

4 December 2015

[REDACTED]

**By email**

[REDACTED]

Dear [REDACTED]

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

I refer to your email of **6 November 2015** in which you requested information under the FOI Act.

#### **Your request**

You made the following request:

*I am told that you recently undertook a piece of work looking at case studies to “evaluate the delivery of benefits from NHS mergers”.*

*If you could be so kind, please can you tell me which mergers were looked at, and also what conclusions the work made? If possible, I would like to see a copy of the report or any internal notes on the work. Please can you provide theses?*

*I understand that the work was done by Aldwych Partners, which I understand is run by the previous head of the Cooperation and Competition Panel. May I ask, how much you paid for this work and how you ensured that the work undertaken was impartial – particularly given that some of the case studies may have been approved by the people undertaking the work?*

#### **Decision**

Monitor holds some of the information that you have requested.

Monitor has decided to withhold some of the information that it holds on the basis of the applicability of the exemptions in sections 22, 22A, 41, and 43 of the FOI Act as explained in detail below.

Monitor has decided to disclose some information relating to the arrangements with Aldwych Partners. Monitor ran a procurement process for this project. The process involved the issuance of an Invitation to Quote (ITQ), short-listing, and interviews with potential suppliers. As a result of this procurement Aldwych Partners was selected to carry out this work. The total value of the contract with Aldwych Partners is £31,450 + VAT.

In respect of the final part of your request regarding impartiality, this does not in our view fall within the FOI Act. We have therefore treated this part of your request as an enquiry and have the following response. The scope of the project is to explore what types of improvements for patients have been delivered by a number of past NHS mergers, ranging from 2006 to 2012, and the factors that affected this. Only a subset of the merged providers selected as case studies were reviewed under the competition rules by the Co-operation and Competition Panel (CCP). Further, this project is not a retrospective assessment of CCP decisions in terms of competition or any benefits accepted in a particular case. As such, the project does not assess the work and/or decisions made by any former members of CCP who are now working for Aldwych Partners.

In relation to the requests falling within the FOI Act, the reasons for our decision to withhold information are set out below.

### **Reasons for decision**

#### **Section 22A - Research**

I have decided that the mergers that were looked at, the draft report and internal project notes are exempt information under section 22A of the FOI Act and that the public interest is best served by withholding the information.

Section 22A applies to information that is obtained in the course of, or derived from, a programme of research in circumstances where:

- (a) the programme is continuing with a view to the publication of a report of the research by a public authority, and
- (b) disclosure of the information under the FOI Act before the date of publication would, or would be likely to, prejudice
  - a. the programme
  - b. the interests of any individual participating in the programme
  - c. the interests of the authority holding the information, or
  - d. the interests of the authority mentioned in paragraph (a) above if different to the authority holding the information.

The work by Aldwych Partners to which you refer was research commissioned by Monitor as part of a project aiming to help improve providers' ability to plan, articulate and evidence how proposed mergers will benefit patients. Drawing on the experience of past NHS mergers, the research and resulting project outputs will provide advice to providers on what improvements they can expect to achieve through a merger, and what factors can affect their delivery and timing. The project is currently ongoing and Monitor has not yet drawn any conclusions from the research. The project has included work with the involvement of a number of stakeholders. It is anticipated that the programme will, in due course, lead to the publication of a set of documents, which we expect to publish in the early part of 2016. However, further work needs to be undertaken before reaching that point.

In that context I consider that disclosure of the draft report and internal project notes at this stage would be likely prejudice the ongoing project and/or the interests of those stakeholders participating in the project.

### **Public Interest test**

The exemption under s.22A of the FOI Act is subject to a public interest balancing test. There is a general interest in promoting transparency in the conduct of public affairs, both in terms of the efficiency and cost effectiveness of work that is being undertaken and in the scrutiny of public decision making. Mergers involving NHS organisations are a subject of legitimate public interest. In my opinion these factors favour public disclosure of the report.

However, Monitor has yet to draw conclusions from this project. A report setting out the overarching themes from the case studies and another document setting out advice to the sector, which will be published, have not yet been finalised and agreed. Further work on this project and similar future projects is, in part, dependent on Monitor's ability to gather information voluntarily from the sector. Whilst Monitor has power to compel the provision of information which it considers necessary or expedient for the purposes of its regulatory functions, in practice we rely heavily on the support of the sector in establishing a solid factual basis underpinning our regulatory judgments. In that context I consider that the publication of the information produced by Aldwych Partners at this stage would be likely to prejudice the willingness of sector stakeholders to support further work on this project and similar projects carried out in future.

Taking all these factors into account I have decided that, on balance, the public interest is best served by withholding the information in this case.

### **Section 22 – Information intended for future publication**

To the extent that details of the mergers looked at, the draft report and internal notes relating to the preparation of that report are to be included in our final published report and recommendations, this information is also exempt under section 22 of the Act. For the reasons set out in relation to section 22A above, I am of the view that the public interest is in favour of withholding the information.

### **Section 43 – Commercial interests**

Some of the information that you have requested in internal notes contains commercially sensitive information relating to the parties involved in the mergers that have been reviewed as part of the project and Monitor's procurement of Aldwych Partners to conduct research. This information 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.

For reasons similar to those above in relation to section 22A, 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. As set out above, Monitor relies on the provision of information voluntarily from the sector. Disclosing sensitive information provided to Monitor relating to

the mergers included in the scope of the project would potentially restrict the willingness of stakeholders to provide Monitor with such information in future. Where the information relates to Monitor's contractual relationship with Aldwych Partners, we consider that the disclosure of such information may affect Monitor's ability to tender effectively for similar services in future.

### **Section 41 of the 2000 Act.**

I am of the view that some of the information included in internal notes has the requisite degree of confidence to be exempt from disclosure under section 41 of the Act. 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.

Information has been obtained from the parties to the relevant mergers being reviewed as part of this project. This information is not trivial and is not readily available by other means. The merger parties have a reasonable expectation that information provided to Monitor and Aldwych Partners as part of this project would remain confidential and be used only by Monitor in the exercise of our regulatory functions. In particular, Monitor would regard the minutes of meetings between Aldwych Partners and the merger parties as being confidential. The expectation is that opinions and views expressed would remain private. Accordingly, the information was imparted in circumstances which created an obligation of confidence. We believe that disclosure of this information would constitute a breach of confidence actionable by those trusts.

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.

Having considered the material in respect of which this exemption would apply and given due weight to the relevant factors, we have concluded that the public interest is best served by withholding this information in this case.

### **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](mailto:foi@monitor.gov.uk).

### **Publication**

Please note that this letter will shortly be published on our website. This is because information disclosed in accordance with the Freedom of Information Act 2000 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,

A handwritten signature in black ink that reads "A. Dunki". The signature is written in a cursive style with a large, stylized 'A' and 'D'.

Alexander Dunki  
Economic Adviser  
Co-operation and Competition Directorate