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28/04/2016

[redacted]

By email
[redacted]

Dear [redacted]

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

I refer to your email of 31 March 2016 in which you requested information under the FOI Act from Monitor. Since 1 April 2016, Monitor and the NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor.

Your request

Your email, set out in full in the Annex to this letter, contained a number of questions about Monitor's report *NHS adult hearing services in England: exploring how choice is working for patients* (the Report).

Decision

NHS Improvement holds some of the information that you have requested and has decided to withhold some of it on the basis of the application of exemptions in section 21, 41 and 43 of the FOI Act.

I have set out below for each question whether NHS Improvement holds the information you have requested and whether NHS Improvement has decided to withhold that information on the basis of the applicability of the exemptions in the FOI Act. Where we are able to provide you with information, it is set in the letter below. We have treated some of your questions as enquiries since they do not seem to be requests for recorded information held by NHS Improvement. I have identified those questions where we have treated your request as an enquiry.

Reasons for decision

1. **Since March 2015: what steps has Monitor taken to raise public awareness and understanding of choice in adult hearing services?**

NHS Improvement has decided to treat this question as an enquiry. To raise public awareness and understanding of the role of choice we have:

- Run a webinar for commissioners on the findings of the Report including how best to ensure choice works well
- Published a set of resources for commissioners to help them make choice work well in their areas, including through making sure people are aware of their choices. These resources include:
  - A slide pack
  - 'Top Tips' to make choice work well
  - Answers to questions frequently asked by commissioners
- Presented on patient choice at various events including at the Ear Foundation conferences
- Worked with National Healthwatch to increase awareness of the findings of Report among local Healthwatch groups including an offer made in their bulletin to work with local Healthwatch groups to improve choice
- Worked with Healthwatch Liverpool to improve the information available to patients about services they can choose in their area on the "Live Well Liverpool" website.

2. **Please provide the latest update/data on the pilot project to share outcomes data in a practical and cost-effective way**

NHS Improvement holds this information and has decided to disclose some of the information that it holds. We are currently working with a CCG in the North of England to improve how patient choice is working in adult hearing services. The aim is to examine what kind of information is useful for patients to help them choose their provider. On 31 March 2016, we held a focus group and several depth interviews with current and prospective users of NHS hearing aids to understand what aspects of the service they would like to know before choosing a provider. We are in the process of collating the results of that research, which will feed into the development of an information package for patients. The intention is to test this further with patients. NHS Improvement holds some data in relation to the pilot project to share outcomes data. NHS Improvement has decided to withhold this data in reliance on the exemption in section 41 (information provided in confidence) of the FOI Act (explained below).

3. **When will Monitor (NHS Improvement) review adult hearing services to understand the impact of Monitor's original work?**

NHS Improvement has decided to treat this question as an enquiry. At this point there are no timetabled plans to conduct a review. This is because of the forthcoming publication of the National Commissioning Framework for hearing services which incorporates many of the findings of our report. We have decided that it is not a good use of our resources to conduct a further review before the National Commissioning Framework has bedded down in the system. Any further work will be considered in the wider context of the priorities of NHS Improvement.

4. **Footnote 38 [of the Report] defined non-complex audiology. Has Monitor's view on the definition of non-complex/complex audiology changed since then, and if so what evidence/objective justification underpinned any change?**

NHS Improvement has decided to treat this question as an enquiry. Footnote 38 (page 16 of the Report) does not define non-complex audiology. The focus of our research was on adult hearing services, which we defined for the purposes of our review as services for people with diagnosed or suspected age-related hearing loss, who are typically aged 55 years and older (page 15 of the Report).

5. **Patients categorised as complex were out of the scope of the patient survey. What were the exclusion criteria for complex patients and how were they derived?**

NHS Improvement has decided to treat this question as an enquiry. The target group for the patient survey was people who had been referred by their GP for a hearing assessment (or who had received hearing aids) in the previous 18 months for age-related hearing loss. The market research company used screening questions to identify the relevant target group. Screening questions formed part of the questionnaire used for the survey, which we published in March 2015 as an Annex to the survey findings report (see: here). Question 5 (reproduced below) seeks information about the cause of survey respondents' hearing loss. The wording for this question was developed with input from patient groups: Action on Hearing Loss and Hearing Link.

> *"Q5. Do you know what caused your [their] hearing loss? For example, was it illness, an injury or is it age-related?*
>
> *Yes, age-related*
> *No/don't know THANK & CLOSE*
>
> *INTERVIEWER NOTE: IF THE HEARING LOSS IS CAUSED BY SIDE EFFECTS OF MEDICATION, VIRAL INFECTION, HEAD INJURY, MÉNIÈRE'S DISEASE OR MENINGITIS, THE RESPONDENT IS OUT OF SCOPE. ALSO IF THE RESPONDENT MENTIONS COCHLEAR IMPLANTS, TINNITUS, VERTIGO/BALANCE PROBLEMS, SUDDEN HEARING LOSS, PAIN, OR INFLAMMATION THEY ARE OUT OF SCOPE. IF THE RESPONDENT MENTIONS OTOSCLEROSIS THEY ARE IN SCOPE"*

6. **Monitor found that patients were not always offered a choice, nor information to make an informed choice. We have the following questions:**

   In its field work and review, did Monitor come across:

   a- **the term "legacy patients"? If so, did this raise any concerns, were these reflected in the final report and, if not, why not given the possible implications for procurement, patient choice and competition regulations, and/or licence conditions?**

NHS Improvement has restricted its search in response to this question to the responses to our online survey. This is because the volume of documents that would need to be reviewed to locate the information covered by the request is significant. In addition. given the nature of the information, we would be required to carry out a manual search of many of the responses to locate the information requested. If we were to do this we would exceed the cost limit under section 12 of the FOI Act[1].

NHS Improvement holds this information and has decided to disclose all the information that it holds. In over 600 stakeholder responses to the online survey we conducted there were two references to 'legacy patients'. One stakeholder said that AQP had brought a "more responsive service for legacy patients"; another said "we are the historical provider that all legacy patients were aware of prior to the AQP Contract". These comments did not lead us to further explore the issue or highlight it in our report.

b- referral templates that were inconsistent with the locally commissioned service specifications – e.g. provider(s) coding patients as complex even if patients met local "non-complex" referral criteria? If so, did this raise any concerns, were these reflected in the final report and, if not, why not given the possible implications for procurement, patient choice and competition regulations, and/or licence conditions?

NHS Improvement does not hold this information. The stakeholders' responses to Monitor's online survey do not contain any information about whether there were referral templates that were inconsistent with the locally commissioned service specifications.

Stakeholders did raise wider issues relating to challenges associated with patient pathways and referral processes. As noted at page 23 of our Report, some stakeholders raised concerns that patients with more complex conditions requiring referral to a consultant-led ENT service may not always be detected by some providers of adult hearing services or that delays may be caused by multiple referrals when patients with more complex conditions are sent back to the GP for suitable onward referral.

c- any evidence of providers encouraging GPs to annotate referrals in a way that could restrict choice and/or lead to the provider receiving more reimbursement per patient? If so, did this raise any concerns, were these reflected in the final report and, if not, why not given the possible implications for procurement, patient choice and competition regulations, and/or licence conditions?

NHS Improvement does not hold this information. The stakeholders' responses to Monitor's online survey do not contain any information about whether or not providers have encouraged GPs to annotate referrals in a way that could restrict choice and/or lead to the provider receiving more reimbursement per patient.

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[1] Under section 12(1) of the FOI Act, NHS Improvement is not required to comply with any request that potentially exceeds the relevant cost limit. The relevant cost limit is £450, which is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. This equates to a period of approximately eighteen hours in which to locate, retrieve and extract the information that you have requested.

7. **The report suggests that a CCG introduced a new service specification but decided not to introduce choice. In this example, did the CCG take into account procurement, patient choice and competition regulations; if so, how? and, if not, why not?**

NHS Improvement does not hold this information. We obtained no information during the review about whether or not the CCG took into account the Procurement, Patient Choice and Competition Regulations in deciding whether to introduce the new service specification for adult hearing services.

8. **Please provide the pricing data obtained during the research project.**

NHS Improvement holds this information. NHS Improvement has decided to withhold this information on the basis of the applicability of the exemptions in sections 21, 41 and 43 of the FOI Act as set out below. It should be noted that the information that NHS Improvement holds is limited. We only received pricing information from a small subset of providers and CCGs.

9. **a) Monitor found evidence of an unfair playing field; what form(s) did this take?**

NHS Improvement has decided to treat this question as an enquiry. The project team did not identify whether there was an "unfair playing field" for providers as the aim of the project was to look at how choice is working in NHS-funded adult hearing services in England. The aims of the project were:

- to understand how choice has been working in relation to adult hearing services funded by the NHS
- to understand whether current arrangements serve the interests of patients effectively and whether there is scope for improvement
- to offer insights for commissioners deciding whether and how to introduce choice.

As set out at page 44 of our Report we identified at least two cases where providers were working to different service specifications and/or payment arrangements and we set out in the Report the implications this may have on patient choice. We made suggestions to commissioners in our Report, which were aimed at ensuring that they get maximum value from patient choice. In relation to promoting a level playing field, we suggested that commissioners align service specifications and prices for all providers of adult hearing services in a given area (point 6, page 53 of the Report).

b) please list the CCGs in which Monitor found material distortions in the playing field.

NHS Improvement does not hold this information. As set out above the purpose of this project was to look at how choice is working. Monitor did not make any findings that there were material distortions in the playing field. Monitor also did not make any findings in relation to individual commissioners.

c) given the review was in part based on the recommendations of 'A fair playing field' what action did Monitor take to address any material distortion(s) in the playing field discovered during its review?

NHS Improvement has decided to treat this question as an enquiry. This review was initiated in part as a result of the Fair Playing Field Review. In particular, because commissioners had told us that there was a general lack of evidence about the risks, costs and benefits of introducing choice, which made it difficult for them to decide whether and how to introduce choice (page 9 of the Report). As set out above, Monitor did not make a finding of material distortions in the playing field. However Monitor did suggest in the Report that "*in an area where choice has been introduced, we would expect all qualifying providers in that area to be working to the same service specification and to be subject to the same locally determined price*" (page 44 of the Report). The suggestion was made to ensure commissioners get maximum value from patient choice.

d) in footnote 153, it is suggested that additional (i.e. non-AQP) contracts were in place for more and less complex audiology. How did Monitor validate these claims and minimise the risk that it was not misinformed/disadvantaged by any information asymmetries?

NHS Improvement has decided to treat this question as an enquiry.

As set out in the Report, we identified at least two cases where providers were working to different service specifications and/or payment arrangements. Footnote 153 of the Report explains that we were told that local determined prices exist alongside block contracts and cost and volume contracts in a further 20 areas. Monitor determined through discussions with several CCGs that in a number of these cases the different prices were in payment for different services, for example, for more and less complex audiology services.

As set out above the purpose of this project was to look at how choice is working. We set out in the Report what we observed from the information provided to us by providers and commissioners.

Exemptions

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. We have previously responded in relation to the information you have asked for in question 8 by email on [redacted] and [redacted]

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 the information you have requested in relation to outcomes data (question 2) and pricing (question 8) has the requisite degree of confidence to be actionable by the parties that provided it if disclosed.

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 carry out research projects that allow us to better understand how choice and competition are operating it is important for NHS Improvement to conduct free and frank discussions with providers and commissioners about commissioning processes.

Section 43 – Commercial interests

The information that NHS Improvement holds in relation to question 8 falls within section 43 of the Act. This section provides that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

NHS Improvement considers that the information it holds in relation to pricing (question 8) contains commercially sensitive information. Prices for adult hearing services are determined locally, through commercial negotiation between CCGs and providers. Disclosing the details of the prices paid to individual providers would disadvantage those providers.

Public interest test

I am of the opinion that the public interest test which must be considered in relation to section 43 does not favour disclosure of the information. NHS Improvement relies on the provision of information voluntarily from the sector. Disclosing sensitive information provided to NHS Improvement relating to pricing included in the scope of the project would potentially restrict the willingness of stakeholders to provide NHS Improvement with such information in future. Further, we would not normally expect providers to share current pricing information. 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 NHS Improvement in research projects would hinder the frankness with which future discussions are conducted which would not be conducive to the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action exist, or may arise.

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 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 and the attached information 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,

Nina Shore
Economics Director (Competition)

FOI REQUEST

DATE: 29 MARCH 2016

REFERENCE DOCUMENT: *"NHS adult hearing services in England: exploring how choice is working for patients"*, Monitor - March 2015.

As Monitor colleagues will be aware, the NCHA is putting together the largest database of NHS hearing services in England. We are keen therefore to double check our findings against those of Monitor two years ago. To assist Monitor colleagues in providing a timely response

- each question includes a page number in brackets – e.g. (p.3) means the question relates to text on page 3 of Monitor's report
- we understand that during transition to NHS Improvement there might be a delay in responding to this request. Colleagues that worked on the original report, who should be able to supply the necessary information to the FoI team, were David.Furness@Monitor.gov.uk; Dennis.Berg@Monitor.gov.uk; Nina.Shore@Monitor.gov.uk

Questions

10. Since March 2015: what steps has Monitor taken to raise public awareness and understanding of choice in adult hearing services? (p.6)

11. Please provide the latest update/data on the pilot project to share outcomes data in a practical and cost-effective way (p.6)

12. When will Monitor (NHS Improvement) review adult hearing services to understand the impact of Monitor's original work? (p.6)

13. Footnote 38 (p.16) defined non-complex audiology. Has Monitor's view on the definition of non-complex/complex audiology changed since then, and if so what evidence/objective justification underpinned any change?

14. Patients categorised as complex were out of the scope of the patient survey (p.23). What were the exclusion criteria for complex patients and how were they derived?

15. Monitor found that patients were not always offered a choice, nor information to make an informed choice (p.21/p.37). We have the following questions:

    In its field work and review, did Monitor come across

    d- the term "legacy patients"? If so, did this raise any concerns, were these reflected in the final report and, if not, why not given the possible implications for

procurement, patient choice and competition regulations, and/or licence conditions[2]?

e- referral templates that were inconsistent with the locally commissioned service specifications – e.g. provider(s) coding patients as complex even if patients met local "non-complex" referral criteria? If so, did this raise any concerns, were these reflected in the final report and, if not, why not given the possible implications for procurement, patient choice and competition regulations, and/or licence conditions[1]?

f- any evidence of providers encouraging GPs to annotate referrals in a way that could restrict choice and/or lead to the provider receiving more reimbursement per patient? If so, did this raise any concerns, were these reflected in the final report and, if not, why not given the possible implications for procurement, patient choice and competition regulations, and/or licence conditions[1]?

16. The report suggests that a CCG introduced a new service specification but decided not to introduce choice (p.32). In this example, did the CCG take into account procurement, patient choice and competition regulations; if so, how? and, if not, why not?

17. The report provided variation in local prices paid for adult hearing services – +/-2% (p.33) in areas were choice had been introduced – and noted that these local prices were about 20% to 25% lower than the non-mandated tariff (p.34). Please provide the pricing data obtained during the research project[3]

18. a) Monitor found evidence of an unfair playing field (section 4.4, p.44); what form(s) did this take?

b) please list the CCGs in which Monitor found material distortions in the playing field

c) given the review was in part based on the recommendations of 'A fair playing field' (p.9) what action did Monitor take to address any material distortion(s) in the playing field discovered during its review?

d) in footnote 153 (p.44), it is suggested that additional (i.e. non-AQP) contracts were in place for more and less complex audiology. How did Monitor validate these claims and minimise the risk that it was not misinformed/disadvantaged by any information asymmetries?

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[2] For example Regulation 10 if CCGs were aware, and licencing conditions if an FT was involved.
[3] We would be happy to receive this in anonymised form. We request this information because we have undertaken a national FoI project and have found significant variation in costs across England and would like to better understand how variation of +/-2% was derived and what the variation in pricing was when considering areas without choice, and/or areas with choice but where CCGs had not ensured there was a fair playing field.