



Resolution

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November 2020
FOI_4805

The following information was requested on 7 October 2020:

Please could you send me the following information for Acute NHS Trusts in England:

- 1. The number of currently-outstanding litigation claims with a primary cause code of "Failure to Warn".*
- 2. NHSR's professional actuaries' estimation of the amount to be paid out, in the event that these claims are unsuccessfully defended.*

Our Response

1. Please find attached the requested information. Please note this is only a snapshot as this figure will change daily as cases are dealt with and closed.

We have suppressed low figures as we believe that disclosure of information with this level of granularity is exempt under Section 40(2) by virtue of section 40(3)(a)(i) of the Act, where disclosure to a member of the public would contravene one or more of the data protection principles. The data protection principles are set out in Article 5 of the General Data Protection Regulation. We take the view that it would not be fair or lawful (given the sensitive and confidential nature of the information held) to disclose such information, and any disclosure would therefore contravene the first data protection principle.

In some instances the low numbers of claims (fewer than 5) in each category, the likelihood exists that individuals who are the subject of this information may be identified either from this information alone, or in combination with other available information. In addition to this, as this information is considered to be sensitive personal data (the data subjects' medical condition); NHS Resolution believes it has a greater responsibility to protect those individuals identities', as disclosure could potentially cause damage and/or distress to those involved. Where we are in the territory of such small numbers in the attached, we have used a '#' symbol in the relevant field. You should still be able to see aggregate/total details for higher level fields containing this data.

2. Please note similar to the above this figure will change daily and is not fixed. We believe this information is exempt under section 43, specifically s.43 (2) of the Freedom of Information Act 2000 (FOIA). Please see below for our reasoning.

Section 43 – Commercial Interests Exemption

The relevant section relied on is section 43 (2) of the FOIA. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

For section 43(2) to be engaged three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the commercial interests;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
- Thirdly, it is necessary to establish whether the alleged prejudice would, or would be likely, to occur.

The Information Commissioner's Office (ICO) guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services.

In this case the estimates requested are held on file are reflective of a point in time. Factors change on cases daily, so we may have a case that we believe, on the evidence to date, it is a case to defend but then a month later further evidence may be obtained that changes that position and the reserve estimate would be amended as would the probability to settle. It is widely accepted insurers operate in a very competitive market where premiums fluctuate and claimants will seek to obtain the most settlement for alleged incidents. At this stage of the process where cases are still being investigated it would be premature and misleading to provide any estimates held in reserves in relation to an allegation.

The reserves are held to ensure insurers hold a sufficient amount if following investigation a settlement is necessary. To provide the public with estimates held would provide a misleading picture in that it could suggest those cases are likely to be settled when in fact that may not be case. Another prejudice is that it could give claimants false hope with regard to the amount they think they could obtain from the claim and as a result could weaken our negotiating position. Reserves are generally not relevant to actions regarding claim assessments and disclosure of reserve information could have a significantly prejudicial effect on insurers at trial.

We believe that disclosing the estimate would be likely to prejudice both our own commercial interests and those of member Trusts who pay premiums. Specifically we believe our commercial interests would be prejudiced if claimants were provided with this misleading information which they could use to undermine our negotiating position. This would cause challenges for us and member Trusts because it would provide an estimate to claimants of what they could ask for. Disclosure of this information could create an inflationary pressure for future negotiations.

We do not generally disclose such estimates and therefore we consider that the disclosure would be likely to be damaging to the wider business relationship between NHS Resolution and our member Trusts.

Public Interest

In order for section 43 (2) of the FOIA to apply we need to demonstrate that the public interest in favour of maintaining the exemption outweighs the public interest in disclosing the requested information. Please see below for our public interest considerations.

Public interest arguments in favour of disclosure

We acknowledge there will always be some public interest in disclosing information which would promote transparency and accountability of how a public authority such as NHS Resolution carries out its functions. This public interest is heightened where the information relates to the spending of public money.

Public interest arguments in favour of maintaining the exemption

We believe that the disclosure of the requested information prejudices our ability to effectively discharge our claims handling and management function. We believe our member Trusts would not expect this information to be disclosed and as such disclosure would erode our relationship with member Trusts.

We also believe that disclosure of the requested information would prejudice our ability to negotiate value for money claims if claimants believed they could negotiate a higher settlement. It could also lead to inflated premiums for member Trusts.

There is a recognised need to protect commercially confidential information, a clear public interest in a fair market and competition reflected in the exemption, and a public interest in having due regard to the NHS Resolution's interests in the decisions it takes. We believe that the public interest in carrying out our claims function would be undermined by the disclosure of the requested information.

Balance of public interest arguments

NHS Resolution is of the view that the public interest is served by having access to broader information about its expenditure. We have previously disclosed to you and the public information about payments made in respect of claims such as these where the case is closed. We believe that this diminishes the public interest in favour of disclosure of the withheld information requested. Therefore, NHS Resolution considers that the public interest in ensuring we are not put to the disadvantages covered by the exemption outweighs any public interest in disclosure of the requested information.

If you would like to know how data is categorised in our Claims database please see the following link: [Glossary](#)

This concludes our response to your request.

If you are not satisfied with the service that you have received in response to your information request, it is open to you to make a complaint and request a formal review of our decisions. If you choose to do this, you should write to [Tinku Mitra](#), Head of Corporate and Information Governance for NHS Resolution, within 28 days of your receipt of this reply. Reviews of decisions made in relation to information requests are carried out by a person who was not involved in the original decision-making about the request.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a review of the decision. Generally, the Information Commissioner will not make a decision unless you have exhausted the local complaints procedure. The address of the Information Commissioner's Office is:

Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

<https://ico.org.uk/>

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NB: Number of claims fewer than 5 (and any associated values, within the same row) are masked with a "#" (in accordance with Data Protection guidelines). Accordingly, some total values may also be approximated to prevent masked values to be deduced through reverse calculation.

[Table 1: Number of Open Claims from Acute Trusts with a primary cause code of 'Fail to Warn - Informed Consent'](#)

[Table 2: Number of Open Claims from Acute Trusts with a primary cause code of 'Fail to Warn - Informed Consent'](#)

Table 1: Number of Open Claims from Acute Trusts with a primary cause code of 'Fail to Warn - Informed Conset'

Closed_Settled	N
Clinical_NonClinical	Clinical
Status_Flag	Open

Primary Cause Code	No_of_Claims
Fail To Warn-Informed Consent	903
Grand Total	903

Table 2: Number of Open Claims from Acute Trusts with a primary cause code of 'Fail to Warn - Informed Consent'

Closed_Settled	N
Clinical_NonClinical	Clinical
Status_Flag	Open
Cause1L1	Fail To Warn-Informed Consent

MemberName	No_of_Claims
Number of Trusts with fewer than 5 claims: 49	124
North Bristol NHS Trust	34
Newcastle Upon Tyne Hospitals NHS Foundation Trust (The)	26
Royal Free London NHS Foundation Trust	21
Barts Health NHS Trust	21
University Hospitals Birmingham NHS Foundation Trust	19
Frimley Health NHS Foundation Trust	19
Oxford University Hospitals NHS Foundation Trust	19
Hull University Teaching Hospitals NHS Trust	18
Nottingham University Hospitals NHS Trust	17
Mid and South Essex NHS Foundation Trust	16
East Kent Hospitals University NHS Foundation Trust	16
Barnsley Hospital NHS Foundation Trust	15
Pennine Acute Hospitals NHS Trust (The)	15
University Hospitals of North Midlands NHS Trust	14
South Tyneside and Sunderland NHS Foundation Trust	13
The Leeds Teaching Hospitals NHS Trust	13
Blackpool Teaching Hospitals NHS Foundation Trust	13
University Hospitals Coventry & Warwickshire NHS Trust	13
Barking, Havering and Redbridge University Hospitals NHS Trust	12
United Lincolnshire Hospitals NHS Trust	12
West Hertfordshire Hospitals NHS Trust	12
University College London Hospitals NHS Foundation Trust	12
Sandwell & West Birmingham Hospitals NHS Trust	12
King's College Hospital NHS Foundation Trust	12
Royal Devon and Exeter NHS Foundation Trust	10
St George's University Hospitals NHS Foundation Trust	10
Doncaster and Bassetlaw Teaching Hospitals NHS Foundation Trust	10
Royal Berkshire NHS Foundation Trust	9
Royal Cornwall Hospitals NHS Trust	9
Imperial College Healthcare NHS Trust	9
Worcestershire Acute Hospitals NHS Trust	9
Wrightington, Wigan and Leigh NHS Foundation Trust	8
Gateshead Health NHS Foundation Trust	8
Homerton University Hospital NHS Foundation Trust	8
Mid Yorkshire Hospitals NHS Trust (The)	8
Liverpool University Hospitals NHS Foundation Trust	8
Bedfordshire Hospitals NHS Foundation Trust	8
Lancashire Teaching Hospitals NHS Foundation Trust	8
Norfolk & Norwich University Hospitals NHS Foundation Trust	8
Maidstone and Tunbridge Wells NHS Trust	8
Walsall Healthcare NHS Trust	8
University Hospitals of Leicester NHS Trust	7
Tameside and Glossop Integrated Care NHS Foundation Trust	7
University Hospital Southampton NHS Foundation Trust	7
Chelsea & Westminster Hospital NHS Foundation Trust	7
University Hospitals Bristol & Weston NHS Foundation Trust	7
Ashford & St Peter's Hospitals NHS Foundation Trust	7
Northern Devon Healthcare NHS Trust	7
North Tees & Hartlepool NHS Foundation Trust	6
North West Anglia NHS Foundation Trust	6
Portsmouth Hospitals NHS Trust	6
Royal Wolverhampton NHS Trust (The)	6
East Suffolk North Essex NHS Foundation Trust	6
Salford Royal NHS Foundation Trust	6
Manchester University NHS Foundation Trust	6
Sheffield Teaching Hospitals NHS Foundation Trust	6
North Cumbria Integrated Care NHS Foundation Trust	6
South Tees Hospitals NHS Foundation Trust	6
Northampton General Hospital NHS Trust	6
St Helens and Knowsley Teaching Hospitals NHS Trust	6

Table 2: Number of Open Claims from Acute Trusts with a primary cause code of 'Fail to Warn - Informed Consent'

Closed_Settled	N
Clinical_NonClinical	Clinical
Status_Flag	Open
Cause1L1	Fail To Warn-Informed Consent

MemberName	No_of_Claims
East Lancashire Hospitals NHS Trust	6
County Durham and Darlington NHS Foundation Trust	6
Hampshire Hospitals NHS Foundation Trust	6
Lewisham & Greenwich NHS Trust	5
London North West University Healthcare NHS Trust	5
Birmingham Women's and Children's NHS Foundation Trust	5
Milton Keynes Hospital NHS Foundation Trust	5
Cambridge University Hospitals NHS Foundation Trust	5
Princess Alexandra Hospital NHS Trust (The)	5
Dudley Group NHS Foundation Trust (The)	5
Royal United Hospitals Bath NHS Foundation Trust	5
George Eliot Hospital NHS Trust	5
Salisbury NHS Foundation Trust	5
Wirral University Teaching Hospital NHS Foundation Trust	5
Stockport NHS Foundation Trust	5
Dorset County Hospital NHS Foundation Trust	5
The Royal Orthopaedic Hospital NHS Foundation Trust	5
Kettering General Hospital NHS Foundation Trust	5
Torbay & South Devon NHS Foundation Trust	5
Epsom and St Helier University Hospitals NHS Trust	5
University Hospitals Dorset NHS Foundation Trust	5
Brighton & Sussex University Hospitals NHS Trust	5
University Hospitals of Derby and Burton NHS Foundation Trust	5
Grand Total	903