

19 October 2016

Wellington House  
133-155 Waterloo Road  
London SE1 8UC

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

**By email**

Dear [REDACTED]

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

I refer to your email of 23 August 2016 in which you requested an internal review of NHS Improvement’s decision dated 5 August 2016.

The decision related to your request of 3 June 2016, which was clarified on 8 July 2016, asking for various documents in relation to the investigation into the commissioning of elective care services at the North East London Treatment Centre.

As previously explained, since 1 April 2016, Monitor and the NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement. The request and this internal review concerns information relating to the exercise of statutory functions conferred on Monitor, and references in this decision to NHS Improvement are references to Monitor.

**Decision**

I have conducted a review of that decision and concluded that the original decision should be upheld. My view is that the information withheld in accordance with the decision of 5 August should continue to be withheld, essentially for the same reasons as those already given in the decision letter. I have set out those reasons below.

**Reasons for decision to withhold**

**Section 21 – information accessible to applicant by other means**

The final decision in relation to the investigation (to accept undertakings) has been published on our website. The information is therefore reasonably accessible to you and is exempt from disclosure under section 21 of the FOI Act.

### **Section 31 – prejudice to law enforcement**

I have considered whether the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act which, as explained in the original decision letter, 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).

I consider that section 31(2)(c) is engaged in respect of the information requested in relation to the meetings with the CCGs, information gathering and review and analysis of the evidence. My view is that that disclosure of the information would be likely to prejudice the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The regulatory action in question would be action under the powers of enforcement in relation to procurement set out in the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 and the enforcement powers exercisable in relation to pricing and the national tariff under sections 105, 106 and 117(4) and (5) of the Health and Social Care Act 2012 (“the 2012 Act”).

The information consists of information provided by various bodies for the purposes of the investigation, including free and frank views expressed by the bodies concerned as well as confidential and other non-public information. The information would have been provided under the expectation that it was to be used for the purposes of the investigation not for general public disclosure.

In order to carry out its enforcement functions effectively, it is important that third parties are able to provide information and express views to assist our investigations and enforcement decisions, without that information being disclosed. If third parties were not able to provide views and information without it entering the public domain, this would severely inhibit the content of such exchanges in future. Individuals and organisations would be dissuaded from providing information or would be less candid and forthcoming. This would have a detrimental impact on the exercise of NHS Improvement’s enforcement functions, which depends on the maintenance of confidentiality and ensuring free, frank and full exchanges with individuals and organisations in relation to NHS Improvement’s enforcement functions, including, as in this case, formal investigations in response to complaints.

I also agree with the finding in the original decision that making some of the information requested available would prejudice the exercise of NHS Improvement’s functions by, among other things:

- (a) deterring commissioners, providers and other stakeholders from co-operating with NHS Improvement on a voluntary basis;
- (b) decreasing the amount of information supplied voluntarily to NHS Improvement from those parties;
- (c) disclosing information that is commercially sensitive and provided expressly on a confidential basis; and
- (d) deterring NHS Improvement officers from engaging in free and frank discussions about the appropriate regulatory approach to take in a particular case.

I note that bodies which provided the information would have a reasonable expectation that this information would not be disclosed, except to the extent that any information formed part of any final published regulatory decision. There has been no indication to the bodies concerned that their information may otherwise be disclosed.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 31(1) of the FOI Act applies.

#### *Public interest test*

Section 31 is a qualified exemption and therefore requires that a public interest test be carried out to determine whether the exemption should be maintained.

I recognise that there is a public interest in transparency in the decision-making of public bodies and in disclosing information about how NHS Improvement performs, so that NHS Improvement may be held to account. I have taken into account that there is a public interest in understanding the basis on which decisions are made to award contracts for NHS services, given that they decisions affecting the expenditure of public funds and the health services provided to patients and the public.

I have also considered the arguments raised in your email of 23 August, namely:

*(1) Matthew Hopkins, the Chief Executive of Barking Havering & Redbridge University Hospitals Trust (BHRUT) made the claim at the January 2016 BHRUT board meeting that the BHRUT bid to run the day surgery site at King George Hospital would improve mortality risks, reduce waiting times and save costs. Depending upon the circumstances, there can be a reasonable excuse to breach regulations. In this case, a credible claim has been made that if BHRUT runs the day surgery unit rather than Care UK Ltd on the King George Hospital Site lives will be saved. It follows that the prospect of saving lives provides a reasonable excuse for breaching the regulations that the NHS has relied upon for withholding information.*

*(2) Public confidence in the ability of the NHS to deliver care will be undermined in a small, but real way, unless all the information surrounding the decision of the clinical commissioning groups to keep the contract with Care UK Ltd is released. The Health Service Journal has carried an article by Ben Glover which is less than complimentary about this £55M contract staying with Care UK Ltd. The perception that the NHS is controlled by corporate rather than clinical objectives is damaging.*

I have weighed these public interest factors against the detrimental impact that is likely to ensue if disclosure is permitted, and considered the specific arguments you have made.

There is a strong public interest in NHS Improvement being able to exercise its regulatory and oversight functions in relation to commissioners and providers of NHS services effectively, with a view to ensuring that services are commissioned effectively for patients, that good use is made of public funds and that the rules on pricing applied in the interests of patients. It is in the public interest that third parties are able to provide views and information to NHS Improvement, and that NHS Improvement officers are able to discuss the appropriate regulatory approach in a particular case, without the need to disclose this publicly. As explained above, my view is that if information could not be freely provided and

discussed, this would inhibit the provision of information in future and dissuade individuals and organisations from providing information or from being as candid and forthcoming as at present. This would prejudice the effective performance of NHS Improvement's enforcement functions.

I note that NHS Improvement has already published a significant amount of information on its website regarding this investigation, and more general information about how it performs its enforcement actions and makes decisions, as explained in the original decision letter.

The information provided ensures transparency in relation to the performance of NHS Improvement's enforcement functions and, in my view, as set out in the original decision, strikes a correct balance between keeping the public informed of our actions and approach, on the one hand, and maintaining trust and confidence between us and third parties with whom we correspond, on whose trust and confidence we rely in order to ascertain whether circumstances which would justify regulatory action exist, or may arise, on the other. It also ensures there is adequate space for NHS Improvement officers to freely discuss with each other the appropriate regulatory approach to take in each case without fear of those discussions being shared with a wider audience.

In relation to the arguments made in your email of 23 August:

- (1) There is a distinction between any justification for not complying with the regulations relating to procurement and the public interest in disclosing the information obtained by NHS Improvement in the course of investigating whether there is such a breach and considering what if any action to take. NHS Improvement's justification for withholding the information is not dependent on the nature of any alleged breach or on whether there are justifications for non-compliance in any particular case. The issue is that disclosure would prejudice NHS Improvement's ability to carrying out its enforcement functions effectively.
- (2) I recognise the public interest in ensuring that sufficient information is available to ensure that public confidence in relation to the NHS is not undermined. In my view, however, that public interest is met by the information which is published by NHS Improvement, as set out above. The public interest in wider disclosure is outweighed by the public interest in ensuring that NHS Improvement can perform its enforcement functions effectively. I note that effective regulation of NHS commissioning and service provision is an important part of maintaining public confidence in the NHS.

In conclusion, I consider that the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### **Section 43(2) – prejudice commercial interests**

NHS Improvement has redacted material from its published preliminary findings and final decision, and withheld information in other documents we have not published, on the basis of the exemption disclosure under section 43(2) FOI Act.

Under section 43(2) of the FOI Act, information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person. In my view this exemption is applied appropriately in relation to information about the procurement

process investigated by NHS Improvement, including information about individual bids and the scoring of those bids, on the basis that disclosure could potentially harm the commercial interests of the commissioners and the bidders concerned.

As explained in the original decision, the CCGs rescinded their decision to award a contract to provide elective care services from the North East London Treatment Centre to the Trust and abandoned the procurement process we investigated. The CCGs extended Care UK's existing contract to provide elective care services from the treatment centre until 30 June 2017 to ensure the on-going provision of those services, and will run a new procurement process in the near future to decide who will provide those services when Care UK's extended contract ends. Disclosure of information such as the bids and scoring of individual bidders in the previous procurement process could be used by potential bidders in the forthcoming procurement process to gain a commercial advantage. This would be prejudicial to the commercial interests of the bidders and the CCGs

### *Public interest*

As with the exemption in section 31, the exemption in section 43(2) is subject to the public interest test.

I have considered the same public interest factors and arguments in favour of disclosure as set out above. In relation to the public interest for maintaining the exemption and withholding the information, I have considered the public interest in ensuring the free and frank provision of information, as described in relation to the exemption under section 31. In addition, I recognise there is a strong public interest in ensuring that CCGs can carry out effective procurement processes which ensure the best use of public funds, deliver value for money and ensure effective services for patients. There is also a public interest in ensuring that there is fair competition between bidders for NHS services where there is a competitive process, without individual bidders gaining unfair commercial advantage.

In conclusion, I consider that the public interest in maintaining the exemption outweighs the public interest in disclosure.

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

Some of the information requested has been withheld on the basis that it is exempt from disclosure under section 41 of the FOI Act.

Under section 41 of the FOI Act, information is exempt if it was obtained by NHS Improvement from any other person and disclosure of the information to the public would constitute a breach of confidence actionable by that other person.

The information requested includes confidential information about bids submitted by tenderers and the scoring of those bids and information that is not otherwise in the public domain. The information was provided in circumstances giving rise to an obligation of confidence and disclosing the information to the public without consent would amount to an unauthorised use of the information to the detriment of the bidders concerned.

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, when determining whether an

action for breach of confidence would be likely to succeed it is necessary to consider whether the public interest in favour of disclosure outweighs the interest in withholding the information. I have considered the various public interest factors and arguments set out above, and I do not consider that there is strong public interest in overriding the duty of confidence owed to the bidders and CCGs.

### **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,

A handwritten signature in black ink, appearing to read 'R. Peden', with a long horizontal flourish extending to the right.

**Richard Peden**  
Director (Independent Providers)  
Regulation Directorate  
NHS Improvement