

15 May 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 3 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 like to see a copy of the terms of reference, contract notice, tender and any other documents discussing the scope of the work on backlog maintenance at nHS trusts. This work has been undertaken by Loughborough University but has not yet been finalised.”*

### **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 basis of the applicability of sections 22, 40 and 43 of the FOI Act as explained in detail below.

### **Contract notice and tender**

This work was not tendered as an exemption was granted.

A copy of the contract held with Loughborough University Enterprises Limited has been attached. Some of the information has been withheld as it constitutes personal data, is commercially sensitive and is due for future publication.

### ***Section 40 – Personal Information***

I consider that the names and direct contact details contained within the contract is exempt from disclosure under section 40(2) of the FOI Act on the grounds that it amounts to

personal data and the first condition under section 40(3)(a)(i) is satisfied, namely, that disclosure would amount to a breach of the first data protection principle (personal data should be processed fairly and lawfully) as the individuals concerned would have a reasonable expectation that their information would not be disclosed into the public domain. Section 40 is an absolute exemption and consideration of the public interest test in disclosure is not required.

### *Section 43 – Commercial Interests*

Section 43 of the FOI Act provides an exemption for information, the disclosure of which would or would be likely to prejudice the commercial interests of any person (including the interests of a public authorities).

The Information Commissioner's relevant guidance states that:

“...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services”

I consider that the commercial interests of Loughborough University Enterprises Limited would be likely to be prejudiced if we disclose the breakdown of their costing arrangements. The fees relate to the University's pricing strategies which are unique to each provider. Disclosure of the information requested could disadvantage the University in competing for work against other providers and for future tenders. If their competitors were to be aware of their fees and pricing mechanisms, they could effectively use this information to price themselves below the University when bidding for similar work. This would give them an unfair advantage to competitors when seeking business from potential clients.

NHS Improvement have sought the views of Loughborough University and they have confirmed the release of the unit costings would be likely to prejudice their commercial interests.

As this is a qualified exemption we must consider whether the public interest in withholding the information outweighs the public interest in disclosing it.

I have taken into account the public interest in promoting accountability and transparency by public authorities for decisions taken by them and in the spending of public money. However, I have also considered the strong public public interest in ensuring that the commercial interests of the University are not prejudiced. Furthermore, withholding the information protects the integrity of the commissioning arrangements. If commercially sensitive information is released, it will discourage providers to do business with public bodies.

## *Section 22 – Future Publication*

Section 22 provides an exemption where information is held by a public authority with a view to future publication, if it is reasonable to withhold the information from disclosure until the date of publication.

The payment to Loughborough University Enterprises Limited for undertaking this piece of work will be published on our website in the coming months on the link below:

<https://improvement.nhs.uk/about-us/corporate-publications/publications/expenditure-data-costs-over-25k/>

Therefore the information that you have requested falls within the exemption at section 22 of the FOI Act and this exemption is subject to the public interest test. I consider the public interest in maintaining the exemption is greater than the public interest in disclosing the information. The public interest test will be met by future publication of this information and NHS Improvement considers it is reasonable to withhold this information and keep to the proposed timetable for publication.

### Terms of reference and other documents

Please see the document titled “NHS Estates & Facilities Backlog Maintenance & Critical Infrastructure Risk (CIR) Review”. One name has been withheld under section 40, as detailed above.

## **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 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,

### **Simon Corben**

Director, and Head of Profession

NHS Estates and Facilities Efficiency & Productivity Division