

3 March 2017

Wellington House
133-155 Waterloo Road
London SE1 8UG

T: 020 3747 0000
E: nhsi.enquiries@nhs.net
W: improvement.nhs.uk

By email

Dear [REDACTED]

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

I refer to your email of 30 January 2017 in which you requested an internal review of NHS Improvement’s decision dated 25 January 2017 in relation to your email of 3 January 2017, in which you made the following request under the FOI Act:

“Under the Freedom of Information Act, please send me a list of acute NHS trusts permitted by NHS Improvement to break their original agency expenditure ceiling for 2016-17.

Please provide me with their original agency ceiling level and their revised ceiling.”

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 both Monitor and the TDA.

Decision

NHS Improvement holds the original agency ceiling figures and revised ceiling figures for all NHS trusts and NHS foundation trusts where the original ceiling figures were adjusted. We decided to withhold this information on the basis of the exemptions set out in sections 31, 33 and 43 of the FOI Act, as explained in our letter dated 25 January 2017. We did, however, disclose, in the form of an Excel spreadsheet, the percentage variance for each NHS trust and NHS foundation trust between its original ceiling and its final allocated ceiling. We provided this information for all NHS trusts and NHS foundation trusts. The Excel spreadsheet had been sorted by reference only to acute NHS trusts but the percentages for all NHS trusts and NHS foundation trusts can be viewed by selecting all trusts in the drop-

down menu. This includes the percentage for Calderdale and Huddersfield NHS Foundation Trust, as referred to in your email of 30 January 2017.

I am the Regional Chief Operating Officer for the Midlands and East region and also have a role in supporting the implementation of the agency rules nationally. I have reviewed the original decision in light of the grounds you put forward in your internal review request. I have decided to uphold the original decision on the basis of the exemptions set out in the original decision dated 25 January 2017, as explained in detail below.

Section 31 – law enforcement

I have considered whether the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act which provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

I consider that section 31(2)(c) is engaged and that disclosure of the information would be likely to prejudice the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment. This applies to the functions conferred on both Monitor and the NHS Trust Development Authority ("the NHS TDA").

The provider licence enables NHS Improvement to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Health and Social Care Act 2012. NHS Improvement takes into account inefficient or uneconomic spending practices, including any relating to agency spending, as a measure of governance and in monitoring NHS foundation trusts' compliance with their licence. In addition, in relation to NHS trusts, the NHS TDA is responsible for overseeing those bodies and ensuring they comply with their duty to exercise their functions effectively, efficiently and economically, and has powers to give directions to NHS trusts under the National Health Service Act 2006, as set out in the directions given to the NHS TDA by the Secretary of State¹.

As set out in the [agency rules](#) NHS Improvement set ceilings on the total amount individual trusts could spend on agency staff in 2016/17. These annual expenditure ceilings were calculated based on a trust's Q1 to Q3 (April to December) 2015/16 spend on agency as a percentage of total staff spend. In exceptional circumstances, an adjustment to individual trust ceilings could be considered and trusts were required to make any submissions for an adjustment by 31 March 2016. Following implementation of the ceilings, NHS Improvement has monitored agency spending and in some cases adjusted ceilings during 2016/17 as appropriate.

Ceilings are maximum levels and trusts are expected to reduce agency expenditure below those levels. Trusts are not given permission to exceed their ceilings. Should a trust exceed its ceiling, NHS Improvement would consider its regulatory approach in relation to that trust under the [single oversight framework](#). Trusts' performance against their agency ceilings is monitored on a monthly basis through their monthly data submissions to NHS Improvement.

¹ See now the NHS Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare NHS Trust Directions 2016.

NHS Improvement also monitors trusts against other agency rules, including price caps, maximum wage rates and the mandatory use of approved framework agreements. NHS Improvement collects a range of information from trusts in relation to their compliance with the agency rules.

Failure to comply with the agency rules could result in NHS Improvement taking regulatory action in relation to NHS trusts and NHS foundation trusts, as set out in section 12 of the agency rules.

NHS Improvement relies on the full and frank provision of information from trusts in order to carry out its functions in relation to the agency rules effectively. This is the case irrespective of whether it is exercising a formal power in gathering information. As set out above, trusts' ceilings for 2016/17 were calculated based on their Q1 to Q3 2015/16 agency spend as a percentage of total staff spend, which was sensitive financial information provided to us by the trusts. If this information were to be disclosed publicly, my view is that trusts would be less forthcoming in providing information to us in connection with their compliance with the agency rules generally. This would have a detrimental impact on the exercise of NHS Improvement's relevant regulatory functions, which relies on having sufficient and comprehensive information.

I note that trusts would not have any reasonable expectation that this information might be disclosed. There has been no indication to trusts that this information may be disclosed, either in the agency rules or elsewhere.

Furthermore, my view is that effective oversight of NHS foundation trusts and NHS trusts, which includes ensuring that NHS Improvement has appropriate information to enable it to make timely and effective decisions about regulatory action, relies on a relationship of trust and confidence between the trusts and NHS Improvement. This relationship would be jeopardised and undermined if NHS Improvement disclosed the requested information, with a detrimental impact on our ability to regulate and oversee trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 31(1) of the FOI Act applies.

Section 33 – public audit functions

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

NHS Improvement has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources, which would be likely to be prejudiced by the release of the information requested. NHS Improvement is responsible for monitoring compliance with the provider licence held by NHS foundation trusts, which includes a requirement to have systems and processes in place for ensuring compliance with the duty of such trusts to operate efficiently, economically and effectively. It should also be noted that NHS Improvement has general duty under section 62(1)(a) of

the 2012 Act, when exercising the functions conferred on Monitor, to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient, and effective (as well as maintaining or improving quality).

In relation to NHS trusts, as mentioned above, NHS Improvement has functions in relation to scrutinising whether NHS trusts are using their resources efficiently and effectively, by virtue of the directions given to the NHS TDA by the Secretary of State.

In relation to both types of trusts, similar arguments apply as those which apply for the purpose of the exemption relating enforcement functions (section 31 of the FOI Act). In order to operate effectively in relation to the examination of the efficient, effective and economic use of resources by trusts, NHS Improvement's view is that it requires a safe space in which trusts are able to share sensitive and confidential information with NHS Improvement without fear of it being shared more widely. Disclosing the requested information would be likely to reduce the quality of information provided by trusts in relation to the agency rules. In addition, effective oversight of NHS foundation trusts and NHS trusts, which includes obtaining information necessary for the effective examination of whether trusts are using their resources efficiently, effectively and economically, relies on a relationship of trust between the trusts and NHS Improvement. This relationship would be likely to be jeopardised and undermined if NHS Improvement disclosed the requested information, with a detrimental impact with a detrimental impact on our ability to regulate and oversee trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 33(1) and (2) of the FOI Act applies.

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.

As set out above, NHS Improvement calculated trusts' agency ceilings for 2016/17 based on their Q1 to Q3 2015/16 agency spend as a percentage of total staff spend. This financial information is commercially sensitive and disclosure would be likely to be detrimental to trusts' commercial interests. For example, it could enable agencies to identify and target trusts with difficulties in relation to their agency spend and strengthen their bargaining position accordingly.

Public interest test

Sections 31, 33 and 43 are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemption should be maintained.

I recognise that, in relation to the finances of public authorities, there is a public interest in transparency; in particular in relation to understanding the impact of trust expenditure on agency staff on NHS deficits and the effectiveness of the measures taken by NHS Improvement to control that expenditure. I have weighed these public interest factors against the detrimental impact that is likely to ensue if disclosure is permitted.

The providers in question are being monitored and NHS Improvement is continuing to assess how trusts are using their resources in this area and whether there is any case for regulatory action in particular case. For the reasons explained above, the ability of NHS Improvement to perform its functions would be likely to be adversely affected by the disclosure of the information (in essence, it is likely to reduce the information we have available and undermine our relationship with trusts). There is a strong public interest in NHS Improvement being able to exercise its regulatory and oversight functions in relation to trusts effectively.

In addition, I have noted that NHS Improvement routinely proactively publishes information when it starts a formal investigation and when it takes regulatory action a result of such investigations. We have also publish detailed information in relation to the agency rules, including in the [quarterly performance of the provider sector](#). We also provided, along with our original decision, the percentage variance for each NHS trust and NHS foundation trust between its original ceiling and its final allocated ceiling.

Taken altogether, I consider that this information addresses sufficiently the public interest in transparency in relation to the trusts' compliance with the agency rules.

In conclusion, in relation to the exemptions above, I consider that the public interest in maintaining the exemption outweighs the public interest in disclosure.

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.

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,



Mark Cubbon

Regional Chief Operating Officer- Midlands and East