

**From:** NHSE/I FOI TEAM <REDACTED >

**Subject: Re: Freedom of Information request - Response - Our ref: FOI-2201-1677422, ICO ref: IC-157517-L1K3 NHSE:0094860**

**Date:** 27 April 2022 at 15:34:31 BST

**To:** Minh Alexander <REDACTED >

Dear Minh Alexander,

We refer to your email of 26 January 2022 in which you requested information under the FOI Act from NHS Improvement. Please accept our apologies for the delay in responding.

### The Healthcare Safety Investigation Branch (HSIB)

By way of advice and assistance, and in accordance with our duties under s. 16 FOIA, we considered it would first be helpful to set out some background to HSIB and the review that was undertaken by the Kings Fund.

HSIB is the safety investigation branch of the National Health Service Trust Development Authority, established under the National Health Service Trust Development Authority (Healthcare Safety Investigation Branch) Directions 2016. HSIB has been operational since 01 April 2017.

HSIB was set up to discharge the Secretary of State duties in relation to the promotion of a comprehensive health service and securing continuous improvement in the quality of services. Its purpose is to conduct effective investigations, and by sharing what we learn, improve patient safety, raise standards, and support learning across the healthcare system in England.

In 2017 the National Health Service Trust Development Authority (Healthcare Safety Investigation Branch) (Additional Investigatory Functions in respect of Maternity Cases) Directions 2018 gave additional functions to HSIB in respect of maternity cases.

Monitor and the National Health Service Trust Development Authority have come together under the operational name NHS Improvement, combining the functions and responsibilities of the two statutory bodies in a single integrated organisation. For the purposes of this letter, NHS Improvement means the National Health Service Trust Development Authority.

### **Your request**

You made the following request:

*“FOI request Kings Fund external review and leadership issues at HSIB*

*With reference to reports in the last week by the Health Service Journal and The Independent about serious issues of culture, racism and bullying at HSIB that were reported in an external review by the Kings Fund, please disclose:*

*1. When was this external review by the Kings Fund commissioned?*

2. *Who in NHS England/ NHS Improvement commissioned this external review?*
3. *Why was the external review commissioned? What were the trigger/triggers?*
4. *Did any HSIB staff make protected disclosures about any matters, events, acts or omissions at HSIB?*

*If so,*

- i) If NHSE/ NHSI's holds the data, how many HSIB staff made such disclosures*
- ii) If NHSE/ NHSI's holds the data, how many disclosures were made*
- iii) If NHSE/ NHSI's holds the data, over what period were the disclosures made?*
- iv) If NHSE/ NHSI's holds the data, broadly what did the disclosures concern?*

*5. Please share the correspondence between the Kings Fund and NHSE/ NHSI that related to the commissioning of the external review from the Kings Fund and to the production of the review report*

*6. Please disclose a copy of the above mentioned external review report on HSIB by the Kings Fund"*

## **Decision**

NHS Improvement holds information in relation to your request and has decided to release some of the information that it holds.

Some of the information is being withheld under sections 36, 40, 41 and 43 of the FOI Act as explained in detail below.

### **1. When was this external review by the Kings Fund commissioned?**

It was commissioned in May 2021 and the Data Sharing Agreement was signed in June 2021.

### **1. Who in NHS England / NHS Improvement commissioned this external review?**

Aidan Fowler, National Medical Director for Patient Safety

### **1. Why was the external review commissioned? What were the trigger/triggers?**

It was triggered by concerns raised by staff under Freedom to Speak Up (FTSU),

work in confidence and HR.

1. **Did any HSIB staff make protected disclosures about any matters, events, acts or omissions at HSIB?**

We have interpreted this question as disclosures made by HSIB staff in relation to the King's Fund Review.

We can confirm that HSIB staff did make a disclosure which would be regarded a 'protected disclosure' for the purposes of the Employment Rights Act 1996, ahead of the King's Fund Review. This was done under the Freedom to Speak Up capacity.

Please note, if your query this refers to conversations HSIB staff had with the investigation team from The Kings Fund (TKF), then any protected disclosures given during meetings and interviews coordinated by TKF would have been retained by them, and are not held by HSIB.

**If so,**

- i. **If NHSE/I's holds the data, how many HSIB staff made such disclosures**
- ii. **If NHSE/I's holds the data, how many disclosures were made**
- iii. **If NHSE/I's holds the data, over what period were the disclosures made?**
- iv. **If NHSE/I's holds the data, broadly what did the disclosures concern?**

NHS Improvement confirms it holds this information but is withholding it under sections 40 and 41 of the FOI Act.

#### Section 40 – personal data

Given the small number of disclosures made we consider release of this information could lead to the individual(s) who made them being identified, or at least a strong inference being drawn as to their identity.

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.

This is on the grounds that it 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 individual(s) 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 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.”*

We consider the information being requested is exempt under section 41 of the FOI Act.

The test in section 41(1)(a) is met as the information was obtained by NHS Improvement (as an organisation) from another person (i.e. its employee(s)).

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.

We consider the information we hold has the necessary quality of confidence in that it is not trivial or otherwise accessible. The information was disclosed to NHS Improvement under the Freedom to Speak Up capacity which allows individuals to share any concerns in confidence. We consider the manner in which the information was obtained by NHS Improvement gives rise to an obligation of confidence owed to the individual by NHS Improvement.

We consider disclosure or an unauthorised use of this information would cause detriment to the confider(s). Given the nature of the subject matter and the small number of disclosure(s) made, releasing this information could lead to individuals being identified. We are assured any breach of confidence in this regard would amount to an actionable breach of confidence for the reasons set out above.

Section 41 is an absolute exemption and 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, NHS Improvement does not consider that there is a strong public interest in disregarding the duty of confidence.

1. **Please share the correspondence between the Kings Fund and NHSE/I that related to**

a. **the commissioning of the external review from the Kings Fund, and**

Please find attached the information we hold

We are withholding the names, job titles and direct contact information of non senior staff members within NHS Improvement. We are also withholding the personal data of those from external organisation. This is being withheld under section 40(2) of the FOI Act.

We further consider some of the material we hold is exempt under section 43 of the FOI Act as explained in detail below.

Section 43 – Commercial interests

Information is exempt under section 43(2) if its release would or would be likely to prejudice the commercial interests of any person, including the public authority holding the information.

A commercial interest relates to a legal person's ability to participate competitively in a commercial activity (i.e. the buying and selling of goods or services).

Some of the information in scope contains financial and commercially sensitive data which if disclosed, would be likely to cause prejudice to the third-party providers. We consider disclosing information such as a cost breakdown of the services provided by TKF would be likely to prejudice TKF's commercial interests. For example, competitors could use this detailed pricing information to their advantage and structure their own proposals when procuring similar work.

Section 43 is a 'qualified exemption' and therefore NHS Improvement is required to conduct the public interest test, which assesses whether releasing the information would be in the public interest despite the prejudice test being satisfied.

NHS Improvement considers that there is a public interest in disclosure of the withheld information as it promotes openness and transparency within the NHS. However, we consider there is a stronger public interest in allowing third-party organisations to work with our organisation without jeopardising their commercial interests.

On balance, we have concluded that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case.

a. **to the production of the review report**

We confirm we hold a draft copy of report produced by TKF's which was shared with NHS Improvement to allow feedback. However, we are withholding this information under section 36 of the FOI Act explained below.

Section 36 – Prejudice to effective conduct of public affairs

Section 36(2) of the FOI Act states:

1. *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 —*
  - a. *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*

For the purposes of the FOI Act, NHS Improvement's qualified person is its Chief Executive. In the opinion of our qualified person, the information in scope of your request meets the required threshold under section 36 36(2)(b)(i) and (ii) of the FOI Act.

In respect of the prejudice test, the Information Commissioner's Office (ICO) have produced guidance which states that public authorities must confirm whether disclosure "would" or "would be likely" to cause harm if material were disclosed. The view of our qualified person is that the disclosure of the draft report would inhibit the free and frank exchange of advice and the free and frank exchange of views for the purposes of deliberation. Whereas, some of the other material would be likely to cause the harm cited under section 36(2)(b)(i) and (ii).

In order to carry out its statutory functions NHS Improvement must be able to hold free and frank discussions, including sensitive discussions. NHS Improvement needs to be able to discuss these issues without concern that the detail of those discussions or that advice will be disclosed. These activities need to be undertaken in a 'safe space'. If this material were published, it would 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 result in an adverse impact on the ability of NHS Improvement to make effective decisions and change.

#### *Public Interest test*

Section 36 is 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 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 colleagues 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.

We have also taken into account that in response to this request we are disclosing the final report produced by TKF which goes a significant way in meeting the public interest in this regard.

1. **Please disclose a copy of the above mentioned external review report on HSIB by the Kings Fund**

Please find attached a copy of the report.

We have withheld the names of certain individuals contained within the report under section 40(2) of the FOI Act.

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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).

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Yours sincerely,

## NHS Improvement

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