

09 March 2018

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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 **12 February 2018** in which you requested information under the FOI Act from NHS Improvement.

### **Your request**

You made the following request:

*“I would like to see a copy of the Grant Thornton report into the financial deterioration at Barking, Havering and Redbridge University Hospitals Trust please.  
I would also like to see a copy of the NHSI internal report into the trust.”*

### **Decision**

Barking, Havering and Redbridge University Hospitals Trust is referred to as “the trust”. For these purposes, NHS Improvement means the National Health Service Trust Development Authority (TDA).

Please note that NHS Improvement recently announced its decision to place the trust in special measures for financial reasons (see our [press release](#)). However, our original investigation into the trust’s (financial) governance remains on-going and we will publish details of any resulting enforcement action that we are expecting the trust to comply with on our website once it is complete.

### **Grant Thornton report**

NHS Improvement holds this in draft form and has decided to withhold it 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*

We consider that the withheld information is exempt from disclosure under section 31(1)(g), which provides that information is exempt information 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 subsection (2).

We consider that section 31(2)(a) and section 31(2)(c) are engaged, i.e. that disclosure of the information would be likely to prejudice the exercise by NHS Improvement of its functions for the purposes of either ascertaining whether the trust has failed to comply with the law (section 31(2)(a)) and/or, ascertaining whether circumstances exist which may justify regulatory action in pursuance of an enactment (section 31(2)(c)).

NHS Improvement is continuing to investigate the trust. The information NHS Improvement gathers is necessary to enable NHS Improvement to assess whether the trust is in breach of its provider licence and to inform what regulatory action might become necessary. To disclose this information more widely is likely to be prejudicial to the consideration by NHS Improvement as to whether there are new breaches of the trust's provider licence and whether circumstances exist that would justify further regulatory action.

We also consider that disclosure of information is likely to have a considerable impact on the willingness of the trust to provide such information to us on an open basis, and is likely to lead to less detailed information being provided, particularly as regards its financial situation. We consider that it is absolutely essential that NHS Improvement is able to communicate with the trust in a full and frank manner without concern that matters forming the basis of NHS Improvement's on-going assessment will enter the public domain.

#### Public interest test

The public interest in accountability and transparency by making access to the information available has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted. NHS Improvement will proactively publish details of any further regulatory action it decides to take as a result of any new concerns once we conclude our investigation, and we consider that this information is sufficient to meet the public interest in transparency.

NHS Improvement has concluded that the need to avoid adversely affecting its continued monitoring and assessment of the trust and 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.

#### *Section 41 – Information provided in confidence*

Section 41(1) provides that information is exempt information 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 a third party, in this case Grant Thornton and 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 withheld information would amount to an actionable breach of confidence.

The draft report was provided to NHS Improvement in confidence and on the understanding that it would be used solely to inform our decision on any regulatory action to be taken against the trust (i.e. it was shared pursuant to our role in monitoring NHS trusts). It does not follow that we in turn (as a natural consequence of this) have a legal obligation to disclose it to a third party on request.

The trust and Grant Thornton should be able to share information with NHS Improvement in the expectation that this will be kept confidential. NHS Improvement considers that it is crucial for trust to be maintained by providers which impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to NHS Improvement of relevant information. Further, NHS Improvement has agreed with Grant Thornton that it will not disclose the contents of the report other than what is necessary for our regulatory purposes – that may extend to establishing grounds for enforcement action against the trust, which will be published, but does not extend to reproduction of the contents of the report generally.

For this reason, I consider that section 41 applies and as it is an absolute exemption, the application of the public interest test under section 2(2) of the FOI Act is not required. 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. I have therefore considered the public interest in disclosing this information but consider that, in the present circumstances, it does not favour disclosure of the information withheld. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. The public (as well as the trusts that we regulate, and stakeholders) would lose confidence in NHS Improvement as a regulator if information provided to it in confidence was disclosed.

#### *NHSI internal report*

NHS Improvement has assumed this refers to our conclusions on the investigation into the trust's financial position and, as explained above, our investigation remains on-going so we do not hold any internal report as such. We have decided to withhold the information in our

internal committee paper (to our Provider Regulation Committee) which recommended putting the trust into special measures.

NHS Improvement has decided to withhold the information within this paper on the basis of the applicability of the exemption in section 36 of the FOI Act, as explained in detail below.

### Section 36

NHS Improvement considers that the withheld information is exempt under section 36(2)(b)(ii) of the FOI Act. That section provides that information is exempt from disclosure if it would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

Disclosing the information within this paper would be likely to inhibit staff within NHS Improvement from expressing themselves openly and fully, or from exploring options when providing advice or expressing views as part of the process of enabling PRC (and other internal committees) to make well informed decisions. If the authors of committee 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 future drafting of committee papers. As the members of committees rely on the papers to prepare for and inform their thinking on matters to be considered at their meetings, a lack of comprehensive and detailed committee papers could impair the quality of decision making by NHS Improvement.

Although the decision to place the trust into special measures for financial reasons has now been finalised, future discussions about other trusts potentially entering special measures (for financial or quality reasons) would be likely to be inhibited if NHS Improvement released the paper.

NHS Improvement’s qualified person (Chief Executive) has approved the use of section 36 for the information within this paper.

### *Public interest test*

NHS Improvement acknowledges the general public interest in disclosure of information and the need for public authorities to be open and transparent regarding their decisions. However, the inhibitions as described above under the engagement of section 36(2)(b) would be likely to affect the internal working of NHS Improvement and therefore the quality of its decisions and its effectiveness as a regulator. This would be against the public interest.

Also, NHS Improvement will publish details on our website of any resulting enforcement action we are expecting the trust to comply with once our investigation is complete (as well as the enforcement action we expect the trust to comply with as a result of being placed in special measures for financial reasons). We consider that this meets the public interest in transparency.

## **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,

**Sebastian Nai**

Director, Transactions and Sustainable Solutions