

22 July 2020

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

Dear ██████████

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

We refer to your emails of 24 June 2020 and 28 June 2020 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**

On 24 June 2020, you made the following request:

*“Please provide me with the following information*

- 1. The dates of the panel hearings for WBSS candidates.*
- 2. The number of people who passed the panel.*
- 3. The ethnic background of people having passed the panel who asked for a job placement.*
- 4. The ethnic background of people who have been assigned a job placement.*

*When I say ethnic background I mean for example in my own case [redacted].*

*Please confirm in the reply the reference date of the information for each person in point 4 above i.e the date that the FOI Team confirmed with the WBSS team the data required to respond to point 4.*

*If you require any clarification as to any aspect of this request then please seek this clarification from me at the earliest opportunity possible.”*

On 28 June 2020, you sent the following emails:

*“You have not yet responded to acknowledge receipt of my FOI request below dated 24th June 2020 so I now ask that point 5 below be considered as if it were included in the original FOI request dated June 24th 2020 in terms of the 20 day upper limit for a response.*

5. Please confirm the ethnic background of each person who has passed panel and the number of coaching sessions with Working Transitions each such person has attended together with the rationale for why they have attended more than the mandated 3 coaching sessions should they have attended more than 3 coaching sessions.

*I look forward to hearing from you on all 5 points at the earliest opportunity possible as in a professionally run program the responses to my questions should already be available.”*

*“Please confirm in the reply the reference date of the information for each person in point 5 i.e the date that the FOI Team confirmed with the WBSS team the data required to respond to point 5.”*

## **Decision**

NHS Improvement holds the information you have requested and has decided to release some of the information it holds. Some of the information is being withheld under sections 40 and 41 of the FOI Act.

### Question 1 - The dates of the panel hearings for WBSS candidates.

4 March (1 candidate)  
11 March (2 candidates)  
17 March (2 candidates)  
18 March (2 candidates)  
25 March (1 candidate)  
26 June (1 candidate)

### Question 2 - The number of people who passed the panel.

6 candidates.

### Question 3 - The ethnic background of people having passed the panel who asked for a job placement.

NHS Improvement holds the information you have requested but is withholding this information under sections 40 and 41 of the FOI Act.

#### *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. We consider that the ethnic backgrounds of candidates who applied constitutes as their personal data and given the small number of candidates involved, we consider disclosing ethnic backgrounds would lead to candidates being identified.

We therefore consider this information 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 their ethnic backgrounds, and whether they have asked for (and been offered) a job placement, 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.

Our assessment is that the test in section 41(1)(a) is met as the information was obtained by NHS Improvement from candidates who applied for the scheme.

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; and
- (iii) disclosure must amount to an unauthorised use of the information to the detriment of the confider.

NHS Improvement considers that disclosure of the information would amount to an actionable breach of confidence in this case because it relates to the confidential records of candidates.

Under the provisions of the Equality Act 2010, NHS Improvement are required to demonstrate that their processes are fair and that they are not discriminating against or disadvantaging anyone because of their age, disability, gender reassignment status, marriage or civil partnership status, pregnancy or maternity, race, religion or belief, sex or sexual orientation. Therefore, NHS Improvement asked a series of questions to candidates who applied for the Whistleblowers' Support Scheme to ensure that no one is being unfairly discriminated against or disadvantaged. When gathering this information, we advised candidates that the information will only be linked to their application form for analysis purposes.

Section 41 is an absolute exemption which 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, for the reasons given above regarding the nature of the data, the purpose for which it was given to NHS Improvement, and the potential detrimental consequences of disclosure, we consider that there is a strong public interest in maintaining confidentiality and consequently the public interest in the duty of confidence overrides that of disclosure.

Question 4 - The ethnic background of people who have been assigned a job placement.

Please see the response provided to question 3.

Question 4a - Please confirm in the reply the reference date of the information for each person in point 4 above i.e the date that the FOI Team confirmed with the WBSS team the data required to respond to point 4.

24 June 2020

Question 5 - Please confirm the ethnic background of each person who has passed panel and the number of coaching sessions with Working Transitions each such person has attended together with the rationale for why they have attended more than the mandated 3 coaching sessions should they have attended more than 3 coaching sessions.

As of 28 June 2020, 3 participants have had additional coaching sessions after the initial 3 sessions. The reasons for additional coaching sessions are specific to each participant and for reasons set out in response to question 3 above, we consider this information is exempt under sections 40 and 41 of the FOI Act.

Question 5a - Please confirm in the reply the reference date of the information for each person in point 5 i.e the date that the FOI Team confirmed with the WBSS team the data required to respond to point 5

28 June 2020.

## **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, Skipton House, 80 London Road, London SE1 6LH 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**