

27 April 2018

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## By email

████████████████████

Dear ██████████,

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

I refer to your email of **29 January 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 copies of the agenda, minutes and papers presented to the last three meetings of the Provider Leadership Committee. These are quarterly meetings and should have taken place in July 2017, October 2017 and this month (January).”*

#### **Decision**

NHS Improvement holds the information that you have requested. The last three meetings of the Provider Leadership Committee were held in April 2017, July 2017 and January 2018. The Committee did not meet in October 2017.

The papers from the April 2017 meeting, to the extent that they were released, are available here: <https://improvement.nhs.uk/about-us/corporate-publications/publications/FOI-Provider-Leadership-Committee-meeting-papers/>

NHS Improvement holds the papers relating to the Provider Leadership Committee meetings in July 2017 and January 2018 and has decided to release some of this information, subject to certain adjustments we have made to ensure personal information is not included (pursuant to section 40 of the FOI Act).

The attached Annex sets out the details of the relevant information that we hold and whether that information is to be disclosed (in whole or in part) or withheld from disclosure. Where information is being withheld, we have identified in the Annex those exemptions which we consider to be relevant, being one or more of sections 21, 22, 31, 33, 36, 40, 41 and 43.

Where we are able to disclose information to you, it will be provided to you electronically. The application of exemptions is explained in the following paragraphs.

### Section 21 – information accessible by other means

Section 21(1) of the FOI Act provides that information is exempt if it is reasonably accessible to the applicant by other means. Some of the information you have requested, as indicated in the Annex, relates to Care Quality Commission well-led ratings. This information can be found on the Care Quality Commission website and is reasonably accessible to you.

### Section 22 – future publication

NHS Improvement considers that part of the withheld information relating to diversity data is exempt from disclosure under section 22 of the FOI Act.

Section 22 provides that information is exempt information if:

- (a) the information is held by the public authority with a view to its publication, by the authority or some other person, at some future date (whether determined or not),*
- (b) the information was already held with a view to such publication at the time when the request for information was made, and*
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

NHS Improvement considers that the information is exempt from disclosure because it is intended for future publication and that it is reasonable to withhold the information because it requires consideration by NHS Improvement before its release.

#### *Public interest test*

The public interest in accountability and transparency by making access to the information available has been weighed against the likely detrimental impact if disclosed.

In recognition of the public interest in transparency, NHS Improvement will proactively publish information resulting from its work around board diversity on its website. We have concluded that the public interest in disclosure of the information in question is outweighed by the need to ensure its accuracy and that it is a true reflection of the outcomes of the diversity work without concerns about pre-emptive disclosure.

To the extent that the information is intended for future publication, as indicated in the Annex, NHS Improvement considers that the public interest is in withholding it from disclosure under section 22 of the FOI Act.

### Section 31 – law enforcement

Where indicated in the Annex, NHS Improvement considers that the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act 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 section 31(2).

NHS Improvement considers that section 31(2)(c) is engaged and that disclosure of the information in question would be likely to prejudice the exercise by Monitor and the Trust Development Authority (“TDA”) of their functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of Monitor’s provider licence enable Monitor to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Health and Social Care Act 2012 (“the 2012 Act”). Monitor will take into account NHS foundation trusts’ inefficient or uneconomic spending practices, including any that relate to agency spending, as a measure of governance and in monitoring NHS foundation trusts’ compliance with the licence.

Section 5 of The National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 (“the 2016 Directions”) provides that the TDA must exercise its functions with the objective of ensuring that English NHS trusts are able to comply with their duty under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively – by, for example, establishing and maintaining best practice corporate governance arrangements and financial management standards, and effectively implementing systems and processes.

NHS Improvement considers that disclosing trust names is likely to prejudice the on-going monitoring by NHS Improvement of providers’ compliance with the rules, which is necessary for NHS Improvement to take into account in any decision of regulatory action needed in respect of a failure to comply with the rules.

NHS Improvement relies on the full and frank information from trusts in order to carry out its functions effectively. NHS Improvement relies on having a safe space in which providers are freely able to share sensitive and confidential information in the knowledge that the information will not be disclosed more widely. To disclose that information more widely is likely to have a detrimental impact on the quality and content of exchanges between NHS Improvement and the bodies it collectively regulates and its ability to make effective and fully informed regulatory decisions.

### Section 33 – audit functions

Sections 33(1)(b) and 33(2) of the FOI Act provide 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.

Where indicated in the Annex, NHS Improvement considers that the withheld information, in so far as it relates to foundation trusts, is exempt under section 33(1)(b) on the basis that Monitor has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources, which is likely to be prejudiced by releasing the withheld information.

Monitor has these functions by virtue of Monitor's general duty under section 62(1)(a) of the 2012 Act 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.

NHS Improvement considers that the withheld information, in so far as it relates to NHS trusts is also exempt under section 33(1)(b) on the basis that the TDA has functions relating to the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources in discharging their functions (as described above), which is likely to be prejudiced by the release of the information that is being withheld.

As noted above, NHS Improvement depends on the free and frank provision of information from trusts without fear of this being shared more widely, and considers (as explained above) that disclosure would be likely to have a detrimental impact on the quality and content of those exchanges in the future if trust names were published to the public at large. This would in turn be likely to have a prejudicial impact on the exercise of NHS Improvement's regulatory functions.

#### *Public interest test*

Sections 31 and 33 are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemptions should be maintained. We consider that in relation to trust leadership, there is a public interest in transparency.

However, we consider that there is a stronger public interest in giving NHS Improvement and providers the space to openly exchange information that relates to NHS Improvement's functions without disclosing the same to a wider audience and to give the sector the time to address any issues identified without premature disclosure.

NHS Improvement considers that the public interest in the performance of trusts is satisfied by the information that we are releasing to you in response to this request.

#### Section 36 – prejudice to the effective conduct of public affairs

NHS Improvement considers that some of the information withheld is exempt under section 36(2)(b)(i) and (ii) and (c) of the FOI Act. Section 36 provides that information is exempt from disclosure if it would, or would be likely to, inhibit the free and frank exchange of views or provision of advice for the purposes of deliberation or otherwise prejudice the conduct of public affairs.

NHS Improvement's qualified person, Ian Dalton (Chief Executive), is of the opinion that disclosure of the information in the documents in question is likely to inhibit the free and frank exchange of views and provision of advice internally within NHS Improvement. This is because the information in the documents relates to on-going projects which remain work in progress and for which final details still need to be further deliberated and considered.

Disclosure of the information in these documents is likely to inhibit the willingness of those who have been involved in these projects to freely and frankly submit their views or give advice. This may have a negative impact on the quality of discussion and analysis which the Committee relies on to make fully-informed decisions. Disclosure would be likely to impair the quality of decision making by the Committee in relation to on-going projects.

Some of the papers contain detailed evaluation of live issues which have yet to be settled and are subject to further discussion. Some of the information provided to the Committee includes advice, views and recommendations about matters which are not yet in the public domain or have yet to be decided.

Further, NHS Improvement's qualified person is of the opinion that disclosure of some of this information might otherwise prejudice the conduct of public affairs by compromising the safe space in which the Committee can discuss items of a sensitive nature at a formative stage. As a result the quality of discussion around developing ideas may be limited. Jeopardising this safe space may also damage NHS Improvement's relationship with the Department of Health and Social Care if information relating to matters which concern the Department were to be prematurely disclosed.

#### *Public interest test*

NHS Improvement considers that the public interest in maintaining the exemption does outweigh the public interest in disclosure of the information, as the members of the Committee need to be able to have candid discussions and express themselves openly in their deliberations.

NHS Improvement recognises that public authorities should be transparent and open in their conduct of their public functions. In recognition of this, NHS Improvement will publish information of interest where appropriate.

As disclosure of the information is likely to inhibit the on-going expression of views and provision of advice in relation to on-going projects, NHS Improvement has decided that the public interest in disclosure is outweighed by the need to safeguard the free and frank discussion and provision of advice and the need to maintain the safe space in which the Committee can openly discuss live and sensitive issues.

#### Section 40 – personal data

NHS Improvement considers that some of the information requested is exempt under section 40(2) and section 40(3)(a)(i) of the FOI Act. We consider that this information constitutes personal data as its disclosure would make it possible to identify individuals who do not form part of trust leadership and who therefore have a legitimate expectation that their personal details will remain undisclosed. Further, some of the information withheld under this exemption also includes details of severance and settlement payments.

We do not consider that disclosure of any of this information would amount to fair processing. We therefore consider that such disclosure would amount to a breach of the data protection principles. In our view, none of the conditions in Schedule 2 of the Data Protection Act 1998 are met.

Disclosure of the information may have negative consequences on the individuals concerned. Specifically, it may prejudice individuals' interests in any on-going legal or financial negotiations; it also reveals precise details about an individual's financial circumstances which do not need to be disclosed to meet the wider public interest in knowing how public money is spent. We recognise the need to be transparent, and to this end we have disclosed information contained within papers for this Committee relating to remuneration.

This exemption is an absolute exemption and consideration of the public interest in disclosure is not required.

#### Section 41

Where indicated in the Annex, NHS Improvement considers that the withheld information is exempt under section 41 of the FOI Act. 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 providers and, in relation to item 15, external companies.

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount to an actionable breach of confidence. For a breach of confidence to be actionable:

- (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; and
- (iii) the disclosure of the information must amount to an unauthorised use of the information to the detriment of the confider.

NHS Improvement considers that disclosure of the relevant information to you would amount to an actionable breach of confidence. Section 41 is an absolute exemption and the application of the public interest test pursuant to 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 nonetheless 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, NHS Improvement does not consider that there is a strong public interest in disregarding the duty of confidence owed to providers and other companies. Some of the information imparted to NHS Improvement as part of these meetings is in confidence and NHS Improvement has a duty to keep that confidence. However, NHS Improvement recognises the need to be transparent and accordingly will publish information of interest where appropriate.

### Section 43 – commercial interests

Where indicated in the Annex, NHS Improvement considers that the withheld information is exempt from disclosure under section 43 of the FOI Act. This provides that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

Some of the information provided to NHS Improvement as part of the Committee meetings is commercially sensitive and its disclosure is likely to be detrimental to providers' legitimate commercial interests. In particular, information relating to employment arrangements and termination. Others seeking to negotiate contracts with any of these bodies or particular individuals could use the information to strengthen their own bargaining positions when negotiating for, or providing services. In addition, competitors may be able to use such information to their advantage to the detriment of any of these persons' legitimate interests.

NHS Improvement accepts that the sensitivity of some commercial information will not be everlasting; however, the sensitivity of information we are withholding remains live.

#### *Public interest test*

The public interest in accountability and transparency by making access to the information available has been weighed against the likely detrimental impact of disclosure.

In recognition of the public interest in transparency, NHS Improvement will publish information where appropriate. We have concluded that, in this case, the need to avoid adversely affecting this Committee's consideration of certain projects and the need to ensure that providers are able to share information with NHS Improvement without fear that such disclosures will enter into the public domain outweighs the public interest in disclosure of the information being withheld.

## **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 [NHS.Improvement.foi@nhs.net](mailto:NHS.Improvement.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,

**Jessica Dahlstrom**  
Head of Governance