

07/07/2016

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**By email**  
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Dear ██████████

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

I refer to your email of 6 May 2016 in which you requested an internal review of NHS Improvement’s decision dated 14 April 2016.

In your email of 28 January 2016, you included a request for:

*“...a list of the trusts reporting these payments [in excess of the price caps]...”*

Our decision letter of 18 February 2016 responded to that request refusing to disclose that information. In your email of 19 February you questioned that decision and asked for information as follows:

*“Please provide a list of trusts that have breached the new agency fee cap for each week since the introduction on 23 November, stating the number of breaches in each case...”*

In our decision letter of 14 April 2016, we explained that we treated that as a new request, while recognising it related to the same information, other than for the extended period covered by the second request (i.e. from 28 January to 19 February).

Your original requests were made to Monitor. As you may know, since 1 April 2016, Monitor and the NHS Trust Development Authority (the NHS TDA”) are operating as an integrated organisation known as NHS Improvement. References to NHS Improvement are references to Monitor and the NHS TDA, unless otherwise explained.

**Decision**

The decision of 14 April 2016 was that the information requested should be withheld on the basis of the application of the exemptions in sections 31 and 33 of the FOI Act. The

rationale of that decision was the same as that set out in NHS Improvement's decision on your first request, albeit the decision also addressed the comments set out in your email of 19 February 2016.

I have now conducted a review of that decision and concluded that the original decision should be upheld. My view is that the names of the trusts who have reported shifts in excess of the prices caps should not be disclosed, essentially for the same reasons as those already given in the decision letters of 18 February and 18 April. I have summarised those reasons below.

I have however also decided that we should disclose the numbers of trusts who have reported one or more shifts in excess of the price caps, in each week from the start of the regime to w/c 9 May. The numbers are attached as an annex to this letter (see below). These show that the majority of trusts are making use of the override mechanism, which was built into the rules to allow trusts to ensure patient safety at all times.

### **Reasons for decision to withhold**

#### *Section 31 – law enforcement*

I have considered whether 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).

I consider that section 31(2)(c) is engaged and that disclosure of the information would be likely to prejudice the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment. This applies to the functions conferred on both Monitor and the NHS Trust Development Authority ("the NHS TDA").

The provider licence enables NHS Improvement 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"). NHS Improvement will take into account inefficient or uneconomic spending practices, including any relating to agency spending, as a measure of governance and in monitoring NHS foundation trusts' compliance with their licence. In addition, in relation to NHS trusts, the NHS TDA is responsible for overseeing those bodies and ensuring they comply with their duty to exercise their functions effectively, efficiently and economically, and has powers to give directions to NHS trusts under the National Health Service Act 2006, as set out in the directions given to the NHS TDA by the Secretary of State<sup>1</sup>.

As explained in the original decision letter, paragraph 6.3 of "Price caps for agency staff: rules" published by NHS Improvement in November last year (the "Rules") makes it clear that any payments in excess of the price caps will be scrutinised by NHS Improvement and may lead to regulatory action as appropriate (see also section 9 on NHS Improvement's

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<sup>1</sup> See now the NHS Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare NHS Trust Directions 2016.

approach to enforcement). In assessing value for money, NHS Improvement will look at the extent to which NHS foundation trusts have followed good practice, including the Rules on agency staff. Disclosing the information on individual trusts before any decision has been made by NHS Improvement, on whether, and what, action to take in respect of a failure to comply with the Rules, would be likely to prejudice that decision.

In addition, NHS Improvement relies on the full and frank provision of information from trusts in order to carry out its functions in this area effectively. This is the case irrespective of whether it is exercising a formal power in gathering information. The identity of the trusts who have breached the cap is sensitive information in the context of the potential for regulatory intervention and a safe space is required. If such information was to be disclosed publicly, my view is that trusts would be less likely to disclose such information in future or may be otherwise less forthcoming in the information they provide in relation to following the Rules. This would have a detrimental impact on the exercise of NHS Improvement's relevant regulatory functions, which relies on having sufficient reliable information.

I note that trusts would not have any reasonable expectation that this information might be disclosed while there is a potential for regulatory action. There has been no indication to the trusts that this information may be disclosed, either in the Rules or elsewhere.

Furthermore, my view is that effective oversight of NHS foundation trusts and NHS trusts, which includes ensuring that NHS Improvement has appropriate information to enable it to make timely and effective decisions about regulatory action, relies on a relationship of trust and confidence between the trusts and NHS Improvement. This relationship would be jeopardised and undermined if NHS Improvement disclosed the requested information, with a detrimental impact on our ability to regulate and oversee trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 31(1) of the FOI Act applies.

### *Section 33 – public audit functions*

Section 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.

NHS Improvement has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources, which would be prejudiced by the release of the information requested. NHS Improvement is responsible for monitoring compliance with the provider licence held by NHS foundation trusts, which includes a requirement to have systems and processes in place for ensuring compliance with the duty of such trusts to operate efficiently, economically and effectively. It should also be noted that NHS Improvement has general duty under section 62(1)(a) of the 2012 Act, when exercising the functions conferred on Monitor, to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient, and effective (as well as maintaining or improving quality).

In relation to NHS trusts, as mentioned above, NHS Improvement has functions in relation to scrutinising whether NHS trusts are using their resources efficiently and effectively, by virtue of the directions given to the NHS TDA by the Secretary of State.

In relation to both types of trusts, similar arguments apply as those which apply for the purpose of the exemption relating enforcement functions (section 31 of FOIA). In order to operate effectively in relation to the examination of the efficient, effective and economic use of resources by trusts, NHS Improvement's view is that it requires a safe space in which trusts are able to share sensitive and confidential information with NHS Improvement without fear of it being shared more widely. Disclosing the requested information would be likely to reduce the quality of information provided by trusts in relation to the agency rules. In addition, effective oversight of NHS foundation trusts and NHS trusts, which includes obtaining information necessary for the effective examination of whether trusts are using their resources efficiently, effectively and economically, relies on a relationship of trust between the trusts and NHS Improvement. This relationship would be jeopardised and undermined if NHS Improvement disclosed the requested information, with a detrimental impact with a detrimental impact on our ability to regulate and oversee trusts effectively.

In conclusion, my view is that the disclosure would be likely to cause the prejudice outlined above and the exemption in section 33(1) and (2) of the FOI Act applies.

#### *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.

I recognise that in relation to the finances of public authorities there is a public interest in transparency; in particular in relation to understanding the impact of trust expenditure on agency staff on NHS deficits and the effectiveness of the measures taken by NHS Improvement to control that expenditure. I have weighed these public interest factors against the detrimental impact that is likely to ensue if disclosure is permitted.

The providers in question are being monitored and NHS Improvement is continuing to assess how trusts are using their resources in this area and whether there is any case for regulatory action in particular case. For the reasons, explained above, the ability of NHS Improvement to perform its functions would be adversely affected by the disclosure of the information (in essence, it is likely to reduce the information we have available and undermine our relationship with trusts). There is a strong public interest in NHS Improvement being able to exercise its regulatory and oversight functions in relation to trusts effectively.

In addition, I have noted that NHS Improvement routinely proactively publishes information when it starts a formal investigation and when it takes regulatory action a result of such investigations. We have also publish detailed information in relation to the agency rules, including the number of shifts where the agency price cap has been exceeded, broken down by week and staff group. This provides the data for each individual trust, albeit anonymised so that the identity of individuals trusts cannot be ascertained. This letter also provides you with the specific numbers of trusts who have, each week, reported shifts in excess of the prices caps. Furthermore, on 20 June we provided further data in relation to the agency

price caps, including the latest data on the number of shifts exceeding the price caps, the results from three surveys completed in 2016 indicating the degree of change to the number of vacant shifts at trusts, and survey results on the impact of the price caps on workforce, expenditure, quality and protected characteristics. See the FOI response at the following link:

<https://www.gov.uk/government/publications/foi-agency-price-caps-data-and-qualitative-information>

Taken altogether, I consider that this information addresses sufficiently the public interest in transparency in relation to the agency price caps regime.

In conclusion, in relation to both exemptions, I consider that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **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.

### **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 blue ink, appearing to read 'M. Carter'.

### **Miranda Carter**

Director of Provider Appraisal and New Organisational Models

## **ANNEX**

### **NUMBER OF TRUSTS REPORTING A PRICE CAP OVERRIDE**

w/c 23 Nov 2015	186
w/c 30 Nov 2015	201
w/c 7 Dec 2015	180
w/c 14 Dec 2015	186
w/c 21 Dec 2015	191
w/c 28 Dec 2015	194
w/c 4 Jan 2016	203
w/c 11 Jan 2016	205
w/c 18 Jan 2016	208
w/c 25 Jan 2016	212
w/c 1 Feb 2016	217
w/c 8 Feb 2016	213
w/c 15 Feb 2016	219
w/c 22 Feb 2016	223
w/c 29 Feb 2016	222
w/c 07 Mar 2016	220
w/c 14 Mar 2016	218
w/c 21 Mar 2016	213
w/c 28 Mar 2016	209
w/c 04 Apr 2016	207
w/c 11 Apr 2016	210
w/c 18 Apr 2016	216
w/c 25 Apr 2016	214
w/c 02 May 2016	212
w/c 09 May 2016	216