

3 November 2015

[REDACTED]
[REDACTED]

By email

[REDACTED]

Dear [REDACTED]

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

I refer to your email of 8 October in which you requested information under the FOI Act.

Your request

You made the following request:

“Under the Freedom of Information Act, please send me copies of any letters or emails sent to by Monitor to external organisations or people in the past three months that explicitly refer to the contract tendered by CCGs in Birmingham for mental health services for people aged 0-25.”

We understand this to be a request for letters and emails sent by Monitor to external organisations or people in the period 8 June to 8 October 2015.

Decision

Monitor neither confirms nor denies that it holds any information falling within the description specified in your request. It follows that Monitor will not be disclosing any information in relation to this request.

Pursuant to section 31(3) of the FOI Act, the duty on a public authority to confirm or deny that it holds information of the description specified in a request does not arise if, or to the extent that, compliance with section 1(1)(a) of the FOI Act would, or would be likely to, prejudice any of the matters mentioned in section 31(3) of the FOI Act.

This should not be taken as an indication that the information you requested is or is not held by Monitor.

Reasons for decision

Section 31 – prejudice to law enforcement – exercise of Monitor’s functions

Section 31(1)(g) of the FOI Act provides a qualified exemption from disclosure where such disclosure would be likely to prejudice the exercise by a public authority of its functions for any of the purposes set out in section 31(2) of the FOI Act. One of these purposes, contained in section 31(2)(c), is ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

Monitor is responsible for enforcing the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 (the “Regulations”). Under these Regulations, Monitor has the power to take, in certain circumstances, formal action where it identifies a breach or potential breach of the Regulations by a commissioner or commissioners. The disclosure of information relating to whether or not there has been a breach of the Regulations is likely to prejudice Monitor’s functions in this respect. This includes circumstances where Monitor has engaged in discussions with a commissioner regarding a potential issue under the Regulations, but no complaint has been received and/or Monitor has not opened a formal investigation under the Regulations.

Duty to confirm or deny

Section 31(3) of the FOI Act provides that the duty to confirm or deny the existence of information does not arise if, or to the extent that, compliance with section 1(1)(a) of the FOI Act would, or would be likely to, prejudice any of the matters mentioned in section 31(1).

Monitor has taken the view that confirming or denying the existence of the information requested would prejudice the exercise of its functions for the purpose of ascertaining whether circumstances exist, or may arise, which would justify regulatory action in pursuance of the Regulations.

The effectiveness of Monitor’s regulatory action depends on the maintenance of confidentiality and ensuring free, full and frank exchanges with individuals and organisations on speculative, prospective or on-going matters, including formal complaints and informal requests for information. Monitor often contacts commissioners and providers on an informal basis, including where no complaint has been received and/or before a formal investigation has been launched, to gather intelligence about potential issues and to provide informal advice to commissioners to help address or avoid issues arising. Where a potential concern arises, Monitor may informally request further information from a commissioner or provider to assist it in deciding whether further formal action is required.

Confirming or denying the existence of the kind of information specified in the request would prejudice, or would be likely to prejudice, the exercise of Monitor’s functions by, among other things:

(a) deterring commissioners, providers and other stakeholders from co-operating with Monitor on a voluntary basis;

(b) decreasing the amount of information supplied voluntarily to Monitor from commissioners, providers and other stakeholders;

(c) inhibiting communications between relevant parties prior to the formal launch of an investigation into a complaint;

(d) reducing the willingness of parties to engage with Monitor ahead of formal submissions taking place; and

(e) disclosing information that is commercially sensitive and provided expressly on a confidential basis.

Even if there are individual cases where confirming that a complaint is underway will not cause prejudice, there will be many cases where such disclosure will cause such prejudice. Any refusal to confirm or deny holding information in relation to complaints would be undermined if in cases where there is no speculative, prospective or on-going complaint Monitor confirms this. If Monitor neither confirms nor denies only in one category of cases but confirms in others that no information is held, that will betray that information is indeed held in the former category.

Public interest test

I have balanced the arguments in favour of maintaining the exemption (i.e. in favour of giving a neither confirm nor deny response) with the factors in favour of either confirming, or denying, whether the requested information is held.

It is in the public interest for Monitor officials to be able to freely exchange views with individuals seeking informal assistance from Monitor, without needing to disclose the same to a wider audience, or confirm whether such information has been received by Monitor. If Monitor was not able to exchange views and information without being able to ensure that such exchanges, or the existence of information leading to such exchanges, would not enter the public domain, it is likely that this would severely inhibit the content of such exchanges in future, and may dissuade individuals and organisations from providing Monitor with information on an informal or formal basis. There is a real risk that having to declare whether or not Monitor holds the requested information would hinder the frankness with which future discussions are conducted (including in relation to consideration of risks, options or approaches) which would not be conducive to the exercise by Monitor of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action exist, or may arise.

We note that there is a public interest in disclosing information about Monitor's performance of its functions so that Monitor may be held to account. Monitor already publishes information about the performance of its functions under the Regulations, including:

- where Monitor decides to open a formal investigation into a complaint received under the Regulations, it publishes a notice on its website together with full details of the investigation and the findings;
- Monitor's Annual Report includes a summary of activity undertaken in relation to its functions under the Regulations;

- Monitor's website includes a number of hypothetical scenarios to assist understanding of how the Regulations might apply; and
- on-going efforts to capture wider lessons for the sector, for example in blog entries.

These steps ensure transparency in Monitor's performance of its functions under the Regulations. We believe this approach strikes a correct balance between keeping the public informed of our actions and approach and maintaining trust and confidence between us and third parties with whom we correspond, on whose trust and confidence we rely in order to ascertain whether circumstances which would justify regulatory action exist, or may arise.

In light of the information set out above, I consider that the public interest is in favour of maintaining the exemption and neither confirming nor denying whether Monitor holds the requested information.

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.

Yours sincerely,



Dipen Gadhia
Competition Inquiries Lead