

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 May 2020

Public Authority: Care Quality Commission
Address: City Gate
Gallowgate
Newcastle
NE1 4PA

Decision (including any steps ordered)

1. The complainant has requested information on a whistleblowing concern sent to the CQC. The CQC withheld some of the information on the basis of section 40(2), 44(1)(a) and 31(1)(g). The CQC also refused to confirm or deny if some of the information was held under the exclusions at these same exemptions.
2. The Commissioner's decision is that the CQC has correctly withheld information at parts a) and b) of the request under section 31(1)(g) of the FOIA and has correctly refused to either confirm or deny if the information at parts c), d) and e) is held by virtue of the exclusion at section 31(3) of the FOIA. She does not require the CQC to take any steps.

Request and response

3. On 21 May 2019 the complainant made a request to the CQC in the following terms:

"Please provide me with further and better particulars in relation to the Concerns raised in 2014 in relation to fraud and information governance breaches at KGH.

In particular please provide

- a. *A copy of the details of the whistleblowing submission that was made*
 - b. *Confirmation of the date that the whistleblowing submission was made*
 - c. *A schedule of the meetings that took place in relation to this whistleblowing event*
 - d. *Any report or reports consequent upon this whistleblowing submission*
 - e. *Any and all communications such as email and/or letters issued/received consequent upon this whistleblowing submission.”*
4. The CQC responded on 19 June 2019 withholding the information requested at parts a) and b) of the request and neither confirming nor denying if the information at parts c), d) and e) was held. The decision was made on the basis that any disclosure or confirmation or denial could allow a motivated person to identify or not specific individuals. The exemptions applied to refuse to either confirm or deny if this information was held were sections 40(2), 40(5B), 44(1)(a), 44(2) and 31(1)(g) and 31(3).
 5. The complainant requested an internal review of this decision on 19 June 2019 and an internal review was conducted with the outcome communicated the complainant on 24 July 2019. The internal review upheld the original response.

Scope of the case

6. The complainant contacted the Commissioner following the internal review on 25 July 2019 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the CQC has correctly withheld information in parts a) and b) of the request under section 31(1)(g) and if the CQC has correctly refused to either confirm or deny if the requested information is held under any of the cited sections of the FOIA.

Reasons for decision

Section 31 – law enforcement

8. Section 31 of the FOIA states that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

- (a) the prevention or detection of crime,*
- (b) the apprehension or prosecution of offenders,*
- (c) the administration of justice*

...

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

9. In this case the CQC did respond and confirm that the information in parts a) and b) of the request was held – this was the whistleblowing submission and the date the submission was made. The CQC refused to provide this information citing section 31(1)(g). The CQC refused to confirm or deny if the information in parts c), d) and e) of the request was held – essentially the information on whether any follow-up action was taken such as meeting information, report and communications about the whistleblowing submission under section 31(3)
10. For both the information the CQC has confirmed it holds and the information it is neither confirming or denying holding the arguments are broadly similar.

Parts a) and b) of the request

11. Section 31(1) states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice, –

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),"

12. The CQC has indicated the subsections in 31(2) it considers relevant in this case are:

"(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 activity which he is, or seeks to become, authorities to carry on,*
13. In considering whether the prejudice would or would be likely to occur from disclosure, the Commissioner will consider the nature and likelihood of the prejudice in question occurring.
 14. In this case the information being withheld is the submission itself and the specific date the whistleblowing allegation was made. The purpose of whistleblowing policies and mechanisms is to allow for a confidential and anonymous means of raising concerns. As the CQC is the regulator of health and social care in England it relies upon information it receives from people who work in and for those services to help it detect breaches in regulations, poor care, and risk to welfare and safety of people who use those services.
 15. The CQC uses information from whistleblowing concerns to identify risk, target its inspections, provide evidence for judgements and to support enforcement action. The CQC emphasises that it requires significant courage for a health or social care professional to become a whistleblower and that there will always inevitably be some fear that identification as a whistle-blower could have significant impact on individuals careers and working relationships.
 16. Whilst the CQC acknowledges that the Public Interest Disclosure Act 1998 gives a right to bring action where a whistle-blower has suffered victimisation or detriment as a result of making a protected disclosure this does eliminate the risk and fear that many whistle-blowers feel.
 17. The CQC is therefore of the view that it must rely on trust and making a disclosure under the FOIA that could deter whistle-blowers from coming forwards with their concerns would be detrimental to a number of its functions listed in 31(2) of the FOIA.
 18. Having viewed the whistleblowing submission the Commissioner is of the view that the concerns raised would have related to all of the subsections referred to by the CQC – 31(2)(a), (b), (c) and (d) – as the allegations (if found to be of merit) would require investigation into all of these areas.
 19. The Commissioner considers that in most cases whistleblowing concerns are likely to relate to areas around failure to comply with the law, improper conduct, potential regulatory action or fitness to practice. Whistleblowing allegations generally tend to relate to serious matters that individuals feel they need to make with an expectation of trust and

anonymity. Undermining the principle of this by disclosing details of the submissions, as well as potentially identifying whistle-blowers (in some cases where motivated individuals may be able to piece information together) is likely to have an impact on the effectiveness of the whistleblowing process. As the CQC has stated, it uses the information gathered this way to inform the action it takes, including regulatory action (section 31(2)(c)).

20. The Commissioner therefore finds that section 31(1)(g) is engaged. Section 31 is a qualified exemption and the Commissioner must therefore consider the public interest before reaching a conclusion.
21. Neither party has presented the Commissioner with substantive public interest arguments in this case although she notes that the CQC did state that disclosing whistle-blower information risks damaging trust and therefore reducing the vital information it receives and uses for the purposes of its regulatory functions which would not be in the public interest.
22. The Commissioner notes in responding to a previous freedom of information request on a similar subject (the response to which was provided to the Commissioner in support of the CQC's position in this case) it acknowledged there was a public interest in the CQC being open and transparent in the way it functions. However, it also found that there was significant public interest in avoiding prejudice to the regulatory functions of the CQC and preventing individuals from being dissuaded from sharing information with the CQC in the future.
23. The Commissioner finds that having found the exemption to be engaged there is an inherent weight to the public interest in withholding the information as it would not be in the public interest to disclose information which may have a prejudicial impact on a public authority's ability to carry out its regulatory functions. As no significant or obvious public interest arguments for disclosing this information have been advanced she can only conclude that the public interest lies in maintaining the exemption and withholding the information at parts a) and b) of the request.

Parts c), d) and e) of the request

24. Section 31(3) provides that a public authority is not obliged to confirm or deny holding information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). The CQC has advised that the relevant matters in this case are those set out in sections 31(1)(g) in conjunction with 31(2)(a), (b), (c) and (d).

25. The Commissioner's guidance on section 31 explains that the prejudice in terms of section 31(3) will depend on how the request is phrased. Typically, where a request identified an individual or an organisation as the possible subject of an investigation, or a particular line of enquiry a public authority could be pursuing, the more chance there is that confirming the information's existence would, or would be likely to, prejudice that investigation.
26. This issue for the Commissioner to consider in this case is whether confirming or denying that the requested information is held would, or would be likely to, prejudice the ability of the CQC to ascertain if circumstances requiring regulatory action existed, if the law had been complied with, if there had been improper conduct or if a person was fit to practice.
27. Confirming or denying whether or not the CQC holds the information requested in parts c), d) and e) would effectively disclose whether or not the CQC carried out further investigation as a result of the whistleblowing allegation. As such, the Commissioner accepts that such confirmation or denial relates to the cited subsections as confirming or denying if the information was held would reveal whether the CQC was conducting further investigations into compliance with the law, into improper conduct, fitness to practice or into ascertaining if regulatory action was necessary as a result of the concerns raised.
28. The Commissioner will next consider whether issuing a confirmation or denial in response to the request would be likely to result in real and significant likelihood of prejudice to these interests.
29. The prejudice in confirming or denying whether relevant information to parts c), d) and e) of the request is held is that it would reveal if further action was taken. Disclosing potentially sensitive information about a whistleblowing allegation, if held, would be likely to undermine the action the CQC could take and the CQC's ability to deliver effective regulatory functions.
30. As already discussed in this decision notice, there is an inherent trust built into the whistleblowing process and whilst it might be appropriate in some cases to confirm that an allegation has been received there is a difference in then confirming if any further action was taken as a result of this allegation. The Commissioner is of the view that confirming or denying this would not only have a detrimental effect on the CQC's ability to continue taking any further action, if any action was already underway, but if no further action was taken it would potentially deter whistle-blowers from coming forwards if they did not think there concerns would be followed up on. Therefore confirming or denying if the information at parts c), d) and e) was held would be likely to have a

prejudicial effect on the ability of the CQC to undertake activities set out in the cited subsections. The Commissioner therefore finds that section 31(3) has been correctly applied to neither confirm nor deny if the information is held.

31. This is a qualified exemption and is therefore subject to the public interest test.
32. The Commissioner notes no different or further arguments have been presented regarding the public interest in neither confirming nor denying if this information is held than for the information being withheld at parts a) and b). She has not repeated these arguments again here.
33. Again, the Commissioner finds that having found that the CQC was correct to neither confirm nor deny if any further information was held relating to the whistleblowing submission such as regarding any follow up action or decisions, she must find there is a significant weight to the public interest in this as confirming or denying would be likely to prejudice the CQC's regulatory functions.
34. As with parts a) and b) as no substantive arguments for confirming or denying if the information is held have been put forward or are immediately obvious to the Commissioner she has concluded that the CQC has correctly refused to neither confirm nor deny if the information at parts c), d) and e) of the request is held. The Commissioner has therefore not gone on to consider any of the other exemptions in this case.

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: 0300 1234504

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

Jill Hulley
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