

23 December 2020

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E: nhsi.enquiries@nhs.net
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Minh Alexander

By email

Minhalexander@aol.com

Dear Dr Alexander

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

We refer to your email of 26 August 2020 in which you requested information under the FOI Act from NHS Improvement. Please accept our apologies for the delay in responding.

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

The full terms of your email has been annexed.

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 36 and 40 of the FOI Act as explained in detail below.

Please find attached copies of the meeting notes and attachments for the Kark Reference Group which took place on 19 September 2019, 4 November 2019 and 19 December 2019.

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 names of non-senior members of staff and certain job titles which would lead to staff being identified 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 their personal data 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

We consider some material is exempt from disclosure under section 36(2) of the FOI Act. It is the opinion of NHS Improvement's qualified person, its Chief Executive (Amanda Pritchard), that disclosure of this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and would be likely otherwise to prejudice the effective conduct of public affairs (section 36(2)(b)(ii) and (c) respectively).

NHS Improvement staff must be able to hold free and frank discussions for the purposes of deliberation, including sensitive discussions, without concern that the detail of those discussions 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 provided in such cases, which would be likely result in an adverse impact on the ability of NHS Improvement to make effective decisions and develop policies.

We also consider it is important to enable the wider health sector to discuss policy development in a safe space and openly share information without fear of premature disclosure. The Kark Reference Group is represented by various public authorities and we consider disclosure would be likely to prejudice effective cross working across government departments.

Public interest test

Section 36 is a qualified exemptions and a public interest test must be carried out to determine whether the exemption should be maintained. We consider that there is a public interest in transparency and openness in relation to decisions made by public bodies, particularly decisions affecting the NHS. However, we consider that there is a stronger public interest in giving NHS Improvement the space openly to exchange information, including the analysis and views of staff, without disclosing the same to a wider audience.

We have taken into account that we have previously provided you with the meeting notes of the Kark Reference Group which took place on 21 August 2020 (subject to the removal of personal data). However, we consider that particular material would not prejudice the effective conduct of public affairs.

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 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.

Publication

We reserve the right to publish this letter and the attached information 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 any version of the letter published on our website to protect your personal information from general disclosure.

Yours sincerely,

NHS Improvement

Annex – Email received by NHS Improvement on 26 August 2020

BY EMAIL

Prerana Isaar
NHS Chief People Officer
NHS Improvement/ England
26 August 2020

Dear Prerana,

Kark Fit and Proper Person Review implementation by NHSI & continuing impunity for NHS whistleblower reprisal by very senior managers

I write to enquire about the progress of NHS Improvement's work on implementing the [Kark Review on Fit and Proper Persons test in the NHS](#), and to request related data.

The COVID-19 pandemic has tragically highlighted the enormous risk presented to both staff and patients by poor whistleblowing governance in the NHS, with threats to staff who raised concerns about lack of PPE, hundreds of staff deaths and avoidable in-hospital transmission of COVID-19.

I am sure you are aware that Tom Kark QC and his colleague Jane Russell, whilst stopping short of full NHS managerial regulation, made recommendations from his FPP review which included:

- The power to disbar directors for serious misconduct
- That a central database of directors should be created holding relevant information about qualifications and history
- The FPPT should be extended to all Commissioners and other appropriate Arms-Length Bodies (including NHSI and NHSE)
- All directors (executive, non-executive and interim) should meet specified standards of competence to sit on the board of any health providing organisation. Where necessary, training should be available.
- The creation of a mandatory reference requirement for each Director

You may also recall that the Kark review stressed the vital importance of good whistleblowing governance in the NHS, and the need to track, deter and robustly manage any whistleblower suppression or victimisation. The review recommended:

- Specified standards of competence for sitting on any health organisation board should include understanding of "The importance of learning from whistleblowing and 'speaking up'"
- The proposed central database on NHS directors should specifically include a record of "Any upheld whistleblowing complaint"

- That Serious Misconduct meriting disbarment should include “Victimisation or knowingly allowing the victimisation of: whistleblowers; those raising concerns with the Freedom to Speak Up Guardian; or those complying with the duty of candour”

The review also recommended that several other types of misconduct, that typically cluster around badly handled whistleblowing cases, should also be classed as Serious Misconduct worthy of disbarment:

- Dishonesty;
- Deliberate bullying;
- Deliberate discrimination, harassment or victimisation;
- Victimisation or knowingly allowing the victimisation of: whistleblowers; those raising concerns with the Freedom to Speak Up Guardian; or those complying with the duty of candour;
- Causing, facilitating, colluding in, or requiring any staff member to fail to comply with the duty of candour including by means of a settlement or confidentiality agreement; • Causing, facilitating or colluding in the reckless mismanagement of an organisation resulting in the compromise of patient safety;
- Falsification, concealment or suppression of records, data or other information which is required to be provided to any other person or organisation;
- Encouraging, facilitating or colluding in the falsification, concealment or suppression of records, data or other information which is required to be provided to any other person or organisation;
- Encouraging, facilitating, or colluding in the provision of false or misleading records, data or other information which is required to be provided to any other person or organisation;

Regarding the point on 'deliberate bullying', it is relevant that Robert Francis advised in his report of the Freedom To Speak Up Review that failure to *modify* bullying behaviour should “always” be a disciplinary matter:

“Failure to modify behaviour or repeated failings of this sort should however always be a matter for disciplinary action.”

http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

Alas, is clear that NHS directors at all levels, from provider services to regulators, continue to silence and harm whistleblowers with impunity.

I list below a few egregious cases of inadequate accountability, which reflect a continuing lack of commitment by NHSI/E to genuinely tackle highly unsafe culture.

The NHS continues to employ NHS directors who have been found by Employment Tribunals to have harmed whistleblowers:

1. The current director of Human Resources at Cornwall Partnership NHS Foundation Trust was criticised by an ET for [whistleblower detriment](#) against two staff.

The Care Quality Commission (CQC) [denied this breached regulation 5 FPPR](#) and currently rates the organisation ["Good"](#), including on the "Well Led" domain.

By any common sense standard, it is highly worrying for an NHS organisation to employ an HR director who has harmed whistleblowers.

2. The current Chief Executive and former medical director of University Birmingham Hospitals NHS Foundation Trust was criticised by an ET for misleading the General Medical Council (GMC) when he referred a doctor who had made protected disclosures and for overstating criticism of this doctor. The Employment Appeal Tribunal has dismissed a trust appeal, criticising the fact that the trust appealed.

Yet the CQC and GMC have taken an inordinate length of time in processing several FPPR and FTP referrals, first made almost 2 years ago.

3. A trust director of nursing who was [personally criticised by an ET](#) for harming a whistleblower was later [feted by the CQC](#) and hired as an Improvement Director by NHS Improvement.

NHS Improvement has conceded that the ET judgment was a concern, but merely said the individual had been spoken to and invited to reflect.

She was assigned as NHS Improvement Director to a very troubled NHS trust, Worcestershire Acute Hospitals, which itself has a history of management bullying and whistleblower victimisation.

4. Equally, the CEO of the Royal Wolverhampton NHS Trust was found by independent review by Verita to have harmed a whistleblower, but a related Deloitte governance review commissioned by NHSI reduced concerns to a matter of "personal style" and advised that he should reflect.

Of relevance, another whistleblower case which occurred under his stewardship included a vexatious GMC referral by the trust, an anonymous death threat to the whistleblower and criminal damage to his office with [racist graffiti](#) scrawled referring to the whistleblower's Black wife.

This second Wolverhampton whistleblower had to challenge a factually inaccurate CQC inspection report which helped to cover the wrong doing about which he raised concerns.

[The then CQC Chief Inspector claimed there had been a "typo"](#).

Lastly, the CQC also concluded [no breach of regulation 5 FPPR](#) with regard to the Wolverhampton CEO.



David Loughton
@david_loughton

Thank you to Dr Henrietta Hughes, NHS National Guardian & Kate Whittaker, Regional Liaison Lead (NG Office, Midlands) for visiting RWT today. A great opportunity to show the progress made by our own Freedom To Speak Up Guardian @Neely8381 in promoting an open & honest culture.



2:37 pm · 25 Oct 2019 · [Twitter Web App](#)

NHSI/E promised in its most recent NHS People Plan to model behaviours to support an effective speaking up culture.

Information request: I would be grateful to be assured of progress. I have not received any updates on the outcome of NHS Improvement's work on implementing the Kark FPP review. Please advise if the work has concluded, and if not, what the is the remaining work programme, including timescales. Please could NHSI also share all meeting records of the Kark Reference Group from August 2019 onwards (I already have the 21 August 2019 meeting notes), including any attachments and reports tabled at these meetings.

Ideally, I would also appreciate some indication of how you as Chief People Officer for the NHS will reconcile the pledges in the NHS People Plan with the continued employment of very senior NHS managers who have been found to have harmed whistleblowers.

Whistleblowing Law Reform

Finally for information, Dr Philippa Whitford MP has introduced a new Bill to replace current, unfit UK whistleblowing law. It introduced principles of genuine accountability for individuals who silence and harm whistleblowers and provides for criminal and civil sanctions to deter

and manage misconduct. I would be delighted if you, Danny and Chris would care to sign a related petition calling for UK whistleblowing law reform:

This is the link to the Westminster petition:

[Replace UK whistleblowing law, and protect whistleblowers and the public](#)

With best wishes,

Minh

Dr Minh Alexander
NHS whistleblower and former consultant psychiatrist

Cc Danny Mortimer CEO NHS Employers
Chris Hopson CEO NHS Providers
Tom Kark QC
Jane Russell Barrister