

3 March 2017

Wellington House
133-155 Waterloo Road
London SE1 8UG

T: 020 3747 0000
E: nhsi.enquiries@nhs.net
W: improvement.nhs.uk

By email

Dear [REDACTED]

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

I refer to your email of **3 February 2017** in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the TDA.

Your request

You made the following request:

"Please disclose: All correspondence and communication between Newcastle Upon Tyne Hospitals Foundation Trust and NHS Improvement on the subject of the chief executive of Newcastle Upon Tyne Hospitals FT's chief executive between June 2016 and February 2017."

Decision

NHS Improvement holds the information within the scope of your request.

NHS Improvement has decided to release the following documents in response to your request:

1. Letter from Newcastle Upon Tyne Hospitals NHS Foundation Trust to NHS Improvement dated 26 July 2016
2. Letter from NHS Improvement to Newcastle Upon Tyne Hospitals NHS Foundation Trust dated 1 September 2016

The other documents within the scope of your request are being withheld on the basis of the applicability of the exemptions set out in sections 31, 40 and 41 of the FOI Act, as explained in detail below.

Section 31 – law enforcement

Section 31(1)(g) of the FOI Act exempts from disclosure information that would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 31(2). NHS Improvement believes that disclosure of some of the information requested in relation to the chief executive of Newcastle Upon Tyne Hospitals NHS Foundation Trust would prejudice the exercise of its functions for the purposes of determining whether any person has failed to comply with the law (section 31(2)(a)) and whether regulatory action is justified (section 31(2)(c)).

NHS Improvement's role includes monitoring NHS foundation trusts' compliance with their provider licence. In order for us to regulate NHS foundation trusts effectively, including assessing whether they are well led, we rely on NHS foundation trusts to voluntarily share information with us. In turn, NHS foundation trusts have a reasonable expectation that we will treat information that they provide to us as confidential.

We consider that disclosing some of the correspondence requested would prejudice the exercise of our functions since it would make this trust and other providers less willing to share sensitive information with us in future. This would have a detrimental impact on the relationship of trust we have built with the sector over the course of many years, and our ability to efficiently assess their governance without recourse to our statutory powers to obtain information by compulsion. The public interest in disclosing this information under section 31 is considered below.

Public interest test

Section 31 is a qualified exemption and is therefore subject to a public interest test. We consider that in relation to correspondence and communications between NHS Improvement and NHS foundation trusts there is a public interest in transparency. However, we also consider that there is a strong public interest in giving NHS Improvement and foundation trusts the space to share sensitive and confidential information, and openly and frankly discuss action that is required to comply with the provider licence/relevant legal requirements without disclosing the content of those exchanges to a wider audience.

NHS Improvement also considers that the public interest in the transparency of public affairs is in part addressed by the publication of information on its regulatory activity, for example, details of any formal enforcement action which is required.

In considering where the balance of the public interest lies in this case I have taken into account whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

For the reasons set out above I have concluded that, on balance, the public interest is better served by withholding some of the information, thereby allowing NHS Improvement to carry

out its functions efficiently and effectively, and to have the space to consider, without concern as to publication, whatever information it requires in such circumstances.

Section 40 – personal information

Some of the information requested is being withheld from disclosure under section 40(2) of the FOI Act on the grounds that it is personal data and that the first condition of section 40(3)(a) is satisfied, namely, that disclosure would amount to a breach of the data protection principles (personal data should be processed fairly and lawfully).

This is because some of the information is personal data of employees of NHS Improvement and Newcastle Upon Tyne Hospitals NHS Foundation Trust, who would have a reasonable expectation that their personal information would be withheld. This is an absolute exemption and consideration of the public interest in disclosure is not required.

Section 41 – information provided in confidence

Some of the information has been withheld under section 41 of the FOI Act on the basis that it was obtained by NHS Improvement from a third party, disclosure of which would give rise to an actionable breach of confidence.

We consider that when corresponding with NHS Improvement, Newcastle Upon Tyne Hospitals NHS Foundation Trust had a reasonable expectation that any sensitive or confidential content would remain private and only be used by Monitor for the purposes of its regulatory functions. This information was not trivial, not readily available by other means and provided in confidence, which created an obligation of confidence.

Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, in considering whether a confidence should be upheld, a court will have regard to the whether the public interest lies in favour of disclosure. Whilst NHS Improvement recognises the public interest in the transparency of communications with NHS foundation trusts, there is also a strong public interest in maintaining the confidentiality of sensitive information provided to NHS Improvement by NHS Foundation Trusts so that providers continue to volunteer such information to us, which in turn assists NHS Improvement to perform its regulatory functions effectively. Disclosing sensitive information provided to NHS Improvement by NHS Foundation Trusts would undermine the relationship of trust that has been built over time with the sector. For these reasons, NHS Improvement does not consider there is a strong public interest in disregarding the duty of confidence owed to NHS foundation trusts.

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 information 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,



Sarah McKinnon
Senior Business Manager
Regulation Directorate

Our ref: PR/KD/2607

Headquarters
Freeman Hospital
High Heaton
Newcastle upon Tyne
NE7 7DN

26th July 2016

Tel: 0191 233 6161
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Mr Hay
NHS Improvement
Wellington House
133-155 Waterloo Road
London SE1 8UG

Dear Mr Hay

Re: Appointment of Chairman, The Newcastle upon Tyne Hospitals NHS Foundation Trust

I am sorry for the delay in responding to your letter of 18th May 2016. As a consequence of the letter there has been full and widespread discussion with key Trust stakeholders, including all Trust Non-Executive Directors and Executive Directors. This led to postponement of the planned interviews.

Sir Leonard was shortlisted for interview by the Nominations Committee in good faith based on an assessment of his skills against the Chairman job description and person specification, and based on the available advice we had received from Monitor prior to our short listing meeting in March 2016.

At this stage we would welcome further collaborative discussion with NHS Improvement on the best way forward and suggest a direct meeting with a small delegation from the Trust (myself with Hilary Parker, Senior Independent Director and the Trust Secretary, Kelly Douglas).

I look forward to hearing from you.

Yours sincerely,



Peter Ramsden
Chairman, Nominations Committee
On behalf of the Council of Governors

Cc: Kingsley Smith, Trust Chairman
Cc: Kelly Douglas, Trust Secretary

Stephen Hay
Deputy CEO / Executive Director of Regulation

Wellington House
133-155 Waterloo Road
London SE1 8UG

Tel: 020 3747 0000

Peter Ramsden

BY EMAIL

1 September 2016

Dear Peter

Thank you once again for attending the meeting with me last Wednesday. I hope it is helpful to follow up in writing on what we discussed.

I repeated NHS Improvement's very real concerns that the Trust's Chief Executive is being considered as a candidate for the role of Chair, notwithstanding the express recommendations against such appointments in the Code of Governance and other relevant provisions, including those on demonstrating appropriate independence in such appointments. The Trust is already well aware of these concerns which were set out in prior correspondence. To be very clear, NHS Improvement does not consider the appointment of the CEO as Chair acceptable in governance terms.

We discussed a number of scenarios which could play out over the following months and concluded on the following next steps:

- the existing chair appointment process should be terminated, and a new process commenced as soon as is practically possible, probably in early September;
- either Kingsley Smith's position as Chair is extended for a defined, short period of a few months to cover this new process, or the Trust appoints a vice chair if Kingsley is not agreeable to an extension;
- the Trust's board secretary writes to NHS Improvement's General Counsel, Kate Moore, to agree appropriate steps to remove the Trust's CEO from membership of the Nominations Committee.

I trust this letter reflects an accurate account of our discussion. As I said in the meeting, I am happy to help you and your colleagues to bring this situation to a rapid conclusion.

Yours sincerely

A handwritten signature in dark ink, appearing to read "Stephen Hay", with a horizontal line underneath the name.

Stephen Hay, Deputy CEO/ Executive Director of Regulation, NHS Improvement

Cc:

David Stout, Non-Executive Director

Kelly Douglas, Trust Secretary

Lyn Simpson, Executive Regional Managing Director, NHS Improvement