

23 January 2018

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[REDACTED]  
**By email**  
[REDACTED]

Dear [REDACTED]

**Review of your Request under the Freedom of Information Act 2000 (the "FOI Act")**

I refer to your email of 6 December 2017 in which you requested an internal review of NHS Improvement's decision dated 6 December 2017 (the "decision"). This was in response to your FOI Act request dated 8 November 2017. You made 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"*

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.

**Decision**

I have now conducted a review of the decision and have decided to uphold it in part.

In the decision letter, Ms Dahlstrom relied on the exemptions in sections 36(2)(b)(ii) and (c), 43 and 41 for all items withheld.

I have reviewed the decision and I have decided to partly uphold it on the basis of the applicability of the exemptions at sections 33 and 36(2) (b)(i),(ii) and (c) of the FOI Act as explained in more detail below.

#### **Agenda item 14 Update on winter resilience preparation 2017/18**

I consider that the exemptions at sections 36(2)(b)(i) and (ii) of the FOI Act apply to extracts of this paper for the reasons set out below.

#### **Agenda item 17 i Shaping a Healthier Future SOC**

I consider that the exemptions at sections 33, 36(2)(b)(i),(ii) and (c) of the FOI Act apply to this paper for the reasons set out below.

#### **Agenda item 17 ii Merseycare MHS Trust MSU FBC**

I consider that the exemptions at sections 33, 36(2)(b)(i),(ii) and (c) of the FOI Act apply to this paper for the reasons set out below.

#### **Section 33 – public audit functions**

Section 33(1)(b) and 33(2) of the FOI Act provides that information may be exempt from disclosure where disclosure would, or would be likely to, prejudice the exercise of any public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

NHS Improvement has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS Foundation Trusts and NHS Trusts (together Trusts) use their resources, which would be prejudiced by the release of the information requested. NHS Improvement is responsible for monitoring compliance with the provider licence held by NHS Foundation Trusts, which includes a requirement to have systems and processes in place for ensuring compliance with the duty of such trusts to operate efficiently, economically and effectively. It should also be noted that NHS Improvement has a general duty under section 62(1)(a) of the 2012 Act, when exercising the functions conferred on Monitor, to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient, and effective (as well as maintaining or improving quality).

NHS Improvement has functions in relation to scrutinising whether NHS Trusts are using their resources efficiently and effectively, by virtue of the directions given to the NHS TDA by the Secretary of State.

The Board paper at agenda item 17 i discussed and analysed the strategic outline case for the Shaping a Healthier Future programme. As you will note from the minutes of the Board meeting which were highlighted to you, the Board was unable to approve the strategic outline case in its current form and it was agreed that further work was required to develop it

before it could be brought back to the Board for approval. The paper contains financial sensitive and confidential information about the providers involved.

The Board paper at agenda item 17 ii considered the Final Business Case for the Mersey Care NHS Trust Medium Secure Unit. It contains financial and other information which has been provided by the provider concerned.

In order to operate effectively in relation to the examination of the efficient, effective and economic use of resources by Trusts, NHS Improvement's view is that it requires a safe space in which Trusts are able to share sensitive and confidential information with NHS Improvement without fear of it being shared more widely. Both Board papers contained such information and disclosing the same would be likely to reduce the quality of information provided by Trusts to NHS Improvement in the future. In addition, effective oversight of Trusts, which includes obtaining information necessary for the effective examination of whether Trusts are using their resources efficiently, effectively and economically, relies on a relationship of trust between providers and NHS Improvement. This relationship would be jeopardised and undermined if NHS Improvement disclosed the information at agenda items 17 i and ii, with a detrimental impact on our ability to regulate and oversee Trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption at section 33(1) and (2) of the FOI Act applies.

#### *Public interest*

The application of this exemption is subject to a public interest test, meaning that the information should be disclosed if the public interest factors in support of a disclosure outweigh those in favour of withholding the information. Although I accept that there is a general public interest in transparency and the way in which health services are planned and delivered in the future, NHS Improvement's view is that there is a greater public interest in Trusts being able to provide information at the formative stages of strategic planning without there being an expectation of public disclosure.

If Trusts and NHS organisations are unable to share information and advice confidentially with the regulator it is likely that this would severely curtail the content of such exchanges in future cases.

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

#### **Section 36 – prejudice to conduct of public affairs**

In the decision letter of 6 December 2017, NHS Improvement explained that it was withholding the information on the basis that it fell 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 outweighed the public interest in disclosure.

Ms Dahlstrom considered that the exemption was engaged as NHS Improvement's qualified person at the time, the Chief Executive Jim Mackey, was of the opinion that disclosure of the Board Papers would, or 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 otherwise prejudice the effective conduct of public affairs.

Shortly after the decision, a new Chief Executive was appointed to NHS Improvement – Ian Dalton. We have sought his opinion as the new qualified person as to whether or not section 36 is engaged.

The Board papers at items 17 i and ii contain detailed evaluation of the proposals for both the Shaping a Healthier Future programme and the Mersey Care NHS Trust Medium Secure Unit, the business cases for which have yet to be finally settled and are subject to further discussion. Both Board papers seek to provide advice and views to the Board on whether or not to approve the cases presented.

The Board paper at agenda item 14 sets out the joint NHS England and NHS Improvement plan for winter. It covers our objectives for winter; the current context for delivery; and our approach to deliver these.

Disclosing the Board papers at items 17 i, ii and 14 entirely would be likely to inhibit NHS Improvement staff from expressing themselves openly and fully, or, from exploring a wide range of options when providing advice or expressing views as part of the process of enabling the Board to make well informed decisions. If the authors of Board papers knew that the advice and views would be disclosed, they would be less likely to express those views and advice in writing and this could have a 'chilling effect' in relation to the drafting of future Board papers. As the members of the Board rely on the papers to prepare for and inform their thinking on matters to be considered at the meeting, a lack of comprehensive and detailed Board papers could impair the quality of decision making by NHS Improvement.

In relation to the Shaping a Healthier Future paper, the Board has asked for further work on the case with a view to an update being considered at the Board at a later date. If the paper is released, it would be likely to inhibit frank discussion at the subsequent board meeting and the deliberative processes in the future would likely to be inhibited. Further, future discussions about other potential business cases would be likely to be inhibited if NHS Improvement released this paper and the paper considering the Mersey Care NHS Trust Medium Secure Unit as explained above. The qualified person considers that sections 36(2)(b)(i) and (ii) are engaged for the Shaping a Healthier Future SOC paper and the Mersey Care NHS Trust MSU FBC paper.

In relation to Update on winter resilience preparation 2017/18, the qualified person considers that the exemption at sections 36(2)(b)(i) and (ii) are engaged (for the reasons noted above) for certain parts of that paper only. Therefore, I attach a redacted version of that Board paper.

Whilst the Board resolved to approve the final business case for the Mersey Care NHS Trust Medium Secure unit, the matter remains subject to further discussion and hence disclosure would be likely to be otherwise prejudicial to the effective conduct of their public affairs. In addition, releasing the Shaping a Healthier Future SOC paper would prejudice and

undermine the Board's next or final decision. The qualified person considers that section 36(2)(c) as well as sections 36(2)(b)(i) and (ii) are engaged for the Mersey Care NHS Trust MSU FBC paper and the Shaping a Healthier Future SOC.

### *Public interest*

In considering the balance, I have considered the public interest in transparency and openness in relation to decisions by public bodies, in particular decisions affecting the NHS. An openness about due process may lead to increased trust and engagement between stakeholders and NHS Improvement.

More openness about process and delivery may lead to greater accountability of NHS Improvement to those it regulates and to the public, an improved standard of public debate and improved trust between NHS Improvement and providers.

In this specific case, the requester is likely to find it helpful to be able to see the full picture of the business cases and proposals and the decision making process in terms of how the proposed new or improved services are approved.

In addition, in the present case, there is a public interest in patients and the public understanding the development of NHS policy for the winter.

I have, however, also considered the strong public interest in allowing NHS Improvement to obtain and share expert analysis and share views and options and to deliberate them internally without fear of disclosure or premature scrutiny so that discussions about public policy and related matters are informed by open, honest, frank and detailed advice and information. This safe working space is crucial to enabling NHS Improvement to perform its regulatory functions. It is my view that there is a greater public interest in being able to exchange views and provide advice at the formative stages of strategic planning without there being an expectation of public disclosure.

If NHS Improvement staff are unable to discuss confidential plans with the Board, it is likely that this will severely curtail the content of such exchanges in future cases with a resulting detrimental impact on the quality of policy decisions.

In relation to the paper at Agenda item 17i on Shaping a Healthier Future, the original decision letter provided you with a link to the discussion and decision on this Board paper. That link also contained the decision on the Board paper at Agenda item 17ii.

Therefore, on balance, it is in the public interest for the information to be withheld in this case.

### **Other matters**

In your request for an internal review, you stated "*you might find the ruling of the ICO on 9 February 2016 on Brent CCG useful to inform the decision of the review*".

That Decision Notice concerns the application of section 43(2) of the FOI Act which states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Commercial interests refer to the ability to participate in a commercial activity and the case in question concerned information relating to the procurement of particular health services.

As you will note from the explanation of my decision above, I have relied upon the exemptions under section 33 and 36 of the FOI Act and the Decision Notice does not affect my view.

### **Review rights**

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Please note that this letter and the attached information 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,



**Sofia Bernsand**  
**Deputy Head of Governance**