

23/12/16

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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 29 November 2016 in which you requested information under the FOI Act from NHS Improvement. 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 both Monitor and the TDA.

Your request

You made the following request:

“I would like to know how many arbitration referrals have been received in the 2016-17 financial year and the 2015-16 financial year.

I would like this broken down by:

relevant parties

issue

date

result”

Decision

NHS Improvement holds the information that you have requested. NHS Improvement has decided to release the numbers of referrals, but not the further details you have asked for, for the reasons explained below.

Background

We have interpreted your request as asking for information on the referrals for arbitration that take place as part of the NHS contract dispute resolution processes agreed by NHS England and NHS Improvement. The guidance setting out the processes applicable for 2015/16 and 2016/17 can be found at:

<https://www.england.nhs.uk/wp-content/uploads/2015/12/joint-dispute-resolution-process-1617.pdf>

<http://www.ntda.nhs.uk/wp-content/uploads/2014/12/Dispute-Resolution-Process-for-the-2015-16-Contracting-Process.pdf>

As explained in the guidance, the process involves 2 stages or phases: (1) advice and/or mediation and (2) formal arbitration. Formal arbitration takes 2 forms: (1) arbitration by an internal or regional panel, consisting of staff from the regional teams of NHS England and the TDA; and (2) arbitration by an independent third party panel. The guidance explains when the different panels will be involved.

In addition, it should be noted that in accordance with the processes, in each year a date was specified by which providers and commissioners should submit arbitration paper work to Monitor, the TDA and NHS England, if issues had not been resolved. Many of these cases were however withdrawn prior to any arbitration being conducted. For the purposes of this response, we have interpreted "arbitration referrals" to mean cases where the matter proceeded to an arbitration panel.

Information disclosed

In 2015/16, 7 cases were considered by regional panels, all involving NHS trusts, but none by an independent panel.

In 2016/17, 7 cases were considered by regional panels (covering a total of 21 issues) and 6 cases where heard by an independent panel (covering a total of 16 issues). The panels sat between late April and mid-May 2016

Information withheld

NHS Improvement has decided to withhold details of the individual cases, as you requested, on the basis of the exemption in section 43(1) of the FOI Act (prejudice to commercial interests).

The exemption applies if disclosure of the information would, or would be likely to, prejudice the commercial interests of any person. The information in question relates to the details of disputes arising in the negotiation of contracts between NHS providers and commissioners. Those disputes were not in the public domain and the providers and commissioners concerned sought to resolve those disputes in private. Arbitration is intended to be a last resort for cases which cannot be resolved locally, in order that contracts are signed in a timely fashion and planning for the forthcoming financial year can be completed. The outcome of that arbitration clearly concerns and affects the commercial interests of the parties concerned. If the results of arbitration were made public, that would discourage trusts from participating fully (or at all) in the process – particularly NHS foundation trusts, for whom participation in arbitration is voluntary. This would reduce the effectiveness of the arbitration process, resulting in disputes not being resolved, or taking longer to be resolved. The providers and commissioners concerned would be less able to plan effectively for the coming year, and possibly left with unresolved disputes affecting their financial position.

Both those outcomes would have an adverse impact on the respective commercial interests of the parties concerned.

The exemption is subject to a public interest test. We have considered the public interest in disclosure, including the general public interest in transparency and the specific public interest in the provision of information to the public about how local negotiations and disputes relating to the planning and provision of NHS services are resolved. We have however also considered the strong public interest in ensuring that disputes between providers and commissioners can be resolved effectively with the minimum impact on the their financial and other interests, and with a view to ensuring that the focus is on planning for the coming year, to the benefit of NHS patients. We also consider that it is not in the public interest for disputes that have been settled and resolved in private to be placed into the public domain with the potential for adversely affecting the relationship between those organisations. We have therefore concluded that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosure.

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,

NHSI Financial Planning Team