject to this provision is found in various parts of the standard contract including clause 29 and schedule 5.[4] This includes information about the service specifications; prices and payments; numbers of patients treated; time taken to treat them; performance quality reports against a range of specific indicators; compliance with an agreed service development and improvement plan; figures on MRSA and Clostridium difficile infections; and reports on complaints, equality monitoring, carbon reduction and certain other matters. There are also obligations to comply with NHS dataset requirements. Additional provisions may be added locally, depending on the commissioning body's requirements. However, we are concerned about what is *not* covered by these provisions.

For example, the standard contract states:

> 5.2 The Provider shall ensure that the Services Environment is fit for the purpose of providing the Services and is clean, safe, suitable, sufficient, adequate, functional, accessible (making reasonable adjustments where required) and effective.

Yet neither the standard contract nor the schedules to it contain any direct requirement for the provider to hold records about or report on the quality of the Services Environment (ie the premises and facilities) or the equipment used in the treatment of patients. Unless some express provision to this effect is added to individual contracts, it appears that such information would not be accessible under the FOI provision.[5] This is not an isolated example.

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[3] Section 3(2)(b) of the FOI Act provides that information is regarded as held by a public authority for the purpose of the Act if it is "held by another person on behalf of the authority".

[4] Schedule 5, for example, states "All information gathered for the purposes of reporting is subject to the requirements set out in clause 27, (Data Protection, Freedom of Information and Transparency)".

[5] Specified regulatory bodies would also be entitled to audit or inspect the services and premises, and the Co-ordinating Commissioner would be entitled on making a 'reasonable' request to receive from the provider the results of any such audit or inspection to which the provider has access (clauses 19.1 to 19.3). However, this provision does not extend to other information which the provider holds about the services environment and equipment.

Examples of disclosures made by just one NHS trust since 2009 illustrate the wide range of material typically available under the Act. They include: the number of infection prevention nurses employed over each of the last 3 years, the annual infection control budget for those years, infection prevention reports and minutes of infection prevention meetings; the numbers of serious untoward and adverse incidents involving foreign trained locums; checks on the competence and language skills of EU locums; policy on the use of restraint to prevent patients harming themselves; arrangements for managing a pandemic flu outbreak; details of incidents which could have led to infectious biological agents escaping; arrangements for inspecting surgical instruments; fire safety policy; spending on continuing professional development for nursing and other non-medical staff; allegations of bullying by staff and outcomes; numbers of staff suspended and reasons; incidents of pest or vermin infestation and action taken; policy on information sharing with the police; research bodies with whom patient data has been shared; Do Not Attempt Resuscitation policy; health authority correspondence on electronic patient records; and a review of the trust's handling of medical records.[6]

In most of these cases, there appears to be no specific reference in the standard contract which would require a provider to supply such information to a commissioning body in order to respond to an FOI request.

Suppose there is concern about the use of potentially contaminated medical supplies by hospitals. For an NHS hospital, the FOI Act could be used to obtain details of stocks of the product, the number of doses administered, the numbers of affected patients, the quality control measures in place, correspondence with suppliers, minutes of meetings at which the problem was discussed, and information showing what measures were considered, what action was taken, how promptly and with what results.

This level of information would clearly not be available in relation to independent providers treating NHS patients. This would represent a major loss of existing information rights. As treatment previously provided by NHS bodies is increasingly carried out by independent providers, the existing broad FOI right will be replaced by narrower duties to provide or report on specified information only. The right to enquire in depth into new issues as they arise may disappear altogether. We hope the government will not permit this to happen.

We understand that the NHS Commissioning Board will be responsible for developing new model contracts for use under the new arrangements, though the department has stated that "It is not possible at this stage to say what reporting requirements will be under the new model contracts".[7] However, the particular

[6] These are taken from the FOI disclosure log of North Cumbria University Hospitals NHS Trust, www.ncuh.nhs.uk/about-us/freedom-of-information/disclosure-log/index.aspx
[7] Letter from Department of Health to Campaign for Freedom of Information, 1 August 2011

problem with which we are concerned is the scope of the FOI disclosure provision rather than the reporting requirements. We suggest below how we think this should be extended.

Outcomes data

A further problem involves outcomes data on matters such as the success rate of various procedures. Comparable outcomes data will be available for NHS hospitals and independent providers treating NHS patients. However, the figures for independent providers will relate solely to their treatment of *NHS* patients.

At the beginning of the contract, there will be no information about a commissioning group's patients – as none of its patients will yet have been treated. The provider may have a long track record in relation to its treatment of non-NHS patients, but this would not be accessible under FOI. A poorly performing independent body would not have to reveal its sub-standard performance until there was sufficient evidence from its NHS patients to document it. This would involve a substantial loss of public data compared to that available for NHS bodies, whose previous years data would be available.

Once a contract has been running for, say, a year, there will be some data on the commissioning group's patients (and some published 'outcomes' information about them). But the NHS patient data may still involve only a small proportion of the patient information it holds. For relatively infrequent events, a large sample will be needed to reveal any problem. Even then a problem such as an implant failure, which may take several years to emerge, may not be apparent from one year's data. A hospital may hold data capable of revealing that failure rate, but would not have to disclose it. Again, questions that could be answered in relation to an NHS body may go unanswered in relation to an independent provider.

These differences may also distort the competitive process, particularly at the beginning of the process. NHS bodies will be competing with independent providers for contracts. But while the NHS bodies' past record will be available under FOI, that of independent providers will not. NHS bodies would be forced to disclose any poor performance, while equally poorly performing independent providers may simply appear to have a blank sheet. The principle of patient choice would also be undermined by such unequal disclosure requirements.

Providers dealing primarily with NHS patients

An even more complex problem would arise where a provider secures contracts with several *different* commissioning groups. The NHS work may become a provider's major, or even sole, activity. Yet there would still be no right to make FOI requests directly to the provider.

To obtain its *overall* figures on a particular matter a separate FOI request would have to be made to *each* of the commissioning groups. Each group would then have to ask the provider for the identical information in relation to *its* patients. Even that might not succeed if any one of the requests exceeded the FOI Act's cost limit.[8] A contractor whose work consisted *solely* of NHS contracts might thus escape many of the obligations of the FOI Act.

After the contract

A further problem is what will happen to any FOI rights when the contract ends. The department's standard contract helpfully provides that the obligation to assist in the answering FOI requests would continue after the contract's expiry.[9] However, it is not clear how this could be enforced other than by the commissioning group suing the contractor for breach of contract. This is most unlikely over the failure to help answer an FOI request. In any event, this remedy would only be available to the *commissioning group* – it could not be invoked by the requester or enforced by the Information Commissioner. If this provision is unenforceable, public rights to information about a former provider's performance may be lost when the contract is completed. We think an amendment to the FOI Act, bringing the Information Commissioner's statutory powers to bear on a former provider in such circumstances, is needed.

Destruction of records

Finally, under section 77 of the FOI Act, it is an offence for a public authority or its staff to deliberately destroy, alter or conceal a record held by it in order to prevent the disclosure of information which has been requested under either the FOI Act or the Data Protection Act. We believe this offence should be extended to providers.

The contractual basis of disclosure

As functions are transferred from NHS bodies to independent providers, the existing broad FOI right of access is likely to be increasingly constricted. To prevent this, any contractual disclosure provision must reflect the full breadth of the existing access right and not be limited to specified datasets, statistics or reports, however numerous they may be. The disclosure provision should extend to any information that will assist in assessing the adequacy of the provider's services, including information about -

[8] This allows FOI requests to be refused if the cost of locating and retrieving the information is more than £450 or, in the case of government departments, £600.
[9] '2011/12 Standard Terms and Conditions for Acute Hospital Services" paragraph 52

(a) performance involving non-NHS patients receiving similar treatment, including those treated before the contract commenced

(b) the facilities, premises, equipment, arrangements, policies and procedures which may affect the care provided to NHS patients

(c) problems occurring in the provider's premises which are capable of affecting the health, safety or welfare of NHS patients and the provider's response to them

(d) its compliance with the requirements of relevant legislation, guidance and codes of practice.

Finally, where a provider's work consists primarily of treating NHS patients, the provider should be made subject to the FOI Act in its own right, under section 5 of the FOI Act.

Yours sincerely

Maurice Frankel
Director