

6 December 2017

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London SE1 8UG

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E: nhsi.enquiries@nhs.net
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By email

Dear [REDACTED]

Request under the Freedom of Information Act 2000 (the “FOI Act”)

I refer to your email of **8 November 2017** in which you made an enquiry, and requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority “NHS TDA” are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the NHS TDA.

This letter relates to your request under the FOI Act. Your enquiry will be dealt with separately.

Your request

Your email, set out in full in the Annex to this letter, contained the following request:

I have been onto your website and refer to the meeting of 28 September.

28 September 2017

Please could you provide a copy of the reports

14. Update on winter resilience preparation 2017/18 (attached) Pauline Philip Discussion BM/17/75(P)

17. Business cases i. Shaping a Healthier Future SOC programme ii. Mersey Care NHS Trust MSU FBC Steve Russell Jonathan Stephens Decision BM/17/78(P)

please could I have the decision made on 17. Business cases i. Shaping a Healthier Future SOC programme

Decision

NHS Improvement holds the information that you have requested.

NHS Improvement has decided to withhold some of the information it holds on the basis of the applicability of the exemptions in section sections 36, 41 and 43 of the FOI Act as explained in detail below.

In order to assist with your request, the information you have asked for relating to the decision on Shaping a Healthier Future SOC programme, can be found in the minutes of the meeting of the Board of NHS Improvement on 28 September 2017, which are available on our website at:

<https://improvement.nhs.uk/events/board-papers-30-november-2017-board-meeting/>

Section 36(2) – prejudice to effective conduct of public affairs

NHS Improvement has decided to withhold the information requested on the basis that it falls within section 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOI Act (prejudice to the effective conduct of public affairs) and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The exemption is engaged as NHS Improvement's qualified person, Jim Mackey (Chief Executive Officer), is of the opinion that the disclosure of this information would inhibit the free and frank provision of advice and/ or free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(i) and (ii)). The qualified person is also of the view that disclosure of the information would otherwise prejudice the effective conduct of public affairs (section 36 (2)(c)).

In order to carry out its statutory functions, NHS Improvement must be able to hold free and frank discussions about policy decisions and about confidential and sensitive matters, without concern that the detail of those discussions or that advice will be disclosed. If this material were published it would restrict the candour and frankness with which similar future discussions would be conducted as individuals would be concerned about the possibility that those views and discussions would be made public. The result would be to inhibit the quality of advice and discussions in such cases, which would have an adverse impact on the ability of NHS Improvement to develop effective policy and carry out its functions.

NHS Improvement's qualified person is also of the opinion that disclosure of the information reserved to the private board sessions would otherwise prejudice the effective conduct of public affairs. The established procedure of the Board is to have both public and private sessions. The information being withheld is papers for a private session of the Board of NHS Improvement which contains commercial and sensitive information and preliminary views and ideas which are not yet the view of NHS Improvement. The private sessions of the Board provide it with a 'safe space' in which to develop ideas, debate live issues, and reach decisions. Disclosure of the private Board papers would prejudice the 'safe space' created by the use of private Board sessions which would reduce the quality of both debate and decision making which, in turn, would prejudice the effective conduct of public affairs.

Section 43 - commercial interests

Section 43(2) of the FOI Act provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person. NHS Improvement considers that the information being withheld is commercially sensitive and that the disclosure of that information is likely to be detrimental to the trust's legitimate commercial interests.

Public interest test

Sections 36 and 43 are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemptions should be maintained. NHS Improvement's view is that, on balance, the public interest in maintaining the exemption outweighs the public interest in disclosure.

In considering the balance, we have considered the public interest in transparency and openness in relation to decisions by public bodies, particularly decisions affecting the NHS. NHS Improvement Board meetings are held in public and members of the public can attend. Only matters of a confidential or sensitive nature are reserved to the private session, where it is considered that discussion in public would be prejudicial to the public interest.

We have therefore considered the strong public interest test in NHS Improvement being able to hold free and frank discussions about policy decisions, and advise on those decisions, without concern that the detail of those discussions will be disclosed.

NHS Improvement has also considered the strong public interest in the Board of NHS Improvement having 'safe space' in which to consider all the advice and views provided to it without concern that those details will be disclosed inappropriately. There is a public interest in preserving the integrity of the private sessions of the Board of NHS Improvement to ensure it is able to have the open and confidential discussions necessary to ensure effective decision making. The public interest lies in sensible, well-considered policies being made, which can only come about when a safe space is provided in which to formulate and develop such policy. By disclosing the private papers and undermining such a 'safe space' for policies to be considered, the quality of future determinations may be impacted, which would not be in the public interest.

We have also taken into account that, in relation to the risk that disclosure would prejudice the effective conduct of public affairs, the opinion of NHS Improvement's qualified person was that the prejudice would occur (ie it was more probable than not that prejudice would occur).

Taking into account these considerations, our decision is that the balance of public interest is in withholding this information.

Section 41 - information provided in confidence

We consider that the withheld information is exempt under section 41 of the FOI Act. Section 41(1) provides that information is exempt if:

*“(a) it was obtained by the public authority from any other person (including a public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount an actionable breach of confidence. This means:

- (i) the information must have the necessary quality of confidence about it;*
- (ii) the information must have been imparted in circumstances giving rise to an obligation of confidence;*
- (iii) disclosure must amount to an unauthorised use of the information to the detriment of the confider.*

NHS Improvement considers that disclosure of the information would amount to an actionable breach of confidence. Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, in considering whether (in an action for breach of confidence) a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. In the present circumstances, NHS Improvement does not consider that there is a strong public interest in disregarding the duty of confidence owed to providers.

Providers should be able to share sensitive and confidential information with NHS Improvement in the expectation that this will be kept confidential. This is particularly important in relation to commercially sensitive information which, if disclosed, may have negative consequences for providers. NHSI considers that it is crucial for trust to be maintained by providers who impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to NHS Improvement of information we need to fulfil our functions.

Review rights

If you consider that your request for information has not been properly handled or if you are otherwise dissatisfied with the outcome of your request, you can try to resolve this informally with the person who dealt with your request. If you remain dissatisfied, you may seek an internal review within NHS Improvement of the issue or the decision. A senior member of NHS Improvement’s staff, who has not previously been involved with your request, will undertake that review.

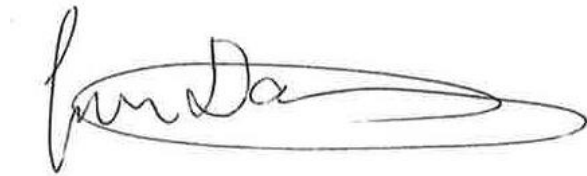
If you are dissatisfied with the outcome of any internal review, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

A request for an internal review should be submitted in writing to FOI Request Reviews, NHS Improvement, Wellington House, 133-155 Waterloo Road, London SE1 8UG or by email to nhsi.foi@nhs.net.

Publication

Please note that this letter will shortly be published on our website. This is because information disclosed in accordance with the FOI Act is disclosed to the public at large. We will, of course, remove your personal information (e.g. your name and contact details) from the version of the letter published on our website to protect your personal information from general disclosure.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jessica Dahlstrom', enclosed within a large, horizontal oval shape.

Jessica Dahlstrom
Head of Governance

Annex

I have been onto your website and refer to the meeting of 20 July and 28 September.

20 July 2017

Please could you provide the reasons why the whole meeting was held in private

28 September 2017

Please could you provide the reasons why items 11 to 20 were held in private.

Please could you provide a copy of the reports

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