

1 February 2016

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██████

**By email**

████████████████████

Dear ██████████

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

I refer to your email of **4 January 2016** in which you requested information under the FOI Act.

### **Your request**

You made the following request:

*‘I would like to see a copy of the completed forms Frances Shattock asked each of the trusts in the 55 high risk systems for ED to submit on 1/1/16, 2/1/16 and 3/1/16 please.’*

### **Decision**

Monitor has understood your request to be for the daily performance data submitted to Monitor and other health sector partners by the 55 high risk systems between 1 and 3 January 2016, in response to emails from the regional teams at Monitor. Please note that the email referred to in your request was only sent to the high risk systems in the Midlands and East regions.

Monitor does hold the information that you have requested. Monitor has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in sections 22, 31, 33 and 41 of the FOI Act as explained in detail below.

It may assist you to know that Monitor and the NHS Trust Development Authority (TDA) (who together form NHS Improvement) are moving towards a more transparent approach to the publishing of A&E performance data for NHS trusts and NHS foundation trusts. We are currently coordinating our approach with our health sector partners to ensure a uniform approach to publishing this data. We will publish details of our revised approach on our website.

## **Section 22 – future publication**

Monitor considers that some of the data you have requested is exempt from disclosure because it is intended for future publication by Monitor or our partners. Monitor and the TDA publish quarterly performance reports for NHS providers (available [here](#)) and NHS England periodically publish a large amount of performance data about the sector (available [here](#)). NHS Improvement will be publishing a quarterly performance report before the end of the month that will cover the period to which your request relates and will contain some of the data subject to your request.

### **Public interest test**

The public interest in accountability and transparency by making access to the information available now has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted.

In recognition of the public interest in transparency, Monitor, TDA and public bodies such as NHS England proactively publish data on a regular basis, as referenced above. We have concluded that the public interest in disclosure of the data is outweighed by the need to ensure that data is published periodically and in an agreed format, following appropriate quality checks with the providers concerned. This provides certainty to the providers concerned and the sector as a whole. We consider that the public interest is satisfied by the pro-active approach to publication currently taken by health sector partners.

## **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 requested about NHS foundation trusts would, or would be likely to, prejudice the exercise of its functions for the purposes of determining whether any person has failed to comply with the law (section 31(2)(a)) and whether regulatory action is justified (section 31(2)(c)).

Monitor's role includes monitoring NHS foundation trusts' compliance with their licence. Within this context, Monitor requires detailed information from foundation trusts, including, in some instances, daily A&E performance data. In order for us to effectively regulate NHS foundation trusts, including assessing whether they are well led, we rely on NHS foundation trusts voluntarily sharing their information with us. In turn, NHS foundation trusts have a reasonable expectation that we will treat sensitive information that they provide to us as confidential.

We consider that disclosing the daily A&E performance data requested would or would be likely to prejudice the exercise of our functions since it would make providers less willing to share sensitive information with us which would reduce the amount and quality of information that they are prepared to voluntarily share with us in future. This would have a detrimental impact on the open relationship of trust that we have built with the sector, and our ability to efficiently assess their finances without recourse to our statutory powers to obtain information by compulsion. The public interest in disclosing this information under section 31 is considered below, in conjunction with the reasoning under section 33.

### **Section 33 – audit functions**

Section 33(1)(b) and 33(2) of the FOI Act provide that information may be exempt from disclosure where disclosure would be likely to prejudice the exercise of any public authority's functions in relation to the examination of economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

Monitor is of the view that the performance data supplied by foundation trusts being withheld is exempt under section 33(1)(b) of the FOI Act on the basis that Monitor has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources in discharging their functions, which would be prejudiced by the release of the information requested. Monitor has this function by virtue of Monitor's general duty under section 62(1)(a) of the Health and Social Care Act 2012 ("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. Further, see the conditions of the provider licence which Monitor uses to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the 2012 Act.

Monitor relies on the full and frank provision of information from NHS foundation trusts in order to carry out its functions effectively. 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 we would not wish to prejudice that relationship of trust and confidence. There is potential prejudice to that relationship, and accordingly to 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 a potential detriment to the system of regulation of NHS foundation trusts. For these reasons, we consider that disclosure of some of the information requested is exempt information under section 33(2).

Further, Monitor considers that the information about NHS trusts being withheld is also exempt under section 33(1)(b) of the FOI Act on the basis that the TDA has functions relating the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources in discharging their functions, which would be prejudiced by the release of the information requested. The TDA's functions under Section 4 of the National Service Trust Authority Directions 2013 extend to scrutinising whether Trusts are using their resources efficiently and effectively.

The TDA's activities are dependent upon having the "safe space" in which NHS trusts are able to share sensitive and confidential information with the TDA without fear of it being shared more widely. This safe space is important to ensuring the free and frank exchanges of views and information between the TDA and the Trusts, to ensure effective collaborative working.

Monitor is satisfied that disclosure of the performance data about NHS trusts requested would be likely to prejudice the TDA's abilities to perform its functions by removing the "safe space" and by creating an atmosphere making it likely that information shared with the TDA would be less open and candid and would be likely to make collaborative working slower, more formal and less open and thereby less effective.

## 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 daily A&E performance data of NHS trusts and foundation trusts there is a public interest in transparency. However, we consider that there is a stronger public interest in giving Monitor, TDA and NHS trusts and foundation trusts the space to share sensitive and confidential information and openly and frankly discuss their views about the action that is required to comply with the provider licence/relevant legal requirements without disclosing the same to a wider audience.

Monitor considers that the public interest in the performance of NHS foundation trusts, NHS trusts and Monitor's regulatory activity is satisfied by the information that is currently in the public domain.

In the interest of transparency, Monitor publishes information on its website about the performance of each NHS foundation trust, including the following:

- Monitor's assessment of the risk of each NHS foundation trust's non-compliance with the continuity of service and governance conditions of their licence;
- whether Monitor has opened an investigation into a NHS foundation trust's compliance with its licence, including evidence of breaches; and
- any enforcement taken by Monitor against a NHS foundation trust for non-compliance with its licence conditions.

Monitor and the TDA publish quarterly reports about the performance of foundation trusts and NHS trusts. We consider that the public interest is therefore satisfied by the information already available.

In considering whether the exemption cited above should be overridden if the public interest demands disclosure, the test is whether "in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

I consider that there is a strong public interest in allowing Monitor and TDA to be able to carry out their functions efficiently and effectively, and to have the space to consider, without concern as to publication, whatever information they require in such circumstances. Any disclosure which would cause Monitor to have to reconsider requesting sensitive information necessary to its statutory function of regulating NHS foundation trusts would be detrimental to the process of regulation.

Furthermore, if confidential information is disclosed, NHS foundation trusts and other relevant third parties are likely to lose confidence in Monitor, or take action to prevent the disclosure of such information.

## **Section 41 – information provided in confidence**

Some of the information has been withheld under section 41 of the FOI Act on the basis that it was obtained by Monitor from a third party, disclosure of which would give rise to an actionable breach of confidence.

We consider that the information providers (NHS trusts and foundation trusts) had a reasonable expectation that the content would remain private and only be used by Monitor for the specific and limited purposes of monitoring the relevant trusts. This information was not trivial, not readily available by other means and provided in confidence, which created an obligation of confidence. For the reasons explained above, Monitor believes this extends to Monitor's relationship with NHS foundation trusts and TDA's relationship with NHS trusts.

Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, in considering whether a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. For the reasons stated above, Monitor does not consider there is a strong public interest in disregarding the duty of confidence owed to NHS trusts and foundation trusts.

### **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).

### **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 'Jonathan Brown', with a long horizontal flourish extending to the right.

**Jonathan Brown**  
Senior Advisor