

26 November 2018

Wellington House  
133-155 Waterloo Road  
London SE1 8UG

T: 020 3747 0000  
E: [nhsi.enquiries@nhs.net](mailto:nhsi.enquiries@nhs.net)  
W: [improvement.nhs.uk](http://improvement.nhs.uk)

Siliang Tian BA MSc LLB

**By email**

[request-517306-6bce2222@whatdotheyknow.com](mailto:request-517306-6bce2222@whatdotheyknow.com)

Dear Ms Tian

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

We refer to your email of 1 September 2018 in which you requested information under the FOI Act from NHS Improvement. Since 1 April 2016, Monitor and the NHS Trust Development Authority have been operating as an integrated organisation known as NHS Improvement. For the purposes of this decision, NHS Improvement means Monitor and the TDA.

### **Your request**

On 1 September 2018, you made the following request:

*“I would like to request the following information:*

- 1. The full communication exchange with the Sun, and any other newspapers contacted, that lead to the Sun article of 30/08/18 linked here:  
<https://www.thesun.co.uk/news/7140596/nhs-wasting-480m-agency-staff/>  
Regarding the figures quoted (£3.2billion agency spend -> £2 billion agency spend)*
- 2. Please confirm that the reductions includes a reduction due to the VAT mitigation element of direct engagement being. (Yes/No)*
- 3. Please confirm that the figures quoted include reductions in cost due to the '7 pillars' strategy reducing the maximum rate a worker can receive by the amount of employers NICs. (Yes/No)*
- 4. Do the figures include any commission that might be paid to direct engagement providers and/or outsourced payroll companies by the trusts? (Yes/No)*
- 5. Do the figures include the costs of operating collaborative banks? (Yes/No)*
- 6. Please disclose the overall raw data supporting this figure.”*

On 21 October 2018, you clarified your request as follows:

*“Sorry folks just to clarify yes there was a typo in the figures this is what was intended:*

*The measure has seen costs fall from £3.6billion in 2015/16 to £2.4billion in 2017/18”*

NHS Improvement sought clarification on 26 October 2018 as follows:

*"In respect to question 6, can you please confirm what you mean when you requested the "overall raw data supporting this figure"? Are you asking for a breakdown of data by each individual trust?"*

On 29 October 2018, you clarified your request and requested further information:

*"Not necessarily, what is sought is the background to the figures to help understand what it represents, and how it is arrived at, also what is not included in this figures, if you do have the per trust figures, and can easily locate them within the time limit then I would be very grateful of this, where it would cause you to exceed the time limit please disclose::*

- 1. Are fees to direct engagement providers included or excluded from this.*
- 2. Confirm that any VAT not paid through direct engagement schemes will result in a reduction in the figure.*

*As a further FOI 200 enquiry if necessary (or bolt on to this one if you prefer):  
Please disclose the total bank spend since you started collecting it that goes along with this.*

*I just realised that the requested data is already in the request. Please disclose the raw data where possible, the additional information request for the totals for bank spend are still sought."*

## **Decision**

NHS Improvement holds the information that you have requested.

NHS Improvement has decided to release some of the information it holds. Some of the information is withheld on the applicability of exemptions 21, 31, 33, 40 and 43 as explained in detail below.

## **Question 1**

Please refer to the information annexed. Some of the information is being withheld under section 40 of the FOI Act.

Section 40(2) states that requested information is exempt from disclosure if the first or the second condition at section 40(3A)(a) of the FOI Act is satisfied.

We consider that direct e-mail addresses, telephone numbers, names of non senior members of NHS Improvement staff and third party employees are exempt from disclosure under section 40(2) of the FOI Act. This is on the grounds that they amounts to personal data and the first condition under section 40(3A)(a) is satisfied, namely that disclosure would amount to a breach of the first data protection principle (personal data should be processed lawfully, fairly and in a transparent manner) as the individuals concerned would have a reasonable expectation that these particular items of personal information would not be

disclosed into the public domain. Section 40 is an absolute exemption and consideration of the public interest test in disclosure is not required.

#### Question 2

Yes. The figures will include all costs of agency staff, which will include irrecoverable VAT.

#### Question 3

No. Employers' NICs are payable regardless of whether the worker is on payroll or not.

#### Question 4

If trusts choose to use this method of engagement, yes.

#### Question 5

No.

#### Question 6

We confirm we hold a breakdown of agency and bank spend broken down by each individual trust but are withholding it under sections 31, 33 and 43 of the FOI Act, as explained in detail below.

#### Section 31 – Law enforcement

NHS Improvement considers that the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act, which provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

NHS Improvement considers that section 31(2)(c) is engaged and that disclosure of the information in question would be likely to prejudice the exercise by Monitor and TDA of their functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of Monitor's provider licence enable Monitor to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Health and Social Care Act 2012 ("the 2012 Act"). Monitor will take into account NHS foundation trusts' inefficient or uneconomic spending practices, including any that relate to agency spending, as a measure of governance and in monitoring NHS foundation trusts' compliance with the licence.

Section 5 of The National Health Service Trust Development Authority Directions and Revocations and the Revocation of the Imperial College Healthcare National Health Service Trust Directions 2016 ("the 2016 Directions") provides that the TDA must exercise its functions with the objective of ensuring that English NHS trusts are able to comply with their

duty under section 26 of the NHS Act 2006. Section 26 sets out the general duty of NHS trusts to exercise their functions efficiently, economically and effectively – by, for example, establishing and maintaining best practice corporate governance arrangements and financial management standards and effectively implementing systems and processes.

Paragraph 12.2 of the agency rules, published by NHS Improvement in March 2016, makes it clear that NHS Improvement may investigate foundation trusts if there is sufficient evidence to suggest inefficient and/or uneconomical spending (e.g. agency and management consultant spend) which indicates wider governance concerns, and NHS trusts that are not managing their agency spend effectively. Also, trust performance against agency spend is a metric in the Single Oversight Framework which will be monitored on an on-going basis.

NHS Improvement considers that disclosing trust names is likely to prejudice the on-going monitoring by NHS Improvement of providers' compliance with the agency rules, which NHS Improvement take into account in deciding whether regulatory action is needed..

NHS Improvement relies on the full and frank information from trusts in order to carry out its functions effectively. NHS Improvement relies on having a safe space in which providers are freely able to share information in the knowledge that the information, or any analysis derived directly from it, will not be disclosed more widely. To disclose that information more widely is likely to have a detrimental impact on the quality and content of exchanges between NHS Improvement and the bodies it collectively regulates and its ability to make effective and fully informed regulatory decisions.

### Section 33 – Audit functions

Section 33(1)(b) and 33(2) of the FOI Act provide that information may be exempt from disclosure where disclosure would, or would be likely to, prejudice the exercise of any public authority's functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

NHS Improvement considers that the withheld information, in so far as it relates to foundation trusts, is exempt under section 33(1)(b) on the basis that Monitor has functions in relation to the examination of the economy, efficiency and effectiveness with which NHS foundation trusts use their resources, which is likely to be prejudiced by releasing the withheld information. Monitor has these functions by virtue of Monitor's general duty under section 62(1)(a) of the 2012 Act to protect and promote the interests of health care service users by promoting the provision of services which is economic, efficient and effective and improves the quality of services.

NHS Improvement considers that the withheld information, in so far as it relates to NHS trusts is also exempt under section 33(1)(b) on the basis that the TDA has functions relating to the examination of the economy, efficiency and effectiveness with which NHS trusts use their resources in discharging their functions (as described above), which is likely to be prejudiced by the release of the information that is being withheld.

As noted above, NHS Improvement depends on the free and frank provision of information from trusts without fear of this being shared more widely, and considers (as explained above) that disclosure would be likely to have a detrimental impact on the quality and content of those exchanges in the future if details or any analysis derived from those details was published to the public at large. This would in turn be likely to have a prejudicial impact on the exercise of NHS Improvement's regulatory functions.

### Section 43 – Commercial interests

Section 43(2) of the FOI Act provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.

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

#### *Public interest test*

Sections 31, 33 and 43 are qualified exemptions and therefore require that a public interest test be carried out to determine whether the exemptions should be maintained. We consider that there is a public interest in transparency in relation to the performance of trusts against the agency rules. However, we consider that there is a stronger public interest in giving NHS Improvement and providers the space to openly exchange information that relates to NHS Improvement's functions in order to determine whether regulatory intervention is appropriate.

### Total Bank Spend

Section 21 provides an exemption from the right to know if the information requested is reasonably accessible to the applicant through other means. This is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.

Bank spend totals are available via our quarterly reports which can be found on our [website](#). Trusts would also publish their total bank spend in their annual report and accounts.

## **Review rights**

If you consider that your request for information has not been properly handled or if you are otherwise dissatisfied with the outcome of your request, you can try to resolve this informally with the person who dealt with your request. If you remain dissatisfied, you may seek an internal review within NHS Improvement of the issue or the decision. A senior member of NHS Improvement's staff, who has not previously been involved with your request, will undertake that review.

If you are dissatisfied with the outcome of any internal review, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

A request for an internal review should be submitted in writing to FOI Request Reviews, NHS Improvement, Wellington House, 133-155 Waterloo Road, London SE1 8UG or by email to [nhsi.foi@nhs.net](mailto:nhsi.foi@nhs.net).

## **Publication**

Please note that this letter and the attached information will shortly be published on our website. This is because information disclosed in accordance with the FOI Act is disclosed to the public at large. We will, of course, remove your personal information (e.g. your name and contact details) from the version of the letter published on our website to protect your personal information from general disclosure.

Yours sincerely,

**NHS Improvement**