

13 December 2017

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By email

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Dear

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

I refer to your email of **17 November 2017** in which you requested information under the FOI Act from NHS Improvement.

Your request

You made the following request:

“I am writing to you under the Freedom of Information Act 2000 to request the following information for the quarter 2, 2017/18 financial period (month ended 30 September 2017):

1) For each NHS provider, please provide the following figures:

- a) Agency pay*
- b) Bank pay*
- c) External bank pay*
- d) Gross pay*

2) In addition to providing these figures, please provide a detailed description of what is included in each of them (e.g. what elements get coded as 'agency').

3) Are direct recruitment costs recorded by providers, and if so, how are these captured within reporting (e.g. included within gross pay costs)?

4) Are training costs recorded by providers, and if so, how are these captured within accounts reporting?”

Decision

NHS Improvement holds some of the information that you have requested. We have set out our responses to your questions in turn:

Question 1

NHS Improvement holds the information you have requested, although (c) (external bank pay) is not held separately, rather it is held within our overall bank figure (i.e. within (b), as explained below in our response to question 2). We have decided to release the information we have in the form of a performance league table rather than actual spend (which we are withholding on the basis of the applicability of the exemptions in sections 31, 33 and 43 of the FOI Act as detailed below), and we are also withholding the information we have on gross pay for the same reasons. The information we are releasing is attached.

Please note that NHS foundation trusts and NHS trusts 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 31 – law enforcement

NHS Improvement 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).

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

The conditions of Monitor's provider licence enable Monitor to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Health and Social Care Act 2012 ("the 2012 Act"). Monitor will take into account NHS foundation trusts' inefficient or uneconomic spending practices, including any that relate to agency spending, as a measure of governance and in monitoring NHS foundation trusts' compliance with the licence.

Section 5 of The National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 ("the 2016 Directions") provides that the TDA must exercise its functions with the objective of ensuring that English NHS trusts are able to comply with their duty under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively – by, for example, establishing and maintaining best practice corporate governance arrangements and financial management standards, and effectively implementing systems and processes.

Paragraph 12.2 of the agency rules, published by NHS Improvement in March 2016, makes it clear that NHS Improvement may investigate foundation trusts if there is sufficient evidence to suggest inefficient and/or uneconomical spending (e.g. agency and management consultant spend) which indicates wider governance concerns, and NHS trusts that are not managing their agency spend effectively. Also, trust performance against agency spend is a metric in the Single Oversight Framework which will be monitored on an on-going basis.

NHS Improvement considers that disclosing actual figures of trust agency/bank spend and gross pay is likely to prejudice the on-going monitoring by NHS Improvement of providers' compliance with the rules, which is necessary for NHS Improvement to take into account in any decision of regulatory action needed in respect of a failure to comply with the rules.

NHS Improvement relies on the full and frank information from trusts in order to carry out its functions effectively. NHS Improvement relies on having a safe space in which providers are freely able to share sensitive and confidential information in the knowledge that the information, or any analysis derived directly from it, will not be disclosed more widely. To disclose that information more widely is likely to have a detrimental impact on the quality and content of exchanges between NHS Improvement and the bodies it collectively regulates and its ability to make effective and fully informed regulatory decisions.

Section 33 – audit functions

Sections 33(1)(b) and 33(2) of the FOI Act provide that information may be exempt from disclosure where disclosure would, or would be likely to, prejudice the exercise of any public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

NHS Improvement considers that the withheld information, in so far as it relates to foundation trusts, is exempt under section 33(1)(b) on the basis that Monitor has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources, which is likely to be prejudiced by releasing the withheld information.

Monitor has these functions by virtue of Monitor's general duty under section 62(1)(a) of the 2012 Act to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient and effective and improves the quality of services.

NHS Improvement considers that the withheld information, in so far as it relates to NHS trusts is also exempt under section 33(1)(b) on the basis that the TDA has functions relating to the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources in discharging their functions (as described above), which is likely to be prejudiced by the release of the information that is being withheld.

As noted above, NHS Improvement depends on the free and frank provision of information from trusts without fear of this being shared more widely, and considers (as explained above) that disclosure would be likely to have a detrimental impact on the quality and content of those exchanges in the future if details or any analysis derived from those details was published to the public at large. This would in turn be likely to have a prejudicial impact on the exercise of NHS Improvement's regulatory functions.

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.

The actual figures for each trust's gross pay relates to financial information, which by its nature is commercially sensitive and disclosure of which is likely to be detrimental to the providers' legitimate commercial interests. For example, parties seeking to negotiate contracts with a provider could use this information to strengthen their own bargaining position when negotiating for, or providing services to, that provider. We consider that the information relating to a provider's gross pay is commercially sensitive.

Public interest test

Sections 31, 33 and 43 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 the finances of public authorities there is a public interest in transparency and that this is met by our disclosure of the information in a way that safeguards the interests described above that we are seeking to protect.

Question 2

Agency pay relates to non-payroll staff such as agency workers, interim managers and specialist contractors.

Bank and external bank pay includes all bank staff spending, including external banks.

Gross pay is the total of all staff costs, including the cost of all staff on the payroll and all agency and bank staff.

Question 3

Direct recruitment costs are not recorded separately by providers in their accounts.

Question 4

Training costs will be fully recorded by providers in 2017/18. The cost of "education and training" will be recorded in the annual accounts for 2017/18 which will be published information available after the end of the financial year.

Please note that NHS foundation trusts and NHS trusts 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.

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 and the attached information 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