

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2015

Public Authority: Monitor
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested copies of papers on an investigation by Monitor into the performance of King's College Hospital NHS Foundation Trust. The Trust identified several documents containing information within the scope of the request and considered the information to be exempt on the basis of sections 31, 33, 41, 21, 36 and 40 of the FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 31(1)(g) with 31(2)(c) to the withheld information and the balance of the public interest favours maintaining the exemption. He requires no steps to be taken.

Request and response

3. On 19 April 2015, the complainant wrote to Monitor and requested information in the following terms:

"I should like to ask under the Freedom of Information Act for a copy of the papers on the recent investigation into the Princess Royal University Hospital leading to the press issued on 2 April including the report of the investigation."

4. Monitor responded on 13 May 2015. It stated that it did not produce reports of investigations and did not consider the request covered correspondence on this issue. It therefore considered the scope of the request to be for internal papers both during and leading up to the

investigation into King's College Hospital NHS Foundation Trust ("the Trust").

5. On this basis, Monitor identified three documents containing information relevant to the request as well as corresponding minutes for the first two papers:
 - Provider Regulation Director's Committee paper for the meeting on 9 March 2015;
 - Provider Regulation Executive paper for the meeting on 12 March 2015; and
 - Board paper (private session) for the meeting on 25 March 2015.
6. Monitor considered this information to be exempt on the basis of sections 31, 33 and 41 of the FOIA.
7. Following an internal review Monitor wrote to the complainant on 11 June 2015. It stated it upheld its position that the information within the scope of the request should be withheld under the exemptions as set out in its refusal notice.
8. During the course of the Commissioner's investigation, Monitor stated it had identified an additional document within the scope of the request which summarised the Trust's view on the enforcement action proposed by the Monitor Provider Regulation Director's Committee ("PRDC") and the relevant Regional Director's views on these proposals. The document had been tabled at the Provider Regulation Executive Committee ("PREC") meeting on 12 March 2015 for consideration in conjunction with the paper which had already been identified as within the scope of the request.
9. As well as identifying a further document within the scope of the request, Monitor also sought to rely on some additional exemptions to withhold all or parts of the information. Monitor listed these exemptions as sections 21, 36 and 40 of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 12 June 2015 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of his investigation to be to determine if Monitor has correctly applied any of the cited FOIA

exemptions – sections 31, 33, 41, 21, 36 and 40 – to withhold the information within the scope of the request.

Reasons for decision

12. As Monitor has applied a number of exemptions to this request the Commissioner has first considered those exemptions which have been applied to all of the withheld information – sections 31, 33 and 36. Of these he has first looked at the application of section 31 as this was one of the exemptions cited by Monitor in its refusal notice (along with section 33).

Section 31 – law enforcement

13. Monitor stated it considered that all of the information identified as within the scope of the request was exempt on the basis of section 31(1)(g) in conjunction with subsections (2)(a) and (c) of the FOIA.

14. Section 31 of the FOIA states that –

"Information which is not exempt by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice - ...

(1)(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

15. The purposes specified at subsection 2(a) and (c) are:

"(a) the purpose of ascertaining whether any person has failed to comply with the law,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise."

16. The Commissioner finds that the use of the word "ascertaining", i.e. determining definitely or with certainty, limits the application of this exemption to those cases where the public authority to which the prejudice is being claimed, has the power to formally ascertain compliance with the law or has a regulatory role in determining if regulatory action should be pursued.
17. In order to show that it exercises the appropriate functions to rely on subsections 2(a) and (c), Monitor has explained that it is the regulator for health services in England. Monitor is responsible for the licencing of providers of health services as set out in Chapter 3 of Part 3 of Health

and Social Care Act 2012 (HSCA)¹. Licenced providers include NHS Foundation Trusts and as part of its obligations under the HSCA it determines standard licence conditions².

18. Monitor has explained it has a range of statutory enforcement powers that give it the ability to intervene formally where it assesses, or has grounds to suspect, that licenced providers have been or are in breach of licence requirements. These powers include the power to impose discretionary requirements (section 105); the ability to accept enforcement undertakings (section 106); the power to revoke a licence (section 89); and the power to evoke additional licence conditions if Monitor is satisfied the governance of a trust is such that it will fail to comply with conditions of its licence (section 111).
19. On the basis of this explanation from Monitor the Commissioner is satisfied that it does have the appropriate functions to rely on subsections 2(a) and (c) as it clearly has statutory obligations to ascertain compliance with the law and to ascertain if circumstances exist which justify regulatory action, which the Commissioner considers to be more relevant in this case.
20. However, the Commissioner must be satisfied the information in question relates to the exercise of these functions by Monitor.
21. In this particular case, Monitor opened an investigation into the Trust's compliance with the governance and continuity of service conditions of its licence due to the Trust's deteriorating performance in certain areas. Monitor released details of the investigation at the time³.
22. The Commissioner is therefore satisfied that the information that has been withheld related to the exercise of Monitor's regulatory functions as it is all contained within papers and minutes of board meetings in which the performance issues of the Trust and its compliance with its licence conditions were being assessed with a view to establishing if regulatory action may be needed. The Commissioner has therefore gone on to consider whether the prejudice claimed is likely to occur.

¹ <http://www.legislation.gov.uk/ukpga/2012/7/contents/enacted>

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285008/ToPublishLicenceDoc14February.pdf

³ <https://www.gov.uk/government/news/investigation-launched-to-help-fix-problems-at-kings-college-hospital-nhs-foundation-trust>

23. Monitor considers there would be a real and significant risk of prejudice if this information was disclosed. In explaining this point Monitor has expanded on the role of its Provider Regulation directorate (PRD) who are responsible for performing Monitor's functions in relation to the regulation of licenced providers. Within this directorate there are teams of individuals responsible for regulating each foundation trust who receive large amounts of information about the performance of the trust throughout the year.
24. Monitor will generally engage with licence providers to seek further information before deciding whether to initiate an investigation or exercise any statutory powers. The Provider Regulation team is therefore focused on building strong relationships with licenced providers to encourage the voluntary sharing of information.
25. Before commencing the investigation Monitor had worked closely with the Trust to get an understanding of the causes of the deteriorating performance particularly in light of the Trust's acquisition of the Princess Royal Hospital. As part of this process, the Trust voluntarily provided a wide variety of information with Monitor.
26. Monitor has explained it carried out a short investigation into the Trust's compliance with its licence and recommendations were made to the PRD Committee. The paper setting out this recommendation and the minutes of the meeting form part of the withheld information.
27. After the recommendation for further action was approved, Monitor engaged with the Trust about the proposed action and a recommendation was made to the Provider Regulation Executive (PRE). At subsequent PREC meetings papers and amended papers were presented and these are also within the scope of the request and form part of the withheld information. Revised undertakings were then agreed with the Trust and a report presented at Monitor's board meeting and this report has also been withheld.
28. Monitor is therefore of the opinion that the disclosure of this information would be likely to have an adverse impact on the willingness of the Trust to provide information to Monitor on a full and open basis in the future which would impact on its ability to carry out its regulatory functions.
29. Monitor has also highlighted the specific nature of the information contained in the papers put before the PRD and PRE Committees and Boards. Much of the information was detailed and sensitive financial information, particularly about its plan to acquire Princess Royal Hospital including financial projections. The papers also include information provided to Monitor by the Trust after the acquisition on the developing

financial and operational situation and includes details of interactions with various stakeholders.

30. The Commissioner accepts the general argument that disclosure of information which has been used as part of an investigation which may result in regulatory action could have a prejudicial effect on future investigations as it may lead to an unwillingness to provide information on a voluntary basis. However, in determining whether the likelihood of this prejudice occurring is real and of substance he has considered whether if Trust's cease to provide information willingly Monitor would be able to obtain this more formally and if so what the impact of this would be on its ability to carry out its functions.
31. Monitor has acknowledged that it can seek information under its statutory powers (section 104 of the HSCA) and licence providers have an obligation to provide information under their licence conditions. However, Monitor has put significant emphasis on the importance of the effective relationships its PRD team has built up with the Trust and how vital this is to obtaining the Trust's cooperation and openness in providing wide ranging information for the purposes of the investigation.
32. Monitor argues that at the very least disclosure of the information in this case may require it to exercise its formal regulatory powers more extensively to obtain the information it requires from the Trust. This would lead to undue delay and inefficiency in the regulatory process as it would have to justify each piece of information it was requesting. Monitor also considers disclosure would impact on the quality of the information provided by the Trust as they may be more inclined to only provide the minimum amount of information to respond to the requests from Monitor, again undermining the efficiency and quality of the regulatory decision making process.
33. In addition to this Monitor has also stated that it continues to closely monitor the Trust's progress in making the required improvements and continues to request information from the Trust to assess this.
34. The Commissioner has considered these arguments from Monitor and accepts that it has sufficiently demonstrated that prejudice to its regulatory functions would be likely to occur if the information were to be disclosed. He accepts there is a real risk that disclosure may make it more difficult for Monitor to obtain the information it requires to make decisions and monitor performance with a view to regulatory action. He also recognises that the wide ranging and large amounts of information currently provided on a voluntary basis by the Trust may not be attainable if Monitor were to rely on its formal powers to request only the information absolutely necessary from the Trust to assess its

performance. This in turn may hinder the quality and efficiency of Monitor's decisions.

35. The Commissioner also considers it important to recognise that the issue is still 'live', in that Monitor is continuing to monitor the Trust's performance and the open and frank relationship between the Trust and Monitor allows the performance of the Trust to be assessed on an ongoing basis.
36. As section 31 is a qualified exemption the Commissioner has gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

37. Monitor recognises the need for transparency, particularly when considering the objectives of NHS Trust's to be accountable to local people and the need for regulators to be accountable for decisions they make.
38. The complainant believes the public interest in disclosure in this case is enhanced as the Trust in question spends large amounts of public money and due to its performance issues, any papers relating to this should be available to allow for the public to see the issues.

Public interest arguments in favour of maintaining the exemption

39. Monitor considers the arguments it presented with regards to the potential prejudice are also relevant considerations for the public interest test. It has highlighted the importance of being able to carry out its functions efficiently and effectively and to have the space to consider issues without undue public scrutiny.
40. Much of the withheld information contained within the papers contain the views and advice of Monitor staff about the extent to which the Trust has complied with the conditions of its licence and the appropriate regulatory action for Monitor to take. Monitor is of the view that disclosing this information may inhibit the free and frank provision of advice as staff who had no expectation their views would be open to scrutiny would be less likely to be so open and candid in their assessments. As such Monitor argues this would not be in the public interest as it would be likely to impact on the quality of decisions made in the exercise of its regulatory functions.

Balance of the public interest

41. The Commissioner gives weight to the argument that there is a need for accountability within NHS Trusts to ensure they are being appropriately and effectively run. However, the information in question is information held by Monitor for the purposes of assessing the performance of the Trust and the Commissioner must therefore weigh the need for transparency and accountability in NHS bodies against the public interest in maintaining the integrity of regulators abilities to fulfil their statutory obligations.
42. Monitor has argued that it makes a large amount of information available on its website about each Trust's performance. This information includes Monitor's assessment of the risk of each Trust's non-compliance with the continuity of service and governance conditions of their licence, whether Monitor has opened an investigation into a Trust's compliance including evidence of breaches, and any enforcement action taken. Monitor therefore considers it is aware of the need for transparency.
43. In this particular case, Monitor issued press statements to announce it was investigating the Trust and a press release once the investigation concluded with copies of the undertakings agreed with the Trust which contained summaries of the issues identified with the Trust and the actions agreed with the Trust to address them.
44. The information which has been withheld in this case is information within the papers submitted to PRD and PRE meetings, a lot of which is views and advice of staff or financial information provided by the Trust which the Commissioner does not consider would provide any increased insight into the performance issues at the Trust as it is not directly relevant to this. The Commissioner accepts this information may be of some public interest but does not apportion significant weight to the argument that disclosing this specific information would increase accountability and provide a greater insight into the issues at the Trust beyond that which has already been made available by Monitor.
45. However, the Commissioner has already acknowledged the potential prejudice argued by Monitor to be real and significant. As such he has taken account of the very strong public interest in not undermining the regulatory functions and process of Monitor. Monitor has placed a great deal of emphasis on the trust it has with NHS Trusts and how important this is to allowing it to make fast, efficient and quality decisions. The public interest in this is still strong as Monitor continues to monitor the Trust's progress towards improvement by the free and frank sharing of information.

46. Taking all of this into account, the Commissioner has concluded that the public interest in this case favours maintaining the exemption. He does not consider the arguments for disclosure to be compelling and he is satisfied that disclosure would be likely to impact on engagement with the Trust and therefore the ability of Monitor to effectively carry out its regulatory responsibilities which would not be in the public interest.
47. As such the Commissioner accepts that the section 31 exemption is engaged and the public interest favours withholding the information. The Commissioner has therefore not gone on to consider the application of the other exemptions and requires the Trust to take no further steps.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF