

16 May 2016

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By email
████████████████████

Dear ██████████

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

I refer to your email of 18 March 2016 in which you requested an internal review of Monitor’s decision of that date in relation to your FOI Act request dated 1 March 2016. You made the following request:

“i would like to make a request under the Freedom of Information Act please. The minutes of this committee refer to https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501931/BM16_12_Joint_Corporate_report__2_.pdf refers to an internal audit for "distressed finance cases". i would like to see a copy of the outputs of this audit please.

Monitor’s decision was to withhold the information on the basis of the exemption in section 41 of the FOI Act (information held in confidence).

Decision

I have reviewed the decision and I have decided to uphold it for the reasons already provided.

As explained in the letter, section 41(1) of the FOI Act 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 report was prepared for Monitor by the Health Group Internal Audit Service (HGIA) which is part of the Department of Health. It contains detailed, confidential information about the auditors’ findings and it reflects conversations between the auditors and members of

Monitor's legal team which were held in confidence. It also includes the auditors' assessment of internal control issues identified and recommendations on actions that should take to rectify those issues. The report was provided under the expectation that it would be read by Monitor management only and not by a wider audience.

As explained in the original decision letter, the HGIA's policy is not to publish or release such reports and they have not consented to release in this case. The HGIA have noted that internal audit services are supplied to Monitor under a service level agreement which stipulates that property in working paper and reports etc. are retained by the HGIA. It is their view that disclosure of such reports would, or would be likely to, prejudice the internal audit function that they provide by discouraging co-operation with auditors, thereby adversely impacting on their ability to fulfil their responsibilities to Monitor and other audited bodies in the future.

In your email of 18 March, you suggest that this argument is circular and that Monitor was saying that the basis for disclosure was that HGIA would consider that a release might breach the confidence of Monitor, and would amount to saying that "the people we hired to do this audit think we might not hire them to do more audits if we release the report based on one of their audits". I have considered your representations, but my view is that they do not fairly reflect the argument put forward by Monitor. The argument is not that HGIA fear we might not hire them in future, nor is it that HGIA are concerned that disclosure might breach a duty of confidence owed to Monitor. The argument, with which I agree, is as follows –

- The audit report is held by Monitor subject to a duty of confidence owed to the HGIA.
- Although the report is produced for Monitor, under the terms on which the service is provided the property in the report and its working papers remain with the HGIA.
- The HGIA wish to maintain that confidence, because disclosure of their work would prejudice their ability to carry out audit work in future cases (whether for Monitor or other bodies).
- HGIA's audit findings are based on discussions held between the auditors and the staff of the body being audited. Those discussions are held in confidence. Their concern is that if audit reports were disclosed publicly, staff would be less forthcoming and less co-operative, which would affect the quality and effectiveness of internal audit reports.
- HGIA do not consent to disclosure the report and disclosure would therefore amount to breach of confidence, actionable by the HGIA.

Public interest

I have also reconsidered the public interest issues. The exemption in section 41 is an absolute exemption and is not subject to the public interest test under the FOI Act. An actionable breach of confidence will not however arise if there is an overriding public interest reason for disclosure. The public interest test to be applied is therefore whether the interest in maintaining confidentiality is outweighed by the public interest in disclosure.

I have considered the public interest factors set out in the original decision letter, including in particular that there is a public interest in fostering transparency in relation to the risk management processes of public bodies including Monitor. I have also considered your statement that the public should be allowed to know what "internal control" issues were

identified in the report. The report you requested was presented to Monitor's Audit and Risk Committee on 18 February 2016 and the minutes of that meeting are to be published on NHS Improvement's website – the current intention is that they would be accessible via the 'Corporate Publications' page within a few weeks. Furthermore, the Annual Governance Statement to be included in Monitor's annual report for 2015/16, which is to be published later this year, will include a statement on the overall effectiveness of internal controls, identifying whether there are any significant internal control problems for 2015/16, whether highlighted by the internal audit process or otherwise.

Having weighed up all these factors, I have concluded that the public interest in disclosure does not outweigh the public interest in maintaining confidentiality.

Review rights

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely,

Adam Sewell-Jones
Executive Director of Improvement