

11 August 2017

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By email

[REDACTED]

Dear [REDACTED]

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

I refer to your email of **18 July 2017** in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority 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:

“Please provide bank spend from July 2015 to date (or from date of first reporting, should that date be more recent), broken down by trust and staff group. The ideal format would be similar to the recent agency spend data release Excel spreadsheets.

Decision

NHS Improvement holds the information that you have requested and has decided to release the information that it holds but only in the form below.

2015/16:	1,768m
2016/17:	2,513m

NHS Improvement has decided to withhold trust names on the basis of the applicability of the exemptions in section 31, 33, 41 and 43 as explained in detail below.

Section 31 – law enforcement

NHSI 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).

NHSI 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 the 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.

As you may know, part of the policy rationale behind the [agency rules](#) published by NHSI in March 2016 ("the rules") is to reduce agency expenditure within the NHS and to encourage staff to return to permanent and bank working. Paragraph 12.2 of the rules makes it clear that NHSI 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.

To the extent that we hold it, NHSI considers that disclosing the information we hold by trust is likely to prejudice the on-going monitoring by NHSI of providers' compliance with the rules, which is necessary for NHSI to take into account in any decision of regulatory action needed in respect of a failure to comply with the rules.

NHSI relies on the full and frank information from trusts in order to carry out its functions effectively. NHSI 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 derives 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 NHSI 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 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.

NHSI 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.

NHSI 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, NHSI depends on the free and frank exchange 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 NHSI'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 information provided by trusts to NHSI is financial, which by its nature is commercially sensitive and disclosure of which is highly likely to be detrimental to the trusts' legitimate commercial interests. For example, parties seeking to negotiate contracts with a provider could use the information relevant to your request to strengthen their own bargaining position when negotiating for, or providing services to, that trust. In addition, competitors may be able to use such information to their advantage to the detriment of that trust's legitimate interests. We consider that the information relating to bank spend 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 exemptions should be maintained. We consider that in relation to the performance of trusts against the agency rules, there is a public interest

in transparency – this is why we have released the information that we have to you albeit in anonymised form.

However, we consider that there is a stronger public interest in giving NHSI and providers the space to openly exchange information that relates to NHSI's functions without disclosing the same to a wider audience and to give the sector the time to address any issues identified without premature disclosure.

Section 41 – information provided in confidence

We consider that the withheld information is exempt under section 41 of the FOI Act. 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."

The test in section 41(1)(a) is met as the information was obtained by NHSI 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.

NHSI considers that disclosure of the information would amount to an actionable breach of confidence. 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, NHSI does not consider that there is a strong public interest in disregarding the duty of confidence owed to providers.

Providers should be able to share information and concerns with NHSI in the expectation that this will be kept confidential, and this is particularly important in relation to financial information which, if disclosed, may have negative consequences for providers. NHSI considers that it is crucial for trust to be maintained by providers who impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to NHSI of information we need to fulfil our functions.

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,

NHS Improvement