

24 December 2015

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By email

Dear [REDACTED]

Review of your request under the Freedom of Information Act 2000 ("the FOI Act")

Request

I refer to your email of 2 December 2015 in which you requested an internal review of Monitor's decision of the same date. That decision addressed your earlier request (4 November 2015) for the following information:

'I would like to make a request under the Freedom of Information Act please.

I would like to see copies of the minutes, agenda and papers submitted to the last three meetings of Monitor's Clinical Advisory Forum.'

Your request for an internal review stated:

'I would like to appeal a couple of the decisions made on s41 grounds.

The paper

Why has Medical Agency Spend increased in the NHS? (Cabinet Office Implementation Unit)

This was not provided by a trust so would not be actionable if it was disclosed. The Cabinet Office would not take this action.

Also the public interest in £3.3bn of public spending outweighs the considerations you mention.'

On 9 December Monitor wrote to you asking for clarification on the scope of your request. Since we do not appear to have received a response we have assumed that your request is limited to the information provided by Cabinet Office.

Decision

I have reviewed Stan Silverman's decision and I have decided to uphold it for the reasons already provided. Cabinet Office has confirmed that the information was originally provided in confidence. It includes information supplied by various providers who had the same expectation of confidence. I note your comment that Cabinet Office "would not take action" in relation to disclosure. This is not the applicable test. A breach of confidence is actionable if a person could successfully bring an action as a result of the disclosure. The test is absolute and, unlike other exemptions under the FOI Act, there is no "public interest test" in this respect. However, the public interest is relevant to consideration of whether it is open to a party disclosing information to defend a claim for breach of confidence on the basis of public interest. Where information is provided in confidence there is a strong public interest in favour of keeping that confidence. Whilst I accept that public expenditure is a matter of legitimate public interest it is my view that in this case the public interest would be best served by withholding the information and on that basis an action for breach of confidence would be successful. For this reason I have decided that the information is exempt under section 41 of the FOI Act.

Whilst the initial decision relied solely on section 41, having considered your request for an internal review Monitor has now decided that, for the reasons set out below, this information is also exempt under section 36 of the FOI Act (prejudice to effective conduct of public affairs).

Section 36

Monitor considers that the information is exempt under section 36(2)(b)(i) and section 36(2)(c) of the FOI Act. These provisions address circumstances where disclosure:

- (a) would, or would be likely to, inhibit the free and frank provision of advice (section 36(2)(b)(i)), or*
- (b) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs (section 36(2)(c)).*

For the purposes of section 36(2) Monitor's qualified person is Jim Mackey, our Chief Executive. In his opinion, disclosure of the information provided by Cabinet Office would inhibit the provision of future advice about developments in government policy, to the detriment of Monitor's policy making process. The information includes advice about the causes of increased medical agency spend and how it could be addressed. It was produced by Cabinet Office Implementation Unit as part of a wider piece of work to develop government policy. Cabinet Office provided advice and support in the expectation of confidence. If Monitor disclosed this information, it would damage an important relationship of trust and confidence and Cabinet Office would be less willing to provide support in the future.

In Mr Mackey's opinion, disclosure of the report is also likely to prejudice the effective conduct of public affairs. The materials also include information provided by NHS trusts and NHS foundation trusts about medical agency spend. Disclosure of this information would prejudice the willingness of providers to provide information for the purpose of assisting future policy development. This would reduce the value of future research, to the prejudice of the effective conduct of public affairs.

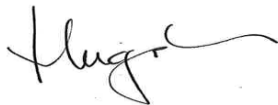
Public interest test

There is a general public interest in disclosing information about public spending, especially where that spending relates to a subject that is in the public interest. In the present case it is in the public interest to further understanding of the reasons why spending on medical agency staff has significantly increased over the past three years and how it might be addressed. However, Monitor needs a safe space to consider advice on government policy without external interference and distraction. Disclosure of the information would be likely to interfere with further policy development. Moreover, the Department of Health, Monitor and the TDA have each published information about their approach to agency spend. I therefore consider that in this case the public interest is best served by withholding the information.

Review rights

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hugo', with a stylized flourish extending to the right.

Hugo Mascie-Taylor

Medical Director