

18 November 2015

[REDACTED]

**By email**

[REDACTED]

Dear [REDACTED]

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

I refer to your email of 22 October 2015 in which you requested information under the FOI Act.

#### **Your request**

You made the following request:

*“Please send me any correspondence (i.e. letters, emails, reports) relating to Oswestry Orthopaedics LLP from the past 12 months.”*

#### **Decision**

Monitor holds information within the description specified in your request.

Monitor has decided to withhold the information that it holds on the basis of the applicability of the exemptions in sections 31, 33 and 41 of the FOI Act, as explained in detail below.

#### **Section 31 – law enforcement**

Section 31(1)(g) of the FOI Act exempts from disclosure information that would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection 31(2). Monitor believes that disclosure of the information you have requested would be likely to prejudice the exercise of its functions for the purpose of determining whether regulatory action is justified (section 31(2)(c)).

The information that Monitor holds relates to Monitor’s regulation of The Robert Jones and Agnes Hunt Orthopaedic Hospital NHS Foundation Trust (the trust). Monitor opened an investigation into the trust in June 2015 because some patients were waiting too long for routine operations and was concerned that this may indicate that there were wider issues with how the trust is run. Monitor also had concerns about how accurately the trust was reporting its performance data for routine operations, after potential problems were identified

by a third party. Monitor's investigation remains underway in relation to the trust whilst we determine the scale and scope of any breaches of the trust's provider licence and establish the appropriate action, if any, to be taken, including enforcement action. To disclose the information more widely is likely to be prejudicial to the consideration by Monitor as to whether circumstances exist that would justify regulatory action.

Some of the information is information provided by the trust, either in correspondence provided directly from the trust itself or as referred to in correspondence from or within Monitor. We consider that disclosure of this information is likely to have a considerable impact on the willingness of the trust to provide information to us on an open basis, and is likely to lead to less detailed information being provided. We consider that it is absolutely essential that Monitor is able to communicate with the trust in a full and frank manner without concern that matters forming the basis of Monitor's on-going assessment will enter the public domain. Although Monitor has statutory powers that enable it to require NHS foundation trusts to provide information to it, Monitor is better able to exercise its functions if such information is provided voluntarily as part of an open relationship between regulator and the regulated. In addition, it is noted in this context and set out in more detail below, that some of this information is confidential.

Some of the information was provided by third parties. This information was either provided directly from those third parties or is referred to in correspondence from Monitor. Monitor relies on information from third parties about the bodies it regulates and disclosure of this information may prejudice their willingness to engage with us and in turn inhibit Monitor's exercise of its regulatory functions.

#### *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. As explained above, Monitor's investigation in relation to the trust remains open. Monitor published a press release when it opened the investigation <https://www.gov.uk/government/news/investigation-launched-into-long-waits-at-shropshire-orthopaedic-hospital> We make public our main findings and any further action resulting from our investigations. Monitor considers that this information is sufficient to meet the public interest in transparency.

Monitor has concluded that the need to avoid adversely affecting its investigation in relation to the trust and the need to ensure that the trust, other NHS foundation trusts and third parties are able to share information with Monitor without fear that such disclosures will enter the public domain outweighs the public interest in disclosure of the information that is being withheld.

#### **Section 33 – audit functions**

The requested information is being withheld pursuant to section 33(1)(b) and 33(2) of the FOI Act which provides that information may be exempt from disclosure where this would be likely to prejudice the exercise of Monitor's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities – the trust in this case – use their resources in discharging their functions.

Monitor relies on the full and frank provision of information from the trust in order to effectively carry out its regulatory functions. This is an extension of one of our core regulatory principles which is to operate a trust-based approach to our relationships with NHS foundation trusts. Accordingly, if at all possible, we would not wish to prejudice that relationship of trust and confidence. There is potential prejudice to that relationship, and accordingly on the ability of Monitor to regulate the NHS foundation trust sector, if sensitive information which NHS foundation trusts provide to Monitor is disclosed. In consequence, there is potential detriment to the system of regulation of NHS foundation trusts. In a similar way as described under section 31, we consider that if we disclosed the information provided by third parties, this would make those third parties less likely to engage openly with us, which would in turn be likely to prejudice the exercise of our functions in relation to the examination of the economy, efficiency and effectiveness with which the trust, and other NHS foundation trusts, use their resources in discharging their functions.

#### *Public interest test*

We have applied the public interest test and consider that it does not favour disclosure of the information withheld under section 33 for similar reasons to those set out in relation to section 31.

#### **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.'*

Monitor considers that the test in section 41(1)(a) is met in respect of some of the information. The information was obtained by Monitor from a third party, either the trust or another third party.

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

- (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) the disclosure of the information must amount to an unauthorised use of the information to the detriment of the confider.

Monitor considers that disclosure of some of the information you have requested would necessarily reveal sensitive information regarding the trust or another third party, which would amount to an actionable breach of confidence.

### *Public interest test*

Section 41 is an absolute exemption and the application of the public interest test pursuant to section 2(2) of the FOI Act is not required. 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 nevertheless 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, we do not consider that there is a strong public interest in disregarding the duty of confidence owed to the trust or other relevant third party.

### **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 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.

Yours sincerely



**Jayne Rhodes**  
Senior Regional Manager