

23 August 2018

Dr Colin Iain Campbell

By email

request-491966-fe84aae6@whatdotheyknow.com

Dear Dr Campbell,

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

I refer to your email of **2 August 2018** in which you requested an internal review of NHS Improvement's decision of 17 July 2018 in relation to your original request under the FOI Act of 19 June 2018 as follows:

“I am writing to request an internal review of NHS Improvement's handling of my FOI request 'Copies of letters and emails'.

We wish an internal review with respect to the information referred to here:

"We consider that the commercial interests of Brookson Direct would be likely to be prejudiced if we disclose their paper titled “managed services in the NHS” (pages 9 to 12 of the information annexed"

Many thanks for your response much of which has been extremely helpful.

I note you have attempted to claim a Section 43 exemption. Whilst I note you have not specified which part of section 43 you are claiming an exemption under, which is a requirement, from the written text we suspect this to be Section 43 (1) 'Trade Secrets', although you may be attempting to argue Section 43 (2).

Both of these are subject to a public interest test and we wish you to consider the following public interest representations and, should you still refuse to disclose the information please provide your full reasoning:

PUBLIC INTEREST TEST REPRESENTATIONS, REGARDING INAPPLICABILITY OF FOIA SECTION 43(1) & SECTION 43(2) EXEMPTIONS:

The numerous NHS trusts may be contracting with a non CQC regulated healthcare/medical services provider for the provision of medical/healthcare services to save VAT. Something which appears Martin Innes, whom we understand from industry talk may be leaving your employment to work with the direct engagement firm you have named, may have knowledge of and not have prevented.

As per our understanding, it may be a criminal offence to provide Healthcare/Medical services, as they are set out under Schedule 1 of the Health and Social Care Act 2008, if not CQC regulated and, as such, the public interest in disclosure is overwhelming if a lot of NHS Improvement regulated NHS trusts are contracting with a medical service provider which is not CQC registered (the provider in question supplies you with locum health workers through an umbrella which apparently claims to 'wholly employ' thousands of health workers).

You can confirm lack of CQC registration on the CQC's website: www.cqc.org.uk - select 'all services'

Once you have verified the provider is unregulated, if you are still unsure on the public interest front could you please call the CQC and verify if they need registration due to the nature of their supply or if they do not need registration as they are supplying workers as an agency might.

You can call the CQC on this number to do so: 03000616161 (also available on their website under 'contact us')

Once this public interest basis for review has been confirmed at your side you are free to consider whether to claim an exemption but please provide justification for your answer with reference to the above public interest representations should you choose not to disclose the contract (this is a requirement of claiming such an exemption under the act)."

You later clarified this in an email of 6 August 2018, which said:

"A small clarification: 'should you choose not to disclose the contract' in the preceding email should read should you choose not to disclose the redacted information."

Decision

I have decided to uphold the original decision to withhold the information within the document entitled "Managed services in the NHS" (pages 9-12 in the Annex originally disclosed), which is the subject of this internal review. However, I am withholding the information under section 41 of the FOI Act rather than section 43(2) as previously relied on. I have detailed my reasons below.

Section 41

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 Brookson Direct.

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. In this instance, the information provided was in draft form and did not represent final views; if it were disclosed, it would not only amount to an unauthorised use of the information by NHS Improvement but would detriment Brookson Direct by revealing confidential information which remained a work in progress.

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. We also consider that the information we have already released to you would satisfy any public interest concern.

Review rights

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

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, reading "D Raymont". The signature is written in a cursive style with a large initial 'D' and a trailing dot.

Dominic Raymont
Deputy Director of Agency Intelligence
NHS Improvement