

31/03/2016

[REDACTED]  
[REDACTED]  
[REDACTED]

### By email

[REDACTED]

Dear [REDACTED]

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

I refer to your email of 7 March 2016 in which you requested information under the FOI Act.

### Your request

You made the following request:

*“Will you please send me a copy of the complaint from Care UK Clinical Services Limited which gave rise to your Investigation into commissioning of elective care services at the North East London Treatment Centre by Barking and Dagenham CCG, Havering CCG, Redbridge CCG and Waltham Forest CCG, Case reference: Pricing/CCD 07/15.”*

We have understood your request to be for the formal complaint letter sent by Care UK Clinical Services Limited (Care UK) to Monitor on 3 July 2015 in relation to the commissioning of elective services at the North East London Treatment Centre by Barking and Dagenham Clinical Commissioning Group, Havering Clinical Commissioning Group, Redbridge Clinical Commissioning Group and Waltham Forest Clinical Commissioning Group (together the CCGs). Monitor announced that it had opened an investigation into some of the issues raised on 30 July 2015.<sup>1</sup>

### Decision

Monitor holds the information that you have requested.

Monitor has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in sections 21, 22, 31 and 41 of the FOI Act as explained in detail below.

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<sup>1</sup> See Monitor’s notice of initiation of investigation [click here](#)

## **Reasons for decision**

### **Section 21 – Information accessible to applicant by other means**

Section 21(1) of the FOI Act provides that information is exempt if it is reasonably accessible to the applicant by other means.

Some of the information you have requested is set out in documents published on our website, in particular, the [Notice of initiation of investigation](#) and the [statement of issues](#) include information about Care UK's complaint.

### **Section 22 – future publication**

Section 22 provides that information is exempt information if:

- (a) the information is held by the public authority with a view to its publications, by the authority or some other person, at some future date (whether determined or not);
- (b) the information was already held with a view to such publication at the time when the request for information was made; and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a) above,

As set out in Monitor's outline timetable<sup>2</sup> we estimate that we will be in a position to publish conclusions of the investigation in March or April 2016. Please note that this timetable may be subject to change, in which case we will update our website. These conclusions will contain further information relating to Care UK's complaint. It is our view that publishing the formal complaint letter received from Care UK at this stage in the investigation process could prejudice the progress of the investigation.

### **Section 31 – prejudice to law enforcement – exercise of Monitor's functions**

Section 31(1)(g) of the FOI Act provides a qualified exemption from disclosure where such disclosure would be likely to prejudice the exercise by a public authority of its functions for any of the purposes set out in section 31(2) of the FOI Act. One of these purposes, contained in section 31(2)(c), is ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

Monitor is responsible for enforcing the Procurement, Patient Choice and Competition Regulations<sup>3</sup> (the "Regulations") and the national tariff<sup>4</sup>. Monitor has the powers to take formal action against a commissioner if it has failed to comply with the Regulations and/or the rules contained in the national tariff.

The information provided by Care UK in its letter of 3 July (to which your request relates) is currently being considered by Monitor in its investigation into whether the CCGs have breached the Regulations and/or the national tariff, and whether regulatory action may be

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<sup>2</sup> <https://www.gov.uk/government/publications/case-investigation-into-the-commissioning-of-elective-services-in-north-east-london>

<sup>3</sup> National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013

<sup>4</sup> See relevant documents and guidance on our website about our role in relation to the NHS payment system: [click here](#).

necessary. It contains the free and frank views of Care UK and confidential information belonging to third parties. The effectiveness of Monitor's regulatory action depends on the maintenance of confidentiality and ensuring free, full and frank exchanges with individuals and organisations on speculative, prospective or on-going matters, including formal complaints and informal requests for information.

Making available the information specified in the request would prejudice, or would be likely to prejudice, the exercise of Monitor's functions by, among other things:

- (a) deterring commissioners, providers and other stakeholders from co-operating with Monitor on a voluntary basis;
- (b) decreasing the amount of information supplied voluntarily to Monitor from commissioners, providers and other stakeholders;
- (c) inhibiting communications between relevant parties prior to the formal launch of an investigation into a complaint; and
- (d) disclosing information that is commercially sensitive and provided expressly on a confidential basis.

#### *Public interest test*

Sections 31 and 22 of the FOI Act are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemption should be maintained. I have balanced the arguments in favour of maintaining the exemption with the factors in favour of disclosing the correspondence that forms the complaint.

It is in the public interest for third parties to be able to freely exchange views with Monitor, without needing to disclose the same to a wider audience. If third parties were not able to exchange views and information without being able to ensure that such exchanges would not enter the public domain, it is likely that this would severely inhibit the content of such exchanges in future, and may dissuade individuals and organisations from providing Monitor with information on an informal or formal basis. There is a real risk that having to disclose information received by Monitor from persons wishing to make a complaint would hinder the frankness with which future discussions are conducted (including in relation to consideration of risks, options or approaches) which would not be conducive to the exercise by Monitor of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action exist, or may arise.

We note that there is a public interest in disclosing information about Monitor's performance of its functions so that Monitor may be held to account. Monitor has already published information regarding this complaint, including:

- a [notice of initiation](#) on our website, which sets out the background to this investigation; and
- a [statement of issues](#), which summarises the complaint and sets out further detail of the circumstances in which Monitor decided to open a formal investigation and the potential breaches of the Regulations that the investigation will look at.

Monitor also publishes the following documents to assist commissioners, providers and the public to understand how Monitor performs its functions and makes decisions as to whether to open an investigation:

- Monitor's Annual Report includes a summary of activity undertaken in relation to its functions under the Regulations and the national tariff;
- Monitor's website includes a number of hypothetical scenarios to assist understanding of how the Regulations might apply;
- on-going efforts to capture wider lessons for the sector, for example in blog entries ; and
- we publish details of enforcement action that we take, including the basis for taking that action.

These steps ensure transparency in Monitor's performance of its functions under the Regulations and relating to the national tariff. We believe this approach strikes a correct balance between keeping the public informed of our actions and approach and maintaining trust and confidence between us and third parties with whom we correspond, on whose trust and confidence we rely in order to ascertain whether circumstances which would justify regulatory action exist, or may arise.

It should be noted that the decision to open a formal investigation is fact specific. The reasons for us opening this investigation and the scope of our investigation are set out in our published statement of issues. Therefore our view is that the complaint letter itself would have limited application beyond that which we have already set out in our statement of issues.

In light of the information set out above, I consider that the public interest is in favour of withholding the requested information.

#### **Section 41 – information provided in confidence**

The section 41 exemption applies to information obtained from another person where its disclosure would give rise to an actionable breach of confidence. A breach of confidence will be actionable if a legal person is able to bring an action for the breach of confidence to court and the action is likely to succeed.

We consider that some of the information you have requested has the requisite degree of confidence to be actionable by Care UK if disclosed, for example, the letter contains information about the scoring given to individual bids in the CCGs' procurement process.

Section 41 is an absolute exemption, so the application of the public interest test pursuant to section 2(2) of the FOI Act is not required. However, when determining whether an action for breach of confidence would be likely to succeed it is necessary to consider whether the public interest in favour of disclosure outweighs the interest in withholding the information. Where a duty of confidence exists there is a strong public interest in favour of maintaining that confidence. In order to decide whether to take regulatory action it is important for Monitor to conduct free and frank discussions with providers about commissioning processes.

### **Additional information**

It may assist you to know that Monitor offers formal and informal advice about NHS procurement, choice and competition. Further details are available on our website via the following link: [click here](#)

### **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.

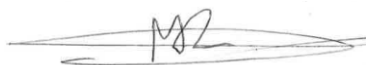
If you are dissatisfied with the outcome of any internal review conducted by Monitor, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

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).

### **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,



**Michel Van Zundert**  
Competition Inquiries Lead