

24 January 2017

[REDACTED]

Wellington House
133-155 Waterloo Road
London SE1 8UG

T: 020 3747 0000
E: nhsi.enquiries@nhs.net
W: improvement.nhs.uk

By email only

[REDACTED]

Dear [REDACTED]

Request under the Freedom of Information Act 2000 (the "FOI Act")

I refer to your letter of **13 December 2016** in which you requested information under the FOI Act from the NHS Trust Development Authority. Since 1 April 2016, Monitor and the NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor/ the TDA.

Your request

You made the following request:

"I am writing to request under the Freedom of Information Act (2000) copies of Mersey Care NHS Foundation Trust's and Bridgewater Community Healthcare NHS Foundation Trust's final versions of all summary plans and presentations on each of the occasions they gave a formal presentation to the Transaction Board overseeing the awarding of the community health services contracts by Liverpool Clinical Commissioning Group and South Sefton Clinical Commissioning Group in 2016.

I also request copies of the minutes of the Transaction Board meetings and meetings attended by NHS Improvement representatives relating to the awarding of the Liverpool community health services contract by Liverpool Clinical Commissioning Group in 2016."

Decision

NHS Improvement holds some of the information that you have requested.

NHS Improvement has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in sections 40, 41 and 43 of the FOI Act as explained in detail below.

Section 43(2) – prejudice to 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 documents within the scope of your request contain commercially sensitive bid information from The Liverpool Health & Care Partnership and the Mersey Care NHS Foundation Trust & 5 Boroughs Partnership NHS Foundation Trust Consortium as well as discussion around the evaluation of the bids submitted. As the process has not yet been concluded, we consider that disclosure of this information would be likely to prejudice the ongoing negotiations between the relevant parties.

Public Interest Test

The exemption in section 43 is qualified and therefore subject to a public interest test – information may be withheld only if the public interest in maintaining the exemption outweighs the public interest in disclosure.

I have considered the public interest in transparency and accountability in relation to the expenditure of public money, including decisions about transactions of this nature involving the contracting of services and dissolution of a trust as well as the public interest in the quality and safety standards of providers of health services. I have however also considered the strong public interest in maintaining commercial confidentiality and enabling tenderers to make full disclosure of relevant information as part of their bid and for the relevant parties to be able to discuss the transaction and the merits of the bids submitted without the risk of such information being made public before the conclusion of the transactions thus prejudicing ongoing negotiations. I have concluded that in this case the public interest in disclosure of the information in question is outweighed by the need to safeguard the commercial interests of the relevant providers without fear that pre-emptive disclosure will enter into the public domain.

To the extent that commercially sensitive information is included in the information requested that is covered by this exemption, that information is being withheld from disclosure under section 43 of the FOI Act.

Section 41 – Information provided in confidence

Section 41 provides an exemption for information which was obtained by NHS Improvement from any other person, if its disclosure to the public by NHS Improvement would constitute a breach of confidence actionable by any person. A breach of confidence will be actionable if a legal person is able to bring an action for the breach of confidence to court and the action is likely to succeed.

Some of the information contained in the minutes is information submitted to the Transaction Board by a third party (a private consultancy firm). That information is not in the public domain and is confidential in nature. In my opinion the consultancy firm which provided that information would have a case for breach of duty of confidence which would be likely to

succeed if NHS Improvement were to release the relevant information in the minutes you have requested. The reasonable expectation of the consultancy firm in providing information to the Transaction Board is that confidential information will remain private and will be used by NHS Improvement for the specific and limited purpose of assessing transactions. The information is not trivial and not readily available by other means and was imparted in circumstances which created an obligation 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, 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. In the present circumstances, NHS Improvement considers that the public interest in a transaction of this kind between two public bodies providing health services is outweighed by the need to protect the ability of public bodies to seek advice from external consultants on a confidential basis. I do not therefore consider that in this case there is a strong public interest in disregarding the duty of confidence owed to external consultants.

Please note that in addition, this information is also commercially sensitive and is therefore also exempt under section 43(2), for the reasons set out above.

Section 40 – personal information

Under section 40 of the FOI Act, information is protected from disclosure if it is personal data protected under the Data Protection Act 1998 ("the DPA"). Section 40(7) of the FOI Act provides that the relevant definition of personal data is that set out at section 1(1) of the DPA:

"personal data" means data which relate to a living individual who can be identified-

- (a) from those data, or*
- (b) from those data, and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Some of the information requested is being withheld from disclosure under section 40(2) of the FOI Act on the grounds that it amounts to personal data and the first and/or second condition under section 40(3)(a) is satisfied, namely, that disclosure would amount to a breach of the first data protection principle (personal data should be processed fairly and lawfully) and/or is likely to cause damage or distress, which would be unwarranted.

The information requested contains personal details of individuals who would have a reasonable expectation that their information would be withheld. This is an absolute exemption and consideration of the public interest in disclosure is not required.

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.

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,

PP NHS Improvement

Iain McInnes

Chair of the Liverpool Community Health Trust Transaction Board

Cc:

[Redacted]