

5 October 2016

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133-155 Waterloo Road
London SE1 8UG

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

By email: [REDACTED]

Dear [REDACTED]

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

I refer to your email of 20 September 2016 in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor.

Your request

You made the following request:

"I'd like to request under FOI all correspondence sent by NHS Improvement relating to the resignation of Katrina Percy as chief executive of Southern Health Foundation Trust and her subsequent employment by the trust providing advice to Hampshire GPs.

My request covers:

- *Any correspondence between NHSI and Southern Health Foundation Trust;*
- *Any correspondence between NHSI and the DH;*
- *Any correspondence between NHSI and any other organisation;*
- *Internal correspondence within NHSI relating to Ms Percy's resignation and new role."*

Decision

NHS Improvement holds information relevant to your request.

NHS Improvement has decided to withhold the information it holds on the basis of the applicability of the exemptions in section 31, 36 and 40, 41 of the FOI Act as explained in detail below.

Section 31 – prejudice to law enforcement – exercise of NHS Improvement’s functions

I consider that some of the information that you have requested is exempt from disclosure under section 31 of the FOI Act.

Section 31(1)(g) of the FOI Act provides that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the exercise by a public authority of its functions for any of the purposes set out in section 31(2) of the FOI Act. One of these purposes, contained in section 31(2)(c), is ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

NHS Improvement’s role includes monitoring NHS foundation trusts’ compliance with their licence. NHS Improvement may take formal action against a foundation trust if it has failed to comply with its licence. Within this context, NHS Improvement requires detailed information from foundation trusts on an on-going basis about matters arising.

Your request covers correspondence between NHS Improvement and Southern Health Foundation Trust (“the Trust”), and other third parties, and internal correspondence, about the resignation of the Trust’s Chief Executive and her new role. This includes confidential information and free and frank views about regulatory compliance.

The effectiveness of NHS Improvement’s regulatory action depends on the maintenance of confidentiality and ensuring free, full and frank exchanges between NHS Improvement and other organisations, and between NHS Improvement staff, in relation to any of our enforcement functions, including monitoring compliance with existing enforcement action.

Making available the withheld information would prejudice the exercise of NHS Improvement’s functions by, among other things:

- (a) deterring providers and other stakeholders from co-operating with NHS Improvement on a voluntary basis;
- (b) deterring NHS Improvement staff from exchanging views on regulatory compliance;
- (c) decreasing the amount of information supplied voluntarily to NHS Improvement from providers and other stakeholders; and
- (d) disclosing information that is confidential and provided expressly on a confidential basis.

Section 36 – prejudice to the effective conduct of public affairs

NHS Improvement has decided to withhold some of the information requested on the basis that it falls within section 36(2)(b)(i) and (ii) and 36(2)(c) of the FOI Act (prejudice to the conduct of public affairs) and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

The exemption is engaged as NHS Improvement's qualified person, its Chief Executive (Jim Mackey), is of the opinion that disclosure of this information would be likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation, and would otherwise prejudice the effective conduct of public affairs.

- Disclosure would inhibit the free and frank provision of advice (s.36(2)(b)(i)) and the free and frank exchange of views for the purposes of deliberation (s.36(2)(b)(ii)). Your request includes internal correspondence and correspondence with central government and the Trust. In order to carry out their functions, NHS Improvement staff need to be able to provide free and frank advice to senior managers and executives about confidential matters arising at foundation trusts and NHS trusts, and in turn, to be able to provide advice to government officials about the same, without concern that the detail of those discussions will be disclosed. In addition, NHS Improvement relies on its staff being able to freely exchange views with each other, with the bodies that it regulates and with central government officials about confidential issues arising in its monitoring of provider performance and how to address those issues, without wider disclosure. Disclosure of the withheld information would reduce the candour and frankness of advice provided and views expressed, which would impact upon the quality of decision making and NHS Improvement's effectiveness at performing its functions and supporting the sector to improve.
- Additionally, disclosure would be likely to prejudice the effective conduct of public affairs. Your request includes correspondence with central government and the Trust. NHS Improvement relies on a relationship of trust and confidence with central government officials, the bodies that it regulates and other health system stakeholders. Disclosure of the withheld information would damage those relationships and inhibit the free flow of views, advice and confidential information which would have a detrimental impact on the ability of NHS Improvement, central government and health sector stakeholders to provide effective and co-ordinated support and management of the NHS.

Public interest test

Sections 31 and 36 of the FOI Act are qualified exemptions and therefore require us to consider the public interest test in determining whether the exemptions should be maintained. We have balanced the arguments in favour of maintaining the exemptions with the factors in favour of disclosing the information we consider falls within these exemptions.

I consider that there is a strong public interest in allowing NHS Improvement to be able to carry out its functions efficiently and effectively, and to have space to consider without concern as to publication, whatever information it requires in the circumstances. In addition, it is in the public interest for NHS Improvement staff to be able to provide honest and frank advice about confidential matters arising and to discuss what approach to take internally and with other health sector stakeholders. If the information requested was disclosed, central government officials, foundation trusts and relevant third parties would be likely to lose confidence in NHS Improvement, or take action to prevent the disclosure of such information.

I have also considered the public interest in disclosing the withheld information, in particular, in the context of the aims and objectives of foundation trusts to be accountable to local people, and also the public interest in NHS Improvement itself being accountable for the oversight role it carries out. NHS Improvement has published a large amount of information on its website about the performance of the foundation trust sector, including:

- our assessment of the risk of each foundation trust's non-compliance with the continuity of service and governance conditions of their licence;
- whether NHS Improvement has opened an investigation into a foundation trust's non-compliance with its licence; and
- any enforcement action taken against each foundation trust for non-compliance with its licence.

This information about the Trust can be accessed via the following link: [here](#).

We have issued several press statements about our approach to the Trust, including explaining our assessment of their performance. See the following:

- January 2016: [click here](#)
- April 2016: [click here](#)
- May 2016: [click here](#)
- June 2016: [click here](#)

We also publish all of our responses to requests under the FOI Act, The following requests about the Trust may be of interest:

- Correspondence with the Trust and CQC on the Mazars Report: [click here](#)
- Assorted questions about the Trust's progress in meeting its undertakings: [click here](#)

In the circumstances, I have concluded that the need to ensure providers are able to share information with NHS Improvement without fear that such disclosures will enter the public domain outweighs the public interest in disclosure of the information being withheld.

Section 40 – personal data

I consider that some of the information is exempt from disclosure under section 40(2) and 40(3)(a) of the FOI Act on the grounds that it contains personal data about the Trust's Chief Executive and other individuals and that the first condition under section 40(3)(a) is satisfied, namely, that disclosure would amount to a breach of the first data protection principle (personal data should be processed fairly and lawfully). This is an absolute exemption and consideration of the public interest test is not required.

Some of the information withheld, include personal information about the Trust's previous Chief Executive and other individuals, which due to the nature of the information, they would have a reasonable expectation would not be disclosed.

Section 41 – Information provided in confidence

Other than information that we are disclosing to you, we consider that some information you requested is exempt from disclosure under section 41 of the FOI Act.

Under section 41 of the FOI Act, information is exempt if it was obtained by NHS Improvement from any other person and disclosure of the information to the public would constitute a breach of confidence actionable by that other person.

The information requested includes confidential information which was provided in circumstances giving rise to an obligation of confidence and disclosing the information to the public without consent would amount to an unauthorised use of the information to the detriment of the bidders concerned.

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, when determining whether an action for breach of confidence would be likely to succeed it is necessary to consider whether the public interest in favour of disclosure outweighs the interest in withholding the information. In the present circumstances, NHS Improvement does

not consider that there is a strong public interest in disregarding the duty of confidence owed to the providers of the information.

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.

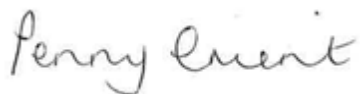
If you are dissatisfied with the outcome of any internal review conducted by NHS Improvement, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

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 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,



Penny Emerit

Delivery and Improvement Director (Wessex)