

18 February 2016

**By email**

**By post**

Dear [REDACTED]

**Request under the Freedom of Information Act 2000 (the "FOI Act")**

I refer to your email of 28 January 2016 in which you requested information under the FOI Act.

**Your request**

You made the following request:

*"Would you please provide the number of shifts from November 23 to date (or the last date for which figures are available) where payments were made in excess of the price caps on agency staff payments, and a list of the trusts reporting these payments and the agencies that were paid."*

**Decision**

**Question 1**

Monitor holds the information that you have requested and has decided to release part of it from the week commencing 23 November 2015 to the week commencing 28 December 2015. It is set out in the attached Annex.

Monitor has decided to withhold the remaining information that it holds on the basis of the applicability of the exemption in section 22(1) of the FOI Act as explained below.

## Section 22 – Future publication

Section 22 provides that information is exempt information if:

- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
- (b) the information was already held with a view to such publication at the time when the request for information was made, and
- (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

Monitor will be publishing the information on the level of shifts in breach of the price caps (for the monitoring periods) on its website in due course.

### Public interest test

The exemption under section 22 of the FOI Act is subject to a public interest balancing test. The public interest in accountability and transparency by making the information publicly available has been weighed against the detrimental impact that is likely to ensue if premature disclosure is made before Monitor has been able to ensure the quality of the data. In recognition of the public interest in transparency, Monitor will proactively publish this information on its website shortly. We have therefore concluded that the public interest in disclosure of the information at this stage is outweighed by the need to ensure accuracy in the numbers which are due to be published.

## Question 2

Monitor does not hold the information on which agencies were paid in excess of the price caps on agency staff payments.

Monitor has decided to withhold the information that falls within the remainder of the request (a list of the trusts reporting on payments made in excess of the price caps) on the basis of the applicability of the exemptions in sections 31 and 33 of the FOI Act as explained in detail below.

## Section 31 – law enforcement

Monitor considers that 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).

Monitor considers that section 31(2)(c) is engaged and that disclosure of the information would be likely to prejudice the exercise by Monitor of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of provider licences enable Monitor 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 ("the 2012 Act"). Monitor will take into account foundation trusts' 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.

Paragraph 6.3 of "*Price caps for agency staff: rules*" published by Monitor in November last year (the "Rules")<sup>1</sup> makes it clear that any payments in excess of the price caps will be scrutinised by Monitor and may lead to regulatory action as appropriate (please also see section 9 on Monitor's approach to enforcement). In assessing value for money, Monitor will look at the extent to which trusts have followed good practice including the Rules. Disclosing the information on individual foundation trusts before a decision has been made by Monitor, on whether, and what action to take in respect of a failure to comply with the Rules, would be likely to prejudice that decision.

In addition Monitor relies on the full and frank provision of information from NHS foundation trusts in order to carry out its functions effectively. Similarly the Trust Development Authority (the "TDA") activities are dependent upon having a "safe space" in which NHS trusts are able to share sensitive and confidential information with the TDA. There is potential prejudice to the ability of Monitor to regulate the NHS foundation trust sector (and to the TDA in relation to its activities), if sensitive information which NHS foundation trusts provide to Monitor is disclosed.

### 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.

Monitor is of the view that the withheld information, in so far as it relates to foundation trusts, 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, which would be prejudiced by the release of the information requested. Monitor has these functions by virtue of Monitor's general duty under section 62(1)(a) of 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.

As noted above, the regulation of NHS foundation trusts and Monitor's ability to discharge its functions in examining the economy, efficiency and effectiveness of those it regulates would be prejudiced if sensitive and confidential information, as is the case with the information requested, were to be disclosed. The relationship of trust between NHS foundation trusts and Monitor would be jeopardised and undermined if providers considered such information would be disclosed.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/484834/price\\_caps\\_for\\_agency\\_staff\\_rules\\_final\\_rev11dec.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484834/price_caps_for_agency_staff_rules_final_rev11dec.pdf)

Further, Monitor considers that the information about NHS trusts 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 and, as noted above, are dependent upon having a 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.

#### 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. The public interest in accountability and transparency by making the information available has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted.

The providers named within the information that is being withheld under these sections of the FOI Act are being monitored (either by way of formal regulatory action or by way of informal action which may become formal) and Monitor and the TDA are continuing to assess concerns raised by these providers. The ability of both Monitor and the TDA to perform their functions would be adversely affected by the disclosure of the information.

In addition, providers do not expect that such sensitive and confidential information will be placed in the public domain and if they were to consider that the information they provided could be disclosed, they may be less likely to provide it or in the detail that they do. Consequently, this would have a detrimental on the ability of Monitor and the TDA to perform their functions.

Monitor routinely proactively publishes details of any regulatory action that it decides to take as a result of its investigations. Further, Monitor has decided to disclose the information at parts (a) and (b) of your request. Monitor considers that this information is sufficient to meet the public interest in transparency.

Please note that NHS foundation trusts and NHS trusts are subject to the FOI Act and as such it is open to you to seek information directly from them. They will need to consider whether information can properly be provided by them in response to any such requests within the terms 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](mailto:foi@monitor.gov.uk).

### **Publication**

Please note that this letter and the attached information 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,



**Katharine Robinson**  
Senior Manager – Finance

## ANNEX

Part (b)	Number of shifts exceeding price caps					
	w/c 23 Nov 2015	w/c 30 Nov 2015	w/c 7 Dec 2015	w/c 14 Dec 2015	w/c 21 Dec 2015	w/c 28 Dec 2015
Nursing & Midwifery & Health Visiting	14,913	14,943	14,016	12,035	8,797	7,848
Medical & Dental	10,358	10,955	9,877	9,806	8,741	7,944
Scientific, Therapeutic & Technical (AHPs)	3,121	4,076	3,353	3,171	2,284	1,771
Health Science	236	309	241	320	269	191
Healthcare assistants and other support	839	826	877	572	729	654
Administration and Estates	5,876	5,914	5,377	5,351	3,905	2,603
Other	319	386	307	485	427	266
<b>TOTAL</b>	<b>35,662</b>	<b>37,409</b>	<b>34,048</b>	<b>31,740</b>	<b>25,152</b>	<b>21,277</b>