

23 November 2015

██████████
By email
████████████████████

Dear ██████████

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

I refer to your email of **26 October 2015** in which you requested information under the FOI Act regarding Heart of England NHS Foundation Trust (“the Trust”).

Your request

You made the following request:

“Under the Freedom of Information Act, please send me all and any documents produced in the last 3 months concerning the position of Les Lawrence as chair of Heart of England Foundation Trust”

Decision

Monitor holds the information that you have requested as both internal correspondence within Monitor and external correspondence between Monitor and third parties.

Monitor has decided to release the external correspondence and documents that it holds (redactions have been made in relation to personal information that falls under section 40 of the FOI Act). This will be provided to you electronically.

Please note that the letter dated 22 October 2015 was sent to multiple stakeholders within the local health economy – we have only included one copy to avoid duplication.

Monitor has decided to withhold the internal correspondence that it holds on the basis of the applicability of the exemptions in sections 36 and 42 as explained in detail below.

Please note that Annex 1, 2, and 3 of the letter dated 16 October 2015 which we have disclosed to you are also being withheld under section 36 for the reasons detailed below.

Section 36

We consider that section 36(2)(b)(ii) of the FOI Act is engaged in relation to the internal correspondence that Monitor holds within its Provider Regulation department. Section 36(2)(b)(ii) provides that information is exempt from disclosure if it would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

We consider that disclosure of internal correspondence on the subject of the request would be likely to inhibit the free and frank exchange of views. This is because the information in question represents different colleagues making their own comments with a view to arriving at a final strategy. That strategy relates to a trust which remains under enforcement action and, in particular, to a person who remains in post at that trust.

It is felt that disclosure of this correspondence and other internal documents is likely to inhibit staff to express themselves openly, honestly and completely, and/or to explore extreme options, as part of the process of deliberation.

Disclosure of this information would be likely to inhibit free and frank discussions within Monitor in the future in relation to other individuals at trusts under enforcement action, and the loss of frankness and candour may damage the quality of deliberation and lead to poorer decision making. Future discussions about individuals at issue trusts are likely to be less candid and this in turn may harm Monitor's deliberations.

To the extent that information covered by this exemption is included in the information requested, that information is being withheld from disclosure under section 36 of the FOI Act and Monitor's qualified person (Chief Executive) has approved the use of this section.

Public interest test

Monitor considers that the public interest in maintaining the exemption does outweigh the public interest in disclosure of the information, as staff within Monitor need to be able to have candid discussions and express themselves openly when deliberating over regulatory decisions.

Monitor recognises that, as a public body, it should be transparent and open in the conduct of its public functions. In recognition of this, we are disclosing the correspondence that Monitor has had with third parties that falls within the scope of your request, and Monitor announces its regulatory decisions and publishes details when these are made pursuant to its legal powers on its website.

As disclosure of the information is likely to inhibit the expression of views in relation to an on-going arrangement and potential future arrangements, Monitor has decided that the public interest in disclosure is outweighed by the need to safeguard the free and frank exchange of views within Monitor.

Section 42

Section 42(1) of the FOI Act provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

Legal professional privilege covers confidential communications between lawyers and their clients made for the dominant purpose of seeking or giving legal advice. We consider that section 42(1) is engaged in relation to the correspondence between the Provider Regulation department within Monitor and its legal advisers as such communications are covered by legal professional privilege.

Public interest test

As section 42 is a qualified exemption under the FOI Act, we have considered whether the public interest weighs in favour of not releasing the information requested. We have decided that as free, frank and confidential exchanges between a client and their lawyer are essential in our legal system and help ensure fairness, the public interest in maintaining the exclusion of releasing the information you have requested outweighs any public interest in disclosing it.

We consider that the public interest is met by Monitor's publication of the use of its legal powers on its website: <https://www.gov.uk/government/groups/heart-of-england-nhs-foundation-trust>

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 Monitor of the issue or the decision. A senior member of Monitor'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 conducted by Monitor, 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, Monitor, Wellington House, 133-155 Waterloo Road, London SE1 8UG or by email to foi@monitor.gov.uk.

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,



Rebecca Farmer
Senior Regional Manager

16 October 2015

Mr Les Lawrence
Chair
Heart of England NHS Foundation Trust
Birmingham Heartlands Hospital
Bordesley Green East
Birmingham
B9 5SS

 Monitor

Making the health sector
work for patients

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E: enquiries@monitor.gov.uk
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Dear Les,

Heart of England NHS Foundation Trust (“the Trust”): Enforcement Action under the Health and Social Care Act 2012 (“the Act”)

1. I write to inform you of our proposed enforcement action.

Outcome of investigation into financial concerns

2. On 30 September we opened a formal investigation into the Trust to determine if it was in further breach of its licence and, if so whether further regulatory action should be taken.
3. This investigation was opened due to concerns around the rapid and unplanned deterioration in the Trust’s financial position in the first few months of the 2015/16 financial year. The month 5 position was a deficit of £29.5m against a plan of £8.5m.
4. As a result of our investigation, Monitor has reasonable grounds to suspect that the Trust has provided, or is providing, a health care service for the purposes of the NHS in breach of its licence. Therefore, under section 106 of the Act Monitor has drafted a set of proposed enforcement undertakings that it is willing to accept from the Trust. A copy of the proposed undertakings is attached in Annex 1.

Proposed action under section 111 of the Act

5. Monitor has continued to have concerns about the leadership of the Trust since we imposed the additional licence condition on the Trust in October 2014. This required the Trust to ensure that it had in place:
 - i. Sufficient and effective board, management and clinical leadership capacity and capability; and
 - ii. Appropriate governance systems and processes.
6. You have confirmed to Monitor that you will step down as Chair of the Trust at the end of November 2015. The previous Chief Executive left the Trust in November 2014 and the Trust has repeatedly failed to appoint a substantive replacement. The current interim Chief Executive leaves the Trust on 30 October 2015. In addition to

these failings at board level, the Trust has also failed to ensure that it has sufficient capacity and capability of leadership across the Trust to address the breadth of issues facing the Trust.

7. Monitor is therefore proposing to take action to appoint an interim Chair and an interim Chief Executive to provide the strong leadership required to deliver the necessary improvement in the Trust's financial position, operational performance, governance and culture.
8. In line with Monitor's wish to utilise the experience of managing success from within the NHS, we are proposing to require the Trust to appoint Rt. Hon Jacqui Smith as interim Chair and Dame Julie Moore as Chief Executive. They will both be combining these roles with their existing interim roles at University Hospital Birmingham NHS Foundation Trust. The notice of intent is attached in Annex 2.

Next steps

9. If you have any written representations with respect to these proposals or any other matters set out in this letter, please ensure that they are provided to Monitor at the latest by 8am on Thursday 22 October 2015.
10. We have arranged a telephone meeting to discuss the proposed section 106 undertakings on 19 October.
11. Annex 3 sets out the proposed timeline for finalising Monitor's proposed enforcement action.
12. If you have any questions in relation to the matters set out in this letter, please contact [REDACTED] on [REDACTED] or by email at [REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]
Regional Director

[REDACTED]

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[REDACTED]
[REDACTED]

22 October 2015

Dear [REDACTED]

Heart of England NHS Foundation Trust (“the Trust’): Enforcement Action under the Health and Social Care Act 2012

1. I write further to my letter of 1 October 2015 in which we notified you of our decision to open a formal investigation into the Trust’s compliance with its licence. This letter sets out details of the formal enforcement action we are taking.

Outcome of investigation into financial concerns

2. Our investigation was opened due to concerns around the rapid and unplanned deterioration in the Trust’s financial position in the first few months of the financial year. The month 5 position was a deficit of £29.5m against a planned deficit of £8.5m.
3. As a result of our investigation, Monitor has reasonable grounds to suspect that the Trust has provided, or is providing, a health care service for the purposes of the NHS in breach of its licence. Therefore, we have agreed enforcement undertakings with the Trust for it to develop and submit a financial improvement plan for 2015/16, and, subsequently a long term financial recovery plan. A copy of these undertakings will be available on our [website](#) shortly.

Regulatory action on leadership of the Trust

4. Monitor has continued to have concerns about the leadership of the Trust since we imposed the additional licence condition on the Trust in October 2014. This required the Trust to ensure that it had in place:
 - 4.1 Sufficient and effective board, management and clinical leadership capacity and capability; and
 - 4.2 Appropriate governance systems and processes.
5. The current Chair has indicated that he will step down at the end of November. The previous Chief Executive left the Trust in November 2014 and the Trust has repeatedly failed to appoint a substantive replacement. The current interim Chief Executive leaves the Trust on 30 October. In addition, the Trust has also not ensured that it has the capacity and capability of leadership across the Trust to address the breadth of issues facing the Trust.

6. Monitor is, therefore, taking action to appoint an interim Chair and an interim Chief Executive to provide strong leadership and deliver the required improvement in the Trust's financial position, operational performance, governance and culture.
7. In line with Monitor's desire to share experience of managing success around the NHS, we are requiring the Trust to appoint Jacqui Smith as interim Chair and Dame Julie Moore as interim Chief Executive. They will both be combining these roles with their existing roles at University Hospital Birmingham NHS Foundation Trust (UHB). A copy of our final notice will also be available on our [website](#) shortly.
8. Please note that our action on leadership is restricted to the appointment of these two individuals. However, given that UHB's Chair and Chief Executive will be appointed as interim Chair and interim Chief Executive at the Trust, it is highly likely that UHB will have sufficient influence to give the Competition and Markets Authority (CMA) jurisdiction to review the appointments. Ultimately, it is the CMA who will decide whether the appointments result in a 'Relevant Merger Situation' and, if so, whether the appointments will lead to substantial competition concerns. We are working closely with the CMA and the two trusts to manage the competition risks.
9. We have already issued a [press release](#) on 20 October and expect to issue a further release tomorrow confirming that the formal decision has been made.
10. If you have any questions in relation to the matters set out in this letter, please contact [REDACTED] on [REDACTED] or by email at [REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]
Deputy Regional Director