



## **Section 36**

We consider that section 36(2)(b)(ii) of the FOI Act is engaged in relation to the internal correspondence that Monitor holds between its Economics, Policy, Private Office, Provider Sustainability, Provider Regulation, Communications, Clinical Directorate and Board Secretariat departments, and within each of those departments as well as to the external correspondence that Monitor holds.

Section 36(2)(b)(ii) provides that information is exempt from disclosure if it would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

The information in question represents different colleagues exchanging views with the aim of arriving at a final strategy regarding the rules around price caps. We consider that disclosure of internal correspondence on the subject of the request would be likely to inhibit Monitor staff to express themselves openly, honestly and completely, and to explore extreme options, when giving their views as part of a process of deliberation.

This in turn is likely to impair the quality of decision making by Monitor of future policies, as the loss of frankness and candour may damage the quality of deliberation and lead to poorer decision making.

The same applies to the information we hold within your request between Monitor/NHS TDA/DH. As the rules around the price caps apply to all NHS trusts and NHS foundation trusts in breach of their licence for financial reasons/those receiving distressed funding, it was important for Monitor as part of its process of deliberation to engage in discussions with both bodies before arriving at a final decision. Disclosure of that correspondence is likely to inhibit the free and frank exchange of views with those bodies regarding future policies that Monitor may implement.

To the extent that information covered by this exemption is included in the information requested, that information is being withheld from disclosure under section 36 of the FOI Act and Monitor's qualified person (Chief Executive) has approved the use of this section.

### *Public interest test*

Monitor considers that the public interest in maintaining the exemption does outweigh the public interest in disclosure of the information, as staff within Monitor need to be able to have candid discussions and express themselves openly when deliberating over major policies with each other, and with relevant external bodies.

Monitor notes your view and recognises that, as a public body, it should be transparent and open in the conduct of its public functions. In recognition of this, we have published our response to the consultation that we carried out prior to making our final decision around the price cap rules, as well as guidance on the rules, on our website:

<https://www.gov.uk/government/consultations/national-price-caps-for-agency-staff-working-in-the-nhs>

As disclosure of the information is likely to inhibit the expression of views in relation to a recently launched policy, Monitor has decided that the public interest in disclosure is

outweighed by the need to safeguard the free and frank exchange of views within Monitor and between Monitor and NHS TDA/DH.

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

Section 41(1) provides that information is exempt information if:

*“(a) it was obtained by the public authority from any other person (including another public authority) and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*

The test in section 41(1)(a) is met as some information that we hold was obtained by Monitor from third parties, in this case NHS TDA and DH.

The test in section 41(1)(b) is met if it is demonstrated that disclosure would amount to an actionable breach of confidence. This means:

- (i) the information must have the necessary quality of confidence about it;
- (ii) the information must have been imparted in circumstances giving rise to an obligation of confidence;
- (iii) disclosure must amount to an unauthorised use of the information to the detriment of the confider.

Monitor considers that disclosure of the relevant information would amount to an actionable breach of confidence. Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, in considering whether (in an action for breach of confidence) a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. In the present circumstances, Monitor does not consider that there is a strong public interest in disregarding the duty of confidence owed to NHS TDA/DH.

Third parties should be able to share information and concerns with Monitor in the expectation that this will be kept confidential, and this is particularly important for third parties who are sharing information with Monitor in respect of a policy that will have an impact on the sector and other groups. Monitor considers that it is crucial for trust to be maintained by third parties who impart information in such circumstances, and that disclosure of information which is imparted in confidence may inhibit the full and frank disclosure to Monitor of relevant concerns.

Monitor recognises that the reasons for withholding some of the information requested does not necessarily extend to all information submitted by third parties. In recognition of its duty of transparency, Monitor proactively publishes information on its website which leads it to create and implement certain policies.

To the extent that information provided to Monitor in confidence is included in the information requested that is covered by this exemption, that information is being withheld from disclosure under section 41 of the FOI Act.

## **Section 42**

Section 42(1) of the FOI Act provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.

Legal professional privilege covers confidential communications between lawyers and their clients made for the dominant purpose of seeking or giving legal advice. We consider that section 42(1) is engaged in relation to the correspondence between Monitor's legal advisers and its Policy and Economics departments as such communications are covered by legal professional privilege.

### *Public interest test*

As section 42 is a qualified exemption under the FOI Act, we have considered whether the public interest weighs in favour of not releasing the information requested. We have decided that as free, frank and confidential exchanges between a client and their lawyer are essential in our legal system and help ensure fairness, the public interest in maintaining the exclusion of releasing the information you have requested outweighs any public interest in disclosing it.

## **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).

Please note that this letter will shortly be published on our website. This is because information disclosed in accordance with the FOI 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,



**Chris Mullin**  
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