

19 January 2017

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Dear [REDACTED]

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

I refer to your letter dated 8 November 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 and the TDA.

Your request

You made the following request:

“In accordance with the provisions of the Freedom of Information Act 2000 I request the following information from the National Health Service:

- 1. Copies of all letters, e-mails, notes of telephone conversations and other communications between NHS Improvement and Mrs K Lavery and between Yorkshire Ambulance Service NHS Trust and Mrs K Lavery since 5 July 2016.*
- 2. A copy of the report and decision of the investigation panel convened to investigate the information about Mrs Lavery relating to her positions at Johnnie Johnson Housing Trust and Hull and East Yorkshire Community Foundation provided by me in my letter and attachments to NHS Improvement dated 5 July 2016.*
- 3. Any other documents relating to the above including correspondence between the recipients of my letter to NHS Improvement dated 5 July 2016.”*

I am sorry for the delay in responding to your request. Due to an administrative oversight, the team responsible for FOI requests at NHS Improvement did not receive your request until 12 December. Our response was then further delayed due to staff annual leave over the Christmas period.

Decision

Please note that NHS Improvement can only respond to your request in relation to the information that it holds. We are unable to respond in relation to any information that may be held by other NHS organisations that is not also held by NHS Improvement.

NHS Improvement holds information relevant to your request.

Part 1 of your request

In relation to part 1 of your request, NHS Improvement holds correspondence between itself and Kathryn Lavery, Chair of Yorkshire Ambulance Service NHS Trust (the **Trust**). This comprises emails and letters both before and after the panel (the **Panel**) convened to consider the issues relating to Hull and East Yorkshire Community Foundation (**HEYCF**) and Johnnie Johnson Housing Trust (**JJHT**) and whether to take any action in relation to Kathryn Lavery in connection with those issues. As set out in Jim Mackey's letter to you dated 1 November 2016, the Panel decided, taking into account all of the circumstances, to recommend that no action was taken in relation to Kathryn Lavery. NHS Improvement is, however, working with Mrs Lavery to ensure that she has learned from her experience at HEYCF and JJHT and that such lessons are used to ensure the effective governance of the Trust.

NHS Improvement has not treated as within the scope of your request certain correspondence it holds with Kathryn Lavery concerning attendance at chair networking events and the re-appointment of certain NEDs at the Trust as these are unconnected with the above issues.

NHS Improvement does not hold any correspondence between the Trust and Kathryn Lavery. As above, NHS Improvement can only respond to your request in relation to the information that it holds.

Part 2 of your request

In relation to part 2 of your request, NHS Improvement holds a report of written evidence to be considered by the Panel and a note of the meeting of the Panel, which includes the decision of the Panel.

Part 3 of your request

NHS Improvement holds a paper to its Provider Leadership Committee in connection with Kathryn Lavery and the issues relating to HEYCF and JJHT. It does not hold any correspondence between the recipients of your letter to NHS Improvement dated 5 July 2016.

NHS Improvement has decided to withhold all of the above information on the basis of the applicability of the exemptions in sections 31, 40 and 41 of the FOI Act, as explained in detail below.

Section 31 – law enforcement

NHSI considers that the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act which provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

NHSI considers that section 31(2)(c) is engaged and that disclosure of the information in question would be likely to prejudice the exercise by the TDA of its functions for the purpose of ascertaining whether circumstances exist or may arise which would justify regulatory action in pursuance of an enactment.

Under regulation 9(3) of the National Health Service Trusts (Membership and Procedure) Regulations 1990 (the **Membership and Procedure Regulations**), if the Secretary of State is of the opinion that it is not in the interests of the health service for a person appointed as a chairman or non-executive director of an NHS trust to continue to hold that office, the Secretary of State may forthwith terminate that person's tenure of office. Under the National Health Service Trust Development Authority Directions 2013, the Secretary of State directed the Trust Development Authority to exercise the above functions in so far as they relate to the chair and non-executive directors of English NHS trusts.

NHS Improvement considers disclosure of the requested information would be likely to prejudice the exercise of the TDA's functions for the purpose of ascertaining whether circumstances exist or may arise which would justify the exercise of its functions under regulation 9(3) of the Membership and Procedure Regulations. It would be likely to have a considerable impact on the willingness of chairs and other non-executive directors of NHS trusts to provide information to us on an open basis, and is likely to lead to less detailed information being provided in cases where TDA is considering exercising the above functions. We consider that it is essential that TDA is able to communicate with the chairs and non-executive directors of NHS trusts in a full and frank manner without concern that matters forming the basis of TDA's assessment of whether to exercise the above functions will enter the public domain.

In addition, disclosure of the considerations of the Panel in relation to whether to recommend that the TDA exercises the above functions is likely to prejudice the exercise of those functions in other cases.

In addition, it is noted in this context and set out in more detail below, that some of the information is confidential.

Public interest test

The public interest in accountability and transparency by making access to the information available has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted.

NHS Improvement has concluded that the need to avoid adversely affecting its functions described above and the need to ensure that chairs and non-executive directors are able to

share information with Monitor without fear that such disclosures will enter the public domain outweighs the public interest in disclosure of the information.

Section 41 – information provided in confidence

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.'

In relation to some of the information, the test in section 41(1)(a) is met as the information was obtained by Monitor from a third party, in this case the Chair of the Trust.

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount to an actionable breach of confidence. For a breach of confidence to be actionable:

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

Monitor considers that disclosure of some of the information you have requested would necessarily reveal sensitive information regarding the Chair of the Trust, which would amount to an actionable breach of confidence. The information was provided by the Chair in the expectation that it would be kept confidential.

Section 41 is an absolute exemption and the application of the public interest test pursuant to 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 nevertheless 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, we do not consider that there is a strong public interest in disregarding the duty of confidence owed to the Chair of the Trust.

Section 40 – personal information

Under section 40 of the FOI Act, information is protected from disclosure if it is personal data protected under the Data Protection Act 1998 ("the DPA"). Section 40(7) of the FOI Act provides that the relevant definition of personal data is that set out at section 1(1) of the DPA:

"personal data" means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data, and other information which is in the possession of, or is likely to come

*into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the
intentions of the data controller or any other person in respect of the individual.*

Some of the information in the documents is being withheld 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) is satisfied, namely, that disclosure would amount to a breach of the first data protection principle (personal data should be processed fairly and lawfully).

Some of the information being withheld comprises personal details about the Chair of the Trust and she would have had a reasonable expectation that this information would be withheld. This is an absolute exemption and consideration of the public interest in disclosure is not required.

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.

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,



Janice Scanlon

Head of Non-executive Development