

30 May 2018

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By email  
[REDACTED]

Dear [REDACTED],

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

I refer to your email of 4 May 2018 in which you requested an internal review of NHS Improvement’s decision dated 20 April 2018. That decision concerned your FOI Act request dated 28 December 2017.

Since 1 April 2016, Monitor and the NHS Trust Development Authority (TDA) are operating as an integrated organisation known as NHS Improvement. For the purposes of this internal review decision letter, NHS Improvement means Monitor and the TDA.

### **Your initial 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.”*

### **Your request for an Internal Review**

You consider that *“the review needs to examine; (1) whether it ought to be Monitor’s, rather than the TDA’s decision, (2) whether Section 41 has been correctly engaged in the circumstances and (3) whether NHSI has responded adequately to informing me of it holding information of the description specified in the request”*.

You also note “*the review should also address the failure of NHSI to adhere to timescales and procedures related to handling FOI requests, referring to the ICO’s Case Reference Number FS50738887 letter to it of 4<sup>th</sup> May 2018.*”

Further in making another FOI request on 12 April 2018, you stated on 11 May that:

*“Given that the publicly disclosed Strategic Business for the future of the guidance explicitly says it confirms and follows on from the findings of the ‘DH internal report’ and therewith also in effect makes public what might otherwise be considered protected policy development set out in it ( to the advanced extent of costing and evaluating the policy options) , would you agree with me that there is now little justification for not publishing it – regardless of what ‘confidentially’ may or may not arise? A question, perhaps, you will ask your senior member staff undertaking the review to look into!”*

### **Decision**

In the decision letter, NHS Improvement relied on the exemption under section 41 of the FOI Act to withhold some information within the scope of your request. However, we released the “*Strategic Business: Estates Guidance and Activity DataBase*”.

I have now conducted a review of your request and the original decision and decided that the information should continue to be withheld. Whilst the original decision was based on the application of section 41 of the FOI Act I consider that, in the light of the opinion of NHS Improvement’s qualified person (see below), the information should be withheld on the basis of the exemption in section 36(2)(c) of the FOI Act. I have set out further details of the rationale below.

In relation to the first question you raise in your review email, I confirm I am responding on behalf of both Monitor and the TDA, collectively referred to as NHS Improvement.

On your second point, having reconsidered the position, my view is that section 36 applies rather than section 41.

Thirdly, I note that the decision letter did not state which documents were being withheld under section 41. In the interests of transparency, I can confirm that they were:

- Report on the requirements for estates and facilities guidance Oct 2015
- Review of Best Practice Technical Guidance April 2016
- Business Case Approval Form Best Practice Guidance Programme 2014-14
- Business Case Approval Form for Guidance Programme 2016-17
- Business Case Approval Form Best Practice Guidance Programme 2015-16

Finally, in response to your complaint to the ICO and the ICO’s subsequent email of 4<sup>h</sup> May 2018, we noted that you had been sent a response on 20<sup>th</sup> April 2018. I acknowledge that this was over the time limit for compliance under the FOI Act and apologise for the delay, which was the result of administrative errors.

## **Section 36**

As you are aware, the information NHS Improvement holds was originally produced by the Department of Health and subsequently provided to NHS Improvement following the transfer of the Estates and Facilities Management functions from the Department to NHS Improvement. The information was either marked by DH "Policy-Restricted" or "Confidential" or had a quality of confidence and concerned ongoing estates policy development.

### *Section 36(2) – prejudice to the conduct of public affairs*

I consider that the information listed above is exempt under section 36(2)(c) of the FOI Act, which provides that information may be withheld where in the reasonable opinion of a qualified person disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The Chief Executive (Ian Dalton) of NHS Improvement is the qualified person for the purposes of section 36(2), for both Monitor and the TDA. Mr Dalton's opinion is that disclosure of the information that NHS Improvement holds would be likely to prejudice the conduct of public affairs.

In the context of the transfer of functions from the Department of Health to NHS Improvement, the Department transferred policy information that it considered was exempt from disclosure under section 35 of the FOI Act. That exemption concerns the formulation of government policy. Whilst section 35 is limited to information held by a government department, the Department wished to ensure that restricted and confidential information concerning policy development would continue to be protected. Both the Department and NHS Improvement rely on a relationship of trust and confidence in working effectively together on a wide range of policy and operation issues, The Department has now confirmed that disclosure of this information by NHS Improvement would be likely to inhibit future policy discussions and mean that the transfer of other work by the Department would be likely to be made without the transfer of policy records. Disclosure would be likely to damage the relationship of trust and confidence and inhibit the free flow of views and information, resulting in a detrimental impact on the quality of policy development.

Having considered the position, Mr Dalton has concluded that disclosure of the information in this case would be likely to prejudice the effective conduct of public affairs.

### *Section 36(2) - public interest test*

NHS Improvement's view is that the public interest in maintaining an exemption under section 36(2)(c) of the FOI Act outweighs the public interest in disclosure.

In considering the balance, we have considered the public interest in transparency and openness in relation to decisions by public bodies, in particular decisions affecting the NHS. We have however also considered the public interest in allowing senior officials at NHS Improvement and senior officials at the Department of Health to have discussions and share information about NHS policy and the handling of major NHS operational issues. If this information was generally made public, this would reduce the information that was

exchanged, which would affect the quality of policy making in the NHS. There is a strong public interest in ensuring that NHS Improvement and other organisations are able to have open and confidential discussions at a senior level and share information, in order to ensure effective and co-ordinated support and management of the NHS. It should also be noted that the information concerns policy development and that, once finalised, NHS Improvement would both engage with the sector and publish the guidance.

Taking into account these considerations, in my view the public interest is, on balance, best served by withholding this information.

I note the question you raise in your email of 11 May 2018 regarding the decision to withhold the documents within the scope of the request on the grounds of confidentiality given the release of *Strategic Business: Estates Guidance and Activity DataBase*. As you will note from my decision above, I consider withholding the documents is justified on the grounds of maintaining a relationship with the Department of Health whereby information may be shared freely, rather than on the basis that disclosing the documents would result in a breach of confidence (section 41).

### **Review rights**

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

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,

### **Simon Corben**

Director, and Head of Profession  
NHS Estates and Facilities Efficiency & Productivity Division