

## Availability of HDC DHB complaint data

<b>Legislation</b>	Official Information Act, s 9(2)(ba)(ii)
<b>Agency</b>	Health and Disability Commissioner
<b>Ombudsman</b>	Professor Ron Paterson
<b>Case number</b>	406561
<b>Date</b>	January 2016

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### Summary

Ombudsman Ron Paterson commenced an Official Information Act 1982 (OIA) investigation into a complaint from a journalist, about a decision by the Health and Disability Commissioner (HDC) to refuse a request for the names of the DHBs published in a report on complaints to HDC involving DHBs over a six-month period. HDC had refused the request on the basis that the information was subject to an obligation of confidence and making it available would damage the public interest (OIA s 9(2)(ba)(ii)).

The Ombudsman formed the provisional opinion that section 9(2)(ba)(ii) did not apply.

HDC accepted the Ombudsman's provisional opinion and advised that the information would be released. The Ombudsman invited the DHBs, as affected parties, to comment. No concerns were raised. The Ombudsman discontinued his investigation on the basis that HDC's decision to release the information meant further investigation was unnecessary.

### Background

1. On 13 May 2015, a journalist emailed HDC asking why DHBs are not identified in HDC's DHB reports. The journalist provided a link to the report published on HDC's website entitled *Complaints to HDC involving District Health Boards: Report and Analysis for period 1 July to 31 December 2014* ('the DHB Report').
2. HDC replied that the DHB Report is published for educational purposes and these reports have not historically identified the DHBs. The journalist was referred to a footnote in the DHB Report, which relates to a table showing the rate of complaints received per

100,000 discharges, with each of the 20 DHBs listed as a number only (eg, DHB 1, DHB 2 etc). The footnote states:

*Individual DHBs have not been named in this report given the small sample size and the short period covered.*

3. The journalist replied that he did not consider that to be an adequate reason for withholding the DHBs' identities, outlining why he considered the information should be published, and asking HDC to reconsider its position.
4. On 12 June 2015, HDC responded further, advising that it chooses not to name individual DHBs as the information is subject to an obligation of confidence, and making the information available would damage the public interest. HDC confirmed that it did not consider the withholding of the information is outweighed by other considerations that make it desirable, in the public interest, to make the information available. HDC responded to the complainant's arguments supporting release of the information, and advised that it did not intend to change its approach regarding the identification of individual DHBs in the DHB reports.
5. On 17 June 2015, the journalist complained to the Ombudsman.

## Investigation

6. On 20 July 2015, the Ombudsman notified HDC and the complainant of his intention to investigate.

## Comments from HDC

7. In responding to the Ombudsman's request for comments, the Commissioner confirmed that he considered the refusal of the request was justifiable on the basis that the information concerned was subject to an obligation of confidence, and making that information available would damage the public interest (OIA s 9(2)(ba)(ii)).
8. The Commissioner submitted that the information is subject to an obligation of confidence held in respect of the DHBs, arising out of a mutual understanding based on custom and practice, and HDC's published *Naming Policy*. Under that policy, a DHB will generally be named only where a complaint is investigated and a breach finding is made. On that basis, HDC has a mutual understanding with the health sector that providers, including DHBs, will not be named simply on the basis of complaints received.
9. The Commissioner outlined a number of reasons in support of his view that releasing the names of the DHBs would be likely to damage the public interest. These related largely to the nature of the data. In broad terms, HDC was concerned about the reliability and the limitations of the information, and the potential for it to be interpreted without requisite care.

## Section 9(2)(ba)

10. Section 9(2)(ba) of the OIA applies if, and only if, the withholding of the information is necessary to:

*protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—*

- (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or*
- (ii) would be likely otherwise to damage the public interest;*

## Provisional opinion

11. On 29 October 2015, the Ombudsman formed the provisional opinion that section 9(2)(ba)(ii) did not apply to the information at issue.
12. He explained that he was not satisfied that an obligation of confidence existed in respect of the information at issue, or that making the information available would be likely otherwise to damage the public interest.

## Obligation of confidence

13. Where an obligation of confidence exists, it is generally owed to the person who supplied the information. In this case, the DHBs are the *subjects*, rather than the *suppliers* of the information. The information is generated by HDC itself, on the basis of complaints received from individual consumers or their representatives.
14. The Ombudsman accepted that it was established practice (developed in his own time as Commissioner) for HDC not to identify individual DHBs in the tables showing the rate of complaints received per 100,000 discharges. HDC has included such tables in each of the DHB reports published since 2008, explaining on each occasion that, given the small sample size and the short period covered, individual DHBs would not be identified.
15. The Ombudsman also accepted that although the *Naming Policy* is primarily concerned with the naming of providers in public reports and therefore with complaints that are formally investigated, it has created an expectation that HDC will name group providers such as DHBs only when a breach of the Code has been established following an investigation.
16. However, as HDC states in its *Naming Policy*:

*The legal processes for deciding whether to release names in response to an OIA request and deciding whether to name a provider under the naming policy are quite different.*

17. The Ombudsman did not consider that either established practice or the fact that HDC has treated the information as confidential is a sufficient basis for concluding that it is subject to an obligation of confidence.
18. An important consideration here is the nature of the information at issue—namely, the rate of complaints to HDC for each DHB per 100,000 discharges. The information shows how the DHBs compare to one another but reveals nothing about who or what the complaints are about, who they are from, the gravity of the matters complained about, whether the complaints were substantiated or how they were resolved. Whether the information can be said to have a ‘*quality of confidence*’ about it, is arguable.
19. In terms of the circumstances of its supply, the Ombudsman said it was not clear that HDC and the DHBs had a mutual understanding regarding the confidentiality of the information. HDC did not refer to any advice or instruction to the DHBs indicating that the information is provided to them in confidence. The way in which the reports were compiled and disseminated, with one section containing national data and a separate section containing DHB-specific data, did not appear sufficient to establish an implied obligation of confidentiality.
20. Furthermore, it was evident that the DHBs themselves have not always understood the information to be confidential. A brief online search revealed that a number of DHBs had, at various times, published their own HDC complaint data. This clearly weighed against any suggestion of a mutual understanding between HDC and the DHBs.

### Likely otherwise to damage the public interest?

21. The Ombudsman explained that even if he *were* to be persuaded that an obligation of confidence existed, he would need to consider whether making the information available would be likely to prejudice the supply of similar information or information from the same source, or likely to damage the public interest in some other way for the purposes of section 9(2)(ba)(ii) of the OIA.
22. The question of prejudice to supply was not relevant, as the information was ‘supplied’ (ie, created) by HDC itself. There could be no suggestion that disclosing complaint rates for individual DHBs would impact on consumers considering whether to make a complaint to HDC. Section 9(2)(ba)(i) was therefore not applicable.
23. The Ombudsman accepted that there would be issues with the reliability of the data (arising from the way in which complaints are necessarily logged by HDC, discharge rate data, variable reporting periods and other factors), and that some members of the public will not recognise the wide range of factors, aside from quality of care, that impact on the number of complaints HDC receives about a particular DHB. He also acknowledged that complaint rates are based on numbers that inevitably include a proportion of complaints that will subsequently be found to be without substance.
24. However, he was not persuaded that these concerns constituted an adequate basis for concluding that release of the information would likely damage the public interest, such that section 9(2)(ba)(ii) applied.

25. First, he noted again the *nature* of the information, which was limited to the rate of complaints received by HDC for each DHB. It did not include any information about the complaints themselves.
26. The Ombudsman also considered that most of the concerns raised by HDC as potentially damaging to the public interest could be overcome with the provision of appropriate caveats and contextual information.
27. By way of example, he noted the UK Parliamentary and Health Service Ombudsman's report entitled *Complaints about acute trusts 2013–14 and Q1, Q2 2014–15*.<sup>1</sup> The numbers of trusts and complaints reported on in that report are significantly higher than the numbers of DHBs and complaints in HDC's DHB reports. Nevertheless, it appeared to be a good example of the way in which complaints information can be presented so as to minimise the risk of misinterpretation or misuse. The Ombudsman noted, in particular, the information provided on pages 6–13 of the UK report, which includes contextual information, caveats, and guidance on how the information might be used. He noted also that the actual information provided includes not only the rate of complaints about each trust, but also the number of enquiries accepted for investigation and the number of investigations partly or fully upheld.
28. The Ombudsman did not consider HDC's concerns about the way in which complaint data might be reported and interpreted were necessarily warranted.
29. Finally, the Ombudsman noted the response HDC received from the DHBs to its February 2014 request for feedback on proposed changes to the content of the DHB reports. HDC advised that one of the options presented was for DHBs to be ranked according to their raw complaint numbers and named, and that of the five DHBs that commented on that option, only one was opposed. Had the DHBs themselves been concerned about the possibility of their complaint numbers being disclosed by HDC and considered that potentially damaging, more opposition might have been expected.

## Conclusion

30. The current Commissioner has continued the practice that the Ombudsman had developed when he was Commissioner, of not publicly identifying individual DHBs when it reports on the rate of complaints to HDC. However, that practice (not to proactively release such information) does not appear consistent with the requirements of the OIA when the information is requested from HDC, as occurred in this case.
31. For the reasons outlined above, it was the Ombudsman's provisional opinion that section 9(2)(ba)(ii) of the OIA did not apply to the information at issue. The Ombudsman did not identify grounds for withholding the information under any other provision of the OIA. It

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<sup>1</sup> Available at: [http://www.ombudsman.org.uk/data/assets/pdf\\_file/0003/33897/NHS\\_Complaint\\_stats\\_report\\_2014-15-new.pdf](http://www.ombudsman.org.uk/data/assets/pdf_file/0003/33897/NHS_Complaint_stats_report_2014-15-new.pdf).

was therefore unnecessary for him to consider whether, in accordance with section 9(1), the withholding of the information was outweighed by other considerations that make it desirable, in the public interest, to make that information available.

32. In these circumstances, the Ombudsman formed the provisional opinion that HDC was not entitled to refuse the request.

## Outcome

33. On 6 November 2015, the Commissioner advised that he had no further comments and had decided to abide by the Ombudsman's decision.
34. The Ombudsman invited the DHBs, as affected parties, to comment. This was in accordance with section 18(3) of the Ombudsmen Act 1975, in recognition of the potential for the proposed release of information to adversely affect an individual DHB. Five DHBs responded, indicating either that they had no comments or that they supported the release of the information.
35. Given HDC's decision to release the information, the Ombudsman discontinued his investigation on the basis that further investigation was unnecessary.