

17 November 2015

By email

Dear [REDACTED]

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

I refer to your email of **4 November 2015** in which you requested information under the FOI Act.

Your request

You made the following request:

“I would like to see a copy of each “application for adjustment to ceiling trajectory” received by Monitor since the new rules on agency spend were introduced at the start of October.

<https://www.gov.uk/government/publications/nursing-agency-rules>

The only bits I want to see are the name of the trust, date completed, and the answers to questions 1 and 3.

1: Why are you applying for this adjustment?

3: What is your proposed annual trajectory of nursing agency spend?”

Decision

Monitor holds the information that you have requested.

Monitor has decided to withhold all the information that it holds on the basis of the applicability of the exemptions in sections 41 and 43 as explained in detail below.

Section 41 – Information provided in confidence

We consider that the withheld information is exempt under section 41 of the FOI Act. Section 41(1) provides that information is exempt if:

“(a) it was obtained by the public authority from any other person (including another public authority) and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

The test in section 41(1)(a) is met as the information was obtained by Monitor by third parties, in this case providers.

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount to an actionable breach of confidence. This means:

- (i) the information must have the necessary quality of confidence about it;
- (ii) the information must have been imparted in circumstances giving rise to an obligation of confidence;
- (iii) disclosure must amount to an unauthorised use of the information to the detriment of the confider.

Monitor considers that disclosure of the information would amount to an actionable breach of confidence. Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, in considering whether (in an action for breach of confidence) a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. In the present circumstances, Monitor does not consider that there is a strong public interest in disregarding the duty of confidence owed to providers.

Providers should be able to share information and concerns with Monitor in the expectation that this will be kept confidential, and this is particularly important in relation to financial information which, if disclosed, may have negative consequences for providers. Monitor considers that it is crucial for trust to be maintained by providers who impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to Monitor of relevant concerns.

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 given to Monitor by providers covered in question 3 of the application form (i.e. proposed annual trajectory of nursing spend) relates to financial information, which by its nature is commercially sensitive and disclosure of which is likely to be detrimental to the providers' legitimate commercial interests. For example, parties seeking to negotiate contracts with a provider could use this information to strengthen their own bargaining position when negotiating for, or providing services to, that provider. We consider that the information relating to a provider's projected annual nursing spend is commercially sensitive.

Public interest test

Section 43 is a qualified exemption and therefore requires 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 providers the space to openly and frankly discuss their views about the action that is required to comply with the provider licence without disclosing this to a wider audience and to give the sector the time to address any issues identified without premature disclosure.

We consider that there may be a public interest in disclosing the proposed annual trajectory of nursing spend for providers which fall into the category in your request, especially where they 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. Also, providers publish their actual annual spend in their accounts which are available to view from their respective websites. Taking these points into account I have decided that in this case the public interest is best served by withholding the information.

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.

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,



Tim Beasley
Senior Manager, FT Approvals