

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 09 January 2018

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

### Decision (including any steps ordered)

---

1. The complainant requested information about communications on raising money from hedge funds. The National Health Service Improvement (NHSI) confirmed that it did not hold any further information. The Commissioner's decision is that NHSI does not hold any further information within the scope of the request. The Commissioner does not require NHSI to take any steps.

### Request and response

---

2. On 19 May 2017 the complainant requested the following information:

*'I am sending this request under the Freedom of Information Act.*

*1) Please provide all communications between the office of the Chief Executive of NHS Improvement, Jim Mackey, and the Treasury regarding raising money for NHS investment by borrowing from hedge funds.*

*2) Please provide all communications between the office of the Chief Executive of NHS Improvement, Jim Mackey, and the Department of Health regarding raising money for NHS investment by borrowing from hedge funds.*

*3) Please provide all communications between the office of the Executive Director of Resources, Bob Alexander, and the Treasury regarding raising money for NHS investment by borrowing from hedge funds.*

*4) Please provide all communications between the office of the Executive Director of Resources, Bob Alexander and the Department of Health*

*regarding raising money for NHS investment by borrowing from hedge funds.'*

3. On 19 June 2017 NHSI responded that it did not hold information for Q2, Q3 and Q4.

4. In response to Q1, NHSI stated that it did hold information:

*'NHS Improvement has decided to release the following information from the communications. On 10 April 2017 the office of the Chief Executive of NHS Improvement confirmed to the Treasury in writing that NHS Improvement has not had any discussions, nor is it planning to have any discussions, with any hedge funds. This illustrates the nature of all communications between the office of the Chief Executive of NHS Improvement, Jim Mackey, and the Treasury regarding raising money for NHS investment by borrowing from hedge funds.'*

5. NHSI withheld the remaining information under section 36 (2) (prejudice to effective conduct of public affairs) of FOIA.

6. The complainant requested an internal review on 22 June 2017.

7. NHSI sent him the outcome of its internal review on 10 July 2017. It confirmed that it did not hold any information for Q2-4 and revised its response to Q1. NHSI stated that

*'Regarding question 1, I do not consider that we hold any information within the scope of your request. As explained in our earlier response letter, NHS Improvement has not had any discussions with hedge funds and there is no current plan to do so. We do not hold any communication with the Treasury on raising money from hedge funds.'*

## **Background**

---

8. NHSI provided the following as background. Since 1 April 2016, Monitor and the National Health Service Trust Development Authority (TDA) have been operating as part of an integrated organisation known as NHS Improvement. Although the two bodies remain separate legal entities, they share a joint Chief Executive (Jim Mackey).

9. In discharging its functions, NHSI is actively involved in the development of policy on the future funding of the health service. On occasion, this may involve communications with No.10, Treasury, Cabinet Office and the Department of Health, together with a range of other health service stakeholders. Mr Mackey is involved in these

discussions, as NHS Improvement's CEO. NHSI's Private Office supports Mr Mackey in this role.

## Scope

---

10. On 11 July 2017 the complainant contacted the Commissioner. He sought a determination on whether the information is in scope and argued that disclosure '*would not inhibit free and frank discussion as claimed in the initial response.*'
11. The Commissioner has considered that the scope of the investigation will be to determine whether NHSI handled the request in accordance with the FOIA. As there is no complaint to the Commissioner about whether NHSI holds any information on Q2, Q3 or Q4, the Commissioner will focus only on the Q1 part of the request.
12. The first question for the Commissioner to consider is whether section 1 of FOIA was applied correctly by NHSI i.e. whether there is any information within the scope of the request at Q1. Then, if appropriate the Commissioner will consider section 36.

## Reasons for decision

---

13. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
14. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
15. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
16. As is the practice in a case such as this, the Commissioner asked NHSI a number of questions to confirm/establish if further information is held.

17. The Commissioner asked NHSI a number of questions to establish what searches had been carried out for information falling within the scope of the request.
18. NHSI confirmed that a comprehensive search had taken place for potentially relevant material:
  - The principal searches which have been undertaken were for communications between Private Office/Jim Mackey and the Treasury. At the time of the request, three members of staff worked in Private Office supporting Mr Mackey.
  - The Head of Private Office has confirmed that if NHSI held any information within the scope of the request, it would be held electronically and would be located in Mr Mackey's NHSI email account. This is the account that has been searched. The Head of Private Office has confirmed that no manual records would have been retained by Mr Mackey or by Private Office, because neither Mr Mackey nor Private Office kept manual records.
  - The search of Mr Mackey's email account captured all emails to and from the Head of Private Office. It is also customary practice for the Senior Adviser to copy Jim Mackey into his emails, so the search carried out encompassed the two senior members of Private Office.
  - NHSI email accounts are fully networked and can only be accessed through corporate computers, telephones and laptops which are connected to NHSI's network, or on personal devices by connecting to the network. The search of Mr Mackey's email account therefore encompassed any information on other devices.
  - The electronic search terms that were used to search Mr. Mackey's email folder were (separately): "hedge", "hedge fund", "treasury", and "HMT". For this reason a number of the documents are between NHSI and bodies other than Treasury.
19. The Commissioner is satisfied that these searches would have retrieved all potentially relevant information.
20. The Commissioner has viewed the withheld information that was considered by NHSI to be potentially within the scope of Q1 of the request.
21. The Commissioner has carefully considered if the information is between Jim Mackey at NHSI and the Treasury and whether the subject matter concerns *'raising money for NHS investment by borrowing from hedge funds'*.

22. Having viewed the withheld information the Commissioner is satisfied that the majority of the documents are not between Jim Mackey and the Treasury and can therefore be discarded from the scope of the request.
23. There is one email from Jim Mackey to the Treasury on 10 April 2017 but the subject matter did not cover *'raising money for NHS investment by borrowing from hedge funds'*. Therefore, the Commissioner is satisfied that the email is not within the scope of the request.
24. There is one note attached to an email (dated 10 April 2017) between Jim Mackay and an employee at NHSI that NHSI originally considered to be partially within the scope of the request. NHSI released paragraph 3 to the complainant on 19 June 2017: *'NHS Improvement has not had any discussions, nor is it planning to have any discussions, with any hedge funds.'* (The remaining paragraphs in the note were not considered by NHSI to be within the scope of the request.)
25. However, at the internal review, NHSI considered that neither the email nor the note fell within the scope of the request.
26. The Commissioner accepts that the email and the note are not within the scope of the request as the exchange is not between the Treasury and Jim Mackay.
27. In conclusion, the Commissioner is satisfied that the withheld information does not contain any information within the scope of the request.
28. Having considered NHSI's responses to the Commissioner's investigations, the Commissioner is satisfied that, on the balance of probabilities, NHSI does not hold any further recorded information within the scope of the request.
29. As the Commissioner's decision is that the information is not held, the Commissioner has not gone on to consider section 36 and does not require NHSI to take any steps.

## Right of appeal

---

30. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

31. 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.
32. 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  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**