

24 November 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 emails of **30 October and 11 November 2017** in which you requested information under the FOI Act from NHS Improvement.

Your request

You made the following request on 30 October:

“I would like data regarding the amount of times NHS Trusts in London have used the 'break glass' clause to breach the pay cap on agency workers. I would like the information per week from 23 November 2015 up until the most recent data submission. If weekly data is not possible, please provide monthly data.

I would like to see the information laid out in a table with columns labelled Name of NHS Trust and Amount of Times 'Break Glass' Clause Used, with rows labelled by date. If possible I would also like a breakdown of which kind of worker the pay cap was breached for - e.g. Medical and Dental, Administration, Nursing etc.”

You made the following request on 11 November:

“I would like data regarding the amount of times NHS Trusts in the UK have used the 'break glass' clause to breach the pay cap on agency workers. I would like the information per week from w/c 18 April 2016 up until the most recent data submission. If weekly data is not possible, please provide monthly data.

I would like to see the information laid out in a table with columns labelled Name of NHS Trust and Amount of Times 'Break Glass' Clause Used, with rows labelled by date. If possible I would also like a breakdown of which kind of worker the pay cap was breached for - e.g. Medical and Dental, Administration, Nursing etc.”

Decision

NHS Improvement holds the information that you have requested and has decided to release it but without disclosing trust names. Although one of your requests specified NHS trusts in London, and the other specified a period starting from 18 April 2016, we have

included information for all trusts in England from November 2015 to our most recent data submission to be as helpful as we can. You'll see that in the information we have provided, the data for London trusts has also been set out separately.

Please note also that we have previously published national figures by trust (anonymised) from November 2015 to 2017 which you can find here: <https://improvement.nhs.uk/about-us/corporate-publications/publications/FOI-agency-price-cap-overrides/>

We have decided to withhold trust names on the basis of the exemptions in sections 31 and 33 of the FOI Act 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 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 NHSI in March 2016, 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. Also, trust performance against agency spend is a metric in the Single Oversight Framework which will be monitored on an on-going basis.

NHSI considers that disclosing trust names 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 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 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 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.

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 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.

Public interest test

Sections 31 and 33 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 (including information beyond your specific request) in a way that safeguards the interests described above that we are seeking to protect.

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