

17 January 2017

[REDACTED]

[REDACTED]

**By email**

[REDACTED]

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Dear [REDACTED]

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

I refer to your email of **15 December 2016** in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority (TDA) are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means the TDA (as you have asked about NHS trusts which fall under the TDA’s domain).

#### **Your request**

You made the following request:

*“1. How many NHS Trusts have you found did not have appropriate systems and processes in place to respond to serious incidents and undertake credible investigations and follow through on action plans involving maternity departments in 2013, 2014, 2015, 2016 to date (in financial or calendar years, however this information is held)?*

*1 a) Please provide further details on which Trusts and what the result was for each incident.*

*2. How many reviews have been carried out by the TDA on Trusts’ Serious Incident Policies regarding maternity departments and what were the findings in 2013, 2014, 2015, 2016 to date (in financial or calendar years, however this information is held)?*

*2 b) Please provide further details on which Trusts and what the result was for each review.”*

#### **Decision**

Incidents and investigations in maternity units are the responsibility of NHS England to administer, rather than NHS Improvement.

We therefore recommend that you re-direct your request to NHS England which is also subject to the FOI Act. NHS England will need to consider whether information can properly be provided by them in response to any such requests within the terms of the FOI Act.

Although reviews into maternity departments are not commissioned by NHS Improvement, we do hold some information that falls within the scope of your request. This is in the form of analysis on the back of a review or, exceptionally, a review into maternity services as part of wider concerns about a particular trust.

NHS Improvement has decided to withhold this information on the basis of the applicability of the exemptions in sections 31 and 41 of the FOI Act as explained in detail below.

## **Section 31 – Law enforcement**

NHS Improvement considers that the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act which provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

NHS Improvement considers that section 31(2)(c) is engaged and that disclosure of the information in question would be likely to prejudice the exercise by the TDA of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

Section 5 of The National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 (“the 2016 Directions”) provides that the TDA must exercise its functions with the objective of ensuring that English NHS trusts are able to comply with their duty under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively – by, for example, establishing and maintaining best practice corporate governance arrangements and financial management standards, and effectively implementing systems and processes.

Some of the information we are withholding relates to a live complaint which is currently being investigated in the context of a particular trust’s performance. To disclose that information now is likely to be prejudicial to our on-going investigation. Other information we hold is related to on-going intervention as part of a continuing development plan for maternity services, and/or to continuing concerns about a trust where we are determining what action to take to address those concerns. Disclosing this information is likely to be prejudicial to ascertaining whether circumstances exist that would justify regulatory action.

### **Public interest test**

Section 31 is a qualified exemption and therefore requires that a public interest test be carried out to determine whether the exemptions should be maintained.

The public interest in accountability and transparency by making access to the information available has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted.

We have concluded that the public interest in disclosure of the information is outweighed by the need to safeguard information that is being used to determine whether regulatory action is needed in relation to trust performance.

## **Section 41 – information provided in confidence**

We consider that the withheld information is exempt under section 41 of the FOI Act. 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 NHSI by third parties, in this case providers.

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.

NHSI considers that disclosure of the information would amount to an actionable breach 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 (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. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. In the present circumstances, NHSI does not consider that there is a strong public interest in disregarding the duty of confidence owed to providers.

### **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](mailto:nhsi.foi@nhs.net).

### **Publication**

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,

**NHS Improvement**