

20/06/2016

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By email

Dear [REDACTED]

Review of your request under the Freedom of Information Act 2000 (the FOI Act)

I refer to your email of 2 May 2016 in which you requested an internal review of NHS Improvement's decision in relation to your requests under the FOI Act dated 24 March 2016 and 12 April 2016.

For the reasons outlined below, I have decided to confirm the existence of the requested information but withhold that information, pursuant to section 31 of the FOI Act.¹

Your original FOI request

You requested the following information:

1. Comments made by NHS England and NHS Brent Clinical Commissioning Group to NHS Improvement in relation to a tender for the provision of primary medical services at Sudbury Primary Care Centre. You also asked that NHS Improvement refer you the other statutory or other legal authority on which NHS Improvement would rely in not providing you this information.
2. A copy of a letter sent by NHS England to Barry Gardiner MP.

On 25 April 2016, NHS Improvement decided to neither confirm nor deny the existence of the information requested pursuant to section 31 of the FOI Act (the decision letter).

In response to paragraphs 1.1 to 1.3 of your email, I confirm that the decision letter was a refusal notice for the purposes of the FOI Act.

Your internal review request

On 2 May 2016, you requested a review of NHS Improvement's decision in relation to points one and two above. However, in your email of 4 May 2016, you withdrew your request for an internal review of the decision in relation to point two (the letter sent by NHS England to Barry Gardiner MP). Accordingly, I have limited the internal review to point one only. I have addressed your grounds for review below.

¹ For the purposes of this internal review decision letter, NHS Improvement means Monitor.

Decision

I have decided to confirm the existence of the requested information and to withhold that information pursuant to section 31(1)(g) of the FOI Act.

Section 31 – law enforcement

In the decision letter, Mr Wood relied on the exemption in section 31(1)(g) of the FOI Act in relation to the requested information. That is, that the requested information is exempt information as its disclosure under the FOI Act would be likely to prejudice the exercise of NHS Improvement's functions for a purpose specified in subsection 31(2). In forming this view, Mr Wood relied on the purpose in section 31(2)(c), that is:

The purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

I agree with Mr Wood that section 31(1)(g), coupled with the purpose in section 31(2)(c), applies and that, therefore, the requested information is exempt from disclosure under the FOI Act.

The prejudice test

I am satisfied that disclosure of the requested information would be likely to prejudice the exercise of NHS Improvement's functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. I agree with Mr Wood's reasoning outlined on page three of the decision letter.

In paragraph 2.2 of your email, you stated that NHS Improvement did not demonstrate that the disclosure of the requested information would be likely to prejudice its regulatory functions, as required by section 31(1). You also said in paragraph 2.5.3 that NHS Improvement did not evidence how the provision of the requested information would inhibit the exchanging of views.

For NHS Improvement to perform its regulatory function for the purposes specified in sections 31(2)(c), commissioners, complainants and third parties must feel free to exchange views fully and frankly with NHS Improvement. Disclosure of the requested information would be prejudicial to NHS Improvement as the risk of disclosure may make parties less willing to engage with NHS Improvement and reduce the amount of information that they are prepared to voluntarily share in the future. This would, therefore, significantly inhibit the exchanging of views. Receipt and consideration of relevant information is vital to the effective performance of our investigatory and enforcement activity, and a reduction in the amount, or quality, of information provided voluntarily would clearly have a detrimental impact. This assessment is based on our experience of regulation and dealing with the sector.

Although NHS Improvement has statutory powers to request information and documents under section 104 of the Health and Social Care Act 2012, using these powers is time- and resource-intensive for both NHS Improvement and the parties from whom information is requested. Additionally, using these powers would undermine the positive relationship of trust and confidence that NHS Improvement currently shares with the sector.

In paragraph 1.12.1 of your email, you have questioned how providing you with the requested information could prejudice NHS Improvement's fulfilment of its statutory functions.

Disclosure under the FOI Act is disclosure to the public at large. NHS Improvement cannot disclose information under the FOI Act to the requestor only. For the reasons outlined above, I have decided that disclosure to the public of the requested information would be likely to prejudice the fulfilment of NHS Improvement's functions.

In paragraphs 1.12.1 and 1.12.2 of your email, you said that public bodies ought to give full and frank disclosure despite the risk of information being disclosed under the FOI Act. In my view, while recognising the general public interest in public bodies being transparent and disclosing information to the public, that has to be balanced against the benefits of confidential disclosure to the effective performance of NHS Improvement's regulatory functions and the detrimental impact on its ability to perform those effectively if such information were to be disclosed publicly. In addition, I note that it is not only public bodies that NHS Improvement works with when assessing complaints and, therefore, not only information from public bodies that are subject to FOI requests. NHS Improvement seeks information from a diverse range of parties, including commissioners, government departments, complainants, industry bodies, and current, past and prospective NHS service providers. There is a likelihood of prejudice to the ability of NHS Improvement to regulate the sector if information provided by these parties in confidence is disclosed.

Public interest

I am satisfied that the public interest in disclosing the requested information is outweighed by the prejudice to NHS Improvement of doing so. I agree with Mr Wood's reasoning outlined on pages three and four of the decision letter.

In paragraph 1.9 of your email, you said that the public interest in confirming or denying whether the requested information exists is greater than the public interest in not doing so. You said this was evidenced from a petition which has over 3500 signatures, and because there is public interest in the procurement process of APMS GP contracts generally.

We recognise there is public interest in transparency and accountability, securing the best use of public resources and ensuring good decision-making by public bodies. However, there is also a strong public interest in allowing public bodies the time and space to reach impartial and appropriate decisions, and in ensuring that bodies responsible for enforcement are able to discharge their functions effectively. NHS Improvement makes decisions impartially and objectively. It looks into each complaint on a case-by-case basis and collects information it considers necessary to decide whether to open an investigation. Requiring disclosure of all the information it obtains when carrying out that pre-investigation activity would prejudice the effective exercise of its regulatory functions, for the reasons explained above. Furthermore, the public interest in transparency is addressed by the information we do publish about our investigations, as explained above.

In my view, these factors outweigh the public interest in favour of disclosure.

Duty to confirm or deny

I note that in your request for internal review, you raised concerns with NHS Improvement refusing to confirm or deny the existence of the information. I have carefully considered your concerns and I have decided that, in the circumstances, it is appropriate to confirm the existence of the information.

I do agree with the reasoning in the decision letter that, in general, confirming or denying the existence of the kind of information specified in the request would prejudice the exercise of NHS Improvement's functions.

It appears to be public knowledge that concerns about Sudbury Primary Care Centre have been raised with NHS Improvement, and, therefore, there is little prejudice in confirming that NHS Improvement has contacted the relevant commissioners.

On this basis, and in the particular circumstances of this case, I do not think that there would, or would be likely to be, prejudice to NHS Improvement's functions in confirming that we hold information within the scope of the request.

I therefore disagree with Mr Wood's findings in the decision letter that, pursuant to section 31(3), the duty on NHS Improvement to confirm or deny that it holds the requested information does not arise because it would prejudice the matters mentioned in section 31(1). Accordingly, I confirm the existence of the information.

Review rights

If you consider that this internal review is unsatisfactory, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted on 0303 123 1113 or 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 'Chris Mullin', with a stylized flourish at the end.

Chris Mullin

Economics Director

Direct line: 020 3747 0654