

12 August 2020

██████████
By email: ██████████

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Dear ██████████,

Review of your request under the Freedom of Information Act 2000

We refer to your email of **2 August 2020** in which you requested an internal review of NHS Improvement's decision of 22 July 2020. Your original request is set out at Annex 1 of this letter.

Your request for an internal review was, in summary, as follows:

"I formally ask for an internal review of this shabby and shoddy response to my FOI request of June 24th 2020. There are in the region of 56 million people living in England, I therefore could not possibly identify specific individual(s) based on full and faithful responses to my FOI requests in the absence of any personally identifiable information. I have specifically not asked for any personally identifiable information, therefore, the use of the exemptions applied is wholly specious and without merit"

Decision

We have now completed an internal review of your request and confirm that we have decided to uphold the original decision. We have set out our reasons below.

For clarity, we provided you with the information to questions 1, 2, 4 (in part), and 5 (in part) in your original request. We have therefore assumed that you are dissatisfied with our response to question 3 and to the following parts of questions 4 & 5 in your original request, i.e.:

Question 3 – The ethnic background of people having passed the panel who asked for a job placement;

Question 4 – The ethnic background of people who have been assigned a job placement;

Question 5 - the ethnic background of each person who has passed panel...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.

Our internal review has focused on the above.

NHS Improvement does not record the reasons for individuals having additional coaching sessions.

Section 40 – Personal information

The ethnic background of candidates is special category personal data under Article 9 of the GDPR 2018. Processing this data is prohibited by law unless one of the exemptions in Article 9 applies. We consider that none are applicable in this case since we do not have explicit consent to release the information, and processing it is not necessary for any of the purposes listed. Additionally, to our knowledge, the candidates in question have not manifestly made this data public.

Section 41 – Information provided in confidence

Where indicated in the Annex, information is being withheld under section 41 of the FOI Act. Section 41(1) provides that information is exempt information 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 a third party, in this case the candidates in question.

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.

NHS Improvement considers that disclosure of the withheld information would amount to an actionable breach of confidence.

In reaching our decision to withhold the information in question under section 41, we have considered your points. The information relating to individuals’ ethnic backgrounds was provided to NHS Improvement in confidence and on the understanding that it would be used solely for analysis purposes linked to the application process, as explicitly set out in the Equal Opportunity forms which contain the information.

Individuals should be able to share information with NHS Improvement in the expectation that this will be kept confidential. NHS Improvement considers that it is crucial for trust to be maintained by those who impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to NHS Improvement of relevant information. This in turn would be likely to impair the effectiveness of NHS Improvement carrying out its public sector equality duty under the Equality Act 2010. Releasing this information may also lead to a loss of trust by the public in schemes which NHS Improvement either creates or participates in for the health sector.

For these reasons, we consider that section 41 applies and as it is an absolute exemption, the application of the public interest test under section 2(2) of the FOI Act is not required.

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 therefore considered the public interest in disclosing this information but consider that, in the present circumstances, it does not favour disclosure of the information withheld. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. The public (as well as the trusts that we regulate) would lose confidence in NHS Improvement as a regulator if information provided to it in confidence was disclosed.

Review rights

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

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

Annex 1

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.