Mr Shaun Lintern

By email to Shaun.Lintern@Emap.com

18 January 2015

Dear Mr Lintern

**Freedom of Information Act 2000: Evidence Reviews produced for the safe staffing guidelines programme**

Ref: EH60476

**Background**

1. On 31 July 2015 you made a three-part FOI request to NICE for:
   
   1.1 Copies of the completed work by NICE on the guideline on A&E safe staffing levels which was originally due to be released at the end of July 2015;

   1.2 Copies of the four evidence reviews completed by NICE which were also scheduled to be released at the end of July;

   1.3 Copies of any correspondence sent between Sir Andrew Dillon and/or Mark Baker, Centre for Clinical Practice Director, both internally and externally relating to the above work since the start of June 2015

2. The first part of the request was refused by NICE and that refusal has already been the subject of an internal review which upheld the refusal. Material was disclosed in response to the third part of this request, subject to some redactions, and no request for an internal review has been made in respect of that decision.

3. This decision therefore relates only to the second part of the request, for disclosure of four evidence reviews ("the request"). NICE refused that request on 12 October 2015, applying the exemption in section 36(2)(c) FOIA. By an email dated 26 November 2015 you asked NICE to carry out an internal review of that refusal decision.

4. NICE convened a Panel of two Non-Executive Directors, Andy McKeon and Finbarr Martin, to conduct the review. In line with the Information Commissioner's guidance on the role of an internal review Panel, the review comprised a thorough reconsideration of the decision. Neither Mr McKeon nor Professor Martin was involved in the original decision communicated on 12 October 2015.

5. The Panel met on 6 January 2016 and interviewed NICE's Chief Executive, Sir Andrew Dillon. Sir Andrew had authorised the decision dated 12 October 2015 to withhold the requested information.
Summary of the decision

6. The Panel concluded that:

6.1 The view of Sir Andrew Dillon that disclosure of the requested materials would be likely to prejudice the effective conduct of public affairs was a reasonable one, and therefore the section 36(2)(c) exemption was engaged;

6.2 The Panel considered that the public interest factors were very finely balanced in this case. Having regard to the FOIA presumption in favour of disclosure, the Panel concluded that the public interest in avoiding the likely prejudice identified by Sir Andrew did not outweigh the public interest in disclosure;

6.3 Therefore the materials should now be disclosed to Mr Lintern.

The materials covered by the request

7. The Panel confirmed that the material held by NICE which falls within the scope of the request comprises four Evidence Review documents relating to work within NICE’s safe staffing guideline development programme to produce guidelines on safe staffing levels for nursing staff in four areas: Inpatient Mental Health Settings, Adult Nursing Care in Community Settings, Accident & Emergency and Management & Organisational Approaches which support safe staffing in Nursing & Midwifery. The Panel noted that it was important that they consider only the impact of disclosing this material into the public domain. It was not for the Panel to consider the disclosure of the almost-final version of the A&E Guideline, as the refusal of this request had already been upheld.

8. The Panel noted that the purpose of an Evidence Review within the safe staffing guideline development programme was to identify the best available research evidence relating to the topic of the guideline and to carry out a preliminary assessment of the relevance, quality and strength or reliability of that evidence. The Evidence Review would then be considered by the Advisory Committee responsible for producing the guideline, which would itself assess the relevance of the Review’s findings and take into account other material to reach conclusions as to guidance which would be given to the NHS on the topic. With the assistance of information provided by Sir Andrew Dillon, the Panel confirmed that the normal process for producing Evidence Reviews within the safe staffing guideline programme was for a draft of the Evidence Review to be published by NICE as part of the material accompanying the draft Guideline when this was published for consultation. After this, the Evidence Review could be subject to amendment during the normal guideline development process, as consideration by the Committee and consultation on a draft of the guideline might result in further relevant evidence being identified or other amendments being made to the content of the Evidence Review.

9. The Panel also noted that the development processes in relation to these four guidelines were at different stages when the decision was taken to suspend and then cease the programme (June 2015). Sir Andrew Dillon confirmed that at this time:

9.1 the Guidelines and Evidence Review in relation to Accident & Emergency had been subject to consultation and review by the Advisory Committee and were due to be published by the end of July 2015;

9.2 the Mental Health guideline and Evidence Review had been considered in
9.3 the other two Guidelines (Nursing Care in Community Settings and Management & Organisational Approaches which support safe staffing in Nursing & Midwifery had been subject to scoping and work on the Evidence Reviews had just started, but the work had not reached the stage of being submitted to the Advisory Committee and was therefore some way from being ready for consultation. However on suspension of the guideline programme a decision had been taken to complete the work already being carried out to produce the first version of the complete Evidence Reviews, so as not to lose the benefits of the investment of public money already made in respect of the work. Originally NICE intended to publish those Evidence Reviews themselves. However following NHS England’s decision to pass the work on safe staffing to NHS Improvement it was decided that it would be more appropriate to pass the Evidence Reviews to NHS Improvement, where they will form part of the material considered within the wider remit of that work (which is expected to relate to safe staffing in multi-disciplinary teams rather than to nursing only). NHS England has indicated that the materials may be published at a later date as part of any publication of the evidence base for that wider guidance when completed.

10. Overall, the Panel noted that the four Evidence Review documents were not necessarily "complete" in that they had not all gone through the full development process.

The exemption relied on

11. The Panel noted that the exemption relied on by NICE in its decision of 12 October 2015 was section 36(2)(c) FOIA. This applies "if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs." The Panel understood that the "qualified person" was Sir Andrew Dillon as the chief executive of NICE.

12. The Panel also understood that section 36(2)(c) is a qualified exemption, which means that the public interest test applies, i.e. for the exemption to be applied the public interest in maintaining the exemption and avoiding the prejudice to the conduct of public affairs must outweigh the public interest in disclosing the information.

13. The Panel confirmed that its role in carrying out an internal review was to consider:

13.1 Whether it was satisfied that the Chief Executive's view that disclosure would cause prejudice to the effective conduct of public affairs was a "reasonable opinion". This meant that they were not deciding whether or not they agreed with the opinion but whether it fell within a range of possible reasonable opinions about the effects of disclosure; and

13.2 If the Panel did consider that the opinion on prejudice was reasonable, it would then need to consider whether it agreed that the public interest in avoiding the prejudice outweighed the public interest in disclosure. This meant a full reconsideration of the relevant public interest factors and the weight which should be given to them.

14. The Panel noted that their role was to consider the impact of disclosure and the
public interest factors in play at the time the request was received by NICE on 31 July 2015.

Prejudice to the effective conduct of public affairs

15. The Panel heard from Sir Andrew Dillon that he had been satisfied at the time, and remained satisfied now, that disclosing the Evidence Reviews in response to the 31 July request would have been likely to have resulted in prejudice to the effective conduct of public affairs. At that time there was very considerable concern about, and sensitivity around, NHS staffing levels, with extensive discussion about the issue in the NHS, the potential NICE guidance and very high profile media comment. This included comment on the suspension of the NICE programme for development of guidelines on safe staffing. The NICE materials related only to staffing levels for nursing staff, whereas the Department for Health and NHS England had indicated that future work on safe staffing levels would have a wider scope, giving guidance in relation to multi-disciplinary teams in particular settings.

16. In this context he considered that disclosure of materials of this nature by NICE would be likely to cause considerable confusion and uncertainty as to the status of the documents and the value or appropriate use of their contents. Such confusion would impact adversely on those trying to manage NHS services and take decisions about resourcing. In the environment at the time he did not consider that providing additional contextual explanations as to the nature of the material (e.g. “warnings” that they were draft documents and that they represented only collation and assessment of evidence rather than guidance) would be sufficient to prevent such confusion and uncertainty. It was also not NICE’s general practice to publish Evidence Reviews on their own outside of the context of the guidance as this simply led to unhelpful speculation and argument about what the guidance would say.

17. Sir Andrew agreed that there was a particular focus at the time on the Accident & Emergency guideline and associated evidence. He could see why it might be thought that the position could be different with regard to disclosure of materials relating to other guidelines, or as to any disclosure of the Evidence Reviews only rather than the draft guidelines. However he remained of the view that disclosure of any of the Evidence Reviews in themselves would be likely to have the adverse effect described.

18. On the basis of all of the information available to it about Sir Andrew’s decision and the factors he had considered in reaching his view, the Panel agreed that he had a reasonable opinion that disclosure of the Evidence Reviews would be likely to result in prejudice to the effective conduct of public affairs.

The public interest test

19. The Panel heard from Sir Andrew that he acknowledged, and had taken into account, a number of public interest factors in favour of disclosing the material. These included factors set out in your original request for the information. He accepted the very considerable public interest in the topic of safe staffing generally and the NICE guideline work. However he considered that the benefits of disclosure in terms of informing the public debate would be limited given the confusion and uncertainty likely to be caused by disclosure as described above. He noted that the materials had been passed to NHS Improvement to be used as part of the evidence base on their wider work to produce guidance on safe staffing levels for multi-disciplinary teams, so that there was not a need for the materials to be published to enable the public to benefit from the work undertaken.
20. The Panel considered the public interest factors in the round, including the further points you have put forward. They accepted that there were substantive factors both in favour of avoiding the prejudice and in favour of disclosure which had been considered by Sir Andrew. The Panel considered that the public interest test was very finely balanced in this case. However the Panel considered that it would have given slightly more weight than NICE had done to the public interest in ensuring public confidence in NICE's work, which was a factor in favour of disclosure. In this context the Panel had regard to the FOIA presumption in favour of disclosure and considered that in relation to all four of the Evidence Reviews the public interest in disclosure slightly outweighed the public interest in avoiding the prejudice to the effective conduct of public affairs, so that the four documents should be disclosed.

The Panel's decision

21. Therefore the Panel's decision is that the requested materials should be disclosed to you.

Next steps

22. If you are not satisfied with the outcome of this internal review, you may apply to the Information Commissioner for a decision by calling 0303 123 1113, through www.ico.org.uk or by writing to The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF. There is no charge for making a complaint to the Information Commissioner.

Yours sincerely

[Signature]

David Coombs
Associate Director, Corporate Office