

1 February 2017

Wellington House
133-155 Waterloo Road
London SE1 8UG

By email

T: 020 3747 0000
E: nhsi.enquiries@nhs.net
W: improvement.nhs.uk

Dear [REDACTED]

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

I refer to your email of **3 January 2017** in which you requested information under the FOI Act from NHS Improvement (NHSI). Since 1 April 2016, Monitor and the NHS Trust Development Authority are operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the TDA.

Your request

You made the following request:

“I would like to request the following information

**since the introduction of the approval process for interim very senior managers costing over £750 a day at the end of October, how many requests for approval have you received and how many posts were covered by these requests?*

**how many of these have been approved and how many refused? Is it possible to have a breakdown of applications listing trust involved, job title, proposed cost per day and length of contract, and outcome?*

**what was the highest pay per day proposed in the applications ? And, if this was approved, what was the highest level of pay per day approved?”*

We have understood your request to relate to the approval process for the procurement of interim agency very senior managers (VSMs) earning above £750 a day by trusts.

The interim agency VSM rules apply to:

- All NHS trusts;
- NHS foundation trusts receiving interim support from the Department of Health; and
- NHS foundation trusts in breach of their licence for financial reasons.

However, all foundation trusts are strongly encouraged to comply with the process.

We have understood your request to relate to all requests for approval received, including from trusts not formally subject to the rules. Full details of the approval process are available on our website via the following link: [click here](#).

Decision

NHSI holds the information that you have requested.

NHSI can confirm that it has received four applications for approval of interim agency VSM pay above £750 a day by trusts. Details are outlined in the table below:

Request no	Daily rate (£)	Duration	Outcome
1	885*	51 Days	Withdrawn
2	860*	255 Days	Withdrawn
3	885*	64 Days	Approved
4	1187.50	3 months	Rejected

* this rate includes an agency fee

It should be noted that the interim agency VSM rules only apply to a small number of appointments within trusts. They do not, for example, apply to:

- the appointment of voting board members, who must be on the payroll of the organisation appointing them, further to a recent [requirement](#) introduced by HMRC;
- contracts already in place at the time that the rules were introduced (they would only apply to any renewal, extensions or variation of an existing contract where the daily rate exceeded £750 per pay); or
- NHS foundation trusts who are not in receipt of interim support from the Department of Health or in breach of their licence for financial reasons (although they may voluntarily comply with the process).

There is a separate approval process in place for on-payroll appointments to VSM roles where the annual salary is £142,500 or more.

It may assist you to know that the interim agency VSM rules are separate from the agency rules (for further details of these see: [click here](#)) and are a value for money requirement. Trusts must demonstrate that the candidate has the skills to undertake the role and that no internal candidate or candidate from within the trust's sustainability and transformation plan area is available. Where a trust can provide evidence of value for money they can, where approved, pay above £750 per day.

NHSI has decided to withhold the remaining information that it holds - the trusts involved and the relevant job title - on the basis of the applicability of the exemptions in sections 31, 33, 43 and 40 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.

Under Chapter 3 of Part 3 of the Health and Social Care Act 2012 (“the 2012 Act”), Monitor’s role includes monitoring NHS foundation trusts’ compliance with their licence, which contains conditions relating to their economy, efficiency and effectiveness. Monitor will take into account NHS foundation trusts’ inefficient or uneconomic spending practices, including any that relate to agency and VSM 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 6 of the interim VSM approval process guidance, published by NHSI in October 2016, makes it clear that compliance with these rules will be taken into account in the “broader value for money” considerations that form part of the Single Oversight Framework and that non-compliance with the process may be evidence that a trust is not achieving maximum value for money in this area, which may lead to regulatory action.

NHSI considers that disclosing applications for approval 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.

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, 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. Further, see the conditions of the provider licence which Monitor uses to regulate the economy, efficiency and effectiveness of foundation 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.

Section 43 (commercial interests)

Section 43(2) of the FOI Act provides that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person.

The daily rates negotiated by individual trusts for particular roles is commercially sensitive, disclosure of which is likely to be detrimental to the providers' and the candidates' legitimate commercial interests. For example, parties seeking to negotiate contracts with a provider could use this information to strengthen their own bargaining position when negotiating for, or providing services to, that provider.

Public interest test

Sections 31, 33 and 43 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 the finances of public authorities there is a public interest in transparency and that this is met by our disclosure of the information in a way that safeguards the interests described above that we are seeking to protect.

Section 40 - personal information

I consider that some of the information is exempt from disclosure under section 40(2) and 40(3)(a) of the FOI Act on the grounds that it contains personal data about candidates for VSM roles and that the first condition under section 40(3)(a) is satisfied, namely, that disclosure would amount to a breach of the first data protection principle (personal data should be processed fairly and lawfully). This is an absolute exemption and consideration of the public interest test is not required.

It may be possible to identify individual candidates from some of the information requested and other information available (for example, it may be possible to identify individuals if details of the trust and the role concerned are combined with information publicly available about individuals carrying out such roles). The individuals concerned would have a reasonable expectation that this information, together with their negotiated daily rates would not be disclosed.

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 NHSI of the issue or the decision. A senior member of NHSI'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, NHSI, Wellington House, 133-155 Waterloo Road, London SE1 8UG or by email to nhsi.foi@nhs.net.

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,

NHS Improvement