

17 July 2017

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By email

Dear [REDACTED]

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

I refer to your email of **19 June 2017** in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority (TDA) 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:

“1) Please provide a breakdown of all NHS providers total agency spend figures for 2016/17, split by each organisation.

2) NHS providers total gross pay costs on all staff in 2016/17, split by each organisation.”

Decision

NHS Improvement holds some of the information that you have requested.

NHS Improvement has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in section 21, 22, 31, 41 and 43 of the FOI Act, as explained in detail below.

Question One

NHS Improvement holds some of the information requested.

The information NHS Improvement holds on total agency spend is publicly available and can be found in our quarterly finance reports. NHS Improvement’s most recent report can be found here: https://improvement.nhs.uk/uploads/documents/Quarter_Three_201617_-_NHS_provider_sector_performance_report_-_Feb_2017.pdf. Therefore, NHS Improvement has decided to withhold that information on the basis of the applicability of the exemption in section 21.

NHS Improvement has decided to withhold the remaining information we hold on the basis of the applicability of the exemptions in section 43, 31 and 41 of the FOI Act.

Question Two

NHS Improvement holds the information requested.

NHS Improvement has decided to withhold all the information we hold on the basis of the applicability of the exemption in section 22 of the FOI Act. This information will be included in the Trust's annual accounts and will be published as part of that process.

Please note that NHS foundation trusts, NHS trusts, and the Department of Health are subject to the FOI Act and as such it is open to you to seek information directly from them. They will need to consider whether information can properly be provided by them in response to any such requests within the terms of the FOI Act.

Section 21

Section 21(1) of the FOI Act provides that information is exempt if it is reasonably accessible to the applicant by other means.

NHS Improvement has published information relevant to this FOI request in our quarterly finance reports. NHS Improvement's most recent report can be found here: <https://improvement.nhs.uk/uploads/documents/Quarter Three 201617 - NHS provider sector performance report - Feb 2017.pdf>.

Section 41

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 third parties, in this case providers.

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 information would amount to an actionable breach of confidence. The information shared by providers is potentially commercially sensitive and is shared by them on an expectation that it would be kept confidential by NHS Improvement.

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 a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. For the reasons stated above, NHS Improvement does not consider there is a strong public interest in disregarding the duty of confidence owed to NHS trusts and foundation trusts.

Section 43 (Commercial interests)

Section 43(2) of the FOI Act provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).

NHS Improvement considers the data it holds regarding agency figures at hospitals in England, to be commercially sensitive.

Section 22 (Information intended for future publication)

Section 22 provides that information is exempt information if:

- (a) the information is held by the public authority with a view to its publication, by the authority or some other person, at some future date (whether determined or not);
- (b) the information was already held with a view to such publication at the time when the request for information was made; and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a) above.

Trusts are required to present their annual report to parliament every financial year. Foundation trusts are similarly required to publish their annual report and accounts, pursuant to Schedule 7, paragraph 25 (4) of the National Health Service Act 2006. These reports contain the information on pay costs you have requested in question two of your FOI request, therefore the information will be published in due course as part of that process.

Public interest test

Sections 22, 31 and 43 of the FOI Act are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemption should be maintained.

We consider that in relation to agency spend figures for NHS providers, there is a public interest in transparency. This public interest is met by our disclosure of the information in a way that safeguards the interests described above that we are seeking to protect, together with the information that will shortly be in the public domain virtue of the NHS Act 2006.

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,

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke at the end.

Martin Innes
Senior Operational Agency Data and Intelligence Lead