

21 October 2015

[REDACTED]
[REDACTED]

By email

[REDACTED]

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Dear [REDACTED]

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

I refer to your email of **23 September 2015** 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 planned reductions in agency spend ordered for each foundation trust Monitor is responsible for please. Monitor will have sent these to trusts recently and will doubtless have a central record of what they are also.’

Decision

Monitor does hold the information that you have requested and has decided to withhold this information on the basis of the applicability of the exemptions in sections 31, 33 and 43 of the FOI Act, as explained in detail below.

Our duty under the FOI Act extends to information we hold at the time of the request. At 23 September 2015, we had communicated proposed (initial) ceilings to each NHS foundation trust and then allowed a period of time for each provider to challenge those and respond. A final decision on ceilings for each NHS foundation trust has since been made but Monitor has decided not to disclose the initial ceilings and has no plan to publish the final ceilings. Our reasons apply to both and are provided in detail below.

Section 31 (law enforcement)

We consider that disclosure of the initial ceilings would, or would be likely to, prejudice the exercise of our functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 31(1)(g) and (2)(c)).

The ceilings proposed by Monitor were based on Monitor’s review of financial information including information provided voluntarily. It is essential for the efficient and effective

exercise of Monitor's functions that Monitor is able to express its views about the steps it considers NHS foundation trusts should take to ensure compliance with the terms of their licence and that NHS foundation trusts should feel able to share information with Monitor freely and openly without fear that the information, or any analysis derived directly from it, will be shared with the public at large.

If this information was disclosed then Monitor staff are likely to be less candid and open in their communications with the bodies that they regulate and the sector is likely to be less willing to share sensitive information with Monitor voluntarily in the future. This would be likely to have a detrimental impact on the quality and content of exchanges between Monitor and the bodies that it regulates and Monitor's ability to make effective and fully informed regulatory decisions.

Section 33 (audit functions)

Monitor is of the view that the requested information is exempt under section 33(1)(b) of the FOI Act on the grounds that release of it would prejudice Monitor's licensing functions which include examining whether foundation trusts have discharged their functions economically, efficiently and effectively.

Monitor relies on having open and frank correspondence with NHS foundation trusts in order to carry out its regulatory functions effectively. As explained above, it would have a detrimental impact on the quality of those exchanges in the future if details of those exchanges, or any information derived from those exchanges, was published to the public at large. This would have a prejudicial impact on the exercise of Monitor's regulatory functions. For the reasons set out above and in relation to the application of section 31, we consider that disclosure of the ceilings proposed by Monitor is exempt information under section 33.

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 information provided by NHS foundation trusts to Monitor relates to financial information, which by its nature is commercially sensitive and disclosure of which is highly likely to be detrimental to the trusts' legitimate commercial interests. For example, parties seeking to negotiate contracts with an NHS foundation trust could use the information relevant to your request to strengthen their own bargaining position when negotiating for, or providing services to, that trust. In addition, competitors may be able to use such information to their advantage to the detriment of that trust's legitimate interests. We consider that the information relating to reductions in agency spend is commercially sensitive.

Public interest test

Section 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.

However, we consider that there is a stronger public interest in giving Monitor and NHS foundation trusts the space to openly and frankly discuss their views about the action that is required to comply with the provider licence without disclosing the same to a wider audience and to give the sector the time to address any issues identified without premature disclosure.

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.

We consider that there may be a public interest in disclosing the proposed ceilings for each NHS foundation trust given the public interest in the financial health of public sector bodies, especially where the NHS foundation trusts in question are in breach of their licence due to financial sustainability and/or financial governance concerns and enforcement action has been taken.

However, since Monitor publishes all enforcement action on its website, including the grounds for undertaking that enforcement action, we consider that the public interest is met by its publication policy. Taking this point into account I have decided that in this case the public interest is best served by withholding the information.

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

I understand you have submitted the same request to the NHS Trust Development Authority (TDA) and trust you will receive a separate response from the TDA in due course.

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.

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 "T. Beasley".

Tim Beasley
Senior Manager, FT Approvals