

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 April 2023

**Public Authority:** Care Quality Commission  
**Address:** Citygate  
Gallowgate  
Newcastle Upon Tyne  
NE1 4PA

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of specific audit review reports. The Care Quality Commission (the CQC) withheld the information under sections 31 (law enforcement) and 40(2) (personal data) of the FOIA. In their internal review, the complainant refined their request to one specific audit report. The CQC maintained that the one report was exempt under section 31. During the course of the Commissioner's investigation, the CQC also relied on sections 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs) to withhold the information.
2. The Commissioner's decision is that the CQC correctly applied section 31 to the withheld information. The Commissioner does not require any steps to be taken.

#### **Request and response**

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3. On 16 August 2022, the complainant wrote to the CQC and requested information in the following terms:  
  
"At the 20 July 2022 CQC Board Meeting, a paper was presented called Audit and Corporate Governance Committee Annual Assurance Report

to Board 2021-2022. This is Paper No: CM/07/22/07 and refers to Agenda Item 5.3.

At Appendix 1 of that Paper, paragraph 4, entitled "Audit", it states

'15 audit reviews have been completed during 2021-2022 (2020/2021: 21). Of these there were 11 reports (2020/2021: 16) for which formal ratings were issued. The ratings and comparison to the equivalent from 2020/21 was 1 rated high risk (2020/2021: 3), 7 were rated medium risk (2020/21: 9), and 3 were rated low risk (2020/21: 4). 1 report was a follow-up and 3 reports were advisory. 1 report has been carried over and will be finalised as part of the 2022-2023 internal audit programme. All recommendations have been discussed with management and action plans agreed.'

Please can I have copies of all 15 reports, with the priority being the 1 report rated High Risk."

4. The CQC issued a refusal notice on 11 October 2022 and stated that the information requested was exempt in its entirety under sections 31(1)(a) and 31(1)(g) of the FOIA. Additionally, the CQC stated that some of the information was also exempt under section 40(2) of the FOIA.
5. On 27 October 2022 the complainant requested an internal review of the handling of their request. In this communication the complainant refined their request to the one report that was rated High Risk. The complainant did not dispute the application of section 40(2) to the information but suggested that any personal data could simply be redacted from the report.
6. The CQC provided the outcome of its internal review and maintained that disclosure of the one report was exempt under section 31(1)(g) of the FOIA. It also stated that there was no personal data within the report in question and as such it was no longer relying on section 40(2) to withhold any information.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 20 January 2023 to complaint about the way their request for information had been handled.
8. During the course of the Commissioner's investigation the CQC stated that it also considered sections 36(2)(b)(i) and 36(2)(b)(ii) to apply to the one High Risk report.

9. The scope of the Commissioner's investigation is to determine whether the CQC should disclose the High Risk report.

## **Reasons for decision**

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### **Section 31 – law enforcement**

10. 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 FOIA 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).

### **The CQC's position**

11. 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 statutory functions and powers under the Mental Health Act 1983 and the Health and Safety at Work Act 1974.
12. The CQC stated that:

"Regulations under the 2008 Act set out a range of regulated activities and the standards that must be met by providers of care services carrying out those activities.

Any person responsible for carrying on or managing these activities is required to be registered with the CQC. Carrying on of a regulated activity without being registered with the CQC is an offence.

The CQC has powers under the 2008 Act to enter and inspect premises where regulated activities are being carried on. Where it does so, CQC has powers to enforce compliance with the standards set out in regulations and to apply a rating to the care being provided (Outstanding, Good, Requires Improvement or Inadequate).

Where we conduct an inspection we are required to publish a report of our findings. We also have various enforcement powers. 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."

13. As such, the CQC considers that it carries out its regulatory functions for the following purposes under regulation 31(2) of FOIA:

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
  - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
  - (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
  - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
14. The withheld information in this case is an internal audit report which was completed in 2021-22. The CQC pointed out that internal audit is a mechanism through which it "assesses and improves the effectiveness, efficiency and economy with which it carries out its functions as a regulator". In order to carry out its functions effectively the CQC has in place "a system of governance controls to monitor and identify areas for improvement both directly within CQC's regulatory framework and within the corporate functions and mechanisms that support it".
15. The CQC considers that disclosure of the internal audit report would prejudice the exercise of its functions by:
- "Aiding registered persons in identifying areas within CQC's regulatory approach that may be vulnerable to 'gaming' (i.e. obtaining favourable regulatory outcomes through exploiting the system of inspection and regulation, rather than by improving care) and to challenge.
  - Removing the safe space in which CQC can obtain, consider and act upon internal audit reports. If colleagues consider that recent audit reports are likely to be disclosed into the public domain under FOIA they are less likely to be fully open and cooperative with auditors.
  - Prejudicing the obtaining of audit advice and implementation of improvements within CQC's corporate functions and other aspects of CQC's work that directly support the delivery of its regulatory functions".

16. In its submission to the Commissioner, the CQC stated that disclosure of the internal audit report would undermine its ability to undertake robust, full and frank internal audits of its regulatory approach in the future. This is because staff involved in the internal audit would be aware that any risks or weaknesses identified in an audit would likely be placed in the public domain. This would have the effect of deterring CQC from conducting internal audits of this nature in future, which would in turn have a significant and long term impact on its efficiency and effectiveness as a regulator.
17. The CQC contends that the report in question covers matters which are live and relate to the ongoing development of its policies and regulatory approach. It considers that disclosure would have a prejudicial impact on the delivery of its ongoing regulatory work and organisational Transformation Programme. The CQC also considers that disclosure would undermine the safe space in which it can utilise internal audit to assess the effectiveness of its regulatory approach and to identify and plan actions to improve future regulation.
18. The CQC also provided the Commissioner with additional representations in relation to the internal audit report, in confidence. The Commissioner is unable to reproduce these representations in the notice as to do so would reveal the content of the withheld information. However, the Commissioner has taken the information into account in reaching a decision in this case.

### **The Commissioner's conclusion**

19. The Commissioner accepts that the CQC is formally tasked with certain regulatory functions under the 2008 Act.
20. Based on the CQC's representations and having viewed the withheld information the Commissioner is satisfied that disclosing the requested information would be likely to prejudice the CQC's functions.
21. The Commissioner accepts that disclosure would enable persons to identify areas within CQC's regulatory approach and processes and provide an insight into any areas which are more vulnerable to challenge. The Commissioner also accepts that disclosure would be likely to have a prejudicial effect on the CQC's ability to both undertake internal audits in the future, to consider any areas for improvement and implement any improvements to its work. He accepts that this would have a detrimental effect on the CQC's ability to carry out its regulatory functions listed in paragraph 15.
22. In reaching a decision the Commissioner has also taken into account the fact that, at the time of the request, the report was recent, and live in

that it was being considered as part of the CQC's ongoing development and review of its policies and regulatory approach.

23. For the reasons set out above, the Commissioner is satisfied that the exemption under section 31(1)(g) is engaged and he has gone on to consider the associated public interest test.

### **Public interest test**

24. The CQC accepts that there is a public interest in openness and transparency in respect of information relating to the effectiveness by which it carries out its regulatory activities.
25. The CQC also acknowledges that there is a public interest in public authorities being accountable for their actions.
26. The complainant considers that it is in the public interest for the information to be disclosed in order to "assure the public, those that the CQC regulates, and those that use services that the CQC is fulfilling its regulatory functions". The complainant pointed out that the report relates to the CQC's consistency of regulation and as its primary function is to regulate, it is in the public interest for the report to be disclosed.
27. In favour of maintaining the exemption, the CQC confirmed that it considered the strong public interest in avoiding any prejudice to its regulatory functions.
28. The CQC also considers that it is in the public interest to maintain a safe space for internal audit processes and procedures to ensure the effectiveness and efficiency with which it exercises its functions.
29. The CQC pointed out that the report in question was discussed in its board meeting on 22 July 2022, the recording of which is available on its website. In this broadcast reference is made to the overall risk profile identified by the internal audit programme and identifies that the one high risk report (the withheld information) relates to:  
  
"consistency of our regulation, which we know is a key point of our transformation programme. Management has responded and as the Transformation Programme delivers, then we'll be able to improve that consistency. We have a number of agreed actions."
30. The CQC considers that the public discussion of the findings of its internal audit in its Board Meeting goes some way to meeting the public interest in disclosure.
31. The CQC maintains that there is a stronger public interest in avoiding the prejudice to its regulatory work and maintaining a safe space for internal audits. The ability to conduct internal audits and implement

action plans based on any findings is key tool in the CQC ensuring the effectiveness as a regulator.

32. The Commissioner recognises the public interest in transparency and accountability and in members of the public understanding more closely how the CQC carries out its regulatory functions. However, the Commissioner does not consider it is in the public interest to prejudice the CQC's regulatory functions.
33. The Commissioner recognises the important role that internal audits have in identifying areas for improvement which allow a public authority to address and implement plans to address any issues. The Commissioner accepts that disclosure would be likely to hinder these internal audit processes and therefore impact on the CQC's ability to carry out its regulatory functions effectively. This would not be in the public interest.
34. Taking into account the subject matter, the content of the withheld information and the CQC's representations, the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption in this case.
35. As the Commissioner has found the exemption under section 31 to be engaged and the public interest favours maintaining the exemption, he has therefore not gone on to consider the use of any other exemptions cited in relation to this information.

## Right of appeal

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36. 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](mailto:grc@justice.gov.uk)

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

37. 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.
38. 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 .....**

**Joanne Edwards**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**