

14 April 2016

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By email

[REDACTED]

Dear [REDACTED]

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

I refer to your email of **19 February 2016** in which you requested information under the FOI Act. As a preliminary point, I apologise for the delay in responding to your request: this was due to an administrative oversight.

I have treated your email of 19 February as a new request although in substance it would appear to overlap with your previous request of 28 January 2016, to which you refer in your email. For the avoidance of doubt I have set out details of both requests below.

Please note that since 1 April 2016, Monitor and the NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement (“NHSI”). For the purposes of this decision, NHSI means Monitor.

Your Request dated 28 January 2016

Your email dated 28 January 2016 requested information in relation to agency price caps and included the following request:

“...and a list of the trusts reporting these payments [in excess of the price caps].”

NHSI’s Decision

As you noted in your email of 19 February 2016, NHSI decided, in its decision letter of 18 February, to withhold this information on the basis of the application of the exemptions in sections 31 and 33 of the FOI Act.

Your request dated 19 February 2016

In your email dated 19 February 2016 you made the following request:

“Please provide a list of trusts that have breached the new agency fee cap for each week since the introduction on 23 November, stating the number of breaches in each case...”

Your most recent request therefore extends the end of the period covered by the original request from 28 January 2016 to 19 February 2016 i.e. the dates of your two emails. Whilst I note that the requests adopt different wording, my understanding is that, in essence, you are seeking the same information.

Decision

NHSI holds the information that you have requested but has decided to withhold it on the basis of the application of the exemptions in sections 31 and 33 of the FOI Act, as explained below. You will see that, unless otherwise stated, the rationale is the same as that set out in NHSI’s decision on your first request. However, I have also sought to address the further comments set out in your email of 19 February 2016.

Section 31 – law enforcement

NHSI 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).

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

The provider licence enables NHSI 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”). NHSI will take into account 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 NHSI in November last year (the “Rules”)¹ makes it clear that any payments in excess of the price caps will be scrutinised by NHSI and may lead to regulatory action as appropriate (see also section 9 on NHSI’s approach to enforcement). In assessing value for money, NHSI will look at the extent to which NHS foundation trusts have followed good practice, including the Rules on agency staff. Disclosing the information on individual NHS foundation trusts before any regulatory

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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

decision has been made by NHSI, 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, NHSI relies on the full and frank provision of information from NHS foundation trusts in order to carry out its functions effectively. This is the case irrespective of whether it is exercising a formal power in gathering information. NHSI considers that the identity of the trusts is sensitive information in the context of the potential for regulatory intervention and that a safe space is required. It is not the case the trusts had a reasonable expectation that this information might be disclosed whilst the potential for regulatory action is at large.

Similarly the Trust Development Authority (the "TDA") activities are dependent upon having a "safe space" in which NHS trusts are able to share information with the TDA. There is potential prejudice to the ability of NHSI to regulate the NHS foundation trust sector (and to the TDA in relation to its activities), if sensitive information 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.

NHSI is of the view that the information being withheld in relation to this request, in so far as it relates to NHS foundation trusts, is exempt under section 33(1)(b) of the FOI Act on the basis that NHSI 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. NHSI has these functions by virtue of NHSI'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 NHSI'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 NHSI would be jeopardised and undermined if providers considered such information would be disclosed.

In gathering the same information from NHS trusts, we assist the TDA in relation to its functions. The TDA's functions under Section 4 of the National Service Trust Authority Directions 2013 extend to scrutinising whether NHS 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 (in this case via NHSI) without fear of it being shared more widely. NHSI therefore considers that the information it holds about NHS trusts is also exempt under section 33(1)(b) of the FOI Act on the basis of its functions in supporting the TDA, which would be prejudiced by the release of the information requested.

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 in question are being monitored (either by way of formal regulatory action or by way of informal action which may become formal) and NHSI is continuing to assess concerns raised by these providers. The ability of NHSI to perform its functions would be adversely affected by the disclosure of the information.

In addition, providers do not expect that such sensitive 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 NHSI to perform its functions.

NHSI routinely proactively publishes details of any regulatory action that it decides to take as a result of its investigations. NHSI 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.

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.

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 NHS Improvement of the issue or the decision. A senior member of NHS Improvement'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, 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, NHS Improvement, Wellington House, 133-155 Waterloo Road, London SE1 8UG or by email to nhsi.foi@nhs.net.

Publication

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,

A handwritten signature in black ink, appearing to read 'C. Mullin', with a horizontal line extending from the end of the signature.

Chris Mullin
Economics Director