

29/08/18

Wellington House
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Ms Siliang Tian

By email

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Dear Ms Tian,

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

I refer to your email of **31 July 2018** in which you requested information under the FOI Act from NHS Improvement.

Your request

You made the following request:

"Regarding communications between NHS Improvement's Senior Data and Agency Intelligence Lead Martin Innes and Gary Snart of Total Workforce Solutions, within HTE Framework.

1) All emails, letters, or other communications between Gary Snart of HTE Framework and Martin Innes from 1st February 2017 until 30th June 2018 inclusive please."

Decision

We have set out in the Annex below the information that NHS Improvement holds within the scope of your request, with a brief explanation of why we have withheld certain information within documents 1, 2, 4, 5, 7, 9, 12, 14, 17, 18, 21, 22, 24, 25 and 27. A detailed explanation of why we have withheld information under various exemptions of the FOI Act is set out below. Where we have decided to release information to you, it will be provided to you electronically.

Please note that we have redacted all personal information which falls outside the scope of your request under section 40 of the FOI Act, as well as information that is generally outside the scope of your request.

Section 36

Where indicated in the Annex, NHS Improvement considers that the withheld information is exempt under section 36(2)(b)(ii) of the FOI Act. That section provides that information is exempt from disclosure if it would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

Disclosing the withheld information would be likely to inhibit staff within NHS Improvement from expressing themselves openly and fully, or from exploring options when providing advice or expressing views, as part of the process of enabling decision makers within NHS Improvement on agency policy to make well informed decisions. Liaising with framework operators and other stakeholders in the market is a key part of NHS Improvement's decision making process when deliberating on policy relating to agency, and if staff within NHS Improvement and those they correspond with externally for market information knew that the advice and views would be disclosed, they would be less likely to express those views and advice in writing and this could have a "chilling effect" in relation to future policy on this topic.

Although the decision to increase price caps in response to the recent changes to the Agenda for Change rates has now been finalised, future discussions about agency rules changing to reflect market developments would be likely to be inhibited if NHS Improvement released the information in question.

NHS Improvement's qualified person (Chief Executive) has approved the use of section 36 for the information within this paper.

Public interest test

NHS Improvement acknowledges the general public interest in disclosure of information and the need for public authorities to be open and transparent regarding their decisions. However, the inhibitions as described above under the engagement of section 36(2)(b) would be likely to affect the internal working of NHS Improvement and therefore the quality of its decisions and its effectiveness as a regulator. This would be against the public interest.

Also, NHS Improvement will publish details of any changes to the agency rules and our rationale behind this. We consider that this meets the public interest in transparency.

Section 41

Where indicated in the Annex, information has been withheld under section 41 of the FOI Act. Section 41(1) provides that information is exempt if:

- "(a) it was obtained by the public authority from any other person (including another public authority) and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

The test in section 41(1)(a) is met as the information was obtained by NHS Improvement from a third party, in this case HTE.

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount to an actionable breach of confidence. This means:

- (i) the information must have the necessary quality of confidence about it;
- (ii) the information must have been imparted in circumstances giving rise to an obligation of confidence;

- (iii) disclosure must amount to an unauthorised use of the information to the detriment of the confider.

NHS Improvement considers that disclosure of the withheld information would amount to an actionable breach of confidence.

The information in question was provided to NHS Improvement in confidence and we consider that third parties should be able to share information with NHS Improvement in the expectation that this will be kept confidential. NHS Improvement considers that it is crucial for trust to be maintained by third parties which impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to NHS Improvement of relevant information.

For this reason, I consider that section 41 applies and as it is an absolute exemption, the application of the public interest test under section 2(2) of the FOI Act is not required.

However, in considering whether, in an action for breach of confidence, a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. I have therefore considered the public interest in disclosing this information but consider that, in the present circumstances, it does not favour disclosure of the information withheld. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. The public (as well as the trusts that we regulate, and stakeholders) would lose confidence in NHS Improvement as a regulator if information provided to it in confidence was disclosed.

Section 43

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.

Where indicated in the Annex, information has been withheld as it relates to HTE's finances and commercial dealings with other companies, which by its nature is commercially sensitive and disclosure of which is likely to be detrimental to its legitimate commercial interests. For example, parties seeking to negotiate contracts with HTE could use this information to strengthen their own bargaining position when negotiating for, or providing services to, HTE.

Public interest test

Section 43 is a qualified exemption and therefore requires that a public interest test be carried out to determine whether the exemption should be maintained. We consider that in relation to the finances of public authorities there is a public interest in transparency and that this is met by our disclosure of the information in a way that safeguards the interests described above that we are seeking to protect.

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 and the attached material 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,



Cathy Corrie
Senior Agency Policy Lead
NHS Improvement

Annex

No.	Description of document	Date	Decision on disclosure
1	Email chain between Martin Innes and Gary Snart: Urgent: xxxxxx	3 February 2017	Disclosed in part. Information withheld under s.43
2	Email between Gary Snart and Martin Innes: RE: Approved Framework Letter – Audit Criteria Attachments: TWS – MEDICAL LOCUMS (3A) – AUDIT CRITERIA 2017 – Final.xlsx; TWS – NURSING & CARE (3B) – AUDIT CRITERIA 2017 – Final.xlsx; TWS – AHP HSS (3C) – AUDIT CRITERIA 2017 – Final.xlsx; TWS – NMNC (4) – AUDIT CRITERIA 2017 – Final.xlsx	6 February 2017	Email: Disclosed in part. Information withheld under s.43 Some information is outside the scope of the request so has been redacted Attachments: Withheld under s.43
4	Email between Gary Snart and Martin Innes: RE: IR35 & Uplifts to Wage Cap Attachments: Total Workforce Solutions – IR35 Update	23 March 2017	Email of 08:57 – Withheld under s.36 Email of 08:50 – Disclosed Attachment – Disclosed
5	Email chain between Gary Snart and Martin Innes: RE: IR35 & Uplifts to Wage Cap	23 March 2017	Withheld in part under s.36 Email of 12:44 – Disclosed
6	Diary invite from Martin Innes to Gary Snart: NHSI and HTE catch up	27 March 2017	Disclosed
7	Email chain between Martin Innes and Gary Snart: RE: xxxxxxxx	17 May 2017	Name of company withheld under s.43 Information in email of 10:08 – Withheld under s.36 Remaining information - Disclosed
8	Email from Martin Innes to Gary Snart: Updated Price caps and maximum wage	22 May 2017	Email - Disclosed

	<p>rates</p> <p>Attachments: NHSI Price Caps 2017 update.xlsx</p>		Attachment - ??
9	Email chain between Martin Innes and Gary Snart: RE: Updated Price caps and maximum wage rates	23 May 2017	<p>Disclosed in part</p> <p>Information withheld under s.36</p>
10	Email between Martin Innes and Gary Snart: RE: Total Workforce Solutions – Agency Caps Uplift (Primary Contract Price)	7 June 2017	Disclosed
11	Email from Martin Innes to Gary Snart: RE: DCHFT – Resourcing Category	16 June 2017	<p>Disclosed</p> <p>The redacted material is out of scope</p>
12	Email from Martin Innes to Gary Snart: RE: Agency – Emerging Issues on IR35 – Umbrella via PSC & “Self Employed” models	23 June 2017	Withheld under s.41
13	Email chain between Martin Innes and Gary Snart: RE: Urgent xxxxx Meeting	13 July 2017	Withheld under s.36
14	<p>Email from Gary Snart to Martin Innes: xxxxxx – Medical Locums – HealthTrust Feedback</p> <p>Attachments: Total Workforce Solutions – Lot Flyer.pdf</p>	26 July 2017	<p>Email: Withheld under s.43</p> <p>Attachment: Disclosed</p>
15	Email from Gary Snart to Martin Innes: Approved Framework Status – Total Workforce Solutions – Renewal	29 September 2017	Disclosed
16	Email from Gary Snart to Martin Innes: RE: Approved Framework Status – Total Workforce Solutions – Renewal	18 October 2017	<p>Disclosed</p> <p>The redacted material is out of scope</p>
17	<p>Email from Gary Snart to Martin Innes: HealthTrust Europe – Total Workforce Solutions – Framework Approval 2017/18 (Renewal Application)</p> <p>Attachments: Total Workforce Solutions –</p>	30 November 2017	<p>Email: Disclosed in part. Information withheld under s.43</p> <p>Attachment: Withheld</p>

	NHSI Framework Application 2017 – Renewal.pdf		under s.43
18	Email from Gary Snart to Martin Innes: Total Workforce Solutions – Approved Framework with requested Action Plan by 190118 Attachments: Total Workforce Solutions – Confirmation of NHSI Approval with Action Plan 190118.pdf; Appendix 1 – 2018 Action Plan – Total Workforce Solutions.xls	19 January 2018	Email: Disclosed Attachments: Withheld under s.43
19	Email from Martin Innes to Gary Snart: Data request Attachments: Agency Commission tool.xlsx	26 March 2018	Disclosed
20	Email chain between Martin Innes to Gary Snart: RE: Data request	28 March 2018	Disclosed
21	Email from Gary Snart to Martin Innes: RE: Data request – TWS (Lot 3b) – Ceiling Commissions Attachments: TWS – Lot 3b – Commission Ceilings.xlsx	28 March 2018	Email – Disclosed Attachment – Withheld under s.43
22	Email from Gary Snart to Martin Innes: RE: Data request – TWS (Lot 3a) – Ceiling Commissions Attachments: TWS – Lot 3a – Commission Ceilings.xlsx	28 March 2018	Email – Disclosed Attachment – Withheld under s.43
23	Email from Martin Innes to Gary Snart: RE: Data request – TWS (Lot 3a) – Ceiling Commissions	29 March 2018	Disclosed
24	Email from Gary Snart to Martin Innes: RE: Data request – TWS (Lot 3c) – Ceiling Commissions Attachments: TWS – Lot 3c – Commission Ceilings.xlsx	5 April 2018	Email - Disclosed Attachment – Withheld under s.43
25	Email from Gary Snart to Martin Innes: RE: Data request – TWS (Lot 4) – Ceiling Commissions	5 April 2018	Email – Disclosed

	Attachments: TWS – Lot 4 – Commission Ceilings.xlsx		Attachment – Withheld under s.43
26	Email from Martin Innes to Gary Snart: RE: Data request – TWS (Lot 4) – Ceiling Commissions	5 April 2018	Disclosed
27	Email from Gary Snart to Martin Innes: RE: [EXTERNAL] Self Employed engagement option	22 May 2018	Withheld under s.43