

16/05/2016

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By email

Dear [REDACTED]

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

I refer to your email of 2 March 2016 in which you requested information under the FOI Act from Monitor and the NHS Trust Development Authority (the NHS TDA), and your subsequent email to Monitor of 24 March. I also refer to your request to the Northumbria Healthcare NHS Foundation Trust in relation to emails to/from Jim Mackey, which has been transferred to us on the basis that the emails requested were held by the Trust on behalf of Monitor and the NHS TDA.

Since 1 April 2016, Monitor and the NHS TDA are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the NHS TDA.

### **Your request**

Your original request to Monitor was:

*“Please release all emails sent from the email account held by Jim Mackey at Monitor and the Department of Health (to include anyone with @dh.gsi.gov.uk contained within their full email address) and/or the NHS Confederation (to include anyone with @nhsemployers.org or @nhsconfed.org contained within their full email address) that have been sent or received within the past 3 months.”*

Following an exchange of emails, we agreed to narrow the scope of the request to correspondence between Jim Mackey and senior officials (or the private secretaries of such officials) at Department of Health (DH) or the NHS Confederation. In relation to the DH, we have in particular limited the search to correspondence between Jim and –

- DH officials at the level of Director-General or above; or
- officials in the private office of DH Ministers.

The Northumbria Health Care NHS Foundation Trust (NHCT) held emails within the scope of your request to the Trust, but as it has explained to you, these emails were held on behalf of

Monitor and the NHS TDA, given that they were sent to/from Jim Mackey in his capacity as Chief Executive of NHS Improvement. The request was therefore transferred to NHS Improvement, and we have considered a response to that request as part of this decision.

Please note that there are no relevant emails using an NHS TDA email account.

For the purposes of this request we have considered emails from the date at the start of the 3 month period before your first request, to the date of your email agreeing the narrowing of scope – i.e. from 1 November 2015 to 24 March 2016.

## **Decision**

NHS Improvement holds the information that you have requested.

NHS Improvement has decided to withhold some of the information that it holds on the basis of the applicability of the exemptions in sections 36(2), 40 and 43 of the FOI Act as explained in detail below.

The attached Annex sets out the details of the relevant information that we hold and whether that information is to be disclosed or withheld from disclosure. Where information is being withheld, we have identified in the Annex those exemptions which we consider to be relevant.

Where we are able to disclose information to you, it will be provided to you electronically as identified by the document number in the Annex. The application of exemptions to the information referred to in the Annex is explained in the following paragraphs.

### *Section 36(2) – prejudice to the conduct of public affairs*

As indicated Annex, NHS Improvement considers that much of the information requested is exempt under section 36(2)(b)(i) and (ii), and (2)(c), of the FOI Act, which provides that information may be withheld where in the reasonable opinion of a qualified person disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice or the exchange of views for the purpose of deliberation, or otherwise prejudice the effective conduct of public affairs.

In relation to information held by NHS Improvement, the Chief Executive (Jim Mackey), is the qualified person for the purposes of section 36(2) for both Monitor and the TDA. The Chief Executive's opinion is that disclosure of most of the information within the scope of the request would inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation, or would be likely to otherwise prejudice the conduct of public affairs. In particular –

- Disclosure would inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. In particular it would inhibit free and frank discussions between the Chief Executive of NHS Improvement and DH Ministers and senior officials, and between the Chief Executive and senior officials at NHS Confederation, in relation to important NHS policy and operational matters. Disclosure would reduce the candour and frankness with which advice and views

would be expressed, as those individuals would be concerned about the possibility that those views and that advice would be made public. This would limit frank, open and honest discussion about policy options or options for communicating on important NHS issues, with the resulting detrimental impact on the quality of policy development, national communication and decision-making in relation to the NHS. This would impact on the ability of DH and NHS Improvement to provide effective and co-ordinated support and management of the NHS.

- For some emails, disclosure would not itself inhibit the provision of advice or exchange of views, but it would nonetheless be likely to prejudice the effective conduct of public affairs. The emails in question were part of the on-going relationship between senior officials at the body concerned, conducted in the expectation that the discussions would not be made public. Disclosure of these emails would be likely damage the relationship of trust and confidence between NHS Improvement and DH or the NHS Confederation. It would also inhibit the free flow of views and information, with a detrimental impact on the ability of DH and NHS Improvement to provide effective and co-ordinated support and management of the NHS.

*Section 36(2) - public interest test*

NHS Improvement's view is that the public interest in maintaining the exemption in section 36(2) of the FOI Act outweighs the public interest in disclosure.

In considering the balance, we have considered the public interest in transparency and openness in relation to decisions by public bodies, in particular decisions affecting the NHS. In particular, in the present case the email exchanges included discussions in relation to high profile NHS matters, such as the financial position of NHS providers, the national tariff and the junior doctors' contract negotiations, which all potentially affect a large number of staff and patients in the NHS.

We have however also considered the public interest in allowing the chief executive of Monitor/NHS Improvement, senior officials and ministers in DH, and senior officials in the NHS Confederation to have free and frank discussions about NHS policy and the handling of major NHS operational issues. If discussions such as these were generally made public, this would reduce the candour and frankness with which views were expressed, advice was given and information exchanged, which would affect the quality of the national leadership of the NHS. There is a strong public interest in ensuring that DH and NHS Improvement are able to have open and confidential discussions at a senior level, in order to ensure effective and co-ordinated support and management of the NHS. We have also taken into account that, in relation to the risk that disclosure would inhibit free and frank provision of advice and exchange of views, the opinion of the qualified person for Monitor and TDA was that the prejudice would occur (i.e. it was more probable than not that the prejudice would occur).

We have also considered that in many cases the emails relate to on-going policy or operational issues for the NHS, where policy and responses are continuing to develop. In particular, we note that the junior doctors' dispute is subject to on-going industrial action and negotiation.

Taking into account these considerations, our decision is that the balance of public interest is in withholding this information.

#### *Section 40 – personal information*

Some information has been withheld under section 40(2) and (3)(a), an exemption which applies to personal data, as defined in section 1(1) of the Data Protection Act 1998. The exemption applies if disclosing the data would contravene any of the data protection principles.

A number of emails contain information relating to individuals who were candidates or potential candidates for appointment to positions in the NHS or within NHS Improvement. This information is personal data. The individuals concerned would reasonably expect that the information about them or their application would be kept confidential. NHS Improvement does not consider there is any legitimate public interest reason for disclosing this data. In the circumstances, disclosure of the personal data of other staff would not be fair and would therefore contravene the first data protection principle (processing must be fair and lawful).

In relation to the emails which have been disclosed, those emails contain the names and contact details of various officials, which is personal data. Some of these staff are neither senior nor in public-facing roles, and they would have a reasonable expectation that their personal information, as set out in those emails, would not be disclosed. NHS Improvement does not consider there is any legitimate public interest reason for disclosing this data. In the circumstances, disclosure of the personal data of other staff would not be fair and would therefore contravene the first data protection principle (processing must be fair and lawful). The relevant personal details have therefore been redacted. In addition, we have redacted telephone numbers of some officials, again on the basis that they would have a reasonable expectation that this is personal data which would not be disclosed.

The exemption in section 40(2) and (3)(a) is an absolute exemption, not subject to the public interest test.

#### *Section 43 – harm to commercial interests*

The documents identified as no. 1 in the Annex to this letter are being disclosed, except for the redaction of figures in the annex to the letter relating to Brighton and Sussex University Hospitals NHS Trust (“the Trust”). The figures have been redacted on the basis of the exemption in section 43 – namely that disclosure would be likely to harm the commercial interests of the Trust, or its contractor.

We understand from the Trust that the figures contained in the annex are commercially sensitive and not in the public domain. Disclosure of the figures could prejudice the interests of the trust, or the contractor concerned, in subsequent contractual negotiations or procurement exercises.

In relation to the public interest test, my view is that the public interest in maintaining the exemption outweighs the public interest in disclosure. I have noted the public interest in

transparency in relation to the use of public funds, particularly large scale capital investments in relation to the NHS. I have however noted the public interest in enabling trusts to negotiate contracts and otherwise manage their commercial affairs with (potential) contractors effectively. In addition, the headline figures and details of the business case approval are set out in the letter which is being disclosed publicly. I have also considered the trust's view that the annex figures may require further analysis and explanation in order to provide useful information to the public, and are not suitable for disclosure in their current form.

### **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 and the attached information 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,



**Helen Buckingham**  
Executive Director Corporate Affairs

## ANNEX

Number	Description	Dates	Decision and any applicable exemption
1.	Emails copied to Jim Mackey (JM) enclosing letters from DH giving approval to business cases for 2 NHS trusts	2.12.15 and 9.12.15	Disclosed, subject to redaction of commercially sensitive information (section 43)
2.	Email from Una O'Brien (DH Permanent Secretary) to JM re. Shared Delivery Plan	19.2.16	Disclosed, subject to redaction of personal information (section 40)
3.	Email from Una O'Brien enclosing JM's letter of appointment as Accounting Officer	23.11.15	Disclosed, subject to redaction of personal information (section 40)
4.	Emails between JM and senior officials at NHS Confederation, including NHS Employers	17.11.15 to 23.3.16	Disclosed, subject to redaction of personal information (section 40)
5.	Emails between JM and Una O'Brien re. various matters	10.12.15 to 24.3.16	Withheld – sections 36(2) and 40
6.	Emails between JM and Charlie Massey (Director-General for Strategy and External Relationships), relating to various matters	25.11.15 to 20.03.16	Withheld – section 36(2)
7.	Emails between JM and David Williams (Director-General, Finance, Commercial and NHS), relating to various matters	5.11.15 to 20.3.16	Withheld – section 36(2) (one email also withheld under section 40 (personal information))
8.	Emails between JM and officials in Secretary of State's private office, relating to various matters	14.11.15 to 24.3.16	Withheld – section 36(2)
9.	Emails to/from senior DH officials using JM's NHCT email address	1.12.15 to 24.3.16	Withheld – section 36(2) (one email also withheld under section 40 (personal information))