

21 March 2019

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

Dear ██████████

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

I refer to your email of 12 December 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:

*“I would like to see a copy of the minutes, agenda and papers/other information presented to the Nominations and Remuneration Committee on 22/10.”*

We have assumed you refer to the Nomination and Remuneration Committee meeting which occurred on 22 November 2018 (as the published corporate report erroneously refers to 22 October 2018).

### **Decision**

NHS Improvement holds the information that you have requested and has decided to release some of the information it holds: please refer to the information annexed. Some of the information is being withheld on the basis that it is exempt information under sections 36, 40 and 42 of the FOI Act.

Please note, the agenda paper was updated to include an additional paper hence the numbering with the agenda items do not match up.

### **Section 40 – Personal information**

Section 40(2) states that requested information is exempt from disclosure if the first or the second condition at section 40(3A)(a) of the FOI Act is satisfied. I consider that e-mail addresses, telephone numbers, names of non senior members of staff and detailed

information relating to remuneration are exempt from disclosure under section 40(2) of the FOI Act. This is on the grounds that they amounts to personal data and the first condition under section 40(3A)(a) is satisfied, namely that disclosure would amount to a breach of the first data protection principle (personal data should be processed lawfully, fairly and in a transparent manner) as the individuals concerned would have a reasonable expectation that these particular items of personal 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 36 – Prejudice to effective conduct of public affairs

Section 36(2) of the FOI Act states:

- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*
- (b) would, or would be likely to, inhibit—*
    - (i) the free and frank provision of advice, or*
    - (ii) the free and frank exchange of views for the purposes of deliberation, or*
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

NHS Improvement's qualified person is its CEO, Ian Dalton. Mr Dalton has decided to withhold some of the information requested on the basis that it falls within section 36(2)(b)(i), (ii) and (c) of the FOI Act.

The exemption is engaged as Mr Dalton is of the opinion that disclosure be likely to inhibit the free and frank exchange of advice, the free and frank exchange of views for the purposes of deliberation and would otherwise prejudice the effective conduct of public affairs.

In order to carry out its statutory functions NHS Improvement must be able to hold free and frank discussions, including sensitive discussions about the remuneration of staff. NHS Improvement need to be able able to discuss these issues without concern that the detail of those discussions or that advice will be disclosed. 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 and advice provided in such cases and would be likely result in an adverse impact on the ability of NHS Improvement to make effective decisions.

Furthermore, some of the information requested concerns the functions of other public bodies, namely: NHS England and the Department of Health and Social Care. Public authorities rely on a relationship of trust and confidence in working effectively together on a wide range of issues. Mr Dalton considers that disclosure would be likely to inhibit future discussions and damage the relationship of trust and confidence between NHS Improvement and these bodies. It would be likely to inhibit the free flow of views and information, resulting in a detrimental impact on the quality of any future decision making.

### Section 42 – Legal professional privilege

Section 42(1) of the FOI Act states:

*(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

The exemption is engaged as one of the papers presented during the meeting is subject to legal privilege and is therefore exempt under section 42(1) of the FOI Act.

#### *Public Interest test*

Sections 36 and 42 are subject to the public interest test. NHS Improvement's view is that, on balance, the public interest in maintaining the exemption outweighs the public interest in disclosure. In considering the balance, we have considered the public interest in transparency and openness in relation to decisions by public bodies, particularly decisions affecting the NHS.

We have however also considered the inherent public interest in the importance of the principle behind legal professional privilege. That is to safeguard openness in all communications between the client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

Additionally, we have also considered the strong public interest in NHS Improvement being able to hold free and frank discussions without concern that the detail of those discussions will be disclosed. If the information were to be released it would make it difficult for the committee to provide honest feedback and have the right discussions, which would be likely to make decision making and deliberations ineffective. There is a public interest in ensuring that staff are able to have the open and confidential discussions necessary to ensure the development of an effective approach. The public interest lies in a sensible, well considered approach, which can only come about when a safe space is provided in which to formulate and develop ideas. By disclosing the information requested and undermining this 'safe space', the quality of NHS Improvement's approach in the future would be negatively impacted.

#### **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,

**Jessica Dahlstrom**  
Head of Governance

Annex 1: Information withheld in part or full

<b>Annex 2: Agenda and papers presented</b>		
<b>Page number(s)</b>	<b>Decision</b>	<b>FOI exemption</b>
2	Withheld in part	Section 36(2) Section 42(1)
3 – 11	Withheld in full	Section 36(2) Section 40(2)
13	Withheld in part	Section 40(2)
17 – 19	Withheld in part	Section 36(2)
21 – 22	Withheld in part	Section 40(2)
26 – 27	Withheld in full	Section 40(2)
28 – 31	Withheld in full	Section 36(2) Section 40(2) Section 42(1)
<b>Annex 3: Minutes</b>		
<b>Page number(s)</b>	<b>Decision</b>	<b>FOI exemption</b>
1 – 5	Withheld in part	Section 36(2) Section 40(2)