

NHS**Executive****Headquarters**

Department of

Health

Quarry House

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To: Chief Officers of Community Health Councils
in England

14 January 1999

Dear Chief Officer

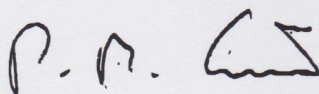
**FOR INFORMATION - GUIDANCE TO THE NHS ON OPENNESS IN
PRIVATE FINANCE INITIATIVE (PFI) SCHEMES**

Please find enclosed for information an operational guidance note on making PFI project documents publicly available. It was issued to NHS Executive Regional Offices just before Christmas 1998.

The NHS Executive Regional Offices are responsible for distributing this note to NHS Trusts currently involved in a capital investment project - under either the PFI or publicly funded route - and to NHS Trusts as and when they commence a capital investment project.

The provisions in this guidance note will be incorporated into the main guidance manual on PFI in the NHS which we are aiming to publish in the near future.

Yours sincerely



Peter Cockett
Private Finance Initiative and Capital Branch

OPENNESS IN THE PRIVATE FINANCE INITIATIVE (PFI)

1. This is an operational guidance note which sets out the details of the undertaking on the release of the key PFI project documents given by the Minister of State (MS(H)) in his speech to Unison on 8 April. It incorporates advice which was circulated to NHS Executive Regional Offices earlier this year and some subsequent points which have now been agreed.

2. The provisions in this guidance note come into immediate effect and all bodies taking forward PFI or PFI type transactions must ensure that they are adhered to. The guidance is also retrospective and applies to all PFI schemes with signed contracts and approved business cases. This note can be sent to NHS Trusts and other NHS bodies and can be made publicly available.

3. Note that all the measures set out below must be applied in exactly the same way to publicly funded schemes.

4. This guidance will be incorporated into the main PFI guidance manual which is currently being prepared for publication in the near future.

GENERAL GUIDELINES

5. In his speech to Unison on 8 April, MS(H) announced that NHS Trusts must publish and make publicly available their key PFI project documents. These are the Outline Business Case (OBC), the Full Business Case (FBC) and the final contract between the trust and its private sector partner. Schemes with a capital value of £25 million or over are required to prepare a Strategic Outline Case (SOC) for consideration by the NHS Capital Prioritisation Advisory Group (CPAG). SOC's must be made publicly available in the same manner as the other key project documents.

6. Publicly available is defined as providing one free copy of each of these project document at the following locations:

- (i) the trust's premises for staff and patients to see;
- (ii) with the Chairperson of the Trades Unions representing staff at the trust;
- (iii) with the local Community Health Council(s);
- (iv) with the local authority (only applies for schemes with a capital value of £1 million or greater);
- (v) at the local main public Library where it must be available for viewing (only applies for schemes with a capital value of £10 million or greater);
- (vi) in the library of the House of Commons (only applies for schemes with a capital value of £10 million or greater);
- (vii) in the PFI Treasury Taskforce Library at HM Treasury (only applies for schemes with a capital value of £25 million or greater).

7. The addresses for sending copies to the House of Commons Library and the PFI Treasury Taskforce Library at HM Treasury are as follows:

House of Commons Library
The Deposited Papers Clerk
Oriel Room
House of Commons
LONDON SW1A 0AA

Ken Brazier
Treasury Taskforce (PFI Library)
Private Finance Policy Team
Room 19A/G
HM Treasury
Parliament Street
LONDON SW1P 3AG

8. One copy of each project document must also be lodged with the appropriate NHS Executive Regional Office.

9. Each project document should be made available in hard copy; NHS Trusts should also consider offering a CD-Rom version where possible. The Business Cases should include the name and address of a contact point at the NHS Trust and the Regional Office who can respond to queries.

10. NHS Trusts should supply further copies of their project documents upon request from any person, but are entitled to make a reasonable charge for them to cover photocopying/postage costs. NHS Executive Regional Offices are responsible for supplying further copies of the SOC's upon request (charging is at Regional Offices' discretion).

11. For PFI projects with a capital value of £10m or greater NHS Trusts must place an advertisement in their local paper at the time of publishing the OBC and FBC. This must explain that these documents are now available for viewing and where they have been placed.

TIMING

12. For schemes just beginning the procurement process and which have to produce business cases from now on, the OBC and FBC must be made publicly available within one month of their respective final approval (which could be by the NHS Executive, HM Treasury or Ministers, depending on value). The final contract must be made publicly available within a month of financial close.

13. Current arrangements are that SOC's must be made publicly available within a month after the results of each national prioritisation exercise are announced. SOC's must be released irrespective of whether they were prioritised or not.

CONFIDENTIALITY

14. It is recognised in current government guidance on openness and access to information (*The Code of Practice on Access to Government Information* (Cabinet Office 1997), *Policy Statement No 4: Disclosure of Information and Consultation with Staff and other Interested Parties* (Treasury Taskforce 1998) and the NHS's own EL(97)35 and *Code of Practice on Openness in the NHS* (EL(95)42)) that there is information relating to PFI projects which by disclosure might cause an NHS Trust's private sector partner to suffer a competitive disadvantage or could prejudice the trust's achievement of value for money.

15. The process of agreeing what information should be withheld from the project documents which are made publicly available will in future be governed by a standard agreement form which both the NHS Trust and its private sector partner will have to agree on and sign up to. It is currently being prepared by the NHS Executive and will be issued shortly. It will cover information contained in the OBC, FBC, and the new standard form contract.

16. Until this becomes available NHS Trusts should observe the guidance documents mentioned in Para 14 above. Particular attention is drawn to Para 9.33 of the NHS's *Code of Practice on Openness in the NHS* (EL(95)42): "The need for commercial confidentiality should be assessed stringently, and balanced against the general presumption of openness when public money is at stake". NHS Trusts and their private sector partners should explicitly agree on what information should be withheld from the project documents to be released and it must be clearly stated in these documents what information has been excluded on the grounds of "commercial confidentiality". NHS Trusts already with signed contracts and/or approved business cases, or who are close to these stages, should follow the procedures from Para 19 onwards.

17. Note that in all cases, information disclosed under the Association of Arbitration and Conciliation Service (ACAS) code of practice for collective bargaining should always be deemed to be in the public domain and must be included in full in business cases made publicly available.

18. NHS Trusts should be able to release their OBCs virtually intact. NHS Executive Regional Offices retain the right to edit Section 1 of the SOC as per current guidance (ie: references which are considered sensitive to the ability of trust or other NHS managers).

NHS TRUSTS WHICH ALREADY HAVE SIGNED CONTRACTS AND/OR APPROVED BUSINESS CASES OR ARE CLOSE TO THESE STAGES

19. Schemes which have reached or are near to financial close prior to the publication of this guidance note must publish and make publicly available their OBCs, FBCs and either the contract itself or - in place of the contract - a summary of the contract (see Para 20 below). These can be published together as one 'job lot'. Schemes at earlier stages - for example with only an approved OBC - must also make their business cases publicly available.

20. Many of the existing schemes have contracts drafted specifically for that project. These are cumbersome documents which usually contain confidentiality clauses and are often difficult to understand. Where schemes have a well developed contract with confidentiality clauses that would be difficult to unwind or the contract itself is complex, NHS Trusts may produce and release a summary of the contract in place of the contract itself. The summary of the contract should be a simply presented document containing summaries of each clause in the contract, written in plain English. The NHS Executive is preparing a new standard form contract which will be more accessible and will be made publicly available, but until this becomes available for use NHS Trusts may prepare and release the summary of contract document.

21. Due to the difficulties and delays involved in the early schemes, NHS Trusts often had to produce an update or 'addendum' to the FBC which reflects the scheme eventually agreed and signed on. Where such an FBC addendum or update exists it must be produced in addition to the original FBC. In cases where an addendum/update is released the contract summary can be included with it. If not, the contract summary should be released as a free standing document.

22. NHS Trusts and their private sector partners must agree on what information is "commercial in confidence" and exclude it from the FBC, contract or contract summary which is made publicly available. In undertaking negotiations with their private sector partners, NHS Trusts should make it clear that there must be a presumption of maximum openness in arriving at decisions, using the guidance documents mentioned in Para 14 as their benchmark. Ministers have asked officials to monitor the release of information for these schemes and trusts should therefore clear their decisions with the relevant Regional Office before the publication of any documents. Ministers place an extremely high priority on openness and may challenge proposed exclusions. It must be clearly stated in the documents released what information has been excluded on the grounds of commercial sensitivity.

23. We recognise that this process may in some cases be quite complex and have not therefore set any time limit on when already approved or signed documents should be made publicly available. However, *NHS Trusts must treat this as a high priority* and aim to have these documents ready for publication as soon as possible. As mentioned, the timetable for all business cases approved and contracts signed from now on is within one month.

24. The delays and difficulties mentioned above in Para 21 resulted in often major changes to the physical and financial nature of schemes. This resulted in outline business cases which may now bear no relation to the current scheme or which were never formally approved. It is difficult to justify the costs involved in making free copies of these outline business cases publicly available. NHS Trusts can therefore exercise discretion and only make publicly available an update of the outline business case which reflects the project currently under debate or which was finally agreed and signed on. Such a document should be released as a free standing document if the scheme has not advanced further than OBC approval, or it should be inserted at the front of the released FBC. The update made publicly

available in these circumstances must clearly record the changes which have occurred to the project over the years in a manner which allows a lay reader to understand the full decision making process.

25. However, NHS Trusts may also exercise discretion and supply copies of these out of date OBC documents upon request from any person, but are entitled to make a reasonable charge for them to cover photocopying/postage costs

PFIC Branch
NHS Executive
December 1998