

09 April 2018

Wellington House  
133-155 Waterloo Road  
London SE1 8UG

T: 020 3747 0000  
E: [nhsi.enquiries@nhs.net](mailto:nhsi.enquiries@nhs.net)  
W: [improvement.nhs.uk](http://improvement.nhs.uk)

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

Dear ██████████,

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

I refer to your email of 21 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 Monitor and the TDA.

### **Your request**

You requested the following information:

*“Please provide me with any information held by NHS Improvement (including any local parts) relating to the proposed formation of a wholly owned subsidiary company by Yeovil District Hospital NHS FT.”*

### **Decision**

NHS Improvement holds the information that you have requested.

NHS Improvement has decided to release some of the information that it holds. We have decided to withhold some of the information on the basis of the applicability of the exemptions in sections 36, 40 and 41 of the Freedom of Information Act 2000.

#### **Section 36 - Prejudice to effective conduct of public affairs**

NHS Improvement has decided to withhold some of the information requested on the basis that it is exempt from disclosure under section 36(2) of the FOI Act. It is the opinion of NHS Improvement’s qualified person (Ian Dalton, Chief Executive) that sections 36(2)(b)(ii) and 36(2)(c) are applicable.

Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of a qualified person disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

In order to carry out its statutory functions public authorities working alongside NHS Improvement must be able to hold free and frank discussions without concern that the detail of those discussions will be disclosed. That is, public authorities must be afforded a safe space within which to deliberate and discuss matters before making a decision. If this material were published, it would be likely to restrict the candour and frankness with which similar future discussions would be conducted and would be likely to restrict external organisation's willingness to be candid and frank with NHSI as their regulator, as individuals would be concerned about the possibility that those views and discussions would be made public. The result would be likely to reduce the quality of discussions both between STP constituent organisations and their discussions with NHSI as regulator in such cases and have an adverse impact on the ability of NHS Improvement to carry out its functions.

Disclosure would inhibit staff from exploring options when providing advice or expressing views for potential strategic changes which may not be taken forward. This would be detrimental to staff being able to make well informed decisions. If all parties 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 decision making. As members of the STP rely free and frank discussions to prepare for and inform their thinking on matters, a lack of comprehensive and detailed discussions could impair the quality of quality of decision making by the STP.

Section 36(2)(c) states that information is exempt from disclosure if, in the reasonable opinion of a qualified person disclosure would, or would be likely to otherwise prejudice the effective conduct of public affairs. The information being withheld would be likely to prejudice the development of collaborative working through the Somerset STP which has yet to reach maturity.

#### *Public interest test*

Section 36 is a qualified exemption and therefore requires that a public interest test be carried out to determine whether the exemptions should be maintained. NHS Improvement's view is that, on balance, the public interest in maintaining these exemptions outweighs the public interest in disclosure.

In considering the balance, I have considered the public interest in transparency and openness in relation to decisions by public bodies, particularly decisions affecting the NHS. On the other hand, I have also noted that there is information already in the public domain around the formation of this wholly owned subsidiary.

I have also considered the strong public interest in the development of collaborative working through STPs and the need for a safe space to hold sensitive discussions. To note, STPs are a way for the NHS to develop its own, locally appropriate proposals to improve health and care for patients. They work in partnership with democratically elected local councils, drawing on the expertise of frontline NHS staff and on conversations about priorities with the communities they serve. A collaborative approach allows local leaders to plan around the needs of whole areas, not just those of individual organisations. Taking into account these considerations, my decision is that the balance of public interest is in withholding this information.

## Section 40 – Personal information

I consider that some information 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 41 - Information provided in confidence

I consider some of the 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 providers.

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.

NHSI considers that disclosure of the information would amount to an actionable breach 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 to providers.

## **Additional information**

There are two additional pieces of information I would like to bring to your attention alongside the information being released:

- a) In relation to the letter of 26 July 2017 to Paul Mears at Yeovil District Hospital I would like to clarify the statement in paragraph 17 around NHS terms and conditions.

The letter says the wholly owned subsidiary “allow[s] the Trust to move staff away from NHS terms and conditions in due course”. We have since had this point clarified by the Trust. Existing Trust staff who transfer to the new subsidiary will retain their terms and conditions, work in the same location with the same salary and pension and this will not change in the future unless NHS terms and conditions improve in the next 5 years in which case their terms and conditions will mirror the NHS changes. New staff employed in the future by the wholly owned subsidiary will work under different terms and conditions, rather than Agenda for Change. The key areas of difference for new staff will be pension contribution, sick pay and holiday entitlement.

- b) The letter from Nick Robinson to Paul Mears dated 29 November 2017 and the response from Tim Newman to Nick Robinson dated 5 December 2017 refer to a request from Somerset STP to Yeovil District Hospital to pause the creation of its wholly owned subsidiary ‘Simply Serve’ until March 2018. I understand that, following further conversations between members of Somerset STP, partners accepted the position of Yeovil Foundation Trust as stated in Tim Newman’s letter of 5 December 2017.

### **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,

**Sam Maunder**  
Head of Finance