

25 October 2017

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By email

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Dear ██████████

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

I refer to your email of **27 September 2017** in which you 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 both Monitor and the NHS TDA.

Your request

You made the following request:

Under the Freedom of Information Act, please send me the board papers for the private session of September 28’s board meeting.

These are:

The chairman’s report (BM/17/72(P))

The chief executive’s report (BM/17/73(P))

M4 sector performance (BM/17/74(P))

Update on winter resilience preparation 2017/18 (BM/17/75(P))

Update on incident management and emergency preparedness (BM/17/76(P))

Collaboration and joint working with NHS England (BM/17/77(P))

Business cases: i) Shaping a Healthier Future SOC programme; ii) Mersey Care NHS Trust MSU FBC (BM/17/78(P))

Challenged providers update (BM/17/79(P))

NHS Improvement Quarter One i) corporate risk report; ii) corporate performance report (BM/17/80(P))

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 36 as explained in detail below.

Section 31 – Law enforcement

Under section 31(1)(g) of the FOI Act, information is exempt from disclosure 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 some of the information in question would be likely to prejudice the exercise by Monitor and TDA of their functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of Monitor's provider licence enable Monitor to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Health and Social Care Act 2012. Section 5 of The National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 provides that the TDA must exercise its functions with the objective of ensuring that English NHS trusts are able to comply with their duty under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively.

NHS Improvement considers that disclosing information about challenged providers is likely to prejudice the on-going monitoring by NHS Improvement of providers' compliance with the rules, which is necessary for NHS Improvement to take into account in any decision of regulatory action needed in respect of a failure to comply with the rules.

NHS Improvement relies on the full and frank information from trusts in order to carry out its functions effectively. NHS Improvement relies on having a safe space in which providers are freely able to share sensitive and confidential information in the knowledge that the information will not be disclosed more widely. To disclose that information more widely is likely to have a detrimental impact on the quality and content of exchanges between NHS Improvement and the bodies it regulates and its ability to make effective and fully informed regulatory decisions.

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

NHS Improvement has decided to withhold some of the information requested on the basis that it is exempt from disclosure under section 36(2) of the FOI Act. It is the opinion of NHS Improvement's qualified person (Jim Mackey, Chief Executive), that disclosure of this information would be likely to inhibit the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation and would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs (section 36(2)(b) and (c)).

In order to carry out its statutory functions NHS Improvement's Board must be able to freely exchange information with, to engage in frank discussions, and to receive advice from, NHS Improvement staff about confidential and sensitive matters reserved to the private session, without concern that the detail of those discussions will be disclosed. If this material were published, it would be likely to 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 reduce the quality of discussion and advice provided in such cases and an adverse impact on the ability of NHS Improvement to carry out its functions.

NHS Improvement's qualified person is also of the opinion that disclosure of this information would otherwise prejudice the effective conduct of public affairs. The information being withheld consists of papers for a private session of the Board of NHS Improvement which contain preliminary views and ideas which are not yet the view of NHS Improvement. Private board sessions are important to the effective functioning of the Board as they provide a 'safe space' within which to develop ideas, debate live issues, and reach decisions about confidential and sensitive matters before making a decision. 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 decision making which, in turn, would prejudice the effective conduct of public affairs. Disclosure of the information would also undermine the principle of holding private sessions of the Board.

Public interest test

Section 36 is a qualified exemption 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 these exemptions 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 those matters of a confidential and/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 also considered the strong public interest in NHS Improvement's Board being able to hold free and frank discussions about policy and regulatory decisions, and advice 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 a '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 and regulatory decisions taken, which can only come about when a safe space is

provided in which to facilitate this. By disclosing the private papers and undermining such a 'safe space' for policies to be considered and decision to be taken, 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 (i.e. it was more probable than not that the prejudice would occur).

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

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 simple oval outline.

Jessica Dahlstrom
Head of Governance