

17 October 2017

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By email

Dear [REDACTED]

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

I refer to your email of 5 September 2017 in which you requested an internal review of NHS Improvement’s decision dated 9 August 2017. For the purposes of this decision, NHS Improvement means Monitor.

For the reasons outlined below, I have decided to uphold NHS Improvement’s decision to not release the requested information pursuant to section 31 of the FOI Act.

Your original FOI request

In your email of 12 July you said:

“I would like to see a copy of the report NHS Improvement commissioned of the RTT issue at King’s College Hospital Foundation Trust, referred to on pg.162 of this document <http://www.croydonccg.nhs.uk/about-us/Governing%20body/Governing%20Boday%20Papers/04-07-17/GB%20040717.pdf>”

On 9 August 2017, NHS Improvement decided to withhold the information requested pursuant to section 31 of the FOI Act (the “decision letter”).

Your internal review request

On 5 September 2017, you requested a review of NHS Improvement’s decision as you believe that, due to the patient harm from RTT issues at St George’s and elsewhere, the public interest outweighs the exemption. You noted that *“allowing trusts to not release information that may be embarrassing because it would dissuade them from sharing information with the statutory regulator”* is a poor argument. You consider that Trusts are legally obliged to provide NHS Improvement with the information it asks for.

You state that the decision allows a culture of tolerating poor waiting list management to flourish across the NHS, which is dangerous.

Decision

I have reviewed the decision and I have decided to uphold it on the basis of the applicability of the exemption at section 31(1)(g) of the FOI Act.

Section 31 – law enforcement

In the decision letter, Ms Leonard relied on the exemption in section 31(1)(g) of the FOI Act in deciding not to disclose the requested information as she considered that disclosure of the information would be likely to prejudice the exercise by NHS Improvement of its functions. In forming this view, Ms Leonard relied on the purpose in section 31(2)(c), that is:

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

I agree with Ms Leonard’s view for the reasons set out below.

The Trust

In January 2017 NHS Improvement opened an investigation in relation to referral to treatment concerns. As stated in the decision letter, NHS Improvement wrote to the Trust on 20 June 2017 to explain that it was closing the investigation. The letter attached a pack of slides in which NHS Improvement set out its findings from the investigation, the actions it expects the Trust to undertake in relation to those findings and the support that NHS Improvement will provide.

Section 31(2)(c) - An overview of NHS Improvement’s statutory functions

NHS Improvement is responsible for the licencing of providers of health services (Chapter 3 of Part 3 of the 2012 Act). Our main duty is to promote the interests of people who use health services which are economic, efficient and effective and which maintains or improves the quality of services.

NHS Improvement has a range of statutory enforcement powers that give it the ability to intervene formally where it assesses, or has reasonable grounds to suspect, that licenced providers have been or are in breach of licence requirements.

For the purposes of section 31(2)(c) of the FOI Act, these enforcement powers are ‘regulatory action’ and the licence conditions an ‘enactment’. I am therefore satisfied that the purpose at section 31(2)(c) applies.

Section 31(g) - Investigations

Our Single Oversight Framework highlights the information we will use to assess compliance with the licence conditions and identify support needs. We receive a wide range of information from foundation trusts, some of which is in response to formal requests from NHS Improvement, others of which is provided informally and voluntarily by providers as part of the open relationship between NHS Improvement and bodies that it regulates.

You consider that not releasing information that may be “embarrassing” because it would dissuade Trusts from sharing information with the regulator was a poor argument. I do not agree with this assessment.

In undertaking its regulatory functions, NHS Improvement is focused on building strong and balanced relationships with providers. NHS Improvement benefits from the trust and confidence of the organisations with whom we engage, such that they are invariably willing to share detailed information with us voluntarily and freely. We rely on the Trust’s co-operation and openness in providing us with wide-ranging information for the effective exercise of our regulatory functions. This relationship is dependent upon the trust and confidence that has built up over time.

You noted that Trusts are legally obliged to provide NHS Improvement with the information it asks for. All of the information provided by the Trust was given to NHS Improvement as part of the open relationship we have with the trusts that we regulate. Although NHS Improvement could have sought the information under its formal powers, the information was provided voluntarily.

Given the scope of our regulatory remit and the resources that we can apply, we consider that this relationship is critical to efficient and effective regulation of the sector. The exercise of our formal regulatory powers more extensively to obtain the information we require would lead to undue delay and inefficiency in the regulatory process.

It may also have an adverse impact upon the quality of information that Trusts provided to us since they would be likely to provide us with the minimal information required to respond to our information request. This would also reduce the efficiency and quality of our regulatory decision-making process.

Public Interest Test

In your request for an internal review, you consider that the public interest outweighs the exemption.

In considering whether the exemption cited above should be overridden if the public interest demands disclosure, the test is whether *‘in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information’*.

I consider that there is a general public interest in disclosing information to further the accountability of NHS foundation trusts. However, I am satisfied that the greater public interest lies in preserving the relationship of trust and confidence and the free flow of information from NHS foundation trusts to NHS Improvement which is vital for NHS Improvement to effectively perform its regulatory functions.

I have therefore concluded that the need to ensure that the Trust and other providers are able to share information with NHS Improvement without fear that such disclosures will enter the public domain outweighs the public interest in disclosure of the information that is being withheld. The public interest lies in favour of not causing prejudice to the regulatory

supervision of the Trust and ensuring that the Trust and other providers are not inhibited in providing information to NHS Improvement in the future.

I would finally, like to assure you that NHS Improvement has agreed a set of improvements that will be made by the Trust and we will oversee the Trust's progress.

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 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 'Steve Russell', with a horizontal line underneath.

Steve Russell

Executive Regional Managing Director (London)