

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 January 2017

**Public Authority:** NHS Improvement  
**Address:** Wellington House  
133-155 Waterloo Road  
London SE1 8UG

#### Decision (including any steps ordered)

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1. The complainant has requested information regarding the provision of primary medical services at Sudbury Primary Care Centre. NHS Improvement holds information falling within the scope of the request and is withholding it under section 31(1)(g) of the FOIA (prejudice to the exercise of a public authority's functions).
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 31(1)(g) and that the public interest favours maintaining this exemption.
3. The Commissioner does not require the public authority to take any steps.
4. Since 1 April 2016, Monitor and the National Health Service Trust Development Authority operate as an integrated organisation known as NHS Improvement. Although this involves a single leadership and operational model, the two bodies remain separate legal entities. Where NHS Improvement is referred to in this notice, the Commissioner means Monitor as the statutory functions that are relevant to this request are exercised by Monitor.

## Request and response

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5. On 24 March 2016, the complainant wrote to NHS Improvement and requested information in the following terms, in relation to a tender for the provision of primary medical services at Sudbury Primary Care Centre:

*"... any comments made by NHSE and Brent CCG; if not, I should be grateful if you would refer me to the statutory or other legal authority on which Monitor would rely in not producing."*

6. NHS Improvement responded on 25 April 2016. It said that under the FOIA exemption at section 31(3), NHS Improvement neither confirmed nor denied that it holds information relevant to the complainant's request as to do so would, or would be likely to prejudice any of the matters mentioned in section 31(1) of the Act. NHS Improvement said that the public interest favoured maintaining the exemption.

7. The complainant requested an internal review on 2 May 2016. In this correspondence, the complainant clarified that her request includes

*"...any extracted content of correspondence/notes of telephone conversations/emails between NHS Improvement (the statutory regulator) and the 2 commissioners in relation to the procurement process..."*

8. NHS Improvement provided an internal review on 20 June 2016. It amended its position. NHS Improvement confirmed that it holds information within the scope of the request and that it is withholding it under section 31(1)(g) of the FOIA.
9. NHS Improvement said that it is satisfied that the public interest in disclosing the requested information is outweighed by the prejudice to NHS Improvement in doing so.

## Scope of the case

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10. The complainant contacted the Commissioner on 25 August 2016 to complain about the way her request for information had been handled.
11. The Commissioner's investigation has focussed on whether NHS Improvement has correctly applied section 31(1)(g) to the request and, if so, whether the public interest favours maintaining this exemption. In its submission to the Commissioner, NHS Improvement says that section 40(2) (third person personal information) also applies to some of the

withheld information. If necessary, the Commissioner is prepared to consider the application of this exemption.

## Reasons for decision

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### Background

12. NHS Improvement has provided the Commissioner with a background to the complaint. The Health and Social Care Act 2012 (the 2012 Act) made Monitor the sector regulator for health care services in England and made it responsible for enforcing rules on procurement, patient choice and competition.
13. NHS Improvement's main duty in exercising these and other functions conferred on Monitor is to protect and promote the interests of people who use health services. It does this by promoting the provision of health services which are economic, efficient and effective and which maintain or improve the quality of the services (section 62 of the 2012 Act).
14. Section 75 of the 2012 Act provides that regulations may impose requirements on NHS England and clinical commissioning groups (CCGs) for the purpose of securing that, in commissioning health care services for the purposes of the NHS, they
  - (a) adhere to good practice in relation to procurement;
  - (b) protect and promote the right of patients to make choices with respect to treatment or other health care services provided for the purposes of the NHS;
  - (c) do not engage in anti-competitive behaviour which is against the interests of people who use such services.
16. The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (the Regulations) are designed to ensure that NHS England and CCGs procure high quality and efficient health care services that meet the needs of patients and protect patient choice. They also prohibit commissioners from engaging in anti-competitive behaviour unless this is in the interests of health care service users. The Regulations set out a principles-based framework to enable commissioners to decide in individual cases what is best for the people they serve. NHS Improvement's role is to ensure that the framework is respected so that decisions are taken in patients' interests. It therefore has the power to investigate potential breaches and to enforce the Regulations.

17. NHS Improvement may open an investigation under the Regulations either on its own initiative (for investigations into breaches of the prohibition on anti-competitive conduct) or in response to a complaint that a commissioner has breached a requirement in regulations 2 to 12 of the Regulations where it considers that the complainant has a sufficient interest.
18. Section 2 of the Enforcement guidance on the Procurement, Patient Choice and Competition Regulations (the Guidance) explains how NHS Improvement is likely to decide whether to take action and what action it might take. In taking these decisions, NHS Improvement applies a prioritisation framework to make sure that it focuses its activities on those issues that enable it to make the best use of resources. This is consistent with its main duty to protect and promote the interests of people who use health care services.
19. In assessing the extent to which action may benefit health care service users, NHS Improvement is mindful of the likelihood of success, and the chances that the potential benefits of its actions will be realised. When it decides whether to take enforcement action it may assess, for example, whether it is likely to be able to fulfil the legal tests in the Regulations to reach a decision whether a commissioner has breached the Regulations and whether it has the power to impose the remedy that it considers will address the potential breach.
20. Section 4 of the Guidance states that when deciding whether to open a formal investigation, NHS Improvement may request information from the commissioner under investigation, any complainant and/or third parties **on an informal basis**. Information may be requested in writing or orally at a meeting. Obtaining sufficient information at this stage is clearly key to ensuring that a proper and fully informed decision is taken as to whether to open a formal investigation.

### **Section 31 – law enforcement**

21. Section 31(1)(g) of the FOIA says that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the exercise by a public authority of its functions for any of the purposes specified in 31(2).
22. In its submission to the Commissioner, NHS Improvement has said that the purpose for which it considers its functions would, or would be likely to be prejudiced is the purpose under section 31(2)(c) – the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

23. As it has explained in its background information, NHS Improvement is responsible for enforcing the National Health Service (Procurement, Patient Choice and Competition)(No. 2) Regulations 2013, which it says is an enactment for the purposes of section 31(2)(c).
24. Under these Regulations, NHS Improvement has the power to take formal action, in certain circumstances, where it identifies a breach or potential breach of the Regulations by a commissioner. NHS Improvement says this is regulatory action for the purposes of section 31(2)(c).
25. Under regulation 13 of the Regulations, NHS Improvement may investigate a complaint it receives that a commissioner has breached a requirement in regulations 2 to 12 of the Regulations. NHS Improvement says this is a function for the purposes of 31(1)(g).
26. As noted above, the Guidance explains NHS Improvement's enforcement powers in more detail and sets out the process NHS Improvement will follow for prioritising issues and deciding what action to take under the Regulations. NHS Improvement will consider what action may be needed to ensure that a breach does not occur, is remedied, does not continue and/or is not repeated. It will also consider what forms of intervention may be needed to deter similar breaches and is able to take enforcement action to prevent breaches.
27. NHS Improvement has the power to make a declaration that an arrangement for the provision of healthcare services for the purposes of the NHS is ineffective (regulation 14); to give directions to remedy a failure to comply with the Regulations (regulation 15); and to accept undertakings instead of issuing directions (regulation 16). The enforcement powers under the Regulations constitute 'regulatory action' for the purposes of section 31(2)(c).
28. NHS Improvement has told the Commissioner that disclosing information relating to whether or not there has been a breach of the Regulations is likely to prejudice NHS Improvement's functions to investigate a complaint under the Regulations. 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. This was the circumstance in this particular case.
29. NHS Improvement's view is that disclosing the requested information would be likely to prejudice the exercise of the functions of NHS Improvement for the purpose of ascertaining whether circumstances

exist which could justify regulatory action in pursuance of the Regulations.

30. The requested information, which NHS Improvement has provided to the Commissioner and which she has reviewed, includes information provided to NHS Improvement by NHS England and Brent CCG on an informal basis whilst NHS Improvement decided whether or not to open a formal investigation. It comprises emails, a phone note, a meeting note and a small number of miscellaneous other associated documents.
31. The Commissioner has noted the Information Tribunal (IT) appeal EA/2014/0295<sup>1</sup>. In that case the IT ordered Monitor to disclose one item of information that it had withheld under section 31(1)(g), this being Monitor's initial letter to the Trust concerned. The information that NHS Improvement is withholding in this case does not appear to include a comparable piece of information. The IT found that Monitor had correctly applied section 31 to the remainder of the information that it had withheld. The Commissioner has noted that she found that Monitor had correctly applied section 31(1)(g) in three further cases: FS50586000, FS50496598 and FS50460738.
32. NHS Improvement says that the complainant made a complaint under the Regulations against NHS England and Brent CCG. The complainant raised a number of concerns about the process followed by NHS England and Brent CCG in procuring a contract for GP services at Sudbury Surgery. The complainant raised concerns about the commissioners' decision to re-procure the Sudbury contract using a competitive tender process. Whilst competitive tenders are not always required, commissioners must comply with the Regulations and general procurement law when procuring these services. This includes acting transparently and treating providers equally, and enabling interested new providers to express an interest in providing services.
33. According to NHS Improvement, the complainant also raised concerns about the process NHS England followed in engaging with patients at the surgery and other stakeholders in relation to the tender. The Regulations require commissioners to act with a view to securing the needs of patients and improving services, which may include engaging

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[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1563/Fuller%20Timothy%20EA.2014.0295.%20\(15.06.2015\).pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i1563/Fuller%20Timothy%20EA.2014.0295.%20(15.06.2015).pdf)

with patients and other relevant stakeholders. In doing so, commissioners must act transparently.

34. NHS Improvement says that the complainant raised concerns about the process NHS England followed in advertising the contract opportunity and, in particular, felt the level of support offered by the commissioners to the current provider of the services as a prospective bidder was insufficient. The Regulations require that when commissioners have decided to seek bids from providers for a contract, they must advertise the opportunity on the Contracts Finder website.
35. Finally, NHS Improvement says that the complainant raised a concern that the commissioners acted inconsistently because they included the Sudbury Surgery contract in the tender but took a different approach for a contract for Wembley GP centre, and a combined contract for Acton Lane and Harlesden surgeries. The Regulations require commissioners to treat providers equally and in a non-discriminatory way. If commissioners treat providers differently, NHS Improvement would expect them to be able to objectively justify any difference in treatment and explain why this is the right decision for patients.
36. NHS Improvement has told the Commissioner that as part of its pre-investigation process, NHS Improvement's Competition team met and liaised with both NHS England and Brent CCG to gather information in response to the complainant's allegations. This included questioning the commissioners on the procurement process. Their responses and the supplementary information they provided fall within the scope of the complainant's request. NHS Improvement says it needed this information to assess, in accordance with the prioritisation framework in the Guidance, whether Monitor was likely to be able to fulfil the legal tests in the Regulations to reach a decision on whether NHS England or Brent CCG had breached the Regulations as described above.
37. It is in this context that NHS England and Brent CCG provided the information on the procurement and tender process in response to the investigation into the specific concerns noted above. NHS Improvement argues that those organisations would have expected this information to remain confidential. All of the information the commissioners provided was given to NHS Improvement's Competition team as part of the open relationship and dialogue that it has with the commissioners it regulates. This in turn ensures that NHS Improvement has the information necessary to determine whether further investigation or regulatory action is necessary. The answers and views NHS England and Brent CCG provided in response to the investigation team's questions and requests for information allow NHS Improvement to make an informed decision about whether to investigate the matter formally.

38. NHS Improvement says it could have sought the information under its statutory powers in the 2012 Act but that information was in effect provided voluntarily without the threat of compulsion. There are formal powers under the Regulations but only once NHS Improvement has decided to start a formal investigation – regulation 13(4) – and even then the Guidance states that NHS Improvement will try to limit the burdens placed on commissioners and third parties as much as possible and ensure that its information gathering is focused and proportionate in line with its obligations under section 68 of the 2012 Act.
39. Exercising its formal regulatory powers more extensively to obtain the information it requires would lead to undue delay and inefficiency in the regulatory process, since NHS Improvement would be required to fully justify every piece of information sought.
40. NHS Improvement has told the Commissioner that there is also a strong likelihood that disclosing the information in this case would have an adverse impact on the quality of information that commissioners provided to it, as they would be likely to provide it with the minimum information required to respond to its information request. NHS Improvement argues that this would reduce the efficiency and quality of its regulatory decision-making process, which could in turn have an impact on its ability to protect and promote the interests of health care services users and the promotion of health services.
41. NHS Improvement says that its Competition team has built effective and cooperative working relationships with commissioners. It relies on their cooperation and openness in providing it with wide ranging information for the effective exercise of its regulatory functions and, specifically in this case, to gather full evidence efficiently whilst an investigation is underway. NHS Improvement considers this relationship is dependent on the trust and confidence it has built up over time.
42. NHS Improvement considers that there is a real and significant risk that disclosing the requested information will have an adverse risk on the willingness of NHS England and any CCG to provide it with information on a full, transparent and open basis in the future (and its relationships with these bodies). NHS Improvement also considers that disclosure would adversely impact the quality and content of the information provided to it, which would impact on its ability to carry out its regulatory functions effectively.
43. The Commissioner has considered NHS Improvement's arguments and accepts that it has sufficiently demonstrated that prejudice to its regulatory functions would be likely to occur if the requested information were to be disclosed. The Commissioner accepts there is a real risk that disclosing the information may make it more difficult for NHS



Improvement to obtain the information it requires more generally to make decisions and monitor performance with a view to regulatory action. Disclosing the information would mean that commissioners' willingness to share information with NHS Improvement would be likely to diminish, they would be likely to be less inclined to cooperate with investigations and NHS Improvement's relationships with commissioners would be harmed. It would then be more difficult for NHS Improvement to carry out its regulatory functions and to make sound decisions. Consequently, the Commissioner is satisfied that NHS Improvement is correct to apply section 31(1)(g) to the requested information.

44. Section 31(1)(g) is a qualified exemption and the Commissioner has gone on to consider the public interest arguments with regard to this exemption.

### **Public interest in disclosing the information**

45. NHS Improvement has acknowledged that there is a general public interest in public bodies being accountable and transparent, and there is a specific public interest in NHS England and CCGs being accountable and responsible for decisions which affect the use of NHS funds. NHS Improvement says that it also considers the public interest in NHS Improvement itself being accountable for its effectiveness in carrying out its statutory functions under the Regulations.
46. NHS Improvement notes that in the interests of transparency, once a formal investigation into the Regulations has been opened, information about the investigation, including the expected timetable, will, where appropriate, be published on its website. NHS Improvement considers that publishing case details will generally be beneficial. This is because it will help to highlight issues that concern NHS Improvement, might help to deter inappropriate conduct and will help to ensure that all interested parties are aware of an issue and can provide relevant information.
47. At any point during an investigation, NHS Improvement says it may close a case without further action if, for example, it considers that continuing with a case would no longer be consistent with its prioritisation framework. Where it is considered appropriate, NHS Improvement will also publish its reasons for making such decisions on its website.
48. Section 5 of the Guidance details the decision-making procedures that NHS Improvement follows, including the decision to formally investigate a potential breach of the Regulations. NHS Improvement is under a legal obligation to publish any undertakings it accepts and, although it is

not required to do so by the 2012 Act, NHS Improvement publishes final notices of declarations of ineffectiveness or directions issued.

49. NHS Improvement has told the Commissioner that it considers that the information outlined above is sufficient to meet the public interest in transparency about its decision-making process and regulatory decisions on complaints and investigations concerning NHS England and CCGs.

### **Public interest in maintaining the exemption**

50. NHS improvement argues that there is a strong public interest in allowing NHS Improvement to be able to carry out its functions effectively. To be able to receive, without concern as to publication, whatever information it needs in such circumstances to allow it to make fully informed and effective regulatory decisions including, in this case, to determine whether there is sufficient evidence or cause to open a formal investigation into compliance with the Regulations.
51. NHS Improvement says that this is how it holds NHS England and CCGs accountable for the decisions they make regarding commissioning health care services. This is so that the rights of patients to make choices with respect to treatment or other health care services provided for the purposes of the NHS are promoted and protected.
52. In order to make the decision to open a formal investigation, NHS Improvement says it is reliant on the information provided by a complainant, NHS England and CCGs, who do so in good faith and voluntarily, without the expectation that such information will be disclosed.
53. Although NHS Improvement will publish its decision to open a formal investigation, it does not publish details of every complaint it receives. It says this is not only to maintain a 'safe space' for potential complainants to come forward to share their concerns with it, but also because it considers there is a real danger that publishing potentially unsubstantiated complaints about commissioning bodies without further investigation would have a detrimental impact on commissioning bodies (and, in a procurement context, their commercial interests).
54. As NHS Improvement has noted in the background information it provided, when deciding to take enforcement action, the investigation team may assess whether it is likely to be able to fulfil the legal tests in the Regulations to reach a decision on whether a commissioner has breached the Regulations. If it is not able to satisfy these thresholds, and related information had been published, a commissioner may suffer reputational damage even though they may not have breached the Regulations.

### **Balance of the public interest**

55. The Commissioner is satisfied that, in this case, the balance of the public interest favours maintaining the exemption. The public interest in NHS Improvement, NHS England and CCGs being accountable and transparent is served through NHS Improvement's intention to publish particular information on formal investigations on its website. In this case, NHS Improvement concluded that no further action was necessary and the complainant's complaint did not progress to a formal investigation. NHS Improvement has said that it intends to publish, when appropriate, information regarding decisions to close a case without further action. However, it does not intend to publish information on all the complaints it receives for the reasons given in paragraphs 53 and 54.
56. The Commissioner considers that there is a greater public interest in NHS Improvement being able to undertake its regulatory functions effectively – by having access to all the necessary information from commissioners and by having open and cooperative relationships with those commissioners. NHS Improvement's effectiveness is likely to lessen if it is required to disclose information about the investigations it undertakes. This would be detrimental to the users of NHS services.
57. Because the Commissioner is satisfied that section 31(1)(g) applies to the information and the balance of the public interest lies in maintaining this exemption, it has not been necessary to consider NHS Improvement's application of section 40(2) to some of the information.

## Right of appeal

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55. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
LEICESTER  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

56. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Pamela Clements**  
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