

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 12 December 2006

Public Authority: The Independent Regulator of NHS Foundation Trusts,
(MONITOR).

Address: 4 Mathew Parker Street
London
SW1H 9NL

Summary

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1. The complainant requested the monitoring returns of NHS Foundation Trusts provided to the public authority between 2004 and 2005 as part of its functions as the regulator of NHS foundation trusts. The authority refused to disclose the information on the grounds that the exemptions in section 33(1) (b) (audit functions), section 43 (commercial interests), section 22 (information intended for future publication) and section 21 (information available by other means) were applicable to the information. The Commissioner's decision is that information provided to the authority as part of its 2004 returns does not fall within the exemptions applied and that the information should therefore be disclosed to the complainant. As regards the returns from 2005, the Commissioner's decision is that Monitor was able to apply the exemptions in sections 33 and 43 of the Act at the time that the request was received. However, the annual reports and accounts of both the public authority and the trusts have been published since the complaint was made to the Commissioner. He has therefore decided that this information should also now be disclosed.

The Commissioner's Role

2. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

3. On 23 March 2006, the complainant wrote to Monitor requesting the following information:

"A copy of each First Wave Foundation Trust's monitoring returns for August 2004 and December 2004, could you also forward the same for the period August 2005 and December 2005."

4. Monitor responded to the request on 5 April 2006. It refused to provide the information on the grounds that sections 22, 33(1)(b), and 43 applied.
5. Due to a previous investigation of a similar request from the same complainant, the Commissioner did not require the complainant to have this refusal internally reviewed by Monitor. Details of the previous request are highlighted in paragraphs 6 – 11 below.

The Investigation

Scope of the case

The first request

6. The Complainant had made a previous request to Monitor on 4 February 2005. In that request he had asked for:

"A copy of each first wave foundation trust's monitoring returns for August and December 2004."

This request was made when Monitor did not fall within the scope of the Act, although this was not initially realised.

7. On 16 February 2005 Monitor refused to provide the information for the same reasons as stated in paragraph 4 above. The complainant therefore invoked the internal complaints procedure on 22 February 2005. Monitor responded to the review on 4 March 2005 upholding its original decision. The complainant then sought a review of the decision from the Commissioner.
8. The Commissioner began an investigation of the refusal as Monitor had not at that time identified to the complainant or to the Commissioner that it was not an authority covered by the Act.
9. The Commissioner wrote to Monitor asking for a copy of the information and any submissions Monitor wished to make in support of its application of the exemptions to the information. After further correspondence Monitor provided a submission in support of this, and at a later point then sent the information to the Commissioner.
10. The fact that Monitor was not an authority falling within the scope of the Act became clear during the course of the investigation. In a letter dated 1 November 2005 Monitor clarified to the Commissioner that it was not named in Schedule 1 of the Act. The Commissioner therefore contacted the Department for Constitutional Affairs requesting information as to when Monitor would be covered and was informed that its inclusion was imminent. Statutory Instrument SI 2005 No 3593 was laid before parliament on 16 January 2006 and Monitor was included within schedule 1 as from 7 February 2006.
11. The Commissioner then re-contacted Monitor on 3 March 2006. In that letter it clarified that as the complainant's request had been made before Monitor had been included within the scope of the Act the request was not an eligible request for the purposes of the Act. The Commissioner therefore asked Monitor if it would consider the complainant's request valid for the purposes of the Act in order that the investigation could continue. Monitor wrote back to the Commissioner on 17 March 2006 and informed him that it would not consider the complainant's request valid. It did not believe that the complainant would remake his request given that, in its view, much of the information which he had requested had by that point been published in the annual accounts and reports of the various trusts. In a letter dated 20 March 2006 the Commissioner therefore informed the complainant that the complaint had been deemed invalid by Monitor and that he would need to make a new request. He also confirmed this to Monitor in a letter dated 20 March 2006. The complainant made a new request to Monitor on 23 March 2006 in the terms highlighted above.

The second request

12. In a letter dated 23 March 2006 the complainant wrote to the Commissioner requesting a decision on this request. The Commissioner received the letter on the 24th April 2006. The Commissioner therefore assumes that this letter was incorrectly dated.
13. The complainant specifically asked the Commissioner to consider the following points:
 - whether Monitor was correct in its application of the exemptions to the information falling within the scope of his request, and,
 - whether the information he requested should have been supplied to him.

Chronology of the case

14. The Commissioner wrote to Monitor on 16 June 2006 clarifying that a new complaint had been made and that the Commissioner was investigating this complaint. In that letter he offered Monitor the opportunity to make further representations on its previous submissions, given the time that had passed since the previous investigation and the additional returns requested by the complainant in his new request. Monitor did not respond to that letter.
15. The Commissioner then telephoned Monitor on 18 September 2006 and, at Monitor's request, wrote on 19 September 2006 and asked whether Monitor would consider disclosing the information to the complainant on an informal basis. This was because Monitor had stated in a letter dated 17 March 2006 that the 2004 information had "little currency left, if at all" due to the publication of annual reports and accounts. Monitor replied by email on 2 October 2006 stating that it did not believe that it was appropriate to provide the information informally and provided further argument in support of its reliance upon the exemptions.

Analysis

16. The Commissioner has considered the public authority's response to the complainant's request for information.

Exemptions

Section 33

17. Monitor applied the exemption in section 33 (1) (b) of the Act to the information requested. This says that information may be exempt from disclosure where this would be likely to prejudice the exercise of any of the authority's functions in relation to the examination of the economy, and efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

Monitor

18. Monitor regulates foundation trust hospitals. As part of this function it requires that trusts submit regular reports covering aspects of a trusts financial management and position. As part of its regulatory powers Monitor has the power to remove the directors or members of the board governors of a trust where it considers that the trust is substantially failing to meet its terms of authorisation. Monitor's authorisation criteria also includes setting a trust's borrowing and credit limits.

Foundation trusts

19. Foundation trusts are NHS hospitals which are authorised to govern themselves. They are allowed to retain any profit they may make and manage their capital to maintain and improve the services they provide. Trusts are decentralised with the idea that the local community is able to have a greater say in governing the trust. Monitor states that foundation trusts possess three key characteristics that distinguish them from other NHS trusts:
- Freedom to decide locally how to meet their obligations
 - Accountable to local people, who can become members and governors
 - Authorised and monitored by Monitor - Independent Regulator of NHS Foundation Trusts.
20. Foundation trusts are allowed to make a financial loss. They must however manage their finances appropriately, and within their given terms of authorisation. The Government does not have to provide guarantees of financial standing on any borrowing made by a foundation trust, and it is possible for a foundation trusts to become insolvent.
21. Foundation trusts are competitive, receiving funding based on reaching targets and the type and amount of services they provide. There is therefore a commercial aspect to their business as trusts compete to provide services to patients and are partly funded on this basis.

The application of section 33(1)(b)

22. The reports are a detailed statistical review of the financial position of a trust over a given period. Within the reports there are also some areas of free text where trusts explain or highlight sections of the report and provide further information as necessary. This information is required from trusts by Monitor as part of its functions in authorising trusts status, and monitoring the financial health of the trusts concerned. Monitor argues that this information amounts to the current trading information of the trusts concerned. It states that the information is financially and commercially sensitive, and could be used by commercial competitors and creditors to the detriment of the commercial interests of the Trusts. Given this, Monitor argues that if the information were to be disclosed it would need to reconsider the amount and types of information it requires from trusts as part of its monitoring process in the future. Should this prove necessary,

the loss of information it is able to obtain from trusts would prejudice its ability to properly regulate and monitor trusts effectively and efficiently in the future.

23. Monitor also argues that a disclosure of this information would be detrimental in that it would damage the confidence and trust which it has built up in its relations with trusts. It states that foreknowledge that sensitive information could be disclosed by Monitor would have a prejudicial effect on some trusts willingness to be full and frank when providing information to it. It also argues that trusts may have concerns about providing sensitive information to it on impending or foreseen problems and may not therefore provide this at the earliest point they are able to. This could be detrimental to Monitor's ability to react to such concerns, where an early intervention may have prevented a situation from deteriorating further.
24. Whilst Monitor may be concerned that the information it collects is financially and commercially sensitive, an argument to the effect that disclosure would affect Monitor's ability to collect such information in the future is not correct. Under section 19 (1) of the Health and Social Care (Community Health and Standards) Act, Monitor has the powers to require any information it needs from trusts in order to properly carry out its functions as regulator.
25. Nevertheless the Commissioner has taken into account the fact that at present Monitor does not, in general, need to rely upon its formal powers to obtain information from trusts. Any actions which dissuade trusts from voluntarily supplying information to Monitor, thereby requiring a greater use of those powers, may harm its ability to function as a regulator. Such a move may be detrimental to the efficiency with which Monitor regulates trusts on the basis that extra time, costs and resources would be needed to enforce disclosure. The Commissioner has also considered the possibility that the use of such powers on a regular basis may be detrimental to the relationship between Monitor and the trusts concerned.
26. The Commissioner has considered why trusts may be reluctant to provide Monitor with information if they are aware that the reports could be disclosed. Monitor argues that the information amounts to the current trading information on trusts and the Commissioner agrees that disclosure of this information whilst it is still sensitive could dissuade trusts from contacting Monitor at the earliest opportunity. It may also dissuade trusts from providing full and frank information where, for example information they are not specifically required to submit may harm the Trusts financial position if disclosed. Trusts may fear that providing such information may worsen their position should it be disclosed whilst it is still sensitive.
27. The argument that the trusts may not be full and frank when providing information to Monitor is weakened by the fact that the majority of the information is statistical in nature. Monitor is able to take formal regulatory action against trusts which fail to provide full and frank information on this basis and has previously done so against Bradford Teaching Hospitals NHS Trust. The reasons Monitor provided for taking action in this case included the allegations that the trust delayed in reporting its financial problems to Monitor, and that it had not clarified that the statistics it provided initially to Monitor were the "best case scenario".

28. As regards the fear that the disclosure of the financial standing of a trust may cause detriment to the trust it is noted that Monitor already publishes risk ratings of foundation trusts on its website. These include a measure of the financial risk a trust faces. Trusts are therefore already accustomed to a degree of disclosure of sensitive information by Monitor.
29. One of the central elements of the arguments submitted by Monitor in the application of this exemption is that trusts will lose trust and confidence in Monitor if sensitive information which they are required to submit to the regulator is disclosed. The Commissioner has considered the position if the information which was disclosed was not commercially or financially sensitive. It is his view that trusts would not then fear the disclosure of the information, and hence would be less likely to withhold information or delay contacting Monitor in the future.
30. The Commissioner has considered the commercial sensitivity of trust information further in paragraphs 49 - 79 below. His decision on the applicability of the exemption in section 43 of the Act has a bearing on his decision on the application of the exemption in section 33 (1) (b). If information which is commercially sensitive is excluded from disclosure then the arguments put forward in support of the application of the section 33 exemption are substantially weakened.
31. Once trusts publish information in their annual accounts and reports at the end of the financial year, the sensitivity of the requested information is significantly reduced. Trusts will have less reason to fear Monitor disclosing the returns after that point as information about their financial and managerial position will already be in the public domain. Competitors and creditors will already be able to access the essential elements of this information from the published reports.
32. If trusts are aware that Monitor will not disclose commercially sensitive information, but will retain it until such time as that sensitivity has waned, they will have less reason to lose trust and confidence in Monitor. Therefore they will be less likely to withhold information when providing submissions to it. Further, if Monitor is able to withhold information until its commercial sensitivity has waned it will not be necessary for it to reconsider how much information it obtains from trusts as part of its monitoring regime. It will have surety that the information can be obtained without fear that its subsequent disclosure could harm the trusts it regulates.
33. For the reasons provided in paragraphs 22 to 32 above the Commissioner's decision is that the exemption is not engaged by the disclosure of the 2004 returns. The information is no longer commercially sensitive given that the annual accounts and reports have been published and the amount of time which has passed since the reports were first collated. The Commissioner does not therefore consider that the prejudice to trusts commercial and financial interests perceived by Monitor would be likely to occur. This view is supported by Monitor's assertion in its letter to the Commissioner dated 17 March 2006 that the information has "little currency left, if at all". This view is explored further in paragraph 55 below. In view of this the Commissioner considers that disclosure of this information would not prejudice the exercise of Monitor's regulatory functions.

34. As regards the reports from 2005, the Commissioner is satisfied that at the time of the request the information was still commercially sensitive as the 2005 reports and accounts had not been published at the time it was received, and hence there was a strong possibility that some of the detrimental effects to Monitor's ability to effectively regulate trusts could have occurred if it had disclosed the information at that point. The Commissioner's decision is therefore that the exemption in section 33(1) (b) is engaged by the 2005 reports.
35. Section 33 is a qualified exemption and therefore requires that a public interest test is carried out to see if the exemption should be upheld. The test is whether "in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

The Public Interest Test

Public interest in maintaining the exemption

36. Foundation Trusts provide medical services to the local community. In providing these services they are acting in a competitive market, which is likely to become more competitive as government-introduced changes to the NHS take place. These will allow a greater degree of choice for patients as to where and when they are treated. Competition for patients is therefore likely to become an important factor in the success or failure of these trusts.
37. The Commissioner considers that the publication of the monitoring reports from 2005, prior to the publication of annual reports and accounts is likely to prejudice Monitor's ability to carry out its functions effectively and efficiently, however he must consider whether the public interest in disclosing the information outweighs that of maintaining the exemption in spite of that prejudice.
38. There is a strong public interest in allowing the official regulator of foundation trusts to be able to carry out its functions efficiently and effectively. Any disclosure which causes Monitor to have to reconsider requesting sensitive information which it requires to carry out its functions would be detrimental to the process of regulating trusts. If Monitor is not able to carry out its functions properly there will not be an effective oversight of foundation trusts, and trusts may fail to keep to their terms of authorisation or develop their services appropriately. This would be detrimental to patients, employees of the trusts and also to the local community who may lose a "choice" as to where they obtain medical services. There is therefore a clear and strong public interest in allowing the regulator of such trusts space to consider as much information as it requires in order to ensure that trusts are being run properly and efficiently.
39. If commercially sensitive information is disclosed, and trusts lose trust and confidence in Monitor or take action to prevent this sort of information being disclosed in the future there is a possibility that Monitor would need to make more use of its formal powers to require the information from trusts. If this is the case Monitor would have to expend additional resources obtaining the information, which would be detrimental to its cost effectiveness and may ultimately affect its

ability to properly regulate trusts. Monitor may also lose some of its ability to take effective action where trusts fail to contact it at the earliest possible stage or fail to provide full and frank information. This may require Monitor taking more drastic action to prevent potential insolvency, or could result in Monitor having to revoke a foundation trust's authorisation.

40. There is also a strong public interest in allowing Monitor to be able to properly carry out its functions in a way that does not prejudice or damage trust's financial or commercial interests. This is explored further in paragraphs 49 – 79 below.
41. If information is disclosed prematurely trusts may face increasing competition from public and private competitors. This may dissuade them from providing information to Monitor. It could damage the relationship Monitor has built up with trusts if Monitor needs to initiate formal action to obtain the information it needs. There is therefore a strong public interest that trusts are provided with a degree of security that their current trading information will be protected for the period of time necessary in order to protect their liquidity, their ability to obtain services at best value, and their ability to provide medical services to the general public.
42. If trusts are aware that sensitive information provided to Monitor may be disclosed they may be less full and frank when submitting monitoring returns or seek to "spin" detrimental information. This may lead Monitor to underestimate the levels of risk faced by particular trusts, and hence fail to take action where it is actually appropriate to do so.
43. The Commissioner therefore believes that the premature disclosure of the requested information could prejudice Monitor's ability to regulate trusts, and that there is a strong public interest in protecting its ability to be able to request all of the information it needs to be able to carry out its functions appropriately.

Public interest in disclosing the information

44. However the Commissioner has also considered the aims and objectives of trusts to be accountable to local people, and the public interest in Monitor itself being accountable for the regulatory functions it carries out. Monitor does publish some information in the annual reports it produces, however this is generally an overview of the past year and it does not provide the level of detail which the complainant has requested.
45. There is a strong public interest in also allowing the general public access to such information given the aim of such trusts to be more accountable to the local community. Monitor can, if it decides it appropriate, take regulatory action against trusts which directly contradicts the wishes of the local community and of the trusts themselves. The aim of such trusts is to be self governed and independent of government. Hence there is strong public interest in allowing access to the information Monitor uses to make its decisions in order to inform debate on Monitor's use of its powers or on the decisions it makes. Disclosure would allow them the opportunity to fully consider information on a trust, compare this with other foundation trusts and fully evaluate the decisions and risk ratings applied by Monitor. This may also help to build public confidence in Monitor's decision

making, and in the ability of trusts to manage themselves independently of government.

46. In addition, given the current political debate about hospital funding the information would add to the current debate about the provision of healthcare and how it is funded in this country. Foundation trusts are a relatively new way of organising the provision of healthcare in the UK, and at the time of the Health and Social Care (Community Health and Standards) Act's passage through parliament there was significant debate about the creation of such trusts and the possibility of a "two tier" health service developing. Allowing access to this information would provide a valuable insight into the way foundation trusts have fared over the period of time since their creation, and would therefore allow much greater scrutiny of the impact of the implementation of this policy. This is all the more important bearing in mind the ability of trusts to be declared insolvent under the Insolvency Act and the potential for reduced medical service provision to the community in a given area should this occur.
47. Disclosure may also provide oversight as to the reasons for management decisions to increase or decrease certain types of services provided by the trusts. It may also provide a greater understanding of the nature of the relationship between trusts and associated Primary Care Trusts, allowing the community to fully consider the funding levels and financial structures set in place as changes to the financial and payment systems take place.
48. For the reasons provided in a paragraphs 33 to 43 above the Commissioner's decision is that section 33 applied to the returns from 2005 at the time the request was made. However, the Commissioner has also considered the fact that the annual reports and accounts for the 2005 returns have been published since that time. Links to the consolidated accounts of the various trusts can be found on Monitor's own website. The information is therefore no longer as sensitive as when the request was first made. For the reasons provided in paragraphs 44 to 47 above, and in paragraphs 72 to 79 below the Commissioner therefore considers that the information would need to be disclosed if the request were to be made now.

Section 43

49. The Commissioner has considered arguments put forward in support of the application of section 43 of the Act to the information and it is his decision that the exemption applied to the 2005 returns at the time the request was made, but that it did not apply to the 2004 returns.
50. The Commissioner is persuaded by the argument that monitoring returns effectively contain the current trading information of a trust at the time they are provided to Monitor. The Commissioner notes that premature disclosure of such information may be detrimental to the commercial interests of a trust. Creditors and those seeking to negotiate contracts with the trust could use the information from these reports to strengthen their own bargaining positions when negotiating

for, or to provide, services to the trust. The Commissioner notes Monitor's submissions that a disclosure of this information would demonstrate the funds available to contractors, suppliers and other creditors.

51. A trust's borrowing needs may also be prejudiced if borrowers are fully aware of its current financial situation. Monitor has also stated that in the short term, disclosing the current status of a trust may disclose financial problems which would otherwise be rectified by the time the trust came to publish its annual accounts. It argues that there is a real possibility that the solvency of a trust could unnecessarily be brought into question by the premature disclosure of this information. There is a risk of creditors seeking to recover their capital should a trust's financial position become visibly weakened or seemingly unviable, and a possibility that creditors may act in concert to recover their capital because of this information.
52. Monitor also states that the reports are un-audited information, and may therefore have errors of fact within them. The disclosure of this material prior to the publication of the audited accounts could therefore provide a misleading picture of the status of a trust which would not otherwise occur through the publication of the audited annual accounts.
53. Additionally Monitor has argued that the disclosure of the monitoring reports will put trusts at a competitive disadvantage to private healthcare providers which are not required to publish such information. Foundation trusts are allowed to provide private healthcare to individuals although these services are limited to a percentage of the public healthcare services they provide. Nevertheless there is therefore a degree of competition against private healthcare providers for the private work they carry out.
54. However it is often the case that commercially sensitive information will only retain its sensitivity over a short period of time. The Commissioner considers that any commercial prejudice which would occur from the disclosure of this information would only exist over such a short period. Once the full annual accounts and report of a trust are published much of the sensitive information from the monitoring reports would be placed into the public domain and many of the arguments put forward by Monitor in support of the application of the exemption will no longer apply.
55. In its letter to the Commissioner dated 17 March 2006 Monitor stated that much of the information requested by the complainant pertaining to the 2004 reviews had "very little, if any currency left" given the time which had passed. In stating this Monitor was taking into consideration:
 - the amount of information which had been published via the annual accounts and reports of trusts,
 - the annual report, consolidated accounts and information on trusts published by Monitor itself, and
 - the fact that the information was over 13 months old at the time of the second request.

56. The annual accounts and reports of trusts provide an audited, consolidated overview of the information provided in the monitoring reports. The accounts provide interested parties with an overview of the financial situation of the trusts concerned, and highlight the deficits or profits of trusts at the end of the financial year. The annual report provides an overview of the functioning and management of the trust and may highlight and address particular problems, negotiations in process or future projects being considered by the trusts concerned.
57. Given this, the Commissioner considers that the publication of this material substantially reduces the likelihood that the disclosure of monitoring returns would prejudice the commercial interests of the trusts. Upon publication the general status of the trust will be in the public domain, and a disclosure of the monitoring reports after that point will not put further sensitive information into the public domain.
58. The publication of the annual accounts would highlight financial problems within trusts. The disclosure of monitoring returns after this point will elaborate upon that fact, and may provide insight as to why financial problems occurred, highlighting managerial or funding concerns to those with an interest. This would increase the level of scrutiny interested parties would have without putting further sensitive material into the public domain. This would not therefore increase the likelihood that the disclosure would prejudice trusts commercial interests. Nor would it increase the likelihood that creditors would act alone or in concert to recover borrowed capital.
59. The Commissioner therefore considers that the 2004 returns do not retain the commercial sensitivity argued by Monitor, and hence the prejudice foreseen is not likely to occur. In the Commissioner's view this information should therefore be disclosed to the complainant.
60. As regards the 2005 returns it is noted that at the time of the complainant's request in March 2006 the annual accounts and reports of trusts for 2005-6 had not been published. The arguments provided by Monitor would therefore be relevant to the request for this information.
61. The Commissioner has considered the argument that a disclosure of this information may affect a trusts borrowing capacity. In his view lenders will assure themselves to the best of their ability that they only lend to institutions capable of paying back the debts they owe. Hence they are likely to require detailed financial information from trusts prior to agreeing a loan, particularly given that trusts are able to become insolvent. The Commissioner is therefore not persuaded that this argument prevents the disclosure of the information.
62. The additional argument is that creditors may seek to withdraw the credit facilities they have provided to trusts if they become aware that a trusts financial position is weak. The Commissioner notes that Monitor publishes "risk ratings" on its website at <http://www.monitor-nhsft.gov.uk/>. These ratings include a category which rates the financial risk faced by particular trusts. Hence creditors can already obtain an indication of the financial standing of a trust from Monitor. Additionally the publication of such ratings means that trusts already provide

information to Monitor knowing that some of their financial information will be disclosed. Trusts are therefore less likely to withhold information from Monitor on the basis that the information may be disclosed because an indicator of their financial standing is already in the public domain.

63. The Commissioner has also considered Monitor's actions when taking action against Bradford Teaching Hospitals NHS Trust. Monitor has suggested that it may not be in the interests of trusts to provide current financial information because creditors who become aware of financial difficulties may take steps to recover their capital. Monitor has also suggested the possibility that creditors may act in concert to ensure the liquidity of a trust. However, in this instance, after requiring that Bradford allowed an independent auditing company to review the financial status of the Trust, Monitor then published the full report on its website, highlighting in detail the financial and managerial difficulties the Trust was facing at a time when that risk was still extant. The Commissioner has therefore taken into consideration the fact that Monitor's arguments in favour of withholding the information was not followed in this instance. The trust did not suffer adversely as a consequence of this disclosure; Bradford's annual report for that year indicates that the perceived deficit was substantially reduced in the period between the publication of the review and the end of the financial year. Monitor has also stated that it will publish information as appropriate where it finds it necessary to intervene into the running of a trust. It is noted that Monitor is under a duty to publish (amongst other things), a copy of any notice served on a trust under its powers under section 23 of the Health and Social Care (Community Health and Standards) Act 2003.
64. However the Commissioner accepts that a disclosure may indicate to competitors and service providers the capital available to a trust, and that it may therefore put the trusts at a commercial disadvantage if it is disclosed before the publication of the annual reports and accounts. Service providers may obtain knowledge of the capital available to a trust and may be able to use this information to their advantage when negotiating contracts for services with the trust.
65. Additionally private healthcare providers are not under a duty to issue quarterly reports. Hence an indicator of the financial standing of a trust within a given financial quarter would provide information beyond that required from private healthcare providers. Trusts could therefore be at a disadvantage when reviewing their position against that of their direct competitors in the short term. However the Commissioner has considered that some private healthcare providers will also be under a duty to publish annual accounts to shareholders. The publication of this information would partially level the playing field at the time of publication.
66. In view of the above the Commissioner accepts that a degree of prejudice to the commercial interests of trusts would be likely should this information be disclosed before the publication of the audited annual accounts and reports. The exemption in section 43 of the Act is therefore engaged so far as the 2005 reports are concerned.

The Public Interest Test

67. Section 43 is a qualified exemption and therefore requires that, where the exemption is engaged, a public interest test is carried out to see if the information should be disclosed in any event. The test is whether “in all of the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Public interest in maintaining the exemption

68. As stated above, if this information was disclosed prematurely a trust's available capital could be disclosed, thereby putting it at a competitive disadvantage when negotiating contracts for goods or services. This may increase the cost the trust has to pay to procure services, damaging its ability to obtain best value for money. This would divert funds away from the provision of other medical services to the detriment of the local community.
69. It is therefore in the public interest that trusts are provided with a degree of security that their current trading information is protected for a period of time in order to protect their liquidity, their ability to obtain services at best value, and their ability to provide medical services to the general public.
70. There is also a strong public interest in allowing the official regulator of foundation trusts to be able to carry out its duties efficiently and effectively, and in a way that does not prejudice or damage trusts commercial interests when doing so. A disclosure of this information within the financial year could put a trust at a disadvantage to its competitors, which in turn would reduce the funding available to it if customers and patients move elsewhere.
71. The publication of interim results which have not been audited may provide a misleading picture of a trusts financial standing. Un-audited accounts may be incorrect, and a disclosure of this information may prejudice a trust's commercial interests which may not have occurred through the publication of the audited accounts at the end of the financial year. Although the Commissioner recognises that Monitor could provide a caveat, warning that un-audited accounts may be incorrect, this may not prevent some parties from considering this information to be valid, (as the Trust itself is basing the figures on its most accurate, up to date information). They may then seek to revoke lending facilities on a precautionary basis. This may be detrimental to the overall ability of the trusts to provide services and to successfully manage its finances.
72. The Commissioner also considers the arguments in paragraphs 36 to 48 are appropriate to the balancing test in this exemption.

Public interest in disclosing the information

73. The Commissioner has also considered the aims and objectives of trusts to be accountable to local people, and the public interest in Monitor itself being accountable for the regulatory functions it carries out. Many of the arguments stated in paragraphs 36 to 48 above are relevant to this argument.

74. The Commissioner considers that the information would provide a clear picture of the current standing of trusts, and allow local communities to fully consider whether they are being managed appropriately. A disclosure of the information would also allow the general public to scrutinise Monitor's actions in any intervention it takes into a trust's management. It may also indicate circumstances where it may have been appropriate for Monitor to take action, but Monitor did not take any. Disclosure would therefore contribute to ensuring that Monitor, a public authority with regulatory responsibilities which affect a large section of the general public, is properly discharging its functions. The Commissioner has taken into account Monitor's statement that where it takes intervening action it will publish such information as is appropriate, however the Commissioner believes that a general disclosure of the monitoring returns will contribute to demonstrating that Monitor's actions are fair and proportionate.
75. The Commissioner has also taken into account written comments by Monitor which indicates that in its view that the information will not be commercially sensitive after the publication of the annual accounts and reports. The Commissioner has also considered the fact that trusts publish annual reports and annual accounts at the end of the financial year. The requirement for publishing such reports provides a degree of accountability, and in publishing these trusts put a great deal of information into the public domain. This substantially reduces the commercial sensitivity of the information held in the monitoring reports. If the reports were disclosed once these documents have been published the prejudice envisaged in the application of the exemption in section 43 will, in the Commissioner's view, be reduced to the point where the public interest arguments in favour of disclosing the information will override the arguments in favour of maintaining the exemption.
76. In spite of the above the Commissioner considers that the prejudice to trust's commercial interests in the short term must override the public interest in transparency. The public interest in transparency can be adequately met by a disclosure of the returns once the commercial sensitivity of the information has waned. In the Commissioner's view, the period of sensitivity is relatively short in this instance, and hence it is appropriate to exempt the information until such time as the accounts and reports have been published. The Commissioner's decision is therefore that Monitor was correct to apply the exemption to the information at the time the request was made.
77. However, as stated above, the Commissioner considers that the publication of financial accounts and reports is sufficient to tip the balance of the public interest towards the disclosure of the information due to the lesser commercial sensitivity of the information once such documents have been formally published. This period lessens any fear which trusts may have that a premature disclosure of financial information will have a detrimental effect upon their viability or their ability to negotiate contracts for services. It will also reduce any likelihood that the disclosure would give competitors a competitive advantage over the trusts.
78. After this has occurred the Commissioner believes that the information should be disclosed.

79. It is noted that the 2005 - 2006 accounts and reports have now been published by Monitor and the Trusts concerned. Further to this an overview of the interim results for the first quarter for the 2006/7 financial year has recently been published by Monitor on its website at <http://www.monitor-nhsft.gov.uk/publications.php?id=928>. Although the Commissioner's decision is that Monitor were justified in applying the exemption in section 43 at the time of the request, as the reports have now been issued and any financial deficits etc have been disclosed it is his view that if the information were to be requested now Monitor would not be able to rely upon section 43.

Section 22

80. The Commissioner has also considered the application of section 21 and 22 to the request. At the time of the request Monitor claimed that section 22 would be applicable to the information concerned. The Commissioner has considered the application of this exemption to the requested information and he has not been persuaded that it is applicable in this instance.
81. The Commissioner recognises that the information published in the annual reports and accounts effectively includes information which would have been supplied as part of the monitoring returns. However the Commissioner also considers that the monitoring returns themselves differ substantially from the information published in the reports. In deciding this he has taken into account the following factors:
- the annual reports and accounts are consolidated. They are a record of the whole financial or reporting year, from which the information from the individual monitoring reports cannot be separated. The individual monitoring
 - records which are the subject of the request are cumulative documents which cover sections of the financial year.
 - the annual accounts which are published are the audited accounts of the trusts concerned. The monitoring returns are un-audited and may therefore be substantially different to the audited accounts. The published documents are created to serve a different purpose to the monitoring returns. Monitoring returns are an overview of a relatively short period of time, providing Monitor with a contemporary overview of the status of the trust compared to its terms of authorisation. Audited accounts are a longer term reference of the financial stability of the Trust, consolidating the information contained in a number of monitoring reports into one overall picture of the financial year. Annual reports highlight in a positive way the way that the management of the trust has handled the last year, and may provide significant overview of the intentions of management over the coming reporting year.
 - The Commissioner is therefore satisfied that the information in the annual accounts will be different to that provided in the monitoring returns – they both serve separate functions.

- Interim results published by Monitor do provide un-audited information but with much less detail than that provided through the monitoring returns.

82. This being the case the Commissioner's decision is that the exemption in section 22 of the Act is not applicable to this information.

Section 21

83. Monitor has also sought to apply section 21 to information which has already been published in the annual accounts and reports of trusts and Monitor itself. For the reasons applied in paragraphs 80 – 82 above the Commissioner has decided that section 21 is not applicable to the requested information.

Other matters

84. The Commissioner has concluded that the exemptions in section 33 and 43 were applicable to the information at the time the request was received, and therefore his formal decision is that the exemptions were applicable to the information held in the 2005..

85. However, the Commissioner has also taken the view that if the information held in the 2005 returns were to be requested at this time it would need to be disclosed in the current circumstances, Although – as a result of his formal decision - he is unable to include this as a legal requirement (a 'step') within this notice, he very much hopes that Monitor will now disclose the 2005 returns.

The Decision

- 86.
- The Commissioner's decision is that the public authority did deal with the request for the information from 2005 in accordance with the Act,
 - Monitor did not deal with the section of the request asking for returns from 2004 in accordance with the Act.

Steps Required

87. In light of the Commissioner's findings highlighted in paragraphs 84 and 85 above the Commissioner requires the public authority to disclose the monitoring returns requested from 2004 to the requestor.
88. The public authority must take the steps required by this notice within 35 calendar days from the date of this notice.

Right of Appeal

89. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 12 day of December 2006

Signed

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**