

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2016

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

Decision (including any steps ordered)

1. The complainant has requested information on the use of off-framework agencies by NHS trusts. NHS Improvement considered this information to be exempt from disclosure on the basis of section 33(1)(b) and 31(1)(g) for some of the information.
2. The Commissioner's decision is that the section 33 exemption is engaged and the balance of the public interest lies in maintaining the exemption. The Commissioner therefore requires no steps to be taken.

Request and response

3. On 28 January 2016, the complainant wrote to Monitor (now NHS Improvement) and requested information in the following terms:

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

4. NHS Improvement responded on 25 February 2016. It stated that for part (a) of the request it considered the information exempt by virtue of the exemption at section 33(1)(b) and 33(2) of the FOIA – that disclosure would be likely to prejudice the function of examining the economy, efficiency and effectiveness of the use of Trust resources in discharging their functions. For part (b) of the request, NHS Improvement also cited section 33 of the FOIA but additionally considered the exemption at section 31(1)(g) in conjunction with 31(2)(c) to provide a basis for refusing the request.
5. Following an internal review NHS Improvement wrote to the complainant on 13 April 2016. It stated that it upheld the decision that all the requested information should be withheld.

Scope of the case

6. The complainant contacted the Commissioner on 6 May 2016 to complain about the way his request for information had been handled.
7. The Commissioner wrote to NHS Improvement to clarify the use of the exemptions, specifically whether NHS Improvement was applying the section 33 exemptions to the information requested in (b). NHS Improvement clarified it considered section 31 to apply to all of the information in part (b) of the request in addition to section 33. Following this clarification the Commissioner considers the scope of her investigation to be to determine if NHS Improvement has correctly withheld information at part (a) and (b) on the basis of the section 33 exemptions and if it is found that section 33 does not apply, whether section 31 provides a basis for withholding the information at part (b) of the request.

Background

8. The request relates to information on off-framework agencies. Monitor and the NHS Trust Development Agency (TDA) introduced agency control measures in October 2015 with the intention of reducing the expenditure by NHS Trusts and NHS Foundation Trusts on agency staff. Reducing the amount hospitals spend on agency staff is part of helping trusts to deliver the “provider task to 2020” which sets out the need for

trusts to deliver high quality patient care, NHS access standards and financial balance.

9. The measures include a set of agency 'rules'¹ which state that trusts should comply with a ceiling for each trust's total expenditure, procure agency staff at or below wage rates specified by certain 'price caps', and use approved national framework agreements to procure staff. The rules include various exemptions from these requirements.
10. In terms of this request, the key provision of these rules is the requirement to use framework agreements approved by NHS Improvement. The rules provide for an 'override' on exceptional patient safety grounds. In addition, NHS Improvement may grant approval for a trust to use an agreement with an agency not on the approved frameworks i.e. an 'off-framework agency' on the basis that the trust can demonstrate equivalent or better value for money than the approved agreements. As part of the agency rules, trusts must provide weekly reports to NHS Improvement containing relevant information, including details of any overrides and it is from this information that the requested information is derived.

Reasons for decision

11. Before analysing the use of the exemptions by the public authority; the Commissioner considers it is important to set out the position of NHS Improvement since it began operation on 1 April 2016 as an organisation integrating the previous bodies Monitor and NHS TDA. NHS Improvement has explained that the two bodies (Monitor and TDA) remain separate legal entities following this integration but NHS Improvement provides a single leadership and operational model. Requests made under the FOIA to NHS Improvement or to either of the individual bodies are handled centrally by NHS Improvement.
12. Therefore, the Commissioner understands that NHS Improvement is the operational name for the organisation that brings together Monitor, NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change team and the Intensive Support Teams.

¹ <https://improvement.nhs.uk/resources/reducing-expenditure-on-nhs-agency-staff-rules-and-price-caps>

13. Monitor is a statutory body under section 61 of the Health and Social Care Act 2012 (HSCA)² and its functions are set out in Part 3 of the HSCA and the provisions of the National Health Service Act 2006 (NHS Act)³ relating to NHS foundation trusts.
14. NHS TDA is a Special Health Authority established by the Secretary of State by order under section 28 of the NHS Act and is responsible, by direction under sections 7 and 8 of the NHS Act, for exercising functions in relation to NHS trusts. The relevant directions are the National Health Service Trust Development Authority Directions⁴ and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 (the TDA Directions)⁵.
15. NHS trusts and NHS foundation trust are different types of NHS bodies, although both are responsible for the provision of services and are established under the NHS Act. Oversight of NHS trusts is the responsibility of the NHS TDA and oversight of foundation trusts is the responsibility of Monitor.
16. In this case, the request was made to Monitor and although the agency rules affect both NHS trusts and NHS foundation trusts, Monitor was the lead body on implementing the arrangements prior to 1 April 2016 (when NHS Improvement was formed). It is Monitor that therefore held relevant information. As the request was made to Monitor before 1 April 2016 and therefore, although NHS Improvement are now responsible for dealing with the request, the Commissioner accepts that the investigation must be viewed in terms of what information was held by Monitor at the time of the request, most likely information relating to NHS foundation trusts, rather than NHS trusts.

Section 33 – audit functions

17. Section 33(1)(b) says

² <http://www.legislation.gov.uk/ukpga/2012/7/contents>

³ <http://www.legislation.gov.uk/ukpga/2006/41/contents>

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216536/dh_134469.pdf

⁵

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/511610/Directions_2016.pdf

"This section applies to any public authority that has functions in relation to -

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions."

18. Section 33(2) says that information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
19. Section 33 is a qualified exemption which means the public authority must apply the public interest test to the requested information.
20. The information that is being withheld under this exemption is the trusts that applied for permission to use off-framework agencies, those that retrospectively used off-framework agencies since October 2015 and, in each case, whether permission was granted and the number of shifts that each off-framework agency provided.
21. NHS Improvement has explained that Monitor has functions that fall within section 31(1)(b) of the FOIA, although the precise functions differ slightly depending on whether the information relates to NHS foundation trusts or NHS trusts.
22. With regard to NHS foundation trusts; NHS Improvement has explained that Monitor has functions in relation to the examination of the economy, efficiency and effectiveness with which foundation trusts use their resources by virtue of Monitor's general duty section 62(1)(a) of the HSCA and the conditions of the provider licence that Monitor uses to regulate and oversee those trusts under Chapter 3 of Part 3 of the HSCA.
23. Section 62(1)(a) states that:

"The main duty of Monitor in exercising its functions is to protect and promote the interests of people who use health care services which -

 - (a) is economic, efficient and effective, and*
 - (b) maintains or improves the quality of the services.*
24. Licence condition FT4(4) provides that:

"The Licensee shall establish and effectively implement systems and/or processes:

(a) to ensure compliance with the Licensee's duty to operate efficiently, economically and effectively;

(d) for effective financial decision-making, management and control (including but not restricted to appropriate systems and/or processes to ensure the Licensee's ability to continue as a going concern);"

25. Licence condition CoS3 provides that:

"The Licensee shall at all times adopt and apply systems and standards of corporate governance and of financial management which reasonably would be regarded as:

(a) suitable for a provider of the Commissioner Requested Services provided by the Licensee, and

(b) providing reasonable safeguards against the risk of the Licensee being unable to carry on as a going concern."

26. The Commissioner understands one of the responsibilities of Monitor as the sector regulator for health services in England is to licence providers of health services, as shown above, including NHS foundation trusts.

27. In addition to this, Monitor has a range of enforcement powers in relation to breaches of the provider licence and is responsible for using those powers with a view to ensuring that NHS foundation trusts comply with those licence conditions, acting consistently with the general duty under section 62 of the HSCA.

28. With regard to NHS trusts; as part of the agency rules arrangements established from October 2015, Monitor was responsible for operating the arrangements for all trusts, including acting as the recipient of weekly returns and the requests for approval of use of off-framework agencies. Monitor carried out this role in support of NHS TDA under Monitor's general duty to do anything that appears necessary or expedient for the purposes of, or in connection with, its functions at paragraph 16 of Schedule 8 to the HSCA.

29. The NHS TDA functions that Monitor were supporting included functions in relation to the economy, efficiency and effectiveness of NHS trusts; particularly the function of the TDA to oversee, develop and support NHS trusts to become sustainable, achieving this by supporting the trusts in complying with their duty under section 26 of the NHS Act to exercise their functions effectively, efficiently and economically as set out in direction 6(g)(i) of the TDA Directions.

30. This direction states that:

“6. The Secretary of State directs the Authority –

(g) oversee, develop and support English NHS trusts to assist those trusts to become sustainable organisations including by –

(i) supporting English NHS trusts to comply with their duty under section 26 of the 2006 Act to exercise their functions effectively, efficiently and economically, in particular by providing advice and support in respect of the efficient management of their estates including the achievement of efficiency savings and reduced running costs and the identification and disposal of surplus land;”

31. Having considered the explanations provided by NHS Improvement and having examined the various directions, chapters and sections cited by NHS Improvement as supporting its position, the Commissioner is satisfied that Monitor does undertake the function at section 33(1)(b) – it examines the economy, efficiency and effectiveness with which providers of health services use their resources in discharging their functions. She has gone on to consider whether disclosing the requested information would, or would be likely to, prejudice the exercise of any of Monitor’s functions in relation to any of the matter referred to in subsection 33(1).
32. NHS Improvement has indicated it is relying on the lower threshold of ‘would be likely’ to prejudice and considers that failure to manage the use of agency staff effectively would be likely to result in significant inefficient and uneconomical spending. The use of off-framework agencies may indicate that there is a failure on the part of the trust as approved frameworks are there to ensure value for money and appropriate prices being paid for agency staff. Therefore the use of off-framework agencies may be seen by Monitor as evidence of a failure to comply with the standards required of trusts in relation to economy, efficiency and effectiveness.
33. NHS Improvement argues that in order to carry out its function in this regard effectively, Monitor requires trusts to provide information about their use of off-framework agencies in an open and timely manner. It is argued that disclosing the requested information would be likely to discourage trusts from providing information or seeking permission, and reduce the flow of relevant information to Monitor. This would, in turn, adversely affect the ability of Monitor to perform its functions under section 33(1)(b), specifically it would reduce the effectiveness with which it could oversee and monitor agency spend and take action where trusts are not achieving value for money.
34. The Commissioner does not consider that this prejudicial outcome, should it occur, would be insignificant or trivial. Less free and frank

communications could impact on NHS Improvement's effectiveness as a regulator. The Commissioner must consider whether disclosure would be likely to, as NHS Improvement argues, impact on the voluntary supply or free flow of information and if so if this would be likely to cause the prejudice to the public authority's audit function.

35. In considering this point, the Commissioner must look at the content of the information, whether the public authority has any statutory powers to compel the supply of information and whether third parties would consider disclosure of the information to be damaging.
36. Having had sight of the withheld information, the Commissioner is satisfied that the identities of trusts that have reported they have used off-framework agencies and the number of shifts involved, does concern the "examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions". She is satisfied this information is important to the audit process as it is clearly a measure of how well a trust is achieving value for money.
37. NHS Improvement has argued that obtaining evidence that trusts have used off-framework agencies, potentially contrary to the agency rules and indicating a failing to manage agency spend effectively, would be difficult without information from the trusts themselves. NHS Improvement does have powers to compel trusts to provide information but has not needed to employ these when asking trusts to make reports on this to NHS Improvement. NHS Improvement is of the view that the process relies on trusts cooperating in full and providing the requested reports and it has effective working relationships with trusts which are key to maintaining effective oversight and ensuring improvements.
38. These relationships, it says, are dependent on the trust and confidence that has been built up over time between Monitor, NHS TDA, NHS Improvement and the trusts and foundation trusts. Although statutory powers can be used to compel trusts to provide information, NHS Improvement argues it is more beneficial to rely on building strong and effective relationships with trusts to encourage full and frank disclosures of information which are of good quality.
39. The Commissioner is satisfied the withheld information has been obtained from free and frank contributions from trusts and not by the use of statutory powers compelling the provision of information. She has gone on to consider whether disclosing this information would be likely to cause any detriment to the trusts and therefore impact on the voluntary provision of information in the future.

40. In support of this, NHS Improvement has argued that the information is not in the public domain and trusts have a reasonable expectation it would not be disclosed. The agency rules do not provide for publication of the reports and some trusts have raised concerns about the disclosure of their information in other similar situations, arguing that information should only be shared where it can be anonymised and, in some cases, not at all. NHS Improvement therefore argues that it is clear that trusts see this information as sensitive.
41. On this basis the Commissioner does accept that disclosing information which trusts clearly regard as sensitive and have no reasonable expectation will be disclosed, would be likely to undermine the relationship between the parties. Whilst it is difficult to estimate how damaging this might be, the Commissioner considers it is reasonable to expect that this will lead to more reluctance on the part of trusts to engage willingly with NHS Improvement and increase the possibility of NHS Improvement having to use its formal powers, not only lengthening the process but potentially impacting on the quality of the information shared.
42. For this reason, the Commissioner has determined that disclosing the requested information would be likely to impact on the voluntary supply of information and, in turn, the ability of NHS Improvement to fulfil its obligations under section 33(1)(b). The exemption is therefore engaged and the Commissioner has now gone on to consider the public interest test.

Public interest arguments in favour of disclosure

43. NHS Improvement accepts there is a general public interest in accountability and transparency of public bodies and a more specific public interest in trusts being accountable and responsible for decisions which affect the use of NHS funds, including how they are managing agency spend.
44. NHS Improvement also acknowledged the public interest in NHS Improvement itself being accountable for its decision making processes and the regulatory functions it carries out in relation to agency spend and the finances of NHS providers. The public interest in understanding the effectiveness of NHS Improvement's controls on agency spend, given the sums of public money involved and the important role the arrangements play in delivering the "provider task for 2020" was also acknowledged by NHS Improvement.
45. The complainant has argued that the information he is seeking is not sensitive or confidential and nor does it carry any expectation it will not be disclosed. In fact the formal application form to use an off-framework

agency makes no reference to the information being confidential and as such there is probably a reasonable expectation from trusts that the information may be disclosed.

46. The complainant also argues there is a very strong public interest in allowing for informed and meaningful participation by the public in the important debate on the NHS use of agencies. This has been reported on in the media⁶ and information should be disclosed to allow the public to understand the effect the changes are having.

Public interest arguments in favour of maintaining the exemption

47. NHS Improvement has identified a number of arguments in favour of maintaining the exemption. Firstly it argues that disclosure would affect its ability to perform its audit functions as it has already argued when discussing the prejudice test. This would then reduce the effectiveness of NHS Improvement's arrangements for seeking to reduce the sums of NHS funding spent on agency staff.
48. Contrary to the complainant's arguments, NHS Improvement does not consider that trusts have any expectation that information will be disclosed. Adding to this, it believes its approach in this case is consistent with its approach elsewhere in relation to agency data and other financial information relating to NHS trusts in that information which is linked to specific trusts has not been disclosed.
49. Finally, NHS Improvement has stated that it does publish a substantial amount of information on the agency rules and the information submitted by trusts, including information published in response to FOI requests. This information goes a long way to meeting the public interest in understanding the effectiveness of controls on agency spend.

Balance of the public interest arguments

50. The Commissioner has already accepted that there is legitimacy to the argument that voluntary provision of information to NHS Improvement is much more beneficial to allowing it to efficiently and effectively examine the use of off-framework agencies by trusts. She therefore has to add significant weight to the argument that adversely affecting NHS Improvement's ability to carry out its functions would not be in the public interest.

⁶ <http://www.telegraph.co.uk/news/investigations/nhs-hit-by-locum-agency-nurses-pay-scandal/>

51. Balanced against this is an equally significant public interest in the disclosure of information about the use of these agencies by NHS trusts. There is clearly a wider public interest in the amount of money spent by trusts on agency staff and, as the complainant has pointed out, the issue has gained attention in the national media.
52. In making a determination about where the balance of the public interest lies the Commissioner has considered the need for NHS Improvement to have a degree of safe space to consider the information it collects from trusts, in order to see what further action or steps might be needed against those trusts which are not delivering value for money. It is accepted that disclosing the information would have undermined the trust between parties and affected the timeliness of the data collection and therefore it stands to reason that this would also affect the ability of NHS Improvement to be able to efficiently analyse that information and make decisions.
53. The agency rules were only introduced in late 2015 and it seems to the Commissioner that there was a public interest in allowing the first few months, if not longer, of this new process with its new framework agreements, to be unencumbered by undue scrutiny and public debate which would have undoubtedly come from disclosure of the information on the use of off-framework agencies at the time of the request.
54. Allowing for efficient, effective and timely data collection based on free and frank exchanges of information and giving the public authority time to analyse the success or otherwise of the new agency rules and therefore the effectiveness of NHS Improvement at fulfilling its function of ensuring trusts are using their resources in an economic way would be in the public interest.
55. The Commissioner notes that since the request was made, NHS Improvement has released figures⁷ which show the savings made in the year following the introduction of the agency rules. Whilst the Commissioner can only consider the position at the time the request was made she does believe this supports the argument that, at the time of the request, NHS Improvement did require a safe space to continue its activities and data gathering in order to fully evaluate the impact of the agency rules and the cost of agency spend by NHS trusts.

⁷ <https://www.theguardian.com/society/2016/oct/15/nhs-funding-staff-agencies-600-million-pounds-crackdown>

56. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 33 outweighs the public interest in disclosure.
57. Since the Commissioner has decided that the information is exempt from disclosure under section 33, and that the public interest favours withholding it, she has not found it necessary to go on to investigate the application of section 31 to the information in part (b) of the request.

Right of appeal

58. 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

59. 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.
60. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF