

20 November 2015

██████████
By email
████████████████████

Dear ██████████

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

I refer to your email of **26 October 2015** in which you requested information under the FOI Act regarding Heart of England NHS Foundation Trust (“the Trust”).

Your request

You made the following request:

“Under the Freedom of Information Act, please send me all and any correspondence between Monitor and University Hospitals Birmingham FT, or its leaders, since September 2014, which relate to Heart of England FT.”

Decision

Monitor holds the information that you have requested.

Monitor has decided to withhold all the information that it holds on the basis of the applicability of the exemptions in sections 36, 41 and 43 as explained in detail below.

You may be aware of our press release of 23 October 2015, in which we explained that Monitor required the Trust to appoint Dame Julie Moore (currently Chief Executive at University Hospitals Birmingham – “UHB”) as interim Chief Executive and Rt.Hon. Jacqui Smith (currently Chair at UHB) as interim Chair at the Trust (as a joint arrangement).

<https://www.gov.uk/government/news/appointment-of-new-leadership-team-at-heart-of-england-approved>

The information that Monitor holds takes the form of correspondence between the monitoring team (Provider Regulation) and UHB, the co-operation and competition team and UHB, the communications and parliamentary relations team and UHB and Monitor’s legal team and UHB.

Section 36

We consider that section 36(2)(b)(ii) of the FOI Act is engaged. That section 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.

As the Trust remains under enforcement action, Monitor's contact with UHB remains ongoing in respect of a combined attempt to help resolve some of the issues at the Trust and finalise details of the intervention arrangement.

Disclosure of the information in the correspondence between the departments within Monitor mentioned above and UHB is likely to inhibit the willingness of those who have been involved in this work to freely and frankly submit their views, and this in turn may hamper the effectiveness of decisions that Monitor makes in relation to the Trust.

The process of exchanging views between Monitor and UHB is crucial to Monitor in informing its regulatory approach and decisions regarding the Trust so this needs to be properly and fully formed. Disclosure of the information requested would be likely to inhibit staff to express themselves openly, honestly and completely.

Disclosure of the information requested would be likely to inhibit free and frank discussions between Monitor and other foundation trusts in future in relation to trusts under enforcement action where possible assistance/intervention arrangements are being considered, and the loss of frankness and candour may damage the quality of deliberation and lead to poorer decision making. Future discussions about issue trusts are likely to be less candid and this may in turn harm Monitor's deliberations.

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 regulatory decisions with third parties.

Monitor recognises that, as a public body, it should be transparent and open in the conduct of its public functions. In recognition of this, Monitor announces its regulatory decisions and publishes details when these are made pursuant to its legal powers on its website.

As disclosure of the information is likely to inhibit the expression of views in relation to an ongoing arrangement and potential future arrangements, Monitor has decided that the public interest in disclosure is outweighed by the need to safeguard the free and frank exchange of views between Monitor and third parties.

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 a third party, in this case UHB.

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 UHB.

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 regarding particular providers, for whom disclosure may have negative consequences (in this case, the Trust). 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 take regulatory action.

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 43 – commercial interests

Section 43 of the FOI Act provides that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

A considerable amount of information provided by UHB to Monitor relates to the proposed working arrangements between UHB and the Trust, and UHB and Monitor. We consider that disclosure of this information is highly likely to be detrimental to the legitimate commercial interests of Monitor, the Trust and UHB. For example, creditors, commissioners

and others seeking to negotiate contracts with any of these parties could use the information to strengthen their own bargaining positions when entering into similar arrangements.

Public interest test

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

In recognition of the public interest in transparency, Monitor will proactively publish information on its website about on-going regulatory action in relation to providers. We have concluded that the public interest in disclosure of the information in question is outweighed by the need to safeguard the commercial interests of Monitor and the providers in question without fear that pre-emptive disclosure will enter into the public domain.

To the extent that commercially sensitive information is included in the information requested that is covered by this exemption, that information is being withheld from disclosure 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. 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,



Rebecca Farmer
Senior Regional Manager