

18 May 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 **28 April** in which you requested information under the FOI Act. Since 1 April 2016, Monitor and the NHS Trust Development Authority (the TDA) are operating as an integrated organisation known as NHS Improvement (NHSI). For the purposes of this decision, NHSI means Monitor and the NHS TDA.

Your request

You made the following request:

“Under the freedom of information act I would like to know the following information in one spreadsheet if possible:

- 1. The total number of breached agency medical locum shifts split by NHS Trust in England during the financial year period 2016/2017 (Apr 16 - Mar 17)*
- 2. The total number of compliant agency medical locum shifts split by NHS Trust in England during the financial year period 2016/2017 (Apr 16 - Mar 17)*
- 3. The total number of breached agency nursing (HCA & Qualified) shifts split by NHS Trust in England during the financial year period 2016/2017 (Apr 16 - Mar 17)*
- 4. The total number of compliant agency nursing (HCA & Qualified) shifts split by NHS Trust in England during the financial year period 2016/2017 (Apr 16 - Mar 17)”*

Decision

NHS Improvement holds part of the information that you have requested. It does not hold the information at points 2 and 4 above.

NHSI holds the information that you have requested and has previously decided to release it in an anonymised form – please see our web site [here](#). We are relying on the following exemptions to withhold trust names.

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. Section 6 of the 2016 Directions set out the TDA’s powers in relation to the exercise of its functions, which include giving directions to NHS trusts and ensuring that they comply with such conditions of Monitor’s provider licence as it deems appropriate.

Paragraph 12.2 of the [agency rules](#), published by NHSI in March 2016 (“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.

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

sensitive and confidential information in the knowledge that the information 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 to oversee, develop and support NHS trusts to assist those trusts to become sustainable by supporting them in complying with their duty under section 26 of the NHS Act 2006 (as described above). This function 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 trust names were 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 exemptions should be maintained. We consider that in relation to the performance of trusts against the rules, there is a public interest in transparency.

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.

NHSI considers that the public interest in the performance of trusts is satisfied by the information that we are releasing to you in response to this request.

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 NHSI of the issue or the decision. A senior member of NHSI'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 stylized, cursive script that appears to read 'Martin Innes'. The signature is written over a horizontal line.

Martin Innes
Senior Operational Agency Data and Intelligence Lead