

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2019

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

Decision (including any steps ordered)

1. The complainant has requested a copy of a temporary staffing report by NHS Improvement (NHSI) into North Lincolnshire and Goole NHS Foundation Trust. NHSI initially refused the request on the basis of sections 41, 43, 31 and 33 of the FOIA but during the investigation disclosed some information previously withheld under sections 41 and 43 but continued to withhold the remaining information under the exemptions as section 31 and 33 of the FOIA.
2. The Commissioner's decision is that NHSI has correctly applied the provisions of section 33 to withhold the remaining information from the report and that the balance of the public interest favours maintaining the exemption. She requires no steps to be taken by NHSI.

Request and response

3. On 5 July 2018 the complainant made a request to NHS Improvement (NHSI) in the following terms:

"Under the Freedom of Information Act, please send me a copy of the temporary staffing report completed by NHSI to review staff deployment and temporary staffing controls at the Northern Lincolnshire and Goole NHS trust."

4. NHSI responded on 2 August 2018 confirming the requested information was held. NHSI stated the information was exempt from disclosure on the basis of the exemptions at sections 31, 33, 41 and 43 of the FOIA.
5. The complainant asked for an internal review of this decision on 3 August 2018. He argued that section 31 was not applicable as the information would not prejudice NHSI's monitoring function or ability to take regulatory action. For section 33 the complainant argued that this had been applied too broadly; similarly section 43 would not apply to all the information. For section 41 the complainant questioned whether there was a genuine and specific obligation of confidence as this was not clear from the response.
6. An internal review was conducted and the outcome communicated to the complainant on 2 October 2018. NHSI upheld its decision to withhold the requested information on the basis of the cited exemptions and provided some additional information to support this position.

Scope of the case

7. The complainant contacted the Commissioner on 4 October 2018 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation NHSI revised its response and confirmed it was no longer relying on the exemptions at section 41 and 43 of the FOIA to withhold information. NHSI disclosed a redacted copy of the report to the complainant.
9. The Commissioner considers the scope of her investigation to be to determine if NHSI has correctly withheld the remaining information from the report on the basis of either of the exemptions at sections 31 or 33 of the FOIA.

Background

10. The request is for a copy of a temporary staffing report completed by NHSI to review staff deployment and temporary staffing controls at North Lincolnshire and Goole NHS Foundation Trust ("the Trust"). Agency control measures were first introduced in October 2015 with the intention of reducing the expenditure of NHS trusts on agency staff. The

agency control measures include a set of agency 'rules'¹ which states that trusts should comply with a ceiling for total agency expenditure, procure agency staff at or below wage rates specified by certain price caps, and use approved national framework agreements to procure agency staff.

11. Paragraph 10.3 of the agency rules notes that NHSI will support trusts in complying with the agency rules and where they are struggling to comply, NHSI will work with them to identify key issue, prioritise actions and implement solutions.
12. The information in this case is a 12-page slide pack which summarises a visit made by NHSI's Agency Intelligence Team to the Trust and sets out recommendations.

Reasons for decision

Section 33 – audit functions

13. Section 33(1)(b) says

"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."

14. 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).
15. Section 33 is a qualified exemption which means the public authority must apply the public interest test to the requested information.
16. The information that is being withheld is the summary of the findings and recommendations of a visit to the Trust on 25 April 2018. The visit involved investigating if there were any areas of non-compliance with the agency rules and recommendations on that.

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

17. Before going any further into this it is important to clarify the position of NHSI since it began operation on 1 April 2016. NHSI integrated the previous bodies Monitor and NHS Trust Development Agency (NHS TDA). These two bodies remain separate legal entities following this integration but NHSI provides a single leadership and operational model. Requests for information made under the FOIA to NHSI or to either of the individual bodies are handled centrally by NHSI.

18. NHSI has explained that Monitor has functions that fall within section 31(1)(b) of the FOIA. With regard to NHS foundation trusts; NHSI 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 Health and Social Care Act 2012 ("the 2012 Act") and the conditions of the provider licence that Monitor uses to regulate and oversee those trusts under Chapter 3 of Part 3 of the 2012 Act.

19. 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."

20. 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);"

21. Finally, Licence Condition CoS3 further provides the following:

"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."

22. 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 2012 Act.
23. Having considered the explanations provided by NHSI and having examined the various directions, chapters and sections cited by NHSI 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 matters referred to in subsection 33(1).
24. NHSI 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. In order to carry out its functions effectively NHSI states that Monitor requires trusts to provide information in an open, timely and transparent manner.
25. NHSI argues that disclosing the information would be likely to discourage trusts generally, and in particular the Trust, from providing information, and thus 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); in particular it would reduce the effectiveness with which it could oversee and monitor agency spend and take appropriate action where trusts may not be achieving value for money.
26. 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 NHSI's effectiveness as a regulator. The Commissioner must consider whether disclosure would be likely to, as NHSI 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.
27. In considering this point, the Commissioner must look at the content of the information, whether the public authority has any statutory power to compel the supply of information and whether third parties would consider disclosure of the information to be damaging.
28. Having had sight of the withheld information, the Commissioner is satisfied that the information does concern the "examination of the

economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.” The information that NHSI continues to withhold from the report is clearly information on a temporary staffing and compliance with agency rules. This includes details of contracts, off-framework agreements and spend at the Trust. 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.

29. NHSI argues that inappropriate or excessive spend on agency staff reduces the availability of NHS funds for other purposes. The ability to thoroughly audit trusts to ensure compliance with the rules and to manage agency spend effectively is a vital part of NHSI’s strategy to reduce that expenditure. Even if only a small number of trusts became less co-operative and forthcoming with their information this would have a significant impact on the ability of NHSI to achieve its objectives in relation to agency spend and the control of NHS finances.
30. The Commissioner is aware from previous investigations that NHSI does have powers to compel trusts to provide information in certain circumstances but has not needed to employ these when asking trusts to cooperate with NHSI or Monitor in the past. NHSI has repeatedly maintained the view that the process relies on trusts cooperating in full and providing input and information to assist in reporting and it has effective working relationships with trusts which are key to maintaining effective oversight.
31. These relationships, it says, are dependent on the trust and confidence that has been built up over time between Monitor, NHS TDA, NHSI and the trusts. Although statutory powers can be used to compel trusts to provide information, NHSI 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.
32. 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.
33. In support of this, NHSI has argued that the information is not in the public domain and trusts have a reasonable expectation it would not be disclosed. NHSI argues its approach is consistent with its approach elsewhere in relation to agency data and other financial information relating to NHS trusts in that non-public information is shared only in aggregate form.

34. 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 NHSI and increase the possibility of NHSI having to use its formal powers, not only lengthening the process but potentially impacting on the quality of the information shared.
35. 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 Monitor 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

36. NHSI 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.
37. NHSI also acknowledged the public interest in NHSI 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 NHSI'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 NHSI.
38. The complainant has pointed to the fact that the Trust has been in special measures both financial and performance-related for some time and has predicted financial losses for 2018-19. Some of these problems can be attributed to staffing shortages leading to a reliance on temporary workers. A financial report² highlighted this issue and in particular page 14 stated that "significant issues were identified by the NHSI temporary staffing team through their recent review". The complainant therefore argues as no significant improvement seems to have been made since this time that it is in the public interest to see the report to see the findings and recommendations.

² <https://www.nlg.nhs.uk/content/uploads/2018/09/NLG18344-Finance-Report-M05.pdf>

39. The complainant further argues that publication would clearly further public understanding of an important issue, encourage public debate, enhance accountability and transparency both of the trust and NHSI and encourage accountability and transparency in the spending of public money and running of vital public services.

Public interest arguments in favour of maintaining the exemption

40. NHSI 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 NHSI's arrangements for seeking to reduce the sums of NHS funding spent on agency staff.
41. NHSI 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.
42. NHSI 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

43. The Commissioner has already accepted that there is legitimacy to the argument that voluntary provision of information to NHSI is much more beneficial to allowing it to efficiently and effectively examine agency spend by trusts. She therefore has to add significant weight to the argument that adversely affecting NHSI's ability to carry out its functions would not be in the public interest.
44. 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 financial issues at this Trust are well documented.
45. In making a determination about where the balance of the public interest lies the Commissioner has considered the need for NHSI 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 NHSI to be able to efficiently analyse that information and make decisions.

46. Allowing for efficient, effective and timely exchanges with trusts and giving Monitor the space and time to make recommendations and follow-up on actions to ensure the efficiency of spending and therefore the effectiveness of NHSI at fulfilling its function of ensuring trusts are using their resources in an economic way would be in the public interest. The ability of Monitor to thoroughly audit trusts to ensure compliance with agency rules is vital to NHSI's strategy to reduce trust expenditure and it would not be in the public interest to disclose information which may impact on this.
47. At the time of the request the visit had taken place and the recommendations in the report had been made. However, the Commissioner notes that from viewing the withheld information that all of the actions and recommendations had action dates that post-dated the request. The Commissioner therefore accepts there was still ongoing audit and regulatory work at the time of the request while the Trust considered the report and how to act on the recommendations. NHSI did therefore require a safe space to continue its activities and monitoring.
48. 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.
49. 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.

Right of appeal

50. 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@justice.gov.uk

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

51. 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.
52. 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
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