

## **Monitor's response to the Cabinet Office's *Making Open Data Real: A Public Consultation***

**27 October 2011**

### **Executive summary**

1. This document sets out Monitor's response to the consultation document dated August 2011 – Making Open Data Real: A Public Consultation published by the Cabinet Office ("the Consultation").
2. This paper provides narrative response to the overall issue from Monitor. It represents our interests and concerns, rather than setting out a question-by-question response. In summary:
  - Monitor agrees with the proposed benefits that an increase in transparency of data and information would offer. However we believe that specific consideration should be given to both the healthcare and regulatory sectors, which have particular requirements and barriers that should be addressed.
  - The healthcare sector already makes a great deal of data available and any further requirements should not unduly add to the burden. NHS-related data and information is already made available on both government wide websites, such as data.gov.uk, as well as those that are more health-specific, such as the NHS Information Centre.
  - The government's open data approach must effectively complement the requirements of the current Health and Social Care Bill. The Bill states that Monitor "must not include commercial information which it is satisfied would or might significantly harm the legitimate business interests of the licence holder to whom it relates". In addition, the Information Centre will be the central point for collecting and analysing data and will be placed on a firmer statutory footing. The Information Centre is therefore in a good position to collate all healthcare data for onward publication in an accessible format, once it is available and no longer deemed commercially sensitive.
  - Public service providers and their regulators will have different requirements. The government might consider: the purpose of the regulator and the information collected; the relationship with those bodies it regulates; and the circumstances in which data would not be made public. For regulators, data is collected for a particular regulatory purpose – in Monitor's case, this is for our assessment, compliance and reporting functions. Regulators that obtain data largely for research or policy development are likely to be more affected by the proposals set out in the Consultation and will no doubt rely on their statutory restrictions on the disclosure of information.
  - We have identified a number of barriers to the open disclosure of the data currently held by Monitor. In some cases, such disclosure could negatively impact on both the performance of our regulatory functions and our relationship with NHS foundation trusts (FTs).
    - We have made a commitment to FTs – as public benefit corporations that operate in a quasi-commercial market – that we will not publish or share their data where there are commercial sensitivity or confidentiality concerns without their prior agreement;
    - We must ensure that the interests of patients and staff are protected, through adherence to relevant law and guidance, such as the Data Protection Act 1998; and
    - There are time and resource costs associated with the preparation of data for disclosure. This includes ensuring data accuracy, that the data disclosed is not

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confidential and has addressed any legal risks; and that the data is provided in the particular format required.

**Context**

3. Monitor agrees with the proposed benefits that an increase in transparency of data and information would offer. Increased availability of information about public services does have a role in: providing greater accountability; driving efficiency and value for money; improving the patient experience; and stimulating competition and real choice to allow service comparison and inform decision making about how and when to use services.
4. The open data proposals form part of the government's transparency agenda. This currently only applies to government departments, and, although non-government departments, such as Monitor, are expected to support this agenda as far as is practicable, they are currently not bound by the policy. There is therefore further for such organisations to go to reach the same degree of transparency currently delivered by central government, particularly in clearly informing potential users what data currently exists and what can, will or can not be accessed and re-used.
5. As explained in the Consultation document, open data refers to large, non-personal datasets, individuals' own records and user feedback on services. However, transparency may also apply beyond data held in spreadsheets or databases, to information about decisions made in board papers and minutes. While this may be a separate element of the overall transparency agenda, it may be worth highlighting what public bodies' responsibilities are for both data and information in the broader respect.

**Themes of interest****The healthcare sector**

6. While the Consultation applies generically across all public sectors and government departments, we believe that consideration should be given to the advancements that the healthcare sector specifically is already making in this area. The government should ensure that further demands and legislation around open data complement these and do not excessively increase the burden.
7. NHS-related data and information is already made available on both government wide websites as well as those that are more health-specific. Public data sets are available for unrestricted reuse through data.gov.uk and the COINS (Combined Online Information System) database houses UK Government expenditure provided by government departments for onward use in, for example, parliamentary reports. NHS Choices and the Care Quality Commission's portal enable people to find out more about services in their area, together with information on the standard of service provided by care professionals and care homes. The NHS Information Centre is England's national source of health and social care information. It allows public access to information large, non-personal datasets routinely collected by public services relating to, for example, activity data (such as Hospital Episode Statistics), outcomes, public health statistics and workforce data.
8. The Health and Social Care Bill that is currently before Parliament reinforces the position of the Information Centre with regard to NHS data and proposes placing it on a firmer statutory footing. Powers will be granted to direct the Information Centre to establish and operate a centralised system for the collection, analysis and publication or other dissemination of information (Clause 238). The government will need to ensure that their general open data approach effectively complements what is set out within the current Health and Social Care Bill for the NHS.

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9. The Information Centre will therefore be the central place for all healthcare information, employing professionals that have the expertise to manipulate and present the data as necessary. We therefore suggest that Monitor would pass its data onto the Information Centre for publication in an accessible format, once it is available and no longer deemed commercially sensitive.
10. In addition, the Department of Health is currently developing policy around an NHS Information Strategy. The intention is that this will give people more information and control and greater choice about their care and transform the way that information is accessed, collected, analysed and used. Further to this, the Department has already been considering stopping the collection of data that has no value or is no longer used, as set out in their current consultation on the Fundamental Review of Data Returns.

**The regulatory context**

11. Consideration should also be given to public bodies in a regulatory rather than service provider role, even when they have been funded, commissioned or established by statute. This would take into account: the purpose of the regulator and the information collected; the relationship with those bodies it regulates; the circumstances in which data would not be made public; and the relatively small size of such organisations compared with public service providers.
12. Monitor, the independent regulator of FTs, is independent of central government control (although directly accountable to Parliament). Its three main work areas generate the data held by the organisation. These are: determining whether NHS trusts are ready to become FTs; ensuring that FTs comply with the conditions they signed up to, that is, that they are well-led and financially robust; and supporting FT development.
13. Data is therefore obtained for a particular purpose – in Monitor's case, this is for our assessment, compliance and reporting functions. However, for public bodies that gather a lot of data for research or policy development, their data is likely to be more susceptible to the proactive, real time transparency that the Consultation promotes. Currently, Monitor does not have a free-standing function to, for example, monitor markets or undertake research for this purpose. Our power to conduct, commission or assist research is considered to relate to our current functions and matters related to them. Therefore, to use this data for such activity is strictly speaking permissible only if it can be related back to the effective performance of assessment, compliance, reporting or forward planning. That is, the basis on which we would support such activity internally or externally. To do otherwise carries a risk – although relatively remote – of judicial review on the basis that, for example, Monitor is acting outside its powers or unreasonably.
14. Generally, Monitor is supportive of projects that seek to disseminate relevant evidence-based analysis of FTs and related matters where it is directly relevant to our current core work, or is directly relevant to our future role following the Health and Social Care Bill's assent. However, current considerations include the extent to which we are confident that the research is likely to add value and that the analysis is being conducted by credible organisations or individuals with a track record for high quality analysis that add value. These would be hard to ensure once data is made open more widely to members of the public. However, we do recognise that wider dissemination of information disclosed through a Freedom of Information (FOI) request can neither be restricted, nor disclosure prevented based on the identity of the requestor.
15. As part of our publication scheme, which explains the information that Monitor makes routinely available and how it can be accessed, we already make data about our expenditure patterns available. This includes financial information about projected and actual income and expenditure (including expenses), procurement, contracts and

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financial audit relating to Monitor as the regulator as well as lists and registers, including risk ratings, that relate specifically to FTs.

16. However, it is important to bear in mind that full adherence to the open data agenda may have a negative impact on the performance of our regulatory functions and our relationship with FTs. Premature disclosure of data used for authorisation or compliance activity could prejudice the performance of those functions in particular instances. FTs are not-for-profit, public benefit corporations, with particular interests and concerns, that operate in a quasi-commercial market. We have made a commitment to FTs that we will not publish or share their data where there are commercial sensitivity concerns. Indeed, in the Health and Social Care Bill currently before Parliament, Clause 99 (Publication of enforcement action) states that, in its annual report, Monitor “must not include commercial information which it is satisfied would or might significantly harm the legitimate business interests of the licence holder to whom it relates”.
17. Monitor’s *Compliance Framework* details our policy on information disclosure, which is guided by three core principles:
  - non-disclosure of commercially sensitive information supplied by FTs without prior agreement (assessed at the time of request for disclosure), subject to compliance with relevant legislation, including the FOI Act 2000;
  - non-disclosure of any other confidential information supplied by FTs without prior agreement (unless there is a statutory obligation or a significant overriding public interest); and
  - protection of the interests of patients and staff, including for example adherence to the Data Protection Act 1998 and other relevant law and guidance.
18. Monitor could be laid open to a claim of breach of confidence if confidential FT data were provided to external parties. However, the risk of such a disclosure is reduced where the data released can be related directly to our core regulatory functions. It would also be necessary to set an effective restriction on onward disclosure by the recipient. The risk of challenge here is greater than the judicial risk, but still relatively low. The extent of the risk would turn on the nature of the confidential data disclosed and on the damage that has or could be caused by such disclosure. Any data made available by Monitor would therefore first need to be ‘cleansed’ of any confidential data that Monitor does not wish to disclose.
19. Monitor, as a public authority, must comply with the FOI Act 2000. This gives every person a legally enforceable right to access recorded information held by public authorities - subject to limitations specified in the Act and unless it can justify the use of applicable exemptions as specified above. Such limitations should be borne in mind when the government extends the rights of individuals and organisations to access, interpret and utilise data in an enhanced form. And with the FOI Act due to undergo post-legislative scrutiny from autumn 2011, it may be more prudent to link this open data agenda more formally within the FOI framework.
20. Monitor – unlike other comparable regulators – does not have express statutory restrictions on the disclosure of information received in performing our functions, such as commercial sensitivity or confidentiality. By enshrining this in legislation, such restrictions are stringent, creating offences of disclosure in breach of statute. We realise, however, that this may be a more appropriate approach for regulators whose information is more routinely gathered expressly for research or market review activity, and in a form that lends itself to wider publication. In the current Health and Social Care Bill, Monitor will have a more wide-ranging information gathering and research function that may require the implementation of such statutory disclosure restrictions.

**Barriers to releasing information**

21. We have previously stated a number of barriers to releasing data deemed to be 'open data'. These include the purpose for which the data was initially collected, the potential risk to the trust-based relationship with FTs that releasing such data could imply, the commercially sensitive or confidential nature of the data and the impact on the performance of our regulatory functions.
22. However, a further barrier is in the resource costs of preparing the data for disclosure. There is a significant onus on the public body regarding accuracy, and employing sufficient quality assurance process to reduce the possibility of transmission errors. A high degree of care should also be taken in checking the data disclosed is not confidential and has addressed any legal risks, which also implies additional time and resource cost. Currently, under the FOI regime, there is no requirement to provide the data in the particular format sought. Therefore, finally, and possibly the most labour intensive part of the process is in making the data available in an accessible and standardised format for meaningful use and re-use and analysis, alongside appropriate contextual information. This, therefore, reinforces the earlier argument that the Information Centre, as a central collector and repository of healthcare information, might be best placed to format and publish any relevant 'open data' that meets the regulatory requirements set out in the Consultation.