

1 November 2007

Sir Liam Donaldson  
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Dear Sir Liam,

**FOI request: Legal advice provided to Department of Health re NHS Database**

I am writing to apply under the provisions of the Freedom of Information Act for the publication of legal advice provided to the Department of Health with regard to the NHS Database proposals. The advice is quoted, in part, in the report of the ministerial working party published by Lord Warner in December<sup>1</sup>. I was informed by Mr James Johnson, formerly Chair of Council at the BMA that a Counsel's Opinion was obtained by the Department of Health in response to a paper I had provided to the BMA and the RCGP. I understand that the quotation in the Ministerial Working party report derives from that legal advice.

In a letter to my MP, Mr. Jeremy Wright, dated 29<sup>th</sup> August 2007, (ref PO00000224421), Mr Ben Bradshaw MP, Health Minister, advised that he would not be willing to publish that advice and that he might claim exemption to such publication under the Freedom of Information act on the grounds of legal privilege. In the same letter Mr Bradshaw confirmed that the CfH proposals do not meet the legal standards set in a draft document produced by the working party of Information Commissioners from across Europe.

I would be grateful if the decision not to publish could be reviewed. There are two grounds on which this should be particularly considered.

Firstly, Lord Warner has already released the advice in part. There is precedent that legal privilege cannot be claimed for selected parts of legal advice where there has already been release of some of the advice, particularly if this might misrepresent the legal advice as a whole.

Secondly, the Government commonly waves the right to legal privilege and publishes legal advice it has obtained, where it is reasonable to do so. The question which may need independent adjudication is whether the Department of Health is reasonable to exercise a claim to legal privilege in the context of this particular legal advice, and thereby inappropriately circumvent the presumption of open government.

As a patient, and data subject, I need clarification of the extent to which the government has been advised that my privacy and confidentiality should be protected. As a doctor, and independent data controller, I need clarification of the liability that might accrue if I co-operate with government proposals to make information accessible, particularly when such information release is intended without the explicit consent of some patients, or even contrary to the explicit, expressed dissent of some patients.

The NHS Care Records Guarantee is clear that such information release without consent will occur "where this is lawful". This phrase can only be meaningful if the legal advice obtained by the Department of Health is published.

Kind regards,

Yours sincerely

Dr Paul Thornton

c.c. Mr Jeremy Wright MP

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<sup>i</sup> [http://www.connectingforhealth.nhs.uk/publications/care\\_record\\_taskforce\\_doc.pdf](http://www.connectingforhealth.nhs.uk/publications/care_record_taskforce_doc.pdf)