

10 May 2018

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██████████  
**By email**  
████████████████████

Dear ██████████,

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

We refer to your email of 29 March 2018 in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority have been 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 (the numbering has been inserted by NHS Improvement for ease of reference):

*“Re: Nomination and Remuneration Committee*

- 1. Please advise who chairs this NHS Improvement committee and please give details of its membership generally*
- 2. Please disclose a copy of the terms of reference of this committee.*
- 3. Please give dates on which this committee has met since 1 April 2016*
- 4. Please disclose copies of all minutes of Nomination and Remuneration Committee meetings since 1 April 2016 and other related meeting papers.*
- 5. Please disclose copies of any reports issued by the Nomination and Remuneration Committee since 1 April 2016.”*

### **Decision**

NHS Improvement holds the information that you have requested and has decided to release some of the information that it holds.

Some of the information has been withheld on the basis of the applicability of the exemptions in sections 21, 36, 40 and 41 as explained in detail below.

### Question 1

The NHS Improvement Nominations and Remuneration Committee is chaired by Professor Dame Glynis Breakwell. Lord Patrick Carter and Sarah Harkness are the other two members.

### Question 2

Section 21 provide that information is exempt if it is reasonably accessible to the applicant through other means. This is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.

The terms of reference are publicly available as an annex to our rules of procedure. They can be found on the link provided below:

<https://improvement.nhs.uk/about-us/corporate-publications/publications/nhs-improvements-rules-procedure/>

### Question 3

The committee has met on the following dates:

13 May 2016  
22 June 2016  
13 October 2016  
27 January 2017  
25 May 2017  
04 October 2017

### Question 4

Please refer to the attached annexes. We have set out the details of the relevant information that we hold and whether that information is to be disclosed (in whole or in part) or withheld from disclosure. Where information is being withheld, we have identified in the annex those exemptions which we consider to be relevant. The application of exemptions to the information referred to in the annex is explained below.

#### Section 36 - Prejudice to effective conduct of public affairs

NHS Improvement has decided to withhold some of the information requested on the basis that it is exempt from disclosure under section 36(2) of the FOI Act. It is the opinion of NHS Improvement's qualified person (Ian Dalton, Chief Executive) that section 36(2)(b)(ii) is applicable.

Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of a qualified person disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

It is the opinion of NHS Improvement's qualified person that disclosing the redacted information would be likely to inhibit NHS Improvement staff from expressing themselves openly and fully, or from exploring options when expressing views as part of the process of enabling the internal committee to make well informed decisions. If the authors of the papers knew that the advice and views would be disclosed, they would be less likely to express those views and advise in writing and this could have a "chilling effect" in relation to future discussions in the nomination and remuneration committee. A lack of comprehensive and detailed discussions would be likely to impair the quality of decision making by NHS Improvement.

#### *Public interest test*

We acknowledge the general public interest in disclosure of information and the need for public authorities to be open and transparent regarding their decisions. On the other hand, the matters described above would be likely to affect the internal working of NHS Improvement and therefore the quality of its decisions and effectiveness. This would be contrary to the public interest.

In order to be able to perform its duties effectively NHS Improvement must be able to hold free and frank discussions without concern that the detail of those discussions will be disclosed. We must further be able to present information to aid those discussions. Public authorities must be afforded a safe space within which to deliberate and discuss matters before making a decision. If this material were published, it would be likely to restrict the candour and frankness with which similar future discussions would be conducted, as individuals would be concerned about the possibility that those views and discussions would be made public. The result would be to reduce the quality of discussion provided in such cases and have an adverse impact on the ability of NHS Improvement to carry out its functions, which is strongly against the public interest.

Taking these points into account, we have decided that on balance the public interest favours withholding the redacted information.

#### Section 40 – Personal information

We consider that some information is exempt from disclosure under section 40(2) of the FOI Act on the grounds that it amounts to personal data and the first condition under section 40(3)(a)(i) is satisfied, namely, that disclosure would amount to a breach of the first data protection principle (personal data should be processed fairly and lawfully) as the individuals concerned would have a reasonable expectation that their information would not be disclosed into the public domain. Section 40 is an absolute exemption and consideration of the public interest test in disclosure is not required.

## Section 41 – Information provided in confidence

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 NHS Improvement from third parties, in this case candidates for appointment.

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.

We consider that disclosure of the information would amount to an actionable breach of confidence. The information was shared by candidates in the expectation that it would be kept confidential by NHS Improvement and not be disclosed.

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. We have considered the public interest in transparency of work conducted by NHS Improvement. However, where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. In the present circumstances, NHS Improvement does not consider that there is a strong public interest in disregarding the duty of confidence.

### Question 5

The information requested is not held as the committee does not issue any reports.

## **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 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,

**NHS Improvement**