

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2022

Public Authority: Care Quality Commission
Address: PO Box 1296
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4PA

Decision (including any steps ordered)

1. The complainant has requested information about an inspection of a specialist hospital. The Care Quality Commission (CQC) applied section 31, section 40, section 41 and section 44 of FOIA to two parts of the request, which concern law enforcement, personal data, information provided in confidence and prohibitions on disclosure respectively. The CQC refused to comply with the final part of the request under section 12 of FOIA as it considered the cost of doing so would exceed the appropriate limit.
2. The Commissioner's decision is as follows:
 - The complainant's entire request engages the exemption under section 31(1)(g) of FOIA and the public interest favours maintaining the exemption.
3. The Commissioner does not require the CQC to take any corrective steps.

Request and response

4. On 23 August 2021 the complainant, a law firm acting on behalf of a company ("the provider"), wrote to the CQC and requested information in the following terms:

"We refer to the correspondence between [redacted] and the CQC enclosed in the Annex to this letter.

By a letter dated 21 June 2021, [redacted] asked the CQC to disclose the inspection notes for the site visits of [redacted] which took place on 12 and 13 April 2021 and, in particular:

1. Inspectors' notes taken during the inspection of communal areas and clinic rooms of the hospital [i.e. [redacted]];
2. Inspectors' notes taken during discussions with four relatives and nine people using the service (provided on an anonymised basis if felt necessary);
3. Any notes of discussions with, or copies of written communication (including emails, letters or reports) [between CQC Inspectors and] other stakeholders, including commissioners or other professionals involved with the service, gathered before or after the inspection visit.

Accordingly, our client respectfully requests that the CQC consider the above Information Request as a formal FOIA request.

For the avoidance of doubt, all references in the Information Request to inspectors' notes taken "during" the relevant inspection or discussion should be treated as including reference to notes taken before and after the relevant inspection or discussion."

5. On 14 September 2021 the CQC responded. It refused to comply with parts 1 and 3 of the request, citing section 12 of FOIA. CQC advised that under FOIA it could aggregate the three parts of the request and refuse to comply with any part of the request under section 12.
6. However, the CQC refused part 2 under sections 40, 41 and 44 of FOIA.
7. The complainant requested an internal review on 23 September 2021 and the CQC provided one on 20 December 2021. It first noted the delay in providing the internal review.
8. The CQC went on to confirm that it now considered section 12 applied to part 3 of the request only. It also confirmed that it considered that parts 1 and 2 of the request engaged the exemptions under sections 40, 41 and 44 of FOIA and also applied section 31 to those parts.

Scope of the case

9. The complainant contacted the Commissioner on 29 November 2021 to complain about the way their request for information had been handled.
10. The CQC had applied section 12 of FOIA to part 3 of the request which is for correspondence associated with the inspection the CQC carried out. In its submission, the CQC provided a section 12 submission but said that [if held] such information would "in all probability" be exempt from disclosure under section 31.
11. The Commissioner has taken a pragmatic approach and has considered whether part 3 of the request also engages section 31. This is because if the Commissioner were to find section 12 was not engaged, any information identified that is within scope of the request may, in the finish, have been exempt from disclosure under section 31 (or another of the exemptions the CQC applied to the remaining parts) in any case. If the Commissioner were to find that section 31 or the other exemptions applied were not engaged, he would consider the CQC's reliance on section 12.
12. The Commissioner's investigation has therefore focussed first on whether the CQC is entitled to rely on section 31(1)(g) of FOIA to withhold the information requested in the three parts of the request, and the balance of the public interest. If necessary, he will consider whether section 40 and/or section 41 and/or section 44 of FOIA are engaged.
13. Finally, the Commissioner has considered the CQC's handling of the internal review under 'Other Matters'.

Reasons for decision

Section 31 – law enforcement

14. Under section 31(1)(g) of FOIA, information which is not exempt from disclosure by virtue of section 30 (investigations and proceedings) is exempt information if its disclosure under the Act would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
15. In its submission to the Commissioner, the CQC has explained that its main functions and powers are provided under the Health and Social Care Act 2008 ("the 2008 Act"), and associated legislation. The CQC also has functions and powers under the Mental Health Act 1983 and the Health and Safety at Work Act 1974.

16. Section 3(1) of the 2008 Act requires that the “main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services”.
17. The CQC says its powers include registering care providers, inspecting services, publishing its reports and ratings, and enforcement powers. These include the power to remove or apply conditions to registration (without which the provider cannot lawfully carry on regulated activities) and the power to bring prosecutions in prescribed circumstances.
18. As such, the CQC considers that it carries out its regulatory functions for the following purposes under regulation 31(2) of FOIA:
 - Ascertaining whether any person has failed to comply with the law [subsection 31(2)(a)]
 - Ascertaining whether any person is responsible for any conduct which is improper [subsection (2)(b)]
 - Ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise [subsection (2)(c)]
 - Ascertaining the fitness and competence of registered persons to carry on regulated activities for which they are, or are seeking to be, registered [subsection (2)(d)]
 - In the CQC’s words, “Protecting people who use health and care services against risk to health or safety arising out of or in connection with the actions of persons who provide, manage or work in those services” [subsection (2)(j)]
19. The CQC has gone on to say that disclosing the requested information would prejudice its regulatory functions in the following ways:
 - Information within scope will not have been subject to the factual accuracy and challenge process prior to disclosure under FOIA. As a matter of natural justice and good administration, CQC does not normally disclose information about providers gathered in preparation for, or during, inspection which has not been through these processes.

Despite advice provided in earlier correspondence it had with the complainant it is unclear whether the provider for whom the complainant is acting understands that the requested information would be disclosed into the public domain under FOIA.

The CQC considers that disclosing these records under FOIA would be likely to undermine CQC's commitment to fairness and factual accuracy, which is important to its credibility and effectiveness as a regulator.

- Notes made by inspectors in the course of inspections are intended as an aide memoire for their personal use in reaching and recording their judgements. In doing so, inspectors also draw upon and consider a range of other documents, data and information obtained from the provider and from other sources to triangulate and corroborate their findings.

Inspection notes are therefore not a full and accurate reflection of the CQC's regulatory findings. Where information in inspection notes is relevant, has been tested and corroborated, and where it is found to proportionately and accurately reflect the CQC's regulatory findings, the CQC will publish that information in the inspection report.

Disclosing the notes and supporting records are likely to detract from the CQC's considered and evidenced regulatory findings, as published in the inspection report, by presenting an alternative narrative.

Whilst the CQC can provide caveats and context to support understanding of any information that it discloses, there is likely to be an understandable, if erroneous, tendency for the public to see inspection notes as a contemporaneous and therefore more accurate narrative.

- The inspection notes contain information relating to the CQC's observations of the care being delivered to people using the service at the time of the inspection.

Even with redaction to hide the identity of those persons, so far as is possible, there will still be a significant possibility that public disclosure of the information would result in identification. For example, people who worked in, visited or received care at the service may be able to identify individuals referred to in the notes. The CQC says that in making this consideration, it noted that the provider in question had a relatively small number of service users at the time.

Even where people are not identifiable to third parties, disclosure of the information is likely to make people concerned about their care being observed by CQC inspectors due to an increased concern about intrusiveness and confidentiality.

As such, disclosing the notes into the public domain is likely to make it more difficult for the CQC to observe and inspect the delivery of care in future. This is because people who use the services it regulates will be reluctant to permit the CQC to do so due to concerns about their privacy and confidentiality.

- Where the CQC interviews, talks to or communicates with any person to receive their views and experiences of a regulated service there is an expectation of confidentiality.

People often feel reluctant or concerned about coming forward to the CQC to share their experiences due to concerns about their confidentiality and privacy.

The CQC notes that the complainant offered that it could anonymise the records for disclosure but this is not as simple as removing names. In particular, disclosure into the public domain under FOIA is likely to make the information available to the registered provider, their staff, and to other people who use or visit the service. Where those people are motivated and have existing knowledge, there is a significant risk that they could identify individuals.

Even where identification does not occur, people who have shared information with the CQC are likely to feel concerned about the risk of identification. Disclosure of the requested information under FOIA is therefore likely to discourage people from sharing their experiences of care with the CQC in the future.

- Disclosing notes relating to interviews with staff, people who use services or their relatives would undermine the CQC's power under section 63(2)(f) of the 2008 Act to interview persons in private.
 - At the time of the FOIA request, the window was still open for legal challenge to the CQC's inspection report and to the application of conditions. Putting additional information about the inspection into the public domain under FOIA would have increased the risk of challenge to the CQC.
20. In correspondence to the Commissioner, the complainant has disputed the CQC's reliance on section 31 - with regard to the inspectors' notes requested in part 2 of their request, in particular. The complainant argued that they would expect those notes to contain information largely obtained from or produced by CQC inspectors in the course of their inspection, rather than from confidential information provided by third parties.

The Commissioner's conclusion

21. First, the Commissioner accepts that the CQC is formally tasked with certain regulatory functions under the 2008 Act.
22. With regard to the level of likelihood of the prejudice the CQC envisions occurring, in its correspondence with the complainant and its submission to the Commissioner, the CQC's position moves between the prejudice definitely occurring and the prejudice being likely to occur. In instances where this matter is not clear, the Commissioner will apply the test for 'would be likely'. In this case he is satisfied that there is a more than hypothetical or remote possibility of prejudice occurring and that there is a real and significant risk that the prejudice that the CQC envisions will occur.
23. The Commissioner is satisfied that disclosing the requested information would be likely to prejudice the CQC's functions. He disagrees with the complainant's point; he considers that, in the case of inspectors' notes, which he has reviewed, these will mainly have been derived from the inspectors' interactions with individuals working at or using the service in question, and from their related observations. The Commissioner accepts that disclosing that information about the inspection would be likely to deter individuals from providing information to the CQC in the future or to communicate fully and frankly with it when it is carrying out an inspection. This would be likely to obstruct the CQC's ability to carry out robust and thorough inspections and so would be likely to prejudice its ability to carry out its regulatory functions listed at paragraph 18.
24. The Commissioner has therefore decided that the requested information engages the exemption under section 31(1)(g) of FOIA and he has gone on to carry out the associated public interest test.

Public interest test

Public interest in disclosing the information

25. In correspondence to the Commissioner the complainant has said that

“...the suggestion that the public interest in withholding disclosure outweighs the public interest in the disclosure of CQC Inspectors' notes taken in the course of the inspection of a health and social care provider is plainly unarguable. In any event, the CQC has clearly failed to provide any cogent reason to the contrary.”
26. The CQC has identified the following interests for disclosure:
 - There is a general public interest in the CQC being open and transparent in the way it functions.

- It is in the public interest that public authorities are accountable for their actions.
- It is in the public interest that services registered to provide health and adult social care are accountable for their actions.

Public interest in withholding the information

27. The CQC has identified the following, relevant interests:

- The strong public interest in avoiding likely prejudice to the CQC's regulatory function.
- Disclosing this information would potentially discourage third parties from sharing information with the CQC, if they perceive information would be disclosed into the public domain, under FOIA. This would prejudice the CQC's regulatory relationship with them and would detract from the accuracy and quality of the CQC's future reports. This in turn would make it more difficult to take enforcement action where necessary.
- Disclosing the information could obstruct the CQC's regulatory function in determining whether registered care providers are compliant with the relevant standards and regulations.
- Disclosing the information would bypass the CQC's systems of checks and controls under the Health and Social Care Act 2008.

Balance of the public interest

28. The CQC confirmed that, on balance, it considers that the public interest favours withholding the requested information. This is because the public interest in transparency and accountability is outweighed by the public interest in maintaining the integrity and effectiveness of CQC's regulatory function for the purpose of protecting the health, safety and welfare of people who use health and social care services.
29. The CQC explained that it understands the argument put forward by the complainant on behalf of the provider for which they are acting, that disclosing the information would have assisted them in challenging the factual accuracy of the inspection report and the CQC's regulatory actions. However the CQC does not agree that disclosure would have assisted this aim in a meaningful way and it considers that it disclosed all of the relevant information to the provider to meet this interest by previously disclosing: the draft inspection report, the notice of proposal to refuse, and the evidence bundle.
30. The CQC also considers that the provider may not have understood that disclosure under FOIA would be made into the public domain. It is

mindful that the provider's service is now deregistered and that the relevant inspection report was published over a year ago. The CQC says that it considers that this has the effect of reducing both the public interest in disclosure and the public interest in withholding the information (as the likelihood of prejudice arising will have decreased to a limited degree). However, the CQC has confirmed that it considers that the public interest remains in favour of withholding the information.

31. The Commissioner appreciates that the provider for whom the complainant is acting has an interest in the specific information that has been requested. However, he considers that it is a private interest that has been met to a satisfactory degree through the information the CQC has provided directly to the provider. The Commissioner considers that the broader public interest in the service provided by care providers and the CQC's role as regulator of care providers is also met through the publication of the CQC's report following the inspection that is the focus of the request. The Commissioner considers that there is greater public interest in individuals being prepared to engage fully and frankly in the CQC's inspections without fearing that their contribution will be put into the public domain in response to a FOIA request. People being willing to engage in the CQC's inspections and investigations into whether care providers are compliant with the relevant standards and regulations ensures those inspections will be robust and thorough. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the section 31 exemption in this case.
32. Because the Commissioner has found that section 31(1)(g) of FOIA applies to the entire request and the public interest favours maintaining this exemption, it has not been necessary for the Commissioner to consider the CQC's application of section 40(2), section 41 or section 44 to the information. Nor has it been necessary to consider the CQC's application of section 12 to part 3 of the request.

Other Matters

33. Provision of an internal review is not a requirement of FOIA but is a matter of good practice. The FOIA Code of Practice¹ recommends that a public authority should offer an internal review and should provide one within 20 working days of a request for one. Only in circumstances where the request is complex, needs consultation with other bodies or the information is of high volume, may the authority take an additional 20 working days. In such cases, the authority should advise the applicant and provide a target date by which it will be able to respond to the request for a review.
34. In this case, the complainant requested an internal review on 23 September 2021 but the CQC did not provide one until 20 December 2021. The CQC did not indicate that any of the factors referred to above were in play and so the Commissioner reminds the CQC that it should always provide a review within the 20 working day recommendation, in the first instance.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

35. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

Cressida Woodall
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