

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 May 2024

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

#### Decision (including any steps ordered)

---

1. The complainant has requested all recorded information held between the Care Quality Commission (CQC) and other parties concerning the safeguarding of service users of named service providers between certain dates. The CQC relied on section 40(5B) of FOIA (third party personal information) to refuse to confirm or deny that the information was held. It also relied on section 31(3) of FOIA (law enforcement) to neither confirm nor deny whether it held this information.
2. The Commissioner's decision is that the public authority has correctly relied on section 40(5B) and section 31(3) of FOIA to refuse to confirm or deny that the information was held.
3. The Commissioner does not require further steps to be taken.

#### Request and response

---

4. On 7 September 2023, a request was made to the CQC that cannot be provided in full. The Commissioner has used the complainant's own summary of the request with certain names redacted -

"Copies of all correspondence, telephone and attendance notes, internal memoranda, minutes and other records (in any format) created or held by the CQC relating to communications between the Council, [redacted], [redacted], [redacted], the London Boroughs of Bromley and Southwark, the police and other stakeholders,

regarding any safeguarding issue(s) relating to service user [redacted], and any other service user receiving services from [redacted] or [redacted],”

between specified dates.

5. On 22 September 2023 the CQC responded. It relied on section 40(5) to neither confirm nor deny (NCND) whether it held any personal data and section 31(3) of FOIA to NCND whether it held information about registered providers and other organisations used to monitor those providers.
6. On 6 November 2023 the complainant made an internal review request.
7. The CQC provided its internal review on 5 December 2023 and maintained its position. It later confirmed that it had cited section 40(5A) incorrectly and had intended to cite section 40(5B) of FOIA.

### **Scope of the case**

---

8. The complainant contacted the Commissioner on 12 January 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to rely on section 40(5B) and section 31(3) of FOIA to refuse to confirm or deny whether the requested information is held.

### **Reasons for decision**

---

#### **Neither confirm nor deny**

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty whereby a public authority may NCND whether it holds the requested information.
11. The decision to use a NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

12. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.

### **Section 40 - personal information**

13. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
14. For the CQC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request, the following two criteria must be met:
  - confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - providing this confirmation or denial would contravene one of the data protection principles.
15. The first step for the Commissioner is to determine whether confirming or denying that the information is held would reveal personal data as defined by the Data Protection Act 2018 ('DPA'). If it would not, section 40(5B) of FOIA cannot be relied upon.
16. Secondly, and only if the Commissioner is satisfied that confirming or denying would reveal personal data, he must establish whether that revelation would breach any of the DP principles.

### **Would confirmation or denial reveal personal data?**

17. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. If held, any information within the scope of this request would clearly be that of the individual identified by their initials and other individuals that are potentially identifiable as service users receiving services from the provider. Just referring to an individual by their initials does not anonymise them. Therefore, the Commissioner is satisfied that if the CQC was to confirm or deny whether it holds the requested information, this would in turn be disclosing personal information to the world at large. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. As far as the Commissioner is aware, there is nothing available in the public domain which reveals any of the information being sought here.
23. The fact that confirming or denying that information is held would reveal the personal data of an identifiable living individual does not automatically prevent the public authority from doing so. The second element of the test is to determine whether confirming or denying that the information is held would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

**Would confirming or denying that the information is held contravene principle (a)?**

25. Article 5(1)(a) of the GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
26. In the case of an FOIA request, the personal data is processed when the confirmation or the denial is provided. This means that confirmation or denial can only be provided where it would be lawful, fair and transparent to do so.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
28. If the information was held, it would include special category data which is particularly sensitive, so the conditions for processing it are very restrictive and generally concern specific and stated purposes.

29. The Commissioner's guidance<sup>1</sup> states that only two conditions are likely to be relevant regarding this type of data. These are:

Article 9(2)(a) – explicit consent of the data subject; or

Article 9(2)(e) – the processing relates to personal data which has clearly been made public by the individual concerned.

30. The CQC has argued that information about safeguarding concerns with regard to their health and social care that indicates a "vulnerable adult" is data concerning health and consequently special category data. The CQC does not have consent to confirm or deny that it holds this data to the public and it does not consider that there is any other UK GDPR Article 9 basis for processing any data, if held.

31. The CQC has been unable to identify any lawful basis under Article 6 of the UK GDPR or condition under Article 9 for confirming or denying whether the information is held.

32. As far as the Commissioner is aware, no information has been made public by the service user referred to by their initials or other "service users" in the request. No consent has been sought for confirmation or denial from the relevant data subject/s. The Commissioner therefore accepts that the CQC can rely on section 40(5B) of FOIA.

33. If a relevant condition cannot be met, a public authority must not disclose the information, as disclosure would be unlawful and therefore in contravention of principle (a).

34. The CQC is entitled to refuse to confirm or deny whether it holds the requested information on the basis of section 40(5B)(a)(i) of FOIA.

### **Section 31 – Law enforcement (NCND)**

35. The CQC has also relied on the NCND exclusion at section 31(3) of FOIA, that confirming or denying information is held would or would be likely to prejudice the exercise by any public authority of its functions (section 31(1)(g)) for any of the listed purposes. The CQC argues that confirming or denying would prejudice the purposes at sections 31(2)(a), (b), (c), and (j) of FOIA:

---

<sup>1</sup> [Section 40 and Regulation 13 – personal information | ICO](#)

“(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,

(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.”

36. The Commissioner’s guidance<sup>2</sup> states that the -

“exemption also covers information held by public authorities without any specific law enforcement responsibilities. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime...”

37. The CQC contends that confirming or denying whether the requested information is held “would be a prejudice to the adult safeguarding process and a prejudice to CQC’s regulatory functions”. It has been asked for information relating to safeguarding regarding an individual who has been identified and others using identified care services. To either confirm or deny under the FOIA “would undermine the principles of confidentiality and appropriate information sharing upon which adult safeguarding processes are based”. The CQC needs to take a consistent approach whether it holds/does not hold the requested information. To do otherwise would risk undermining “the confidentiality of safeguarding processes by the mosaic effect”.

38. The CQC has stated that the prejudice in either confirming or denying whether it holds the requested information is at the higher level ie it would occur.

39. The Commissioner is satisfied that the exemption at section 31(1)(g) provides grounds for NCND whether information is held in this case as to do so would prejudice the CQC’s functions. The Commissioner also

---

<sup>2</sup> [law-enforcement-foi-section-31.pdf \(ico.org.uk\)](http://ico.org.uk/law-enforcement-foi-section-31.pdf)

accepts that the exemption is engaged at the higher level of prejudice because of the potential effect on its functions.

40. The Commissioner will go on to consider whether, despite the exemption being engaged, the public interest lies in confirming or denying whether this information is held.

### **Public interest factors in favour of disclosing the requested information**

41. The complainant states that they are “not requesting information that would prejudice the CQC's regulatory functions, nor does it wish to undermine public trust or put at risk the CQC's relationship with the healthcare sector”. They wish to understand “how the CQC has analysed the services provided by these entities”. The complainant believes that the disclosure of the requested information (if held) could be done with redactions.
42. The complainant states that, “There is a public interest in the CQC being transparent, in that disclosure of such records will enable” certain parties “to better understand its position”. They do not accept that “disclosure would undermine the trust that underpins how the CQC engages with providers, quite the reverse; it would assist the providers...to communicate more effectively with the CQC”. The complainant does not understand “how disclosing such information could prejudice or obstruct the CQC's regulatory functions”.

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

43. The CQC lists the reasons why it believes that confirming or denying whether it holds this information would not be in the public interest:
- “• Undermining the trust of local authorities and partner organisations in CQC as an information sharing partner for safeguarding purposes.
  - Undermining public trust in the confidentiality of safeguarding processes and in the security of their personal data within the health and social care system as a whole.
  - Undermining the effectiveness of adult safeguarding processes by impeding the effective and timely sharing of information due to lost trust within the system and the need to protect the confidentiality and privacy of service users, care workers and others.
  - Undermining the exercise of CQC's regulatory functions due to reluctance of safeguarding partners to share confidential information with CQC...”

44. It also argues that it's not in the public interest to create a regulatory unfairness by providing confirmation or denial about matters that have "not been subject to the usual checks and balances applied" when it publishes its regulatory findings.

45. The CQC also considers that, if held -

"...disclosure of confidential communications relating to adult safeguarding processes would serve a limited public interest in transparency and openness and in public understanding of those processes. We consider that this interest would be very significantly outweighed by the damage that would be caused to the confidentiality and integrity of, and trust in, those processes".

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

---

46. The Commissioner has decided that transparency is outweighed here by the much more persuasive factors against confirmation or denial in this case and that the public interest lies in maintaining the exemption. Consequently, he finds that section 31(3) of FOIA was correctly applied to the request.



## **Right of appeal**

---

47. 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)

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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