

3 November 2015

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

Dear [REDACTED]

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

I refer to your email of 6 October 2015 in which you requested information under the FOI Act.

Your request

You made the following request:

“In July, Calderdale and Huddersfield NHS Foundation Trust lodged a formal complaint with Monitor over the decision by local CCGs to award the £238m Care Closer to Home contract to Locala.

<http://www.examiner.co.uk/news/west-yorkshire-news/angry-hospital-chiefs-mount-official-9617093>

Please provide me with:

*A copy of the NHS trust's complaint to Monitor and all supporting documents supplied.
Copies of all written correspondence between Monitor and the Trust regarding the complaint.”*

Decision

Ordinarily Monitor neither confirms nor denies whether it holds information of the kind described in the request because, pursuant to section 31(3) of the FOI Act, to do so would prejudice the exercise of Monitor's functions for the purpose of ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise. In this case, the fact that Calderdale and Huddersfield NHS Foundation Trust made a formal complaint to Monitor is publicly available information, so confirming or denying that Monitor holds the information that you requested will not prejudice the exercise

of Monitor's regulatory functions. On this basis Monitor confirms that it holds the information that you have requested.

Monitor has decided to withhold some of the information that it holds on the basis of the applicability of the exemptions in section 21, 31 and 41 of the FOI Act as explained in detail below.

The attached Annex sets out the details of the relevant information that we hold and whether that information is to be disclosed (in whole or in part) or withheld from disclosure. Where information is being withheld, we have identified in the Annex those exemptions which we consider to be relevant.

Where we are able to disclose information to you, it will be provided to you electronically as identified by the document number in the Annex. The application of exemptions to the information referred to in the Annex is explained in the following paragraphs.

Reasons for decision

Section 21 – information accessible to applicant by other means

One of the supporting documents supplied by Calderdale and Huddersfield NHS Foundation Trust is a map of the local area. Pursuant to section 21 of the FOI Act, Monitor is not required to provide you with this information as it is reasonably accessible to you by other means.

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 Procurement, Patient Choice and Competition (No.2) Regulations (the Regulations).¹ Under section 76 of the Health and Social Care Act 2012 and the Regulations, Monitor has the power to investigate a complaint received by it that a clinical commissioning group or NHS England has failed to comply with a requirement imposed by the Regulations. The disclosure of information provided to Monitor in connection with a complaint made under the Regulations and correspondence between Monitor and the complainant about the complaint would prejudice Monitor's ability to exercise its functions in this regard.

The effectiveness of Monitor's regulatory action depends on the maintenance of confidentiality and ensuring free, full and frank exchanges with individuals and organisations in relation to any of our enforcement functions, including formal complaints and informal

¹ The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013.

requests for information. The free and confidential provision of information and evidence by complainants when making a complaint is particularly important for Monitor to make fully informed decisions against our prioritisation framework² when deciding whether to open an investigation, take informal action or take no action at all in response to a complaint.

Disclosure of the information specified in the request would prejudice, or would be likely to prejudice, the exercise of Monitor's functions by, among other things:

- (a) inhibiting communications between relevant parties prior to the formal launch of an investigation into a complaint;
- (b) reducing the willingness of parties to make complaints to Monitor or to engage with Monitor ahead of making a complaint;
- (c) decreasing the amount of information supplied voluntarily to Monitor from complainants; and
- (d) deterring complainants from co-operating with Monitor on a voluntary basis.

Public Interest Test

Monitor has balanced the arguments in favour of withholding the requested information with the arguments in favour of disclosing the requested information. It is in the public interest for Monitor officials to be able to freely exchange views, both within Monitor, and with individuals who make a complaint to Monitor, without needing to disclose the same to a wider audience. If Monitor was not able to exchange views and information without being able to ensure that 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 disclosing 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:

- if a person or organisation makes a complaint, we will consider, on a case-by-case basis, whether we will investigate the complaint according to our prioritisation framework;
- where Monitor decides to open an 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. When publishing information about an investigation on our website, we follow a process to allow Monitor to balance the interests in favour of disclosing that information against any detriment such disclosure may have on the complainant;
- Monitor's Annual Report includes a summary of activity undertaken in relation to its functions under the Regulations;

² Our prioritisation principles are set out in our Enforcement guidance on the Procurement, Patient Choice and Competition Regulations, which is published on our website [here](#).

- 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.

Where there is publicity about a particular complaint the public interest in favour of disclosure of information provided by a complainant to Monitor may be increased. In the interests of transparency and accountability and having regard to the public interest in informing the public about the exercise of Monitor's functions in respect of this complaint, we have decided to disclose part of our prioritisation letter to Calderdale and Huddersfield NHS Foundation Trust.

In respect of the remaining requested information, having weighed up the competing factors and in light of the information set out above, Monitor's position is that the public interest is in favour of maintaining the exemption and withholding disclosure of the requested information.

Section 41 – Information provided in confidence

Some of the requested information is also exempt from disclosure under section 41 of the FOI Act as it is information provided in confidence to Monitor. The section 41 exemption applies to information obtained from another person where its disclosure would give rise to an actionable breach of confidence. A breach of confidence will be actionable if a legal person is able to bring an action for the breach of confidence to court and the action is likely to succeed.

Some of the information requested, and to which this exemption applies, includes confidential information contained in correspondence between Monitor and Calderdale and Huddersfield NHS Foundation Trust, including supporting documents submitted by the trust. We believe that disclosure of this information would constitute a breach of confidence actionable by the trust.

Section 41 is an absolute exemption, so there is no public interest test to be carried out under the FOI Act. However, when determining whether an action for breach of confidence would be likely to succeed it is necessary to consider whether the public interest in favour of disclosure outweighs the interest in withholding the information. Where a duty of confidence exists there is a strong public interest in favour of maintaining that confidence.

The public interest arguments in favour of maintaining the confidentiality of information provided to Monitor by complainants, and the public interest in disclosing information about Monitor's performance of its functions, are the same as those set out above in relation to the application of section 31 of the FOI Act to the information requested.

In respect of the prioritisation letter, which we are disclosing in part, to the extent that the redacted letter discloses any confidential information, the public interest in disclosing the information outweighs the public interest in withholding the information.

For the remaining information requested, the disclosure of which would constitute a breach of confidence, having weighed up the competing factors, the strong default interest in keeping confidential information provided to Monitor by complainants outweighs the public interest in disclosing 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.

Please note that this letter and the attached information 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 'L Dealtry', with a stylized flourish at the end.

Luke Dealtry
Inquiries Lead
Co-operation & Competition Directorate

ANNEX

No.	Document description	Decision	FOI Act exemption(s)
Complaint and supporting documents			
1	Complaint letter	Withheld	31 and 41
2 – 29	Appendices 1, 2(a), 2(b), 3, 13(a) – (x): various supporting documents including scoresheets and moderation notes	Withheld	31
30 – 32	Appendices 5, 6, 15: file notes and correspondence between CCGs and third parties	Withheld	31 and 41
33	Appendix 7a: Map	Withheld	21
34 – 44	Appendices 4, 7, 8(a), 8(b), 9 – 12, 13, 14, 16: correspondence between CHFT and CCGs	Withheld	31 and 41
Written correspondence between Monitor and Calderdale and Huddersfield NHS Foundation Trust regarding the complaint			
45 – 72	Various emails between Calderdale and Huddersfield NHS Foundation Trust (CHFT) to Monitor dated between 19 August 2015 and 16 September 2015	Withheld	31 and 41
73	Prioritisation letter	Disclose in part	31 and 41

16/09/2015

Owen Williams
Chief Executive
Calderdale and Huddersfield NHS Foundation Trust
Huddersfield Royal Infirmary
Lindley
Huddersfield
HD3 3EA

Dear Mr Williams,

Procurement of community services provided closer to home by Greater Huddersfield CCG and North Kirklees CCG

I refer to the complaint by Calderdale and Huddersfield NHS Foundation Trust and its bid partners dated 19 August 2015 regarding the procurement of community services provided closer to home (known as Care Closer to Home) by Greater Huddersfield CCG and North Kirklees CCG (the CCGs).

We have reviewed the complaint and the other information you supplied. We also contacted the CCGs and sought further information from them on the matters set out in the complaint. Having reviewed all the information and having regard to our prioritisation framework¹, we have decided not to open an investigation into the complaint. Our reasons are set out below. However, we have decided to take informal action and will speak to the CCGs about [REDACTED] the importance of commissioners being (and giving the appearance of being) fair and non-discriminatory during a procurement process. We think there are lessons for commissioners on this point and these will inform our future advice to commissioners.

The complaint

The complaint was that the CCGs acted in breach of the Procurement, Patient Choice and Competition Regulations². The complaint raises three issues:

1. Bias and discrimination: whether the phone call made by [REDACTED] to [REDACTED] demonstrates discriminatory treatment of Calderdale and Huddersfield FT by the CCGs.
2. Evaluation of bids: whether the CCGs correctly evaluated the bids, including by following the evaluation process set out in the guidance note to evaluators³.

¹ Our prioritisation framework can be found in our Enforcement guidance on the Procurement, Patient Choice and Competition Regulations [here](#).

² The National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013.

³ Appendix 13(R) to the complaint.

3. Commissioning of the service: (i) whether the CCGs should have designed the service in a different way and (ii) whether, by designing the service in the way that they have, the CCGs have: missed opportunities to improve other services, including through better integration of primary and secondary care; created risks to the provision of seven day care at Calderdale and Huddersfield FT; and reduced your ability to discharge patients in a timely manner.

Assessment of the complaint against our prioritisation framework

When deciding whether to investigate a complaint, we think about how best to use our resources consistently with our main duty to protect and promote the interests of people who use health care services. We do this by reference to our published prioritisation framework.

Key considerations in deciding how to proceed, including whether to open a formal investigation, are the expected direct and indirect benefits for patients and the likely cost of taking action. In assessing the extent to which action may benefit patients, we are mindful of the impact of any alleged breach of the Regulations on patients, the likelihood of an investigation resulting in enforcement action and whether formal or informal action may provide a better outcome for patients. In assessing the costs of our actions, we look at whether any action to be taken is proportionate to the scale of the problem it aims to correct.

We have considered each of the issues raised by the complaint:

1. Bias and discrimination: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

It is important that a commissioner does not prejudge or discriminate against any bidder. Providers must be treated equally and no provider (or type of provider) treated more favourably than another provider. Having reviewed the information provided by both parties, it is not apparent to us that the call, in and of itself, demonstrates bias or discriminatory treatment. We have considered whether opening an investigation would enable us to find additional evidence to support a finding of bias or discrimination and we do not think it likely that it would. For these reasons, we do not consider that opening an investigation would be the best use of our resources.

2. Evaluation of bids: commissioners should have a robust process for evaluating bids and the process should be adhered to. This process should not favour one particular bidder. From the information available to us, it appears that the CCG followed the procedural steps that were set out in the guidance note to evaluators. Having reviewed the notes of the individual scoring sheets and the evaluation meetings, it appears to us that the evaluators reached consensus scores or, as appropriate, majority scores and took notes which documented the reasons the scores were reached. Based on the information we have seen, we think it is unlikely that an investigation into the scoring and evaluation of the bids would lead to a finding of a breach of the Regulations and for that reason it does not appear to us that opening an investigation would be the best use of our resources.

3. Commissioning of the service: when commissioning services commissioners must act with a view to improving the quality and efficiency of services, including through services being provided in an integrated way. There is often more than one way of meeting a health care need and many different steps that commissioners can take to improve the quality and efficiency of the services they obtain. The commissioning of one service may have an impact on the provision of other services and commissioners should have regard to this when taking commissioning decisions.

Having reviewed this aspect of the complaint, it does not appear to us that the information provided demonstrates a risk to the quality or efficiency of the services being commissioned or to other services in the area, that the provision of seven day care for other services will be negatively affected, that patients will experience delays when being discharged, or that the commissioners should have commissioned a different service. Therefore, we do not consider that opening an investigation would be the best use of our resources.

[REDACTED]

For the reasons set out above and in line with our prioritisation framework, we have decided not to open an investigation. We have not made a substantive finding about whether or not the CCGs complied with the Procurement, Patient Choice and Competition Regulations.

We appreciate the time you have taken in bringing this matter to our attention. We understand that this is not the outcome you were looking for. However complaints such as this do help us to assess and shape our future work.

If you would like to discuss any matters in this complaint, then please do not hesitate to contact Luke Dealtry either by telephone on [REDACTED] or by email on [REDACTED]

Yours sincerely



John Pigott

Competition Inquiries Director