

20 April 2018

Wellington House
133-155 Waterloo Road
London SE1 8UG

T: 020 3747 0000
E: nhsi.enquiries@nhs.net
W: improvement.nhs.uk

██████████
By email
████████████████████

Dear ██████████,

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

We refer to your email of 28 December 2017 in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority have been operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means the TDA.

Your request

You made the following request:

“The Department of Health has suggested I re-direct an FOI request to NHS Improvement (copy of advice attached), having stated that it does not hold any information relevant to my request about the Department’s NHS Estates & Facilities guidance programme prior to its transfer to NHS improvement in February 2017; in particular the: (1) funding provided for each of the financial years from 2010/11 through to 2016/17, together with the business plan description(s) for the provision; (2) assessment of the funding needed to fully update the guidance over three years; (3) reports produced and/or commissioned since 2015 on the future and status of the guidance, including new models of production and the Activity Data Base element. In addition to making an FOI request of NHSI for this information, then, I should be grateful if you would also let me have information about the transfer of record management responsibilities from the Department to NHSI that appear to have taken place.”

Decision

NHS Improvement holds some of the information that you have requested.

NHS Improvement has decided to withhold some of the information it holds on the applicability of section 41 of the FOI Act.

We understand that the Department of Health and Social Care (DHSC) has previously released one of the documents which falls within the scope of your request under the FOI Act. This information has been attached.

However, we consider the remainder of information held by us is exempt under section 41 of the FOI Act.

Section 41 – Information provided in confidence

We consider that the withheld information 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 NHSI by third parties, in this case the Department of Health and Social Care (DHSC).

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 NHS Improvement holds was originally produced by the Department of Health and subsequently provided to NHS Improvement following the transfer of functions. The reports to which you refer were protectively marked by the Department as being Policy Restricted/Confidential and in our view therefore had the necessary quality of confidence. The information was provided to inform future policy development and the circumstances gave rise to an obligation of confidence.

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. In the present circumstances, NHSI does not consider that there is a strong public interest in disregarding the duty of confidence owed.

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 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,

NHS Improvement