

17 November 2015

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Dear [REDACTED]

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

I refer to your email of 30 October 2015 in which you requested information under the FOI Act.

### Your request

You made the following request:

- "A. *What was the ceiling level for agency nurse spending for each NHS Foundation Trust for the financial year 2014/15 and what is it for the current financial year.*
- B. *What was the actual level of agency nurse spending for each NHS Foundation Trust for the financial year 2014/15 and what is it projected to be for the current financial year.*"

### Decision

Monitor holds some of the information that you have requested. Some of this information is publicly available/reasonably accessible and Monitor has decided not to release the remainder of the information based on the applicability of the exemptions in sections 21, 31, 33 and 43 of the FOI Act. Further explanation of this decision is set out below.

You may be aware that, in September 2015, Monitor introduced the following rules for NHS foundation trusts and NHS trusts:

- (i) an annual ceiling for total nursing agency spending for each trust, and
- (ii) mandatory use of approved frameworks for procuring agency staff.

Details can be found here: <https://www.gov.uk/government/publications/nursing-agency-rules>

Monitor has recently concluded a consultation regarding proposed rules around price caps which, if implemented, would act as a limit on the amount that individual agency staff can be paid per shift.

Details can be found here: <https://www.gov.uk/government/consultations/national-price-caps-for-agency-staff-working-in-the-nhs> and our consultation response will be published in due course.

Our duty under the FOI Act extends to information we hold at the time of the request. At 30 October 2015, Monitor had communicated final ceilings for 2015/16 to each NHS foundation trust (having allowed a period of time for each provider to challenge proposed initial ceilings and respond).

#### Part A

The first part of your request refers to 2014/15 ceilings, which do not exist. This is because (as explained above), ceilings have only recently been introduced for NHS trusts and NHS foundation trusts (in the second half of 2015/16).

We hold information relating to 2015/16 ceilings, but Monitor has no plan to publish the final ceilings (or disclose the proposed initial ceilings). This is primarily because disclosure would reveal financial information relating to trusts, which by its nature is commercially sensitive. Also, there are selected exemptions in the FOI Act that apply to this situation, which are set out below (sections 21, 31, 33 and 43).

#### Part B

In relation to the actual spend on agency nurses, you can find the actual level of *aggregate spend* (across the sector) for 2014/15 [here](#) (it is available within the 'Performance of the foundation trust sector: year ended 30 June 2015' document):

Q1 2014/15: <https://www.gov.uk/government/publications/nhs-foundation-trusts-quarterly-performance-report--3>

Q2 2014/15: <https://www.gov.uk/government/publications/nhs-foundation-trusts-quarterly-performance-report-quarter-2-201415>

Q3 2014/15: <https://www.gov.uk/government/publications/nhs-foundation-trusts-quarterly-performance-report-quarter-3-201415>

Q4 2014/15: <https://www.gov.uk/government/publications/nhs-foundation-trusts-quarterly-performance-report-quarter-4-201415>

The actual level of agency nurse spending for each NHS foundation trust for 2014/15 can be found in their annual accounts which are normally held on trust websites. As this information is publicly available/reasonably accessible by other means according to section 21 of the FOI Act, we will not duplicate the information by releasing it.

Should you want to seek the information directly from NHS foundation trusts, they are subject to the FOI Act and will review any request under the FOI Act.

In relation to your final request about the 2015/16 projections, we have decided not to release the information we hold because of the exemptions below.

#### Exemptions (for Part A re 2015/16 ceilings and Part B re 2015/16 projections)

##### Section 31 (law enforcement)

We consider that disclosure of the ceilings would, or would be likely to, prejudice the exercise of our functions for the purpose of ascertaining whether circumstances which would

justify regulatory action in pursuance of any enactment exist or may arise (section 31(1)(g) and (2)(c)).

The ceilings introduced by Monitor were based on Monitor's review of financial information including information provided voluntarily. It is essential for the efficient and effective exercise of Monitor's functions that Monitor is able to express its views about the steps it considers NHS foundation trusts should take to ensure compliance with the terms of their licence and that NHS foundation trusts should feel able to share information with Monitor freely and openly without fear that the information, or any analysis derived directly from it, will be shared with the public at large.

If this information was disclosed then Monitor staff are likely to be less candid and open in their communications with the bodies that they regulate and the sector is likely to be less willing to share sensitive information with Monitor voluntarily in the future. This would be likely to have a detrimental impact on the quality and content of exchanges between Monitor and the bodies that it regulates and Monitor's ability to make effective and fully informed regulatory decisions.

#### Section 33 (audit functions)

Monitor is of the view that the requested information is exempt under section 33(1)(b) of the FOI Act on the grounds that release of it would prejudice Monitor's licensing functions which include examining whether foundation trusts have discharged their functions economically, efficiently and effectively.

Monitor relies on having open and frank correspondence with NHS foundation trusts in order to carry out its regulatory functions effectively. As explained above, it would have a detrimental impact on the quality of those exchanges in the future if details of those exchanges, or any information derived from those exchanges, was published to the public at large. This would have a prejudicial impact on the exercise of Monitor's regulatory functions. For the reasons set out above and in relation to the application of section 31, we consider that disclosure of the ceilings introduced by Monitor is exempt information under section 33.

#### Section 43 (commercial interests)

Section 43(2) of the FOI Act provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

The information provided by NHS foundation trusts to Monitor relates to financial information, which by its nature is commercially sensitive and disclosure of which is highly likely to be detrimental to the trusts' legitimate commercial interests. For example, parties seeking to negotiate contracts with an NHS foundation trust could use the information relevant to your request to strengthen their own bargaining position when negotiating for, or providing services to, that trust. In addition, competitors may be able to use such information to their advantage to the detriment of that trust's legitimate interests. We consider that the information relating to reductions in agency spend is commercially sensitive.

## **Public interest test**

Section 31, 33 and 43 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.

However, we consider that there is a stronger public interest in giving Monitor and NHS foundation trusts the space to openly and frankly discuss their views about the action that is required to comply with the provider licence without disclosing the same to a wider audience and to give the sector the time to address any issues identified without premature disclosure.

In the interest of transparency, Monitor publishes information on its website about the performance of each NHS foundation trust, including the following:

- Monitor's assessment of the risk of each NHS foundation trust's non-compliance with the continuity of service and governance conditions of their licence;
- whether Monitor has opened an investigation into a NHS foundation trust's compliance with its licence, including evidence of breaches; and
- any enforcement taken by Monitor against a NHS foundation trust for non-compliance with its licence conditions.

We consider that there may be a public interest in disclosing the ceilings for each NHS foundation trust given the public interest in the financial health of public sector bodies, especially where the NHS foundation trusts in question are in breach of their licence due to financial sustainability and/or financial governance concerns and enforcement action has been taken.

However, since Monitor publishes all enforcement action on its website, including the grounds for undertaking that enforcement action, we consider that the public interest is met by its publication policy. Taking this point into account I have decided that in this case the public interest is best served by withholding the information.

Monitor considers that the public interest in the performance of NHS foundation trusts and Monitor's regulatory activity is satisfied by the information that is currently in the public domain.

## **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](mailto:foi@monitor.gov.uk).

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,

A handwritten signature in blue ink, appearing to read 'T. Beasley', with a large, stylized flourish at the end.

**Tim Beasley**  
Senior Manager, FT Approvals