



**Improvement**

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2 August 2018

**By email**

████████████████████

Dear ██████████,

**Request for Internal Review under the Freedom of Information Act 2000 (the “FOI Act”)**

I refer to your email of **2 July 2018** in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority “NHS TDA” are operating as an integrated organisation known as NHS Improvement.

**Your request**

You made the following request:

*“I would like to see copies of the cashflow statements submitted to NHS Improvement from King’s College Hospital over the past year.*

*I would also like to see the documentation for the monthly performance management meetings since September 2017 please.”*

**Decision**

In his decision of 2 July 2018, Mr Mark Turner decided to withhold the information on the basis that it fell within sections 31, 33, 41 and 43 of the FOI Act and that the public interest in maintaining the exemption outweighed the public interest in disclosure, in those sections where the test applies, section 41 being an absolute exemption not requiring the application of the public interest test.

I have now conducted a review of that decision and the original decision has been upheld. I have looked at all of the relevant material which pertains to this request, in order to complete a fully-informed, independent, evidenced-based review. Having considered the request, and the relevant material, I have decided to withhold all of the information that NHS Improvement holds on the basis of the applicability of the exemptions in section 31, 33, 41 and 43 of the FOI Act as explained in detail below.

### **Section 31 – law enforcement**

As a statutory regulator, NHS Improvement relies on full and frank information from trusts in order to carry out its functions effectively and relies on having a safe space in which providers are freely able to share information in the knowledge that the information, or any analysis derived directly from it, will not be disclosed more widely. To disclose any information supplied in this open manner by trusts to NHS Improvement 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 will adversely affect the ability of NHS Improvement to make effective and fully informed regulatory decisions.

NHS Improvement considers that disclosing this information would be likely to prejudice the on-going monitoring by NHS Improvement of providers' compliance with the licence, 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 licence.

The conditions of the provider licence enable Monitor to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Social Care Act 2012 ("the 2012 Act"). Monitor will review any ongoing regulatory action in relation to NHS foundation trusts in monitoring their compliance with the licence.

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 of its regulatory functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

### **Section 33 – audit functions**

NHS Improvement considers that the withheld information, in so far as it relates to NHS 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.

Section 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.

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 details or any analysis derived from those details 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.

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

I consider that some of the withheld information is also 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 NHS Improvement from third parties, in this case the trust.

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.

NHS Improvement 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. NHS Improvement considers that there is a strong public interest in upholding the duty of confidence owed to providers, which outweighs any public interest issues in disclosing the information.

Providers should be able to share information and concerns with NHS Improvement in the expectation that this will be kept confidential, and this is particularly important in relation to financial information which, if disclosed, would be detrimental to the provider. NHS Improvement considers that it is crucial that the trust and confidence of providers who impart information in such circumstances should be maintained, and that disclosure of information

which is imparted in confidence may inhibit the full and frank disclosure to NHS Improvement of further information we need to fulfil our functions.

### **Section 43 – commercial interests**

Section 43(2) of the FOI Act provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

The information provided by trusts to NHS Improvement is financial which, by its nature, is commercially sensitive and disclosure of which is highly likely to be detrimental to the trusts' legitimate commercial interests. For example, parties seeking to negotiate contracts with a provider could use the information relevant to your request to strengthen their own bargaining position when negotiating for, or providing services to, that trust. In addition, competitors may be able to use such information to their advantage to the detriment of that trust's legitimate interests. We consider that this information is commercially sensitive.

#### *Public interest test*

Sections 31, 33 and 43 are qualified exemptions that require a public interest test be carried out to determine whether the exemptions should be maintained. We consider that in relation to financial and operational performance of trusts within the NHS, there is a public interest in transparency. However, I 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 time to address any issues identified without premature disclosure.

Further, information about sector finances and NHS Improvement's regulatory action is available to the public. Monthly cash flow numbers are included in Board reports and a detailed cashflow is provided in the Trust's annual report, both of which can be found on the Trust's website, along with published regulatory actions. In addition both the Trust's website and NHS Improvement's website provide information on financial and operational performance in published Board papers and performance publications.

## **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.

## **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,

**Miranda Carter**

Director of M&A and New Organisational Models