

13 November 2015

██████████
██████

By email

Dear ██████████

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

I refer to your email of **16 October 2015** in which you requested information under the FOI Act.

Your request

You made the following request:

‘Please can you send me the minutes of any meetings held by a committee to approve or reject management consultancy spend submitted by acute trusts.’

Decision

Monitor does hold the information that you have requested. Monitor holds minutes of the meetings from June 2015, but has decided to withhold this material.

From 2 June 2015, NHS foundation trusts (FTs) receiving interim support from the Department of Health and those that are in breach of their licence for financial reasons are required to secure advance approval from Monitor before signing new contracts for consultancy projects over £50,000 or extending or varying existing contracts or incurring additional expenditure to which they are not already committed (where the total contract value exceeds £50,000). All other FTs, particularly those under investigation by Monitor for financial breaches or planning a deficit for 2015/16, are strongly encouraged to comply. FTs are required to submit a business case to Monitor’s Foundation Trust Consultancy Approval Panel, which the panel will review against a number of assessment criteria, including ambition to deliver something of value, importance and relevance, clear scope and robust contract management.

Monitor believes that there is valid public interest in information relating to FTs’ use of management consultancy. Monitor therefore intends to publish information on the applications it has received and the decisions it has taken in due course, other than where there are strong arguments not to publish specific aspects of that information.

Monitor has therefore decided to withhold the information requested on the application of sections 22, 33, 41 and 43(2) of the FOI Act, as explained in detail below.

Section 22 – information intended for future publication

Section 22 provides an exemption where information is held by a public authority with a view to future publication, if it is reasonable to withhold the information from disclosure until the date of publication. Monitor intends to publish information about the decisions of the panel in 2015/16, which will provide some of the information contained within the minutes which you have requested. It is currently considering the form and content of what will be published, but the intention is to publish information other than that which would be exempt under FOI Act (e.g. commercially confidential information). This requires proper internal consideration of the material before publication and, where appropriate, discussions with third parties such as the applicant trusts. It would be premature to release the information before such consideration and discussion, and it is reasonable in the circumstances to withhold it.

The exemption is subject to a public interest test. There is a public interest in understanding the finances of FTs and of the NHS more general and in making information available to facilitate the scrutiny of how Monitor carries out its regulatory functions. Monitor considers that the public interest will be met by the future publication of this information. In addition, Monitor should have a reasonable period of time to consider the precise form and content of publication. Our conclusion is that the balance of public interest lies in withholding this information and keeping to our proposed timetable for publication.

In relation to the information in the panel minutes which we do not intend to publish, the following exemptions apply.

Section 33 – audit functions

Section 33 provides an exemption for information whose disclosure would, or would be likely to prejudice the exercise of Monitor's functions in relation to the audit of the accounts of FTs or the examination of the economy, efficiency and effectiveness with which FTs use their resources in discharging their functions ("audit-related functions").

Monitor is responsible for examining economy, efficiency and effectiveness of FTs, as part of its monitoring of compliance with the standard conditions of each FT's licence. The standard conditions for FTs include a requirement to establish and effectively implement systems and processes for ensuring compliance with the FT's statutory duty to act economically, efficiently and effectively in the exercise of its functions. In addition, as explained above, for some trusts, compliance with the licence is a requirement of enforcement action, which is intended to address breaches of those and other related conditions of the licence. The approval process and panel decisions form an important part of Monitor's exercise of its audit-related functions.

The minutes provide a description of the approval process, sometimes including details of the support offered from consultancy firms, data on the procurement process followed by FTs, including information provided voluntarily, as well as analysis and scrutiny from the

panel. If all of this information was published, FTs, particularly those that voluntarily follow the approval process, would be likely to provide Monitor with less complete or robust data, which would prejudice the effective operation of the approvals process and therefore Monitor's functions in relation to the examination of economy, efficiency and effectiveness with which FTs use their resources in discharging public functions.

The exemption is subject to a public interest test. There is a public interest in understanding the finances of FTs and of the NHS more generally. There is also an interest in making information available to facilitate the scrutiny of how Monitor carries out its regulatory functions. Monitor publishes a large amount of information regarding FT spending on its website and, as explained above, intends to publish information regarding the approval process at a later date. There is also a strong public interest in FTs making information available to Monitor to carry out its audit-related functions on the understanding that information will not all be placed in the public domain, and Monitor takes a 'trust-based approach' when engaging with FTs. Publication of the information would undermine that approach. The strength of the public interest in withholding this information therefore outweighs the interest in disclosing it.

To the extent that the information in the panel minutes is information which if disclosed would, or would be likely to, cause the prejudice to Monitor's audit-related functions described above, it is withheld under section 33 of the Act

Section 41 – information provided in confidence

Section 41 provides an exemption for information which was obtained by Monitor from any other person, if its disclosure to the public by Monitor would constitute a breach of confidence actionable by any person. 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.

Some of the information contained in the minutes is information submitted to the panel by a third party (an FT). Some of that information is not in the public domain and is confidential in nature (for example, some details of the proposals put forward by consultancy firms). The trusts providing the information or other third parties from whom that information is derived (e.g. the consultancy firms) would have a case for breach of a duty of confidence which would be likely to succeed, if Monitor were to release the relevant information in the minutes you have requested. The reasonable expectation of the trusts in providing information to the panel is that confidential information will remain private and will be used by Monitor for the specific and limited purpose of regulating trusts, including operation of the approvals process. This information is not trivial and not readily available by other means and was imparted in circumstances which created an obligation of confidence.

This is an absolute exemption, so does not require consideration of the public interest test. 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 overrides the public interest in maintaining the confidence. In this case, I have considered the public interest factors outlined above and I am content that there is no overriding public interest in disclosing this information.

To the extent that the information in the panel minutes consists of information whose disclosure would be an actionable breach of confidence, it is withheld under section 41 of the FOI Act

Section 43(2) – commercially sensitive information

Section 43(2) provides an exemption for information if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

A considerable amount of the information provided to the panel as part of the approval process is commercially sensitive, and some of that information is included in the minutes. Its disclosure is highly likely to be detrimental to the legitimate commercial interests of either the trusts or the firms involved. For example, third parties seeking to negotiate contracts with an FT could use the information to strengthen their own bargaining positions when negotiating for, or providing services to, that trust and competitors may be able to use such information to their advantage to the detriment of that trust's legitimate interests. In addition, details of consultancy firms' non-standard proposals could be disclosed, which could be commercially damaging to them when competing for work in the future.

Monitor considers that the public interest test in relation to section 43 does not favour disclosure of the information, having considered the public interest factors outlined above.

To the extent that the information in the panel minutes contains commercially sensitive information which if disclosed would, or would be likely to, cause the prejudice described above, it is withheld under section 43 of the FOI Act.

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. 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,

A handwritten signature in blue ink, appearing to read 'Tim Beasley', with a stylized flourish at the end.

Tim Beasley
Senior Manager, FT Approvals