

25 April 2016

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By email

Dear [REDACTED]

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

I refer to your emails of 24 March 2016 and 12 April 2016 in which you requested information from Monitor. 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. Although you did not expressly refer to the FOI Act in your email NHS Improvement considers it appropriate to treat your request for information as a request under the FOI Act.

### **Your request**

In your emails you asked for:

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 to the 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.

### **Decision**

NHS Improvement neither confirms nor denies that it holds any information falling within the description specified in your request. It follows that NHS Improvement will not be disclosing any information in relation to this request.

Pursuant to section 31(3) of the FOI Act, the duty on a public authority to confirm or deny that it holds information of the description specified in a request does not arise if, or to the extent that, compliance with section 1(1)(a) of the FOI Act would, or would be likely to, prejudice any of the matters mentioned in section 31(1) of the FOI Act.

This should not be taken as an indication that the information you requested is or is not held by NHS Improvement.

Please note that NHS England is subject to the FOI Act and as such it is open to you to seek information directly from them. They will need to consider whether information can properly be provided by them in response to any such requests within the terms of the FOI Act.

### **Reasons for decision**

#### **Section 31 – prejudice to law enforcement – exercise of NHS Improvement’s functions**

Section 31(1)(g) of the FOI Act provides a qualified exemption from disclosure where such disclosure would be likely to prejudice the exercise by a public authority of its functions for any of the purposes set out in section 31(2) of the FOI Act. One of these purposes, contained in section 31(2)(c), is ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

NHS Improvement is responsible for enforcing the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 (the “Regulations”). Under these Regulations, NHS Improvement has the power to take, in certain circumstances, formal action where it identifies a breach or potential breach of the Regulations by a commissioner or commissioners. The disclosure of information relating to whether or not there has been a breach of the Regulations is likely to prejudice NHS Improvement’s functions in this respect. This includes circumstances where NHS Improvement has engaged in discussions with a commissioner regarding a potential issue under the Regulations, but no complaint has been received and/or NHS Improvement has not opened a formal investigation under the Regulations.

#### *Duty to confirm or deny*

Section 31(3) of the FOI Act provides that the duty to confirm or deny the existence of information does not arise if, or to the extent that, compliance with section 1(1)(a) of the FOI Act would, or would be likely to, prejudice any of the matters mentioned in section 31(1).

NHS Improvement has taken the view that confirming or denying the existence of the information requested would prejudice the exercise of its functions for the purpose of ascertaining whether circumstances exist, or may arise, which would justify regulatory action in pursuance of the Regulations.

The effectiveness of NHS Improvement’s regulatory action depends on the maintenance of confidentiality and ensuring free, full and frank exchanges with individuals and organisations on speculative, prospective or on-going matters, including formal complaints and informal requests for information. NHS Improvement often contacts commissioners and providers on an informal basis, including where no complaint has been received and/or where NHS Improvement has not opened a formal investigation under the Regulations, to gather intelligence about potential issues and to provide informal advice to commissioners to help address or avoid issues arising. Where a potential concern arises, NHS Improvement may informally request further information from a commissioner or provider to assist it in deciding whether further formal action is required.

Confirming or denying the existence of the kind of information specified in the request would prejudice, or would be likely to 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 commissioners, providers and other stakeholders;
- (c) inhibiting communications between relevant parties prior to the formal launch of an investigation into a complaint;
- (d) reducing the willingness of parties to engage with NHS Improvement ahead of formal submissions taking place; and
- (e) disclosing information that is commercially sensitive and provided expressly on a confidential basis.

Even if there are individual cases where confirming that a complaint is underway will not cause prejudice, there will be many cases where such disclosure will cause such prejudice. Any refusal to confirm or deny holding information in relation to complaints would be undermined if in cases where there is no speculative, prospective or on-going complaint NHS Improvement confirms this. If NHS Improvement neither confirms nor denies only in one category of cases but confirms in others that no information is held, that will betray that information is indeed held in the former category.

#### *Public interest test*

I have balanced the arguments in favour of maintaining the exemption (i.e. in favour of giving a neither confirm nor deny response) with the factors in favour of either confirming, or denying, whether the requested information is held.

It is in the public interest for NHS Improvement officials to be able to freely exchange views with individuals seeking informal assistance from NHS Improvement, without needing to disclose the same to a wider audience, or confirm whether such information has been received by NHS Improvement. If NHS Improvement was not able to exchange views and information without being able to ensure that such exchanges, or the existence of information leading to such exchanges, would not enter the public domain, it is likely that this would severely inhibit the content of such exchanges in future, and may dissuade individuals and organisations from providing NHS Improvement with information on an informal or formal basis. There is a real risk that having to declare whether or not NHS Improvement holds the requested information would hinder the frankness with which future discussions are conducted (including in relation to consideration of risks, options or approaches) which would not be conducive to the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action exist, or may arise.

We note that there is a public interest in disclosing information about NHS Improvement's performance of its functions so that NHS Improvement may be held to account. NHS

Improvement already publishes information about the performance of its functions under the Regulations, including:

- where NHS Improvement decides to open a formal investigation into a complaint received under the Regulations, it publishes a notice on its website together with full details of the investigation and the findings;
- NHS Improvement's Annual Report includes a summary of activity undertaken in relation to its functions under the Regulations;
- NHS Improvement's website includes a number of hypothetical scenarios to assist understanding of how the Regulations might apply; and
- on-going efforts to capture wider lessons for the sector, for example in blog entries.

These steps ensure transparency in NHS Improvement's performance of its functions under the Regulations. We believe this approach strikes a correct balance between keeping the public informed of our actions and approach 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.

In light of the information set out above, I consider that the public interest is in favour of maintaining the exemption and neither confirming nor denying whether NHS Improvement holds the requested information.

### **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.

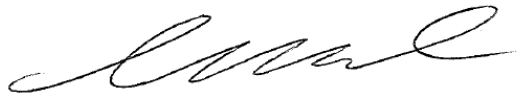
If you are dissatisfied with the outcome of any internal review, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

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](mailto: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,

A handwritten signature in black ink, appearing to read 'Thomas Wood', written in a cursive style.

**Thomas Wood**

Inquiries Lead, Co-Operation and Competition.