

10 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 **22 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 (“NHS TDA”) are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the NHS TDA.

Your request

You made the following request:

“Under the FOI act for my research on NHS hospitals and staffing issues.

Please can I have a list of hospitals that have had to break glass for nursing shifts due to staff shortages etc.

Break glass meaning that the trust have had to either increase pay rate or use off framework agencies.

Please can I have a breakdown of spend per hospital in order of hospitals that have spent the most on them breaking glass.”

Decision

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

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

NHS Improvement only holds information on hospitals in England. For England, we hold only total agency spend for nursing and not off framework nursing agencies.

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 NHS Improvement has therefore decided to withhold that information on the basis of the applicability of the exemption in section 21, as explained below.

Since 1 April 2017, NHS Improvement has been collecting increased weekly data from trusts, including additional data on shifts that are both off framework and above price caps. This data does not give full information on total off framework spend. NHS Improvement does not hold full information on total spend per hospital on nursing agency off framework spend.

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

NHS Improvement collects weekly information from trusts on the number of off framework shifts across all staff groups. Information up to the end of March was recently published here: <https://improvement.nhs.uk/about-us/corporate-publications/publications/foi-agency-overrides-trust/>. Through the 'break glass' clause, all trusts are permitted to use off framework agency staff in exceptional patient grounds. We have previously advised that all trusts have used the 'break glass' clause, although we cannot confirm if this is for framework breaches.

NHS Improvement is withholding the information it holds on the number of off framework shifts across all staff groups at these hospitals. We have decided to withhold the information we hold on the basis of the applicability of the exemptions in section 43, 31 and 41.

Section 21 (information accessible to applicant by other means)

Section 21 of the FOI Act provides that information is exempt if it is reasonably accessible to the applicant by other means. As set out above, NHS Improvement has published information relevant to relevant to this FOI request in our quarterly finance reports and has therefore decided to withhold that information on the basis of the applicability of the exemption in section 21.

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 that 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.

NSH 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 set out 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 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 NHS Improvement of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment. NHS Improvement considers that releasing the data collected weekly from trusts on off framework agency shifts would be likely to prejudice its relationship with providers and therefore NHS Improvement's regulatory role in the performance of the service.

Paragraph 12.2 of the agency rules, published by NHS Improvement in March 2016 ("the rules"), 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 spend effectively.

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 43 (prejudice to 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.

NHS Improvement considers the data it holds regarding nursing shifts that are off framework at hospitals in England, to be commercially sensitive.

Public interest test

Section 43 and 31 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 there is a public interest in transparency and that this is met by our disclosure of information in this letter in a way that safeguards the interests described above that we are seeking to protect, together with the information already available to the public.

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.

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