

11 August 2016

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[REDACTED]  
**By email**

Dear [REDACTED]

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

I refer to your email of **1 August 2016** in which you requested information under the FOI Act. Since 1 April 2016, Monitor and the NHS Trust Development Authority ("TDA") are operating as an integrated organisation known as NHS Improvement ("NHSI"). For these purposes, NHSI means Monitor and the TDA.

### **Your request**

You made the following request:

*"I am requesting information on agency / wage / framework breaches by Trust for the whole of England each week since the start of January 2016.*

*I am aware that each Trust submits a weekly agency cap return covering the areas mentioned above and I assume that you collate these into reports.*

*Therefore I request copies of the raw data from the returns that have been submitted plus the internal reports that you have produced based on these returns to show me the level of breaches of the agency, wage and framework caps by each England Trust by week since Jan 2016."*

### **Decision**

NHSI holds the information that you have requested.

NHSI has decided to release some of the information that it holds. Namely, the raw data you have requested which shows the level of breaches of the respective caps within the agency rules by each trust in England by week since January 2016. This is set out in the attached spread sheet.

The data for ambulance trusts is not included in the information we are releasing in the spread sheet, and we have anonymised trust names within the spread sheet. We have also decided to withhold all the information within our weekly monitoring reports. We are

withholding that information on the basis of the applicability of the exemptions in sections 31 and 33 of the FOI Act as explained in detail below.

### 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 in question would be likely to prejudice the exercise by Monitor and TDA of their functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of Monitor's provider licence enable Monitor 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"). Monitor will take into account NHS foundation trusts' inefficient or uneconomic spending practices, including any that relate to agency spending, as a measure of governance and in monitoring NHS foundation trusts' compliance with the licence.

Section 5 of The National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 ("the 2016 Directions") provides that the TDA must exercise its functions with the objective of ensuring that English NHS trusts are able to comply with their duty under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively – by, for example, establishing and maintaining best practice corporate governance arrangements and financial management standards, and effectively implementing systems and processes.

Paragraph 12.2 of the agency rules, published by NHSI in March 2016 ("the rules"), makes it clear that NHSI may investigate foundation trusts if there is sufficient evidence to suggest inefficient and/or uneconomical spending (e.g. agency and management consultant spend) which indicates wider governance concerns, and NHS trusts that are not managing their agency spend effectively.

NHSI considers that disclosing trust names, the data relating to ambulance trusts and the information in the monitoring reports is likely to prejudice the on-going monitoring by NHSI of providers' compliance with the rules, which is necessary for NHSI to take into account in any decision of regulatory action needed in respect of a failure to comply with the rules. Ambulance trusts in particular can be easily identified because there are only a handful of them and the population they serve is smaller than other trusts.

NHSI relies on the full and frank information from trusts in order to carry out its functions effectively. NHSI relies on having a safe space in which providers are freely able to share sensitive and confidential information in the knowledge that the information, or any analysis derived directly from it, will not be disclosed more widely. To disclose that information more

widely is likely to have a detrimental impact on the quality and content of exchanges between NHSI and the bodies it collectively regulates and its ability to make effective and fully informed regulatory decisions.

### Section 33 – audit functions

Sections 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 considers that the withheld information (trust names, data relating to ambulance trusts and the information in the monitoring reports), in so far as it relates to foundation trusts, is exempt under section 33(1)(b) 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, which is likely to be prejudiced by releasing the withheld information. Monitor has these functions by virtue of Monitor'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. Ambulance trusts in particular can be easily identified because there are only a handful of them and the population they serve is smaller than other trusts.

NHSI considers that the withheld information, in so far as it relates to NHS trusts is also exempt under section 33(1)(b) on the basis that the TDA has functions relating to the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources in discharging their functions (as described above), which is likely to be prejudiced by the release of the information that is being withheld.

As noted above, NHSI depends on the free and frank provision of information from trusts without fear of this being shared more widely, and considers (as explained above) that disclosure would be likely to have a detrimental impact on the quality and content of those exchanges in the future if details or any analysis derived from those details was published to the public at large. This would in turn be likely to have a prejudicial impact on the exercise of NHSI's regulatory functions.

### Public interest test

Sections 31 and 33 are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemptions should be maintained. We consider that in relation to the performance of trusts against the rules, there is a public interest in transparency.

However, we consider that there is a stronger public interest in giving NHSI and providers the space to openly exchange information that relates to NHSI's functions without disclosing the same to a wider audience and to give the sector the time to address any issues identified without premature disclosure.

NHSI considers that the public interest in the performance of trusts is satisfied by the information that we are releasing to you in response to this request.

### **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](mailto:nhsi.foi@nhs.net).

### **Publication**

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,



**Katharine Robinson**  
Senior Manager - Finance