

21 May 2018

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████████████████████  
**By email**  
████████████████████

Dear ██████████

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

We refer to your email of 20 April 2018 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 Monitor and the TDA.

### **Your request**

You made the following request:

“I would be very grateful for a copy of the Oxford University Hospitals NHS Foundation Trust’s original activity, workforce and financial plans for the new financial year, 2018-19 as already submitted to NHS Improvement and as referred to in the HSJ article of April 18, 2018 (link below).”

<https://www.hsj.co.uk/quality-and-performance/nhs-improvement-chief-trust-plans-are-unrealistic-and-unachievable/7022191.article?sm=7022191>

### **Decision**

NHS Improvement does hold the information that you have requested.

NHS Improvement has decided to withhold all of the information that it holds on the basis of the exemptions in sections 31, 33, 41 and 43 of the FOI Act, as explained in detail below.

### **Section 31 – law enforcement**

Section 31(1)(g) of the FOI Act exempts from disclosure information that would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 31(2). NHS Improvement believes that disclosure of the information requested about NHS foundation trusts (other than the information to be published) would be likely to prejudice the exercise of its functions for the purposes of determining whether any

person has failed to comply with the law (section 31(2)(a)) and whether regulatory action is justified (section 31(2)(c)).

NHS Improvement's role includes improving NHS foundation trusts' compliance with their licence and deciding whether regulatory action is necessary if a breach is identified. Within this context, NHS Improvement requires detailed information from foundation trusts in order to regulate NHS foundation trusts effectively, including assessing whether they are well led. As part of our open trust-based approach to our relationships with NHS foundation trusts, we often rely on full and frank provision of information by NHS foundation trusts, rather than on our formal powers to compel the provision of information. In turn, NHS foundation trusts have a reasonable expectation that we will treat sensitive information that they provide to us as confidential.

We consider that disclosing the activity, workforce and financial plans requested would be likely to prejudice the exercise of our functions since it would make providers less willing to provide full and frank plans or similarly sensitive information with us, which would reduce the amount and quality of information that they are prepared to share with us in future. It also would be likely to have a detrimental impact on the open relationship of trust that we have built with the sector, and on our ability to assess their finances efficiently, without recourse to our statutory powers to obtain information by compulsion. The public interest in disclosing this information under section 31 is considered below, in conjunction with the reasoning under section 33.

### **Section 33 – audit functions**

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

NHS Improvement is of the view that the data supplied by the Oxford University Hospitals foundation trusts is also exempt under section 33(1)(b) of the FOI Act on the basis that NHS Improvement has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources in discharging their functions ("audit-related functions"), which would be likely to be prejudiced by the release of the information requested. NHS Improvement is responsible for improving compliance with the conditions of the provider licence, including conditions relating to the economy, efficiency and effectiveness of NHS foundation trusts. In addition, NHS Improvement's general duty under section 62(1)(a) of the Health and Social Care Act 2012 ("the 2012 Act") is to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient, and effective and improves the quality of services.

In order to exercise these functions effectively, NHS Improvement requires detailed information from foundation trusts. As part of our open, trust-based approach to our relationships with NHS foundation trusts, we rely on full and frank provision of information by NHS foundation trusts, rather than on our formal powers to compel the provision of

information. In turn, NHS foundation trusts have a reasonable expectation that we will treat sensitive information that they provide to us as confidential.

Similarly to section 31 and our enforcement functions, we consider that disclosing the data requested would be likely to prejudice the exercise of our audit-related functions since it would make providers less willing to share daily performance data or similarly sensitive information with us, which would reduce the amount and quality of information that they are prepared to share with us in future. It also would be likely to have a detrimental impact on the open relationship of trust that we have built with the sector, and on our ability to efficiently assess their finances without recourse to our statutory powers to obtain information by compulsion

For these reasons, we consider that disclosure of some of the information relating to NHS foundation trusts is exempt information under section 33(2).

NHS Improvement's activities are dependent upon having the "safe space" in which trusts are able to share sensitive and confidential information with NHS Improvement without fear of it being shared more widely. This safe space is important to ensuring the free and frank exchanges of views and information between NHS Improvement and the Trusts, to ensure effective collaborative working.

NHS Improvement is satisfied that disclosure of the data about NHS trust requested would be likely to prejudice NHS Improvement's abilities to perform its functions by removing the "safe space" and by creating an atmosphere making it likely that information shared with NHS Improvement would be less open and candid and would be likely to make collaborative working slower, more formal and less open and thereby less effective.

#### *Public interest test*

Section 31 and 33 are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemption should be maintained. We have considered whether the public interest in disclosure is outweighed by the public interest in maintaining the exemptions.

We recognise that in relation to the performance of NHS trusts and foundation trusts there is a public interest in transparency, and in NHS Improvement's regulatory activity.

We have however noted that, in the interests of transparency, NHS Improvement publishes information on its website about the performance of each NHS foundation trust, including the following:

- any enforcement taken by NHS Improvement against a NHS foundation trust for non-compliance with its licence conditions, or equivalents thereof.
- NHS Improvement publishes reports about the performance of foundation trusts and NHS trusts.

In addition, we consider that there is a strong public interest in giving NHS Improvement, NHS trusts and foundation trusts the space to share sensitive and confidential information, and openly and frankly discuss their views about the action that is required without disclosing the same to a wider audience. NHS Improvement consider that it is able to

exercise its functions more efficiently and effectively if information is supplied by trusts on the basis of an open relationship, without requiring the use of formal powers, and disclosure would prejudice that. Furthermore, if such information is disclosed, NHS foundation trusts and other relevant third parties are likely to lose confidence in NHS Improvement, or take action to prevent the disclosure of such information.

On balance, therefore, we consider that the public interest in maintaining the exemptions outweighs the public interest in disclosure.

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

Some of the information has been withheld under section 41 of the FOI Act on the basis that it was obtained by NHS Improvement from a third party, disclosure of which would give rise to an actionable breach of confidence.

We consider that the trust had a reasonable expectation that the content and the information supplied would remain private and only be used by NHS Improvement for the specific and limited purposes of NHS Improvement's work with the trust. This information was not trivial, not readily available by other means and provided in confidence, which created an obligation of confidence. For the reasons explained above, NHS Improvement believes this extends to NHS Improvement's relationship with NHS foundation trusts and NHS trusts.

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 a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. For the reasons stated above, NHS Improvement does not consider there is a strong public interest in disregarding the duty of confidence owed to NHS trusts and foundation trusts.

### **Section 43 – Commercial interests**

The information that NHS Improvement holds in relation to your request also falls within section 43 of the Act. This section provides that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

NHS Improvement considers that the information it holds in relation to the financial plans of Oxford University Hospitals contains commercially sensitive information. Prices and future demand information are key factors for negotiations regarding contracts between CCG's and providers. Disclosing this information would be likely to provide unfair advantages to those having access to it, in comparison to those that do not.

#### *Public interest test*

NHS Improvement considers that the public interest test which must be considered in relation to section 43 does not favour disclosure of the information. NHS Improvement relies

on the provision of information voluntarily from the sector. Disclosing sensitive pricing and financial information provided to NHS Improvement would be likely to restrict the willingness of stakeholders to provide NHS Improvement with such information in the future. It is in the public interest for third parties to be able to freely exchange views and information with NHS Improvement, without needing to disclose the same to a wider audience. If such exchange of views and information were likely to enter the public domain, it is likely that this would severely inhibit the content of such exchanges in the future, and may dissuade individuals and organisations from providing NHS Improvement with information on an informal or formal basis.

### **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 conducted by NHS Improvement, 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 [foi@NHS.Improvement.gov.uk](mailto:foi@NHS.Improvement.gov.uk).

### **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,

**NHS Improvement**