

26 November 2015

[REDACTED]

By email

[REDACTED]

Dear [REDACTED]

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

I refer to your email of **29 October 2015** in which you requested information under the FOI Act.

Your request

You made the following request:

“Please can you send me any list or database Monitor uses to select interim or permanent appointments to NHS trusts.”

Decision

Monitor holds information relevant to your request.

Monitor has decided to withhold all of the information that it holds on the basis of the applicability of the exemptions in sections 40, 41 and 43, as explained in detail below.

Monitor holds a spreadsheet containing market intelligence about individuals who may be suitable for senior leadership roles in NHS organisations. The spreadsheet contains the contact details of the individuals concerned as well as details about their experience, availability and other information considered relevant when assessing potential candidates for any roles arising. The individuals concerned are not on Monitor’s payroll, nor has Monitor carried out detailed checks or obtained formal references to assess their suitability for roles. It would be for any potential appointing organisation to carry out relevant detailed checks before appointing any of the individuals concerned.

I’ve set out below the relevant exemptions and the grounds for their application.

Section 40 – personal information

Under section 40 of the FOI Act, information is protected from disclosure if it is personal data protected under the Data Protection Act 1998 (“the DPA”). Section 40(7) of the FOI Act provides that the relevant definition of personal data is that set out at section 1(1) of the DPA:

“personal data” means data which relate to a living individual who can be identified-
(a) from those data, or
(b) from those data, and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Some of the information requested is being withheld from disclosure under section 40(2) of the FOI Act on the grounds that it amounts to personal data and the first and/or second 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) and/or is likely to cause damage or distress, which would be unwarranted.

The information requested contains personal details of individuals who would have a reasonable expectation that their information would be withheld. This is an absolute exemption and consideration of the public interest in disclosure is not required.

Section 41 – information provided in confidence

Under section 41 of the FOI Act, information is exempt if it was obtained by Monitor from any other person and disclosure of the information to the public would constitute a breach of confidence actionable by that other person.

The information requested includes information about individuals that is not otherwise in the public domain, and is confidential in nature. That information was provided in circumstances giving rise to an obligation of confidence, given the circumstances in which the information was disclosed to Monitor. Disclosing the information to the public without consent would amount to an unauthorised use of the information to the detriment of the individuals concerned, and an actionable breach of confidence. We therefore consider that the information is exempt from disclosure under section 41 of the FOI Act.

Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, in considering whether (in an action for breach of confidence) a confidence should be upheld, a court will have regard to whether the public interest lies in favour of disclosure. Where a duty of confidence exists, there is a strong public interest in favour of maintaining that confidence. In the present circumstances, Monitor does not consider that there is a strong public interest in disregarding the duty of confidence owed to the individuals concerned given the detrimental impact this likely to have on their willingness to share information with Monitor and other health sector stakeholders in the future.

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 documents within the scope of your request include market intelligence about individuals, including in some cases, their expected rates and actual and anticipated contracting arrangements. We consider that disclosure of this information would be likely to prejudice the commercial interests of the individuals concerned and Monitor, for example, disclosing information about the rates individuals expect to charge may weaken their bargaining position in seeking to negotiate contracts in the future.

Public interest test

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

I have considered the public interest in transparency and accountability in relation to the activities of Monitor, including the information Monitor has sought fit to gather about individual who may be suitable for senior leadership roles. I have also considered the strong public interest in maintaining commercial confidentiality, and enabling sensitive information about individuals who may be suitable for leadership positions to be gathered by Monitor, without the need to disclose the same to the public at large. Disclosure of sensitive information about potential candidates for leadership roles would be likely to inhibit Monitor from corresponding with, or enquiring about, those individuals and would make the individuals concerned reluctant to correspond with Monitor and provide sensitive information about themselves, to the detriment of recruitment processes within the NHS. I am therefore of the view that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Review rights

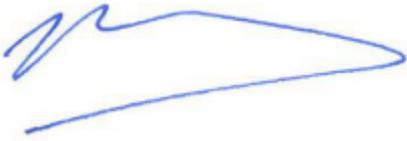
If you consider that your request for information has not been properly handled or if you are otherwise dissatisfied with the outcome of your request, you can try to resolve this informally with the person who dealt with your request. If you remain dissatisfied, you may seek an internal review within 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 Freedom of Information Act 2000 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, consisting of a stylized, cursive 'P' followed by a long, sweeping horizontal line that tapers to a point on the right.

Philippa Harding
Director of Operations and Performance