

4 October 2017

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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 5 September 2017 in which you requested information under the FOI Act from NHS Improvement. For the purposes of this decision, NHS Improvement means the NHS Trust Development Authority.

**Your request**

You made the following request:

*In relation to the investigation into Lewisham and Greenwich NHS Trust, please can I get a copy of the EY report from May and the letter you sent to the trust?*

**Decision**

NHS Improvement holds the information that you have requested.

NHS Improvement has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in sections 31 and 41 of the FOI Act as explained in detail below.

**Section 31 – Law enforcement**

NHS Improvement considers that the information requested is exempt from disclosure under section 31(1)(g) of the FOI Act. This provides that the information is exempt if its disclosure would, or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

NHS Improvement considers that section 31(2)(c) is engaged and that disclosure of the information in question would be likely to prejudice the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

NHS Improvement relies upon the relationships it builds with providers. In particular, it relies on open relationships in order to obtain information with a view to completing investigations efficiently. In this case, the investigation letter requested includes information we are seeking from the Trust in order to conduct our investigation. NHS Improvement holds reports from Ernest & Young which have been provided in the expectation that they would remain confidential. In our view, disclosure of this information would undermine our relationship with the Trust and its willingness to engage with us. We also consider that the disclosure of this information would be likely to prejudice the willingness of other providers to work with us voluntarily in other cases.

#### *Public interest test*

The exemption set out in section 31 of the FOI Act is subject to a public interest test. The public interest in accountability and transparency, which favours disclosure of the information that has been withheld, has been weighed against the detrimental impact that disclosure would have. There is a public interest in the transparency of decision making in relation to providers NHS Improvement regulates. However, NHS Improvement considers the public interest in disclosure of the information is outweighed by the need to safeguard information provided by trusts. In addition, NHS Improvement does publish outcomes of investigations.

#### Section 41 – Information provided in confidence

NHS Improvement considers that the Ernst & Young reports are 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 another 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)(a) is met as the information was obtained by NHS Improvement from third parties, in this case the Trust and Ernst & Young.

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount to 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. The information shared by providers and Ernst & Young is potentially commercially sensitive and is shared by them on an expectation that it would be kept confidential by NHS Improvement.

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. NHS Improvement considers 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. In the present circumstances, therefore, NHS Improvement does not consider that there is a strong public interest in disregarding the duty of confidence owed to the Trust and Ernst & Young.

### **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](mailto: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,



**Jen Leonard**

Delivery & Improvement Director (South London)