

22 June 2016

Wellington House
133-155 Waterloo Road
London SE1 8UG

T: 020 3747 0000
E: nhsi.enquiries@nhs.net
W: improvement.nhs.uk

By email [REDACTED]

Dear [REDACTED]

Request under the Freedom of Information Act 2000 (the "FOI Act")

I refer to your email of **24 May 2016** in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority ("NHS TDA") are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the NHS TDA.

Your request

You made the following request:

"Q4 performance reports were released this week stating that total agency expenditure for the provider sector has reached £3.6bn in 2015/16. Please provide a breakdown of every NHS Trust and Foundation Trusts' agency expenditure for the financial year (15/16)."

Decision

NHS Improvement holds the information that you have requested and has decided to withhold the information on the basis of the applicability of the exemptions in sections 31 and 33 of the FOI Act as explained in detail below.

Section 31 - law enforcement

NHS Improvement 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).

NHS Improvement considers 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 NHS TDA.

The conditions of provider licences enable 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 foundation trusts' 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 NHS 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 NHS TDA by the Secretary of State¹.

Paragraph 6.3 of "Price caps for agency staff: rules" published by Monitor in November last year (the "Rules")² makes it clear that any payments in excess of the price caps will be scrutinised and may lead to regulatory action as appropriate (please also see section 9 on the approach to enforcement). In assessing value for money, NHS Improvement will look at the extent to which trusts have followed good practice including the Rules. Disclosing the information on individual foundation trusts before a 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 NHS Improvement relies on the full and frank provision of information from trusts in order to carry out its functions effectively. Its regulatory activities are dependent upon having a "safe space" in which trusts are able to share sensitive and confidential information. There is potential prejudice to the ability of NHS Improvement to regulate the sector, if sensitive information which trusts provide to NHS Improvement is disclosed.

Therefore 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 has these

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

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484834/price_caps_for_agency_staff_rules_final_rev11dec.pdf

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.

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

As noted above, the regulation of trusts and NHS Improvement's ability to discharge its functions in examining the economy, efficiency and effectiveness of those it regulates would be prejudiced if sensitive and confidential information, as is the case with the information requested, were to be disclosed. The relationship of trust between trusts and NHS Improvement would be jeopardised and undermined if providers considered such information would be disclosed.

Therefore 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.

We consider 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. The public interest in accountability and transparency by making the information available has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted.

The providers named within the information that is being withheld under these sections of the FOI Act are being monitored and NHS Improvement is continuing to assess concerns raised by these providers. The ability of NHS Improvement to perform its functions would be adversely affected by the disclosure of the information.

In addition, providers do not expect that such sensitive and confidential information will be placed in the public domain and if they were to consider that the information they provided could be disclosed, they may be less likely to provide it or in the detail that they do. Consequently, this would have a detrimental impact on the ability of NHS Improvement to perform its functions.

NHS Improvement routinely proactively publishes details of any regulatory action that it decides to take as a result of its investigations. 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 individual trusts cannot be ascertained. NHS Improvement considers that this information is sufficient to meet the public interest in transparency.

Therefore, in relation to both exemptions, NHSI considers that the public interest in maintaining the exemptions 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.

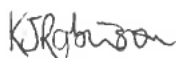
If you are dissatisfied with the outcome of any internal review, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

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,



Katharine Robinson
Senior Manager, Finance