

25 February 2016

[REDACTED]

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By email

[REDACTED]

Dear [REDACTED]

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

I refer to your email of 28 January 2016 in which you requested information under the FOI Act.

Your request

You made the following request:

"Would you please provide a list of trusts that have a) applied for permission to use off-framework agencies or b) retrospectively reported use of off-framework agencies, since October 2015.

In each case please state the agencies involved.

For (a) please state whether permission was granted or not.

For (b) please state the number of shifts that each off-framework agency provided."

Decision

Question (a)

Monitor holds the information that you have requested. It has decided to withhold it on the basis of the applicability of the exemption in 33 of the FOI Act as explained in detail below.

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.

Monitor is of the view that the withheld information, in so far as it relates to foundation trusts, 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, which would be prejudiced by the release of the information requested. Monitor has these functions 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.

Paragraph 12 of "*Price caps for agency staff: rules*" published by Monitor in November last year (the "Rules")¹ states that Monitor will be explicitly taking into account trusts' inefficient or uneconomic spending practices, including in relation to agency spending, as a measure of governance. In assessing value for money, Monitor is likely to look at the extent to which trusts have followed good practice. Therefore the Rules in so far as they relate to the use of off-framework agreements will be taken into account in monitoring NHS foundation trusts' compliance with their licence.

The regulation of NHS foundation trusts and Monitor's ability to discharge its functions in examining the economy, efficiency and effectiveness of those it regulates would be prejudiced if sensitive and confidential information, as is the case with the information requested, were to be disclosed. The relationship of trust between NHS foundation trusts and Monitor would be jeopardised and undermined if providers considered such information would be disclosed.

Further, Monitor considers that the information about NHS trusts is also exempt under section 33(1)(b) of the FOI Act 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, 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 and, as noted above, are dependent upon having a 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.

Public interest test

Section 33 is a qualified exemption and therefore requires that a public interest test be carried out to determine whether the exemption should be maintained. This is considered below.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/484834/price_caps_for_agency_staff_rules_final_rev11dec.pdf

Question (b)

Monitor holds the information that you have requested. It has decided to withhold it on the basis of the applicability of the exemptions in sections 31 and 33 of the FOI Act. The explanation of section 33 above also applies to the information requested at question (b) and I refer you to that explanation. I explain in detail below how the exemption in section 31 of the FOI Act applies to the information requested.

Section 31 – law enforcement

Monitor 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).

Monitor considers that section 31(2)(c) is engaged and that disclosure of the information would be likely to prejudice the exercise by Monitor of its functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of provider licences enable Monitor to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the 2012 Act. Monitor will take into account foundation trusts' 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.

Paragraph 50 of the Rules makes it clear that, in relation to the use of non-approved frameworks, Monitor and the Trust Development Authority will take appropriate and proportionate action in cases of non-compliance. Disclosing the information on individual foundation trusts before a decision has been made by Monitor, 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 Monitor relies on the full and frank provision of information from NHS foundation trusts in order to carry out its functions effectively. Similarly the Trust Development Authority (the "TDA") activities are dependent upon having a "safe space" in which NHS trusts are able to share sensitive and confidential information with the TDA. There is potential prejudice to the ability of Monitor to regulate the NHS foundation trust sector (and to the TDA in relation to its activities), if sensitive information which NHS foundation trusts provide to Monitor is disclosed.

Public interest test

Section 31 is a qualified exemption and therefore requires that a public interest test be carried out to determine whether the exemption should be maintained. This is considered below.

Public interest test – questions (a) and (b)

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 the finances of public authorities there is a public interest in transparency. The public interest in accountability and transparency by making the information available has been weighed against the detrimental impact that is likely to ensue if disclosure is permitted.

The providers named within the information that is being withheld under these sections of the FOI Act are being monitored (either by way of formal regulatory action or by way of informal action which may become formal) and Monitor and the TDA are continuing to assess concerns raised by these providers. The ability of both Monitor and the TDA to perform their functions would be adversely affected by the disclosure of the information.

In addition, providers do not expect that such sensitive and confidential information will be placed in the public domain and if they were to consider that the information they provided could be disclosed, they may be less likely to provide it or in the detail that they do. Consequently, this would have a detrimental on the ability of Monitor and the TDA to perform their functions.

Monitor routinely proactively publishes details of any regulatory action that it decides to take as a result of its investigations..

Please note that NHS foundation trusts and NHS trusts are subject to the FOI Act and as such it is open to you to seek information directly from them. They will need to consider whether information can properly be provided by them in response to any such requests within the terms of the FOI Act.

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.

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 that reads "KJ Robinson". The signature is written in a cursive style.

Katharine Robinson
Senior Manager – Finance