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**By email**

Dear [REDACTED]

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

I refer to your email of 17 November, which we have understood to be a request for an internal review of Monitor’s decision of the same date in relation to the following FOI Act request you made on 4 November:

*“Hello,*

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

*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 decided to withhold the information held on the basis of the applicability of the exemptions in sections 41 and 43 of the FOI Act.

I have now conducted a review of that decision and have decided to release some of the information requested. I have decided to release the dates that the applications submitted to us were completed (as set out in each application form received). This information is outlined in the attached appendix.

However, I have decided that the remaining information is exempt from release under sections 41 and 43 of the FOI Act for the reasons outlined in the original decision letter and any additional reasons outlined below. In addition, I have decided that the information requested is exempt from disclosure under sections 31 and/or 33 for the reasons outlined below.

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

I have decided to withhold the majority of the information requested on the basis that disclosure would constitute a breach of confidence actionable by the providers concerned, for the reasons outlined in the initial decision letter. The information requested includes commercially sensitive information which, if disclosed, would prejudice any attempts to reduce agency spend by the providers concerned. The information was provided with an expectation of confidentiality in the context of an open relationship between regulator and regulated.

### **Section 43 – commercial interests**

I have decided to withhold the majority of the information requested on the basis that disclosure would prejudice the commercial interests of the providers concerned, for the reasons outlined in the initial decision letter. I consider that disclosure of the information being withheld, including the names of the providers and the reasons given for seeking an amendment to the nursing agency spend ceiling, would adversely affect the commercial interest of the providers concerned, for example, by weakening their bargaining position when negotiating with providers of nursing staff. The information includes detailed and open expressions of opinion by the providers concerned including about current levels of agency spend, challenges in meeting the proposed ceiling and local markets issues. We consider this information to be commercially sensitive and are satisfied that it would prejudice the commercial interests of the providers concerned if it was to be released.

### **Section 31 – law enforcement**

Section 31(1)(g) of the FOI Act exempts from disclosure information that would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 31(2). Monitor believes that disclosure of the information requested about NHS foundation trusts would, or would be likely to, prejudice the exercise of its functions for the purposes of determining whether any person has failed to comply with the law (section 31(2)(a)) and whether regulatory action is justified (section 31(2)(c)).

Monitor's role includes monitoring NHS foundation trusts' compliance with their licence. Within this context, Monitor requires detailed information from foundation trusts, including about their finances. In order for us to effectively regulate NHS foundation trusts, including assessing whether they are well led, we rely on NHS foundation trusts voluntarily sharing their information with us. In turn, NHS foundation trusts have a reasonable expectation that we will treat sensitive information that they provide to us as confidential.

The ceilings on nursing agency spend introduced by Monitor and the TDA were based on Monitor's and the TDA's review of financial information largely provided voluntarily by providers. Monitor issued each provider with a ceiling figure and gave them an opportunity to apply to have the ceiling revised if they thought that exceptional circumstances applied such that the proposed ceiling figure was not appropriate.

The applications for adjustments received by Monitor contained expressions of opinion by providers about their financial and commercial position. They contained confidential and highly sensitive information about the providers concerned. The information was provided in the context of the relationship outlined above – that is to say, in the context of an open and honest relationship in which providers voluntarily provide sensitive confidential information, which we rely upon in order to effectively regulate. That information was provided with an expectation of confidence and disclosure of the information would adversely affect the position of the providers concerned, particularly when negotiating contracts with suppliers of temporary staff.

We consider that disclosing the sensitive financial information requested, as well as the names of the providers concerned, would or would be likely to prejudice the exercise of our functions since it would make providers less willing to share sensitive information with us which would reduce the amount and quality of information that they are prepared to voluntarily share with us in future. This would have a detrimental impact on the open relationship of trust that we have built with the sector, and our ability to efficiently assess their finances without recourse to our statutory powers to obtain information by compulsion.

### **Section 33**

Section 33(1)(b) and 33(2) of the FOI Act provide that information may be exempt from disclosure where disclosure would be likely to prejudice the exercise of any public authority's functions in relation to the examination of economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

Monitor is of the view that the information about foundation trusts being withheld is exempt under section 33(1)(b) of the FOI Act on the basis that Monitor has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources in discharging their functions, which would be prejudiced by the release of the information requested. Monitor has this function by virtue of Monitor's general duty under section 62(1)(a) of the Health and Social Care Act 2012 ("the 2012 Act") to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient, and effective and improves the quality of services. Further, see the conditions of the provider licence which Monitor uses to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the 2012 Act.

Monitor relies on the full and frank provision of information from NHS foundation trusts in order to carry out its functions effectively. This is an extension of one of our core regulatory principles which is to operate a trust-based approach to our relationships with NHS foundation trusts. Accordingly we would not wish to prejudice that relationship of trust and confidence. There is potential prejudice to that relationship, and accordingly to the ability of Monitor to regulate the NHS foundation trust sector, if sensitive information which NHS foundation trusts provide to Monitor is disclosed. In consequence there is a potential detriment to the system of regulation of NHS foundation trusts. For these reasons, we consider that disclosure of the majority of the information requested is exempt information under section 33(2).

Further, Monitor considers that the information about NHS trusts being withheld is also exempt under section 33(1)(b) of the FOI Act on the basis that the TDA has functions relating to the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources in discharging their functions, which would be prejudiced by the release of the information requested. The TDA's functions under Section 4 of the National Service Trust Authority Directions 2013 extend to scrutinising whether Trusts are using their resources efficiently and effectively.

The TDA's activities are dependent upon having the "safe space" in which NHS trusts are able to share sensitive and confidential information with the TDA without fear of it being shared more widely. This safe space is important to ensuring the free and frank exchanges of views and information between the TDA and the Trusts, to ensure effective collaborative working.

Monitor is satisfied that disclosure of the information about NHS trusts requested would be likely to prejudice the TDA's abilities to perform its functions by removing the "safe space" and by creating an atmosphere making it likely that information shared with the TDA would be less open and candid and would be likely to make collaborative working slower, more formal and less open and thereby less effective.

#### Public interest test

Section 31 and 33 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, TDA and NHS trusts and foundation trusts the space to share sensitive and confidential information and openly and frankly discuss their views about the action that is required to comply with the provider licence/relevant legal requirements without disclosing the same to a wider audience.

In relation to the latter, it may assist you to know that the ceilings on nursing agency spend are used by Monitor to assist it in assessing licence compliance. In particular, Monitor has recently introduced a new value for money trigger in its [Risk Assessment Framework](#), which means that Monitor will be explicitly taking into account trusts' inefficient or uneconomic spending practices, including in relation to agency spending, as a measure of governance. We consider that there is a public interest in allowing trusts to discuss the proposed ceiling figures frankly and openly with their regulator without needing to disclose the content of those discussions to a wider audience.

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

- 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.
- Monitor also publishes the annual reports and accounts for each foundation trust (see the [foundation trust directory](#)) and, together with TDA, [quarterly reports](#) about the performance of foundation trusts and NHS trusts. These reports include information about agency spend across the sector. In addition, the TDA publishes its [board papers](#). We consider that the public interest is therefore satisfied by the information already available.

In considering whether the exemption cited above should be overridden if the public interest demands disclosure, the test is whether "in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

I consider that there is a strong public interest in allowing Monitor and TDA to be able to carry out their functions efficiently and effectively, and to have the space to consider, without concern as to publication, whatever information they require in such circumstances. Any disclosure which would cause Monitor to have to reconsider requesting sensitive information necessary to its statutory function of regulating NHS foundation trusts would be detrimental to the process of regulation.

Furthermore, if confidential information is disclosed, NHS foundation trusts and other relevant third parties are likely to lose confidence in Monitor, or take action to prevent the disclosure of such 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,



**Richard Peden**

Director – Independent Providers

## Appendix

Date applications completed as stated on application	Number of applications
03/09/2015	1
07/09/2015	1
08/09/2015	1
09/09/2015	1
10/09/2015	7
11/09/2015	17
14/09/2015	35
15/09/2015	2
16/09/2015	1
24/09/2015	1
<b>Grand Total</b>	<b>67</b>