

10 November 2016

Wellington House
133-155 Waterloo Road
London SE1 8UG

By email

[REDACTED]

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

Dear [REDACTED]

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

I refer to your email of 25 October 2016 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.

Your request

You made the following request:

“Thanks for your response and advice that my request cannot be met because of cost limitations, and the suggestion to look up an earlier FOI by PCaW.

I see that in calendar years 2013,2014 and 2015, Monitor received a total of nine ET1 forms.

I would be grateful to submit an amended request as follows:

- 1) Please advise how many ET1 forms were received by Monitor in financial years 2010/11, 2011/12, 2012/13*
- 2) I would be grateful if you could reformat the data that you have given for ET1s received by Monitor in calendar years 2013, 2014, 2015 into financial years.*
- 3) Please indicate which regulated bodies where the subject of the ET1s sent to Monitor since 2010.*
- 4) Please advise what NHSI’s procedure is now, when it receives an ET1 from an Employment Tribunal. Please include in your response the seniority of officers who decide the relevant action in response to ET1s, and whether a central record is now kept of all ET1s.”*

Decision

NHS Improvement holds some of the information that you have requested and has decided to withhold some of the information as set out below:

Part 1: NHS Improvement has not been able to progress this part of your request because to do so would, in our opinion, exceed the cost limit specified under section 12 of the FOI Act.

Part 2: NHS Improvement holds this information and has decided to release all of the information that it holds. We have set out below the number of ET1 forms that were received by NHS Improvement in financial years 2013/14, 2014/15 and 2015/16 based on the date that these forms were received by NHS Improvement:

Financial Year	Number of ET1 forms received
2013/14	1
2014/15	4
2015/16	4

Part 3: NHS Improvement has not been able to progress this part of your request in respect of the period 2010 to 2013 because to do so would, in our opinion, exceed the cost limit specified under section 12 of the FOI Act. In respect of the period 2014 to 2016, NHS Improvement holds this information and has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in section 41 of the FOI Act.

Part 4: NHS Improvement holds this information and has decided to release all of the information that it holds. NHS Improvement handles ET1 forms received in the same way as any other whistleblowing information it receives. This process involves logging the information received on a central database. Usually the process will involve contacting the individual to understand more about their concerns. The information is analysed by a complaints and whistleblowing manager to determine whether it raises potential wider governance concerns. If it does, the complaints and whistleblowing team will work with the regional team to decide what action is necessary.

Cost Limit under section 12 of the FOI Act.

Under section 12(1) of the FOI Act, NHS Improvement is not required to comply with any request potentially exceeds the appropriate cost limit. The limit is £450, as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. This equates to a period of approximately eighteen hours in which to locate, retrieve and extract the information requested.

In NHS Improvement's view, compliance with your request will exceed this limit. There is no central file for the period 2010 to 2013. To collate this information we would need to search through the mailboxes of individuals or in correspondence folders for each NHS trust and NHS foundation trust.

Advice and Assistance provided under section 16 of the FOI Act

Under section 16 of the FOI Act, we are required, as a public authority, to provide advice and assistance so far as it is reasonable, to individuals who have made a request to it under the FOI Act. In light of our response, you may wish to consider specifying a particular foundation trust for which you seek information.

Section 41 – Information provided in confidence

The section 41 exemption applies to information obtained from another person where its disclosure would give rise to an actionable breach of confidence. We consider that the information you have requested in relation part 3 of your request has the requisite degree of confidence to be actionable if disclosed.

In considering this NHS Improvement has had regard to:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the claimant.

NHS Improvement considers that this information has the necessary quality of confidence as it is not otherwise accessible. Information relating to employment claims made against NHS foundation trusts is not published and is therefore not otherwise available. The ET1 claim forms are provided to NHS Improvement in its capacity as a Prescribed Person under the Public Interest in Disclosure Act 1998 (PIDA).

NHS Improvement's view is that the ET1 forms provided to it have both an implied and explicit obligation of confidence. If a notification of wrongdoing in the public interest is made to NHS Improvement the claimant is protected under the PIDA and NHS Improvement must treat the information confidentially. Information provided to NHS Improvement by the Tribunal in the form of an ET1 claim form is information communicated in confidence to NHS Improvement in its capacity as regulator of NHS foundation trusts and as a Prescribed Person under the PIDA. NHS Improvement's view is that, whilst the claimant in these cases has consented to information being shared by the Tribunal with NHS Improvement they would not expect the information they have provided, including the name of the trust they are reporting on, to be made publicly available.

Although the disclosure of this information may not cause harm to the claimants in terms of loss in these cases, knowledge of the disclosure of the names of NHS foundation trusts who have been reported to NHS Improvement could identify employees of those NHS foundation trusts who might have reported matters to NHS Improvement and it could be of distress to whistle blowers who will normally only report when they are assured that their concerns will be treated in the upmost confidence.

Section 41 is an absolute exemption, so the application of the public interest test pursuant to section 2(2) of the FOI Act is not required. 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.

Where a duty of confidence exists there is a strong public interest in favour of maintaining that confidence and we note that confidentiality with regard to whistle blowers is very strong.

NHS Improvement is of the view that disclosure of this information would undermine the confidence the public has in knowing they can approach NHS Improvement to raise concerns in a confidential manner. Disclosing information relating to specific NHS foundation trusts may compromise the future voluntary provision of information to NHS Improvement, which in turn may have a detrimental impact on NHS Improvement's ability to carry out its statutory functions. Where information, including whistle blowing information, results in NHS Improvement concluding that there are governance concerns at an NHS foundation trust such that regulatory action is required, the details of that regulatory action is published by NHS Improvement. Therefore I am of the view that the public interest is in favour of withholding 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, I am happy to discuss it to try to resolve any concerns informally. 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 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,

A handwritten signature in black ink, appearing to be 'T. G.', written in a cursive style.

Tom Grimes

Head of Enquiries, Complaints & Whistleblowing