

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 February 2015

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

### Decision (including any steps ordered)

---

1. The complainant made a Freedom of Information request to Monitor for communications between Adrian Masters the Managing Director of Monitor and McKinsey consultants. In response Monitor disclosed some of the information it held but withheld other information under the section 36(2)(b)(i) and (ii) exemptions.
2. The Commissioner has investigated the complaint and found that the section 36(2)(b)(i) and (ii) exemptions are engaged and that the public interest in maintaining each exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

### Request and response

---

3. On 14 July 2014 the complainant made a freedom of information request to Monitor which asked for:  
  
*"Any communications held between Adrian Masters of Monitor and McKinsey (including Natasha Stern) in 2012."*
4. Monitor responded to the request on 8 August 2014 when it confirmed that it held information falling within the scope of the request. It

disclosed some of this information to the complainant with redactions under the section 40(2) (personal information) exemption. Some other information was not disclosed as Monitor was considering whether the section 36 exemption would apply. It explained that it needed further time to obtain the opinion of the qualified person.

5. A second response was issued on 4 September 2014 which confirmed that some of the requested information was being withheld under the sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) exemptions.
6. The complainant subsequently asked Monitor to carry out an internal review of its handling of the request and it presented its findings on 8 October 2014. The internal review upheld the initial decision to refuse to disclose some of the requested information under the section 36 and section 40 exemptions. However, it also found that some additional information had been identified which fell within the scope of the request which was the dates of meetings attended by Adrian Masters and representatives of McKinsey. This information was disclosed to the complainant.

### **Scope of the case**

---

7. On 7 November 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner agreed with the complainant that the scope of his investigation would be to consider whether Monitor was correct to withhold some of the requested information under the section 36(2)(b)(i) and (ii) exemptions. The complainant did not challenge Monitor's application of the section 40(2) exemption.

### **Reasons for decision**

---

#### **Section 36 – free and frank provision of advice or exchange of views**

9. The information withheld under this exemption is an email dated 30 July 2012 between McKinsey and a number of members of staff at Monitor as well as an attachment headed "Developing a unified risk assessment framework". The third piece of information is an attachment to an email which was disclosed to the complainant but where the attachment itself was withheld. This was labelled "The role of Monitor in realising improvement opportunities in the NHS".

10. Monitor has confirmed that it is relying on section 36(2)(b)(i) and (ii) which provide that information is exempt if in the reasonable opinion of the qualified person disclosure would or would be likely to inhibit:

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation*

11. The qualified person for Monitor is its Chief Executive David Bennett. Monitor provided the Commissioner with a copy of the qualified person's opinion which confirms that the opinion was given on 2 September 2014 following receipt of the request. Monitor also sought the opinion of the qualified person again on 6 October 2014 whilst it was carrying out the internal review. This confirmed that sections 36(2)(b)(i) and (ii) were being applied. Again, the Commissioner was provided with a copy of the opinion.

12. Having satisfied himself that Monitor has obtained the opinion of the qualified person, in order to determine whether the exemption is engaged the Commissioner must then go on to decide whether this opinion is reasonable. This involves considering:

- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying upon;
- the nature of the information and the timing of the request; and
- the qualified person's knowledge of or involvement in the issue.

13. The Commissioner has also issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

*"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*

14. As noted above the withheld information is a copy of an email and two documents which Monitor said contain work carried out by McKinsey to assist Monitor in its policy development. The email and the attached document relating to risk assessment were work which led eventually to Monitor's Risk Assessment Framework which was published in August

2013. The Framework sets out Monitor's approach to overseeing how NHS Foundation Trusts comply with certain requirements of the licence

issued to them by Monitor under Part 3 of the Health and Social Care Act 2012, in particular how it assesses and monitors risks of non-compliance.

15. The second document related to Monitor's consideration of efficiency in the NHS and how the NHS can close the "funding gap". The work informed the policy development that led eventually to Monitor's report on closing the funding gap, in October 2013, and which has also been published.
16. In this case, the qualified person said that as regards section 36(2)(b)(i) in his opinion disclosure of this information would inhibit:

*"the provision of advice during future steering group meetings on topics relating to developing policy. Third parties and stakeholders may be inclined not to provide advice during policy discussions if the discussions were then made available to the public. This would therefore detriment Monitor's ability to carry out its regulatory function."*

17. As regards section 36(2)(b)(ii) the qualified person explained that:

*"The purpose of these steering groups is to discuss the development of policy. Disclosing these documents would risk inhibiting the free and frank discussion of individual's views and the exploration of policy options. It would also discourage stakeholders and third parties, in this case McKinsey, from being involved in such deliberations with Monitor.*

*Therefore, it would not be helpful to good policy making, nor would it be conducive to the free and frank exchange of views, for these documents to be disclosed."*

18. It is important to note that when considering whether the exemption is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold he must find that the exemption is engaged.
19. The Commissioner has reviewed the withheld information and considered the opinion of the qualified person. He notes that the qualified person was provided with copies of the withheld information, as

well as counter arguments to applying the exemption and that this material should have allowed him to reach a balanced decision. The Commissioner would also accept that it was at least reasonable to conclude that disclosure of the withheld information would affect the frankness with which officials and external consultants provide advice or contribute to policy discussions. The information whilst in the form of presentations and reports, is relatively candid in the sense that it includes a full assessment of the challenges faced by Monitor where it can be effective but also where it has not been successful in the past. The reports represent only the current thinking at that time and are not a final statement of Monitor's position. Therefore, it is more likely that officials and consultants would be discouraged from engaging in a free and frank manner if there was a prospect of disclosure.

20. The Commissioner has decided that both section 36(2)(b)(i) and (ii) are engaged and therefore he will now go on to consider the public interest test.

### **Public interest test**

#### **Public interest arguments in favour of disclosure**

21. The complainant argued that the public interest favoured disclosure because this would help to shed light on the relationship between Monitor and Mckinsey. He suggested that the involvement of McKinsey was very significant because of the role they have played in suggesting improvements within the NHS, including the use of private providers.
22. The complainant highlighted that considerable sums had been paid to McKinsey by Monitor for consultancy services and there was a need for greater transparency in the role they played and the influence they have.
23. Disclosure would better inform the public on the discussions that led to the reports on the NHS funding gap and the Risk Assessment Framework both of which have the potential to affect patients.
24. For its part, Monitor said that when balancing the public interest it had taken into account the following arguments in favour of disclosure.
  - There is a general public interest in favour of public sector organisations acting in a transparent manner, including being transparent about the role of third parties such as McKinsey, in policy making.
  -

- There is a public interest in how Monitor assesses risks when regulating and the role of Monitor in enabling the NHS to achieve improvements in efficiency with a view to addressing the 'funding gap'.
- There is a public interest in policy development that led to Monitor's report on the NHS funding gap and the Risk Assessment framework, including work carried out by third parties.

### **Public interest arguments in favour of maintaining the exemption**

25. As regards the public interest in maintaining the exemption Monitor argued:

- The detailed outcomes of the policy discussions and development (Monitor's report on the NHS funding gap and the Risk Assessment Framework) have been published and are available to the public. They have been published fairly recently and the topics were still the subject of interest and discussion.
- There is a strong public interest in ensuring Monitor is able to receive full and frank advice and views when considering policy development. The advice and views provided by McKinsey were given in confidence and with an expectation that working documents and discussions would not be placed in the public domain. Disclosure of the information would inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation because third parties such as McKinsey would be unwilling to work with Monitor on policy development if the views and advice they provided would go into the public domain. In this case, both areas (risk assessment and efficiency), involved important high profile policy issues on which it is vital that Monitor was able to have vigorous internal discussions, informed by relevant expert advice.

### **Balance of the public interest arguments**

26. In balancing the public interest, the Commissioner has taken into account the opinion of the qualified person. In accepting that the qualified person has given a reasonable opinion that disclosure would cause the inhibition described, this carries through a certain amount of weight to the public interest test. In particular the fact that the opinion was that disclosure 'would' rather than 'would be likely to' cause inhibition means that the public interest in maintaining the exemption is necessarily greater. That said, the Commissioner must still go on to consider the severity, extent and frequency of that inhibition in making

his decision on where the balance of the public interest lies, taking into account the arguments in favour of disclosure.

27. As regards the public interest in disclosure, the Commissioner accepts that the information would increase transparency and accountability, helping the public to better understand the contribution McKinsey made to the policy work on the Risk Assessment Framework and bridging the NHS funding gap. However, the Commissioner would also agree with Monitor that this public interest has already been met to a significant extent by the publication of the final versions of these documents and the other information disclosed by Monitor in response to this request. The Commissioner has reviewed the actual withheld information and would also add that in his view disclosure would add little to the public's understanding of the influence of McKinsey on Monitor more generally and in the NHS more widely, which the complainant had suggested was a factor in favour of disclosure. Therefore, the Commissioner has given only limited weight to the arguments in favour of disclosure.
28. Moving on to the public interest for maintaining the exemption, the Commissioner has also found that the arguments advanced by Monitor are somewhat overstated. The Commissioner does not accept that disclosure would lead McKinsey or other consultants to refuse to work with Monitor in future. It should be remembered that consultants are paid significant sums to carry out the kind of work undertaken by McKinsey in this case and it seems unlikely that they would be unwilling to bid for such work in future by the prospect of disclosure. The Commissioner has seen no evidence to suggest that McKinsey would react in this way. That said, in accepting that the exemption is engaged the Commissioner has found that disclosure would cause inhibition to the way in which officials and consultants contribute to Monitor's policy work. However, in his view this is likely to be the result of being more guarded in how they provide advice or offer their views. This is the so called 'chilling effect' argument which is concerned with the argued loss of frankness and candour in debate / advice which, it is said, would lead to poorer quality advice and less well formulated policy and decisions. The Commissioner is prepared to give this argument some weight given that the information constitutes working documents discussing sensitive issues that are still fairly recent and where the issues discussed are still live. This weighs in favour of maintaining the exemption.
29. In conclusion, the Commissioner finds that the public interest is relatively finely balanced. In his view Monitor has overstated the harm that would be caused by disclosure but he nevertheless does accept that the chilling effect argument carries some weight. On the other hand the arguments for disclosure are also limited by the information already in

the public domain which in the Commissioner's view say more about the relationship between Monitor and McKinsey than the information in question here. Therefore, taking into account all the circumstances of the case and having given due weight to the opinion of the qualified person, the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.



## Right of appeal

---

30. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

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