

30 November 2017

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By post

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Your reference: [REDACTED]

Dear [REDACTED]

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

I refer to your letter of **1 November 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 the NHS TDA.

Your request

You made the following request:

“ I am requesting a copy of the presentation by SSHG Health on the FIP Phase 2 analysis, which was presented to the board of the East of England Ambulance Service NHS Trust on 29th June 2017 and was subsequently passed on to NHS Improvement for analysis.”

Decision

NHS Improvement holds the information that you have requested and has decided not to release it to you for these reasons. In arriving at this decision, we have applied the Information Commissioner’s Office decision number FS50680102 (‘the ICO decision’) as it is highly relevant to this request. I have enclosed a copy of the ICO decision for your reference.

Section 31 – law enforcement

Section 31 of the FOI Act states that –

“Information which is not exempt by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice - ...

(1)(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).”

The purpose specified at subsection 2(c) is:

“(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.”

For the reasons set out in the ICO decision, NHS Improvement has the appropriate functions to rely on subsection 2(c) as it clearly has statutory obligations to ascertain if circumstances exist which justify regulatory action.

SSG is a private consultancy firm appointed by East of England Ambulance Service NHS Trust (“the Trust”) as part of NHS Improvement’s Financial Improvement Programme (“FIP”)¹. Under this programme NHS Improvement procures firms to be appointed to trusts to help them identify and implement financial savings. The information is contained within a presentation discussing the Trust’s financial performance and financial management standards and the content is relevant to discussions about regulatory action NHS Improvement may take. The information that has been withheld under this exemption as it relates to the exercise of NHS Improvement’s regulatory functions.

NHS Improvement considers there would be a real and significant risk of prejudice if this information was disclosed for the reasons explained in the ICO decision.

Public interest test

As section 31 is a qualified exemption we have also considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

NHS Improvement recognises there is a public interest in transparency and accountability in relation to the expenditure of public money, particularly in relation to decisions by NHS trusts to engage external consultancy firms to assist them in identifying and implementing potential cost savings. However, NHS Improvement also considers there is a strong public interest in preserving the relationship of trust and confidence and the free flow of information from NHS trusts to NHS Improvement and this is vital to NHS Improvement’s regulatory work. In particular, there is a strong public interest in allowing the regulator of NHS trusts to be able to carry out its functions effectively and efficiently, and to have the space and freedom to consider, without concern as to publication, whatever information it requires in such circumstances. Any disclosure that would cause NHS Improvement to have to reconsider

¹ <https://improvement.nhs.uk/news-alerts/fip-helping-save-nhs-tens-millions-pounds/>

requesting sensitive information which is necessary to carry out its function of regulating NHS trusts would be detrimental to the process of regulation.

NHS Improvement recognises the argument that there is a need for accountability within NHS trusts to ensure they are being appropriately and effectively run. However, the information in question is information held by NHS Improvement for the purposes of assessing the financial sustainability and viability of the Trust and therefore the need for transparency and accountability in NHS bodies must be weighed against the public interest in maintaining the integrity of regulators to fulfil their statutory obligations.

We note that the Trust has published details of SSG's work on the FIP on its website² and this goes some way to satisfying the public interest in understanding the Trust's finances and SSG's involvement.

We have also taken into account the very strong public interest in not undermining our regulatory functions and process and how important the trust we have with NHS trusts is to allowing us to make fast, efficient and quality decisions. The public interest in this is still strong as NHS Improvement continues to monitor the Trust by the free and frank sharing of information.

Taking all of this into account, we have concluded that the public interest in this case favours maintaining the exemption. Disclosure would be likely to impact on engagement with the Trust and therefore our ability to effectively carry out our regulatory responsibilities which would not be in the public interest. This conclusion is supported by the ICO decision.

Section 33 – audit functions

NHS Improvement has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources by virtue of section 5 of the NHS TDA Directions which provides that NHS Improvement 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 also has a specific function of supporting NHS trusts to become sustainable organisations including by supporting them to exercise their functions effectively, efficiently and economically in the management of their estates and land: see paragraph 6(g)(i) of the NHS TDA Directions.

NHS Improvement bases its oversight of NHS trusts on the regulatory framework set out in its Single Oversight Framework³ by monitoring and gathering insights about providers' performance against five themes, one of which is "use of resources". Under this theme, NHS Improvement oversees and supports providers in improving financial sustainability, efficiency and value for money. NHS Improvement will consider a trust's compliance with sector controls and consider how efficiently a trust uses its resources more broadly, and how financially sustainable it is over the longer term.

² <http://www.eastamb.nhs.uk/about-us/financial-improvement-programme.htm>

³ <https://improvement.nhs.uk/resources/single-oversight-framework/>

We consider that the functions of NHS Improvement which would be prejudiced by the disclosure of the information are those set out in the following paragraphs of the NHS TDA Directions:

- paragraph 6(a) – the ability of NHS Improvement to issue directions to NHS trusts about the exercise of their functions;
- paragraph 6(b)(ii) – the function of NHS Improvement to oversee and develop and support NHS trusts including supporting and giving directions to NHS trusts to make improvements in their governance and risk management (including financial risk); and
- paragraph 6(c) – the function of NHS Improvement to ensure that NHS trusts comply with appropriate conditions of the NHS foundation trust licence

We rely on the full and frank provision of information from NHS trusts in order to carry out our functions effectively. This is an extension of our core regulatory principles which is to operate a trust based approach to our relationships with providers. Accordingly we would not wish to prejudice that relationship of trust and confidence. There is a potential prejudice to that relationship and to the effective and efficient gathering of information, and accordingly our ability to regulate the NHS trust sector, if sensitive information which NHS trusts provide to us is disclosed. Trusts would be less likely to co-operate and provide full disclosure. Although NHS Improvement has powers to compel trusts to provide information, we are better able to exercise our functions if information is provided voluntarily as part of our relationship. In consequence there is a potential detriment to the system of regulation.

Public interest test

Section 33 of the FOI Act is a qualified exemption and therefore requires that a public interest test is carried out to determine whether the exemption should be maintained. The test is whether, in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

There is a public interest in understanding the finances of NHS trusts and the NHS more generally. There is also a strong interest in NHS trusts making information available to NHS Improvement to carry out its efficiency-related functions on the understanding that information will not all be placed in the public domain, and NHS Improvement takes a 'trust-based approach' when engaging with NHS trusts. Publication of the information would undermine that approach. We have also taken into account that the Trust has published details of SSG's work on the FIP on its website which, in our view, goes towards satisfying the public interest in understanding the Trust's finances and SSG's involvement. It follows that in our opinion the strength of the public interest in withholding this information therefore outweighs the interest in disclosing it.

Section 41 – information provided in confidence

NHS Improvement considers that the SSG presentation 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 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.

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 the Trust is financially sensitive information and both the Trust and SSG have confirmed that it was shared by them with the expectation that it would be kept confidential by NHS Improvement. To illustrate, the presentation specifically states that “it is for the benefit of East of England Ambulance Service NHS Trust (“EEAST”, “the Client”) alone and has been released to the Client on the basis that it shall not be copied, referred to or disclosed, in whole or in part, without our prior written consent.”

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.

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 that reads "J Rhodes". The signature is written in a cursive style.

Jayne Rhodes

Senior Oversight and Regulation Lead – Midlands and East