

# Consultation On Sharing And Publishing Information About Complaints



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<b>Target Audience</b>	Department of Health, NHS bodies and practitioners, regulators, Parliament, advice and advocacy organisations, consumer organisations.
<b>Description</b>	The purpose of this consultation document is to seek the views of a range of stakeholders on the Health Service Ombudsman's proposed approach to sharing and publishing information about complaints in the context of the Health Service Commissioners Act 1993.
<b>Contact Details</b>	Public Affairs Team Parliamentary and Health Service Ombudsman Millbank Tower Millbank London SW1P 4QP  Email: <a href="mailto:consultation.response@ombudsman.org.uk">consultation.response@ombudsman.org.uk</a>



## CONSULTATION

### HEALTH SERVICE OMBUDSMAN FOR ENGLAND SHARING AND PUBLISHING INFORMATION ABOUT COMPLAINTS

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## 1. INTRODUCTION

- 1.1. The purpose of this consultation document is to seek the views of a range of stakeholders on the Health Service Ombudsman's proposed approach to sharing and publishing information about complaints.
- 1.2 This consultation is taking place now because of an increased focus recently on the importance of information about complaints following events in Mid-Staffordshire and elsewhere; and because recent changes in the NHS complaints system, particularly the abolition of the Healthcare Commission as a second stage complaint handler, have given rise in some quarters to unrealistic expectations of the volume and scope of information that the Ombudsman can and will make available.
- 1.3 If someone is not satisfied with the way their complaint has been dealt with by the NHS, they have the right to take their complaint to the Ombudsman. The Ombudsman is empowered by the *Health Service Commissioners Act 1993* to investigate complaints about injustice, or hardship, arising in consequence of maladministration, or service failure, by the NHS in England. In simple terms the Ombudsman looks at complaints that the NHS has not acted properly or fairly or has provided a poor service.
- 1.4 The Ombudsman aims to provide an independent, high quality complaint handling service that rights individual wrongs, drives improvements in public services and informs public policy. So, in addition to considering and resolving individual complaints, the Ombudsman wants to ensure that improvements in the quality of service provided by the NHS are secured as a result of the Ombudsman's work.
- 1.5 The Ombudsman's service is confidential and the Ombudsman is required by law to conduct investigations 'in private'.<sup>1</sup> Information gathered for the purposes of Ombudsman investigations can only be disclosed in very specific and limited circumstances.
- 1.6 The Ombudsman needs to protect the privacy of her casework and, at the same time, wants to share the learning from complaints with those who are likely to benefit from having access to that information. That includes the public at large; MPs; organisations providing advice and advocacy; regulators such as the Care Quality Commission, Monitor, the General Medical Council, and the Nursing and Midwifery Council; and, of course, the NHS itself.
- 1.7 The challenge for the Ombudsman is to act within the legislation that governs her work, and balance the need to protect the privacy of personal and other information given to the Ombudsman in confidence with the potential benefit of sharing more widely information that can help to improve healthcare. The approach set out below seeks to address that challenge.

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<sup>1</sup> *Health Service Commissioners Act 1993*, section 11(2).

## 2. THE HEALTH SERVICE COMMISSIONERS ACT 1993

- 2.1 The *Health Service Commissioners Act 1993* (the Act) is the substantive legislation governing the Ombudsman's work. It includes a number of provisions which are relevant to the issue of information sharing and which are set out below.

### What the Ombudsman must do

- 2.2 Section 11(2) of the Act says that an Ombudsman investigation must be conducted '*in private*'.
- 2.3 Section 14 of the Act says that when the Ombudsman investigates a complaint, the investigation report must be sent to the complainant (and any MP who has assisted them); to the NHS body or practitioner complained about; and to the Secretary of State for Health. The Ombudsman is not specifically empowered to send the investigation report to anyone else.
- 2.4 Section 14 of the Act says that when the Ombudsman decides not to investigate a complaint, a statement of reasons (usually described by the Ombudsman as a 'decision letter') must be sent to the complainant (and any MP who has assisted them). The Ombudsman is not specifically empowered to send the statement of reasons to anyone else.

### What the Ombudsman must not do

- 2.5 Section 15(1) of the Act says that information obtained by the Ombudsman '*in the course of or for the purposes of an investigation*' shall not be disclosed except for '*the purposes of the investigation and any report to be made in respect of it*', apart from in very specific and limited circumstances. This is known as the 'statutory bar' on disclosure of information and has been described as a 'quid pro quo' for the Ombudsman's extensive powers to obtain information.

### What the Ombudsman may do

- 2.6 Section 15(1) of the Act allows the Ombudsman to disclose information '*for the purposes of the investigation and any report to be made in respect of it*'. This may take many forms but it will include sharing information with a range of sources, including NHS bodies and practitioners, and sometimes also from regulators and others, in order to decide whether to investigate a complaint; in order to carry out an investigation; and in order to conclude a report of an investigation.
- 2.7 Section 15 of the Act says that the Ombudsman may disclose information obtained '*in the course of or for the purposes of an investigation*' to anyone whom she thinks it should be disclosed '*in the interests of the health and safety of patients*' where '*the information is to the effect that any person is likely to constitute a threat to the health and safety of patients*'. The Ombudsman has used this power mostly to disclose information to professional regulators such as the General Medical Council and General Dental Council when she has had concerns about the fitness to practise of an individual doctor or dentist, but it could be used in a range of different circumstances.

- 2.8 Section 14 of the Act enables the Ombudsman to lay before both Houses of Parliament a special report in respect of any individual case where the Ombudsman has found injustice or hardship which '*has not been and will not be remedied*'. This power is rarely used as the Ombudsman's recommendations are usually complied with but it could be used to 'name and shame' an individual NHS body or practitioner.
- 2.9 Section 14 of the Act enables the Ombudsman to lay before both Houses of Parliament '*such other reports*' with respect to her functions as she sees fit. This power is used to inform Parliament and to put in the public domain a range of information about the Ombudsman's work. It has been used to publish digests of selected cases (which are usually anonymised); and to raise awareness of issues which have come to the Ombudsman's attention as a result of her casework, for example, the *Six Lives* report in March 2009 on the provision of public services to people with learning disabilities.
- 2.10 It may be of interest that the Ombudsman's reports and statements as described in paragraphs 2.3 and 2.4 are absolutely privileged for the purposes of the law of defamation.

### **3. FREEDOM OF INFORMATION AND DATA PROTECTION LEGISLATION**

- 3.1 The Ombudsman's Office is not exempt from Freedom of Information and Data Protection legislation. The Ombudsman's Publication Scheme follows the approach recommended by the Information Commissioner.
- 3.2 At the same time, the information gathered for the purposes of an Ombudsman investigation is subject not only to the statutory requirement of privacy within the *Health Service Commissioners Act 1993*. It is also generally exempt from disclosure under the *Freedom of Information Act* by the operation of Section 44 of that Act.<sup>2</sup> Generally there is also exemption from release under the *Data Protection Act* by the operation of Section 31(4) where there is a likely prejudice to the Ombudsman's statutory function.
- 3.3 These matters are not central to this consultation.

### **4. SHARING INFORMATION WITH OTHER OMBUDSMEN**

- 4.1 The Health Service Ombudsman for England has specific powers to carry out joint work with and/or share information with the UK Parliamentary Ombudsman, the Public Services Ombudsman for Wales, the Scottish Public Services Ombudsman and the English Local Government Ombudsmen, amongst others.
- 4.2 These information sharing and joint working powers are not central to this consultation.

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<sup>2</sup> Information is exempt from disclosure if its disclosure is prohibited by any other enactment (in this case section 15 of the *Health Service Commissioners Act 1993*).

## 5. THE OMBUDSMAN'S APPROACH TO SHARING AND PUBLISHING INFORMATION ABOUT COMPLAINTS

### What information the Ombudsman can share and publish about complaints

5.1 In summary, the Ombudsman has limited powers to share and publish information about complaints and is subject to some significant constraints on doing so. The main routes open to her are:

- Sharing information '*for the purposes of an investigation and any report to be made in respect of it*'.
- Sharing information '*in the interests of the health and safety of patients*'.
- Sending reports of investigations to the Secretary of State for Health.
- Laying reports before Parliament and thereby putting information about complaints in the public domain.

5.2 The Ombudsman will use any or all of the powers available to her in support of her published aim to provide an independent, high quality complaint handling service that rights individual wrongs, drives improvements in public services and informs public policy.<sup>3</sup> That will include the following:

- Putting information in the public domain
- Sharing information with the NHS
- Sharing information with the Care Quality Commission and Monitor
- Sharing information with professional regulators
- Sharing information with others.

### Putting information in the public domain

5.3 The Ombudsman takes the view that one of the most effective ways of sharing the learning from complaints is to put information about complaints made to her about the NHS in the public domain. NHS bodies and practitioners are now required to prepare and make available an annual report specifying the number of complaints received and their outcomes; and summarising the subject matter of those complaints, any matters of general importance arising from them and the action taken to improve services as a consequence of those complaints.<sup>4</sup> The Ombudsman will complement the information made available by the NHS locally by laying before Parliament and publishing a number of reports relating to her work on considering complaints about the NHS.

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<sup>3</sup> See PHSO's *Three Year Strategic plan 2009-12*, [www.ombudsman.org.uk/pdfs/strategic\\_plan\\_2009\\_12.pdf](http://www.ombudsman.org.uk/pdfs/strategic_plan_2009_12.pdf)

<sup>4</sup> *National Health Service Complaints (England) Regulations 2009*

#### 5.4 They will include:

- An annual report on NHS complaint handling performance, which will give a comprehensive picture of the numbers and types of complaints received about NHS bodies and practitioners, the numbers and types of complaints investigated and their outcomes, any issues and themes arising from those complaints and an assessment of the NHS's overall performance in complaint handling. The Ombudsman aims to lay before Parliament and publish the first of these annual reports in October 2010.
- Regular digests of case summaries (generally anonymised to protect the privacy of the complainants).
- Occasional reports to raise awareness of issues that have come to the Ombudsman's attention in the course of her casework.
- If necessary, a special report in respect of any individual case where the Ombudsman has found injustice or hardship as a consequence of service failure and/or maladministration, which has not and will not be remedied.

#### Sharing information with the NHS

##### For the purposes of the investigation

- 5.5 The Ombudsman needs to obtain information from and share information with the NHS in order to assess whether to investigate a complaint; in order to carry out an investigation; and in order to conclude an investigation report - which, in the case of an upheld complaint, will involve making recommendations for remedy. In all these circumstances, the Ombudsman is using her powers to disclose information *'for the purposes of the investigation and any report to be made in respect of it'*.

##### Investigation reports

- 5.6 As outlined in paragraph 2.3, when the Ombudsman investigates a complaint, she must send the investigation report to the Secretary of State for Health, as well as to the complainant and to the NHS body and/or practitioner complained about. The Ombudsman takes the view that the purpose of this legislative provision is to provide a mechanism whereby the NHS generally can be aware of and, where appropriate, act on, the findings of an Ombudsman report. The Ombudsman sees it as particularly important that this happens in the case of upheld complaints and especially so where the Ombudsman has found service failure and/or maladministration which extends beyond the individual case and has therefore included in her recommendations for remedy action to prevent a recurrence of that service failure and/or maladministration.
- 5.7 The Ombudsman therefore intends, in future, where a complaint is upheld (in full or in part), to send a copy of the investigation report (anonymised to protect the privacy of the complainant) to both the commissioning Primary Care Trust, and to the relevant Strategic Health Authority, so that they can take account of it in their commissioning and oversight roles. The Ombudsman will continue to meet her

statutory obligations by sending the investigation report to the NHS body and/or practitioner complained about, and to the Secretary of State for Health.

### **Decisions not to investigate**

- 5.8 As outlined in paragraph 2.4, when the Ombudsman decides not to investigate a complaint, she must send a statement of reasons to the complainant, but is not required, or indeed empowered, to send a statement of reasons to anyone else. What this means in practice is that - because of the confidential nature of complaints made to the Ombudsman and the requirements of the *Data Protection Act* - the Ombudsman does not generally share information about a complaint with the NHS body or practitioner complained about in cases where she decides not to investigate. There are two main exceptions to this:
- i. Where the Ombudsman has made enquiries of the body or practitioner concerned in order to help with the assessment of the complaint. This may include making enquiries of the Primary Care Trust which has responsibility for commissioning the service. In such cases, because they already know about the complaint and may well have provided information that has informed the decision not to investigate, the Ombudsman normally advises the body or practitioner of her decision not to investigate the complaint. That does not usually amount to sending them a copy of the detailed decision letter but the Ombudsman will take the opportunity to pass on any general learning points identified.
  - ii. Where the Ombudsman has made enquiries of the body or practitioner concerned in order to ask them to provide a resolution to the complaint. This may include making enquiries of the Primary Care Trust which has responsibility for commissioning the service. In those circumstances the Ombudsman provides information to make clear to the body or practitioner the failings the Ombudsman has identified and the action the Ombudsman expects them to take to put things right, and by when. If the body or practitioner agrees to take that action, then the Ombudsman declines to investigate the complaint on that basis. The Ombudsman notifies the body or practitioner of the decision not to investigate. That does not usually amount to sending them a copy of the detailed decision letter but the Ombudsman will take the opportunity to pass on any general learning points identified.

### **In the interests of the health and safety of patients**

- 5.9 From time to time in the course of her casework the Ombudsman may obtain information, for example about an individual clinician, manager or administrator, that leads her to conclude that that person is likely to constitute a threat to the health and safety of patients. In such circumstances the Ombudsman will use her powers to disclose information to whomever she thinks it should be disclosed '*in the interests of the health and safety of patients*', as described in paragraph 2.7. The Ombudsman may decide, for example, to disclose information to the NHS employer, and/or the commissioning Primary Care Trust, and/or the relevant Strategic Health Authority, and/or the Chief Executive of the NHS.

## Sharing information with the Care Quality Commission and Monitor

### For the purposes of the investigation

- 5.10 From time to time the Ombudsman needs to obtain information from and share information with the Care Quality Commission and/or Monitor in order to assess whether to investigate a complaint; in order to carry out an investigation; and in order to conclude an investigation report - which, in the case of an upheld complaint, will involve making recommendations for remedy. In all these circumstances, the Ombudsman is using her powers to disclose information *‘for the purposes of the investigation and any report to be made in respect of it’*.

### Investigation reports

- 5.11 The Ombudsman will not normally send copies of investigation reports to the Care Quality Commission, or Monitor. There will, however, be times when the Ombudsman will wish to alert the Care Quality Commission and/or Monitor to the recommendations she has made in an investigation report in order to ensure that those recommendations are properly followed up by the regulators in their inspection and monitoring programmes.<sup>5</sup>
- 5.12 The Ombudsman will normally do this in cases where she has found service failure and/or maladministration that extends beyond the individual case and has therefore included in her recommendations for remedy action to prevent a recurrence of that service failure and/or maladministration. Often a complainant will tell the Ombudsman that one of their reasons for pursuing a complaint is to ensure that what happened to them or their loved one whilst in the care of the NHS should not happen to anyone else. The Ombudsman can make recommendations to that effect, and secure their acceptance, but it is not her role to monitor the performance of NHS bodies in delivering service improvements. That is the responsibility of NHS leaders and managers, and of the regulators.
- 5.13 Such recommendations are generally referred to by the Ombudsman as recommendations for ‘systemic remedy’ and usually take the form of recommending that the NHS body (or practitioner) concerned should do three things:
- i. Within a specified timescale, prepare an action plan which:
    - describes what the NHS body has done to ensure that the organisation (and where appropriate the individual(s) concerned) have learnt the lessons from the failings identified by the upheld complaint, and
    - details what the NHS body has done and/or plans to do, with timescales, to avoid a recurrence of these failings in future.

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<sup>5</sup> Again, this will be done for the purposes of the investigation and report, and so will be within the purposes allowed by section 15(1)(a) of the *Health Service Commissioners Act 1993*.

- ii. Send a copy of the action plan to:
- The complainant
  - The Ombudsman
  - The Care Quality Commission
  - Monitor (if the NHS body is a Foundation Trust)
  - The commissioning Primary Care Trust
  - The Strategic Health Authority.
- iii. Ensure that the regulator(s), the commissioning Primary Care Trust and the relevant Strategic Health Authority are updated regularly on progress against the action plan.
- 5.14 The Ombudsman will not send a copy of the investigation report to the Care Quality Commission, or Monitor. However, in order to alert the regulator(s) to the fact that there is an upheld complaint about the NHS body concerned, which contains recommendations for systemic remedy, the Ombudsman will provide the Care Quality Commission, and where appropriate Monitor, with the following information when the investigation report is issued:
- The name of the NHS body concerned
  - A summary of the Ombudsman's findings
  - Details of the Ombudsman's recommendations.
- 5.15 The Ombudsman will not normally disclose to the regulator any information which would enable them to identify the complainant.<sup>6</sup>

#### **Decisions not to investigate**

- 5.16 As outlined in paragraph 2.4, when the Ombudsman decides not to investigate a complaint, she must send a statement of reasons to the complainant, but is not required, or indeed empowered, to send a statement of reasons to anyone else. What this means in practice is that - because of the confidential nature of complaints made to the Ombudsman and the requirements of the *Data Protection Act* - the Ombudsman does not generally share information about a complaint with the Care Quality Commission or Monitor in cases where she decides not to investigate.
- 5.17 Exceptionally, the Ombudsman may make enquiries of the regulator(s) in order to help with the assessment of the complaint.<sup>7</sup> In such cases, because the Care Quality Commission and/or Monitor already know about the complaint and may well have provided information on which the Ombudsman has relied in reaching her decision, the Ombudsman will normally advise the regulator(s) of her decision not to investigate the complaint (although this will not usually amount to sending the regulator(s) a copy of the detailed decision letter).

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<sup>6</sup> If she does she will use her powers under section 15(1)(a) of the *Health Service Commissioners Act 1993*.

<sup>7</sup> Using her powers under section 12(1) or (1A) of the *Health Service Commissioners Act 1993*.

## **In the interests of the health and safety of patients**

- 5.18 From time to time in the course of her casework the Ombudsman may obtain information, for example about an individual clinician, manager or administrator, that leads her to conclude that that person is likely to constitute a threat to the health and safety of patients. In such circumstances the Ombudsman will use her powers to disclose information to whomever she thinks it should be disclosed '*in the interests of the health and safety of patients*', as described in paragraph 2.7. The Ombudsman may decide, for example, to disclose information to the Care Quality Commission and/or Monitor.

## **Sharing information with professional regulators**

### **For the purposes of the investigation**

- 5.19 Sometimes a complainant will pursue a complaint of service failure and/or maladministration about an NHS practitioner to the Ombudsman in parallel to pursuing a complaint about their fitness to practise to the practitioner's professional regulator. On such occasions, information obtained from and shared with professional regulators will assist the Ombudsman in assessing whether to investigate a complaint; in carrying out an investigation; and in concluding an investigation report - which, in the case of an upheld complaint, will include making recommendations for remedy. In all these circumstances, the Ombudsman is using her powers to disclose information '*for the purposes of the investigation and any report to be made in respect of it*'.<sup>8</sup>

### **Investigation reports**

- 5.20 The Ombudsman does not normally send copies of investigation reports to professional regulators. However, the Ombudsman may occasionally send a copy of an investigation report to a professional regulator when she is using her powers to disclose information '*in the interests of the health and safety of patients*'<sup>9</sup> - see paragraph 5.23.

### **Decisions not to investigate**

- 5.21 As outlined in paragraph 2.4, when the Ombudsman decides not to investigate a complaint, she must send a statement of reasons to the complainant, but is not required, or indeed empowered, to send a statement of reasons to anyone else. What this means in practice is that - because of the confidential nature of complaints made to the Ombudsman and the requirements of the *Data Protection Act* - the Ombudsman does not generally share information about a complaint with the professional regulators in cases where the Ombudsman decides not to investigate.

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<sup>8</sup> Section 15(1)(a) of the *Health Service Commissioners Act 1993*.

<sup>9</sup> Sections 15(1)(e) and (1B) of the *Health Service Commissioners Act 1993*.

5.22 Exceptionally, the Ombudsman may make enquiries of the professional regulator in order to help with the assessment of the complaint. In such cases, because the regulator already knows about the complaint and may well have provided information on which the Ombudsman has relied in reaching her decision, the Ombudsman will normally advise the regulators of her decision not to investigate the complaint (although this will not usually amount to sending the regulator a copy of the detailed decision letter).

### **In the interests of the health and safety of patients**

5.23 From time to time in the course of her casework the Ombudsman may obtain information that leads her to conclude that a person is likely to constitute a threat to the health and safety of patients. In such circumstances the Ombudsman will use her powers to disclose information to whomever she thinks it should be disclosed '*in the interests of the health and safety of patients*', as described in paragraph 2.7. If the Ombudsman obtains information that calls into question the fitness to practise of an individual clinician, she is likely to disclose that information to the relevant professional regulator. In such cases the information disclosed might well be the full investigation report. The Ombudsman has done this on a number of occasions with varying results. In one case the clinician was given a formal warning; in others the clinician was removed from the register.

### **Sharing information with others**

5.24 There are various other organisations with which the Ombudsman may decide to share information obtained in the course of her casework. Some examples are given in the following list, which is intended to be illustrative rather than exhaustive:

- Coroners
- Police
- National Patient Safety Agency/National Clinical Assessment Service
- Equality and Human Rights Commission
- Information Commissioner

5.25 When sharing information with any other organisation, either for the purposes of the investigation or the investigation report, or in the interests of the health and safety of patients,<sup>10</sup> the Ombudsman will adopt the approach set out above.

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<sup>10</sup> Sections 15(1)(a), and (1)(e) and (1B), of the *Health Service Commissioners Act 1993*.

## 6. CONSULTATION QUESTIONS

1. Do you think the Ombudsman's intended overall approach to sharing and publishing information about complaints strikes a reasonable balance between protecting the privacy of the Ombudsman's casework and sharing the learning from complaints in the wider interest?
2. Do you support the Ombudsman's approach to putting information about complaints in the public domain? [Paragraphs 5.3 and 5.4]
3. Do you support the Ombudsman's approach to sharing information with the NHS? [Paragraphs 5.5 - 5.9]
4. Do you support the Ombudsman's approach to sharing information with the Care Quality Commission and Monitor? [Paragraphs 5.10 - 5.18]
5. Do you support the Ombudsman's approach to sharing information with professional regulators? [Paragraphs 5.19 - 5.23]
6. Do you have any other comments on the Ombudsman's approach to sharing and publishing information about complaints?

## 7. HOW TO RESPOND TO THE CONSULTATION

Please send your response by no later than 10 March 2010 to:

Public Affairs Team  
Parliamentary and Health Service Ombudsman  
Millbank Tower  
Millbank  
London  
SW1P 4QP

Email: [consultation.response@ombudsman.org.uk](mailto:consultation.response@ombudsman.org.uk)

### Confidentiality of information

Information you provide in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the *Freedom of Information Act 2000*, the *Data Protection Act 1998* and the *Environmental Information Regulations 2004*).

If you want the information that you provide (including any personal data) to be treated as confidential, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding.

Please ensure that your response is marked clearly if you wish your response and/or name to be kept confidential.

**Parliamentary and  
Health Service Ombudsman**

Millbank Tower  
Millbank  
London SW1P 4QP

Tel: 0345 015 4033

Fax: 0300 061 4000

Email: [phso.enquiries@ombudsman.org.uk](mailto:phso.enquiries@ombudsman.org.uk)

[www.ombudsman.org.uk](http://www.ombudsman.org.uk)