

4 April 2018

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By email

[REDACTED]

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Dear [REDACTED],

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

I refer to your email of 1 March 2018 in which you requested an internal review of NHS Improvement’s decision dated 9 March 2018. This decision was in response to your FOI Act request dated 11 February 2018 as follows:

“Please could you provide me with:

- a. the 1. total, 2. bank and 3. agency spend, broken down by trust (including ODS code) and by staff group for the last available 12 months.*
- b. the % of staff who are compliant with their appraisals, i.e. have had an appraisal within the last 12 months, broken down by staff group, for the whole country.*
- c. the number of posts and the number of vacancies broken down by trust (including ODS code) and by staff group for the last available 12 months. Please also provide a breakdown of UK to overseas trained staff for each trust and staff group.”*

Since 1 April 2016, Monitor and the NHS Trust Development Authority (the TDA) are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the TDA.

Decision

The decision of 9 March 2018 was that, in relation to the information that NHS Improvement did hold (under part a of the request), the information requested should be withheld on the basis of the application of the exemptions in sections 31, 33 and 43 of the FOI Act.

I have now conducted a review of that decision and concluded that the original decision should be upheld. My view is that the information should not be disclosed on the basis of the exemptions at sections 31 and 33 of the FOI Act. I have summarised those reasons below.

Section 31 – law enforcement

I have considered whether 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).

I consider that section 31(2)(c) is engaged and that disclosure of the information 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. This applies to the functions conferred on both Monitor and the TDA.

The provider licence enables NHS Improvement 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”). NHS Improvement will take into account inefficient or uneconomic spending practices, including any relating to agency spending, as a measure of governance and in monitoring NHS foundation trusts’ compliance with their licence. In addition, in relation to NHS trusts, the TDA is responsible for overseeing those bodies and ensuring they comply with their duty to exercise their functions effectively, efficiently and economically, and has powers to give directions to NHS trusts under the National Health Service Act 2006, as set out in the directions given to the TDA by the Secretary of State¹.

Paragraph 12.2 of the Agency Rules state:

“For foundation trusts, NHS Improvement will consider compliance in accordance with the provider licence and risk assessment framework. NHS Improvement may investigate foundation trusts if there is sufficient evidence to suggest inefficient and/or uneconomical spending at a trust, for instance agency and management consultant spend, which indicates wider governance concerns. NHS Improvement will continue to work with NHS trusts through application of the accountability framework and may also investigate trusts that are not managing their agency spend effectively”.

Disclosing the information on individual trusts before any decision has been made by NHS Improvement, on whether, and what, action to take in respect of a failure to comply with the Rules, would be likely to prejudice that decision.

In addition, as explained in the original decision letter, NHS Improvement relies on the full and frank provision of information from trusts in order to carry out its functions in this area effectively. This is the case irrespective of whether it is exercising a formal power in gathering information. If such information was to be disclosed publicly, my view is that trusts would be less likely to disclose such information in future or may be otherwise less forthcoming in the information they provide in relation to following the Rules. This would have a detrimental impact on the exercise of NHS Improvement’s relevant regulatory functions, which relies on having sufficient reliable information.

¹ See now the NHS Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare NHS Trust Directions 2016.

I note that trusts would not have any reasonable expectation that this information might be disclosed while there is a potential for regulatory action. There has been no indication to the trusts that this information may be disclosed, either in the Rules or elsewhere.

Furthermore, my view is that effective oversight of NHS foundation trusts and NHS trusts, which includes ensuring that NHS Improvement has appropriate information to enable it to make timely and effective decisions about regulatory action, relies on a relationship of trust and confidence between the trusts and NHS Improvement. This relationship would be jeopardised and undermined if NHS Improvement disclosed the requested information, with a detrimental impact on our ability to regulate and oversee trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 31(1) of the FOI Act applies.

Section 33 – public audit functions

Section 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 has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources, which would be prejudiced by the release of the information requested. NHS Improvement is responsible for monitoring compliance with the provider licence held by NHS foundation trusts, which includes a requirement to have systems and processes in place for ensuring compliance with the duty of such trusts to operate efficiently, economically and effectively. It should also be noted that NHS Improvement has general duty under section 62(1)(a) of the 2012 Act, when exercising the functions conferred on Monitor, to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient, and effective (as well as maintaining or improving quality).

In relation to NHS trusts, as mentioned above, NHS Improvement has functions under the directions to the TDA given by the Secretary of State in relation to scrutinising whether NHS trusts are using their resources efficiently and effectively.

In relation to both types of trusts, similar arguments apply as those which apply for the purpose of the exemption relating enforcement functions (section 31 of FOI). In order to operate effectively in relation to the examination of the efficient, effective and economic use of resources by foundation trusts and trusts, NHS Improvement's view is that it requires a safe space in which trusts are able to share sensitive and confidential information with NHS Improvement without fear of it being shared more widely. Disclosing the requested information would be likely to reduce the quality of information provided by trusts in relation to the agency rules. This relationship would be jeopardised and undermined if NHS

Improvement disclosed the requested information, with a detrimental impact on our ability to regulate and oversee trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 33(1) and (2) of the FOI Act applies.

Public interest test

Section 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.

I recognise that in relation to the finances of public authorities there is a public interest in transparency; in particular in relation to understanding the impact of trust expenditure on agency staff on NHS deficits and the effectiveness of the measures taken by NHS Improvement to control that expenditure. I have weighed these public interest factors against the detrimental impact that is likely to ensue if disclosure is permitted.

The providers in question are being monitored and NHS Improvement is continuing to assess how trusts are using their resources in this area and whether there is any case for regulatory action in a particular case. For the reasons, explained above, the ability of NHS Improvement to perform its functions would be adversely affected by the disclosure of the information (in essence, it is likely to reduce the information we have available and undermine our relationship with trusts). There is a strong public interest in NHS Improvement being able to exercise its regulatory and oversight functions in relation to trusts effectively.

In addition, we have also published detailed information in relation to the agency rules, including the number of shifts where the agency price cap has been exceeded, broken down by week and staff group. This provides the data for each individual trust, albeit anonymised so that the identity of individuals trusts cannot be ascertained.

In conclusion, in relation to both exemptions, I consider that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Review rights

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

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,

Dominic Raymont
Deputy Director of Agency Intelligence