

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 May 2014

Public Authority: Regulation and Quality Improvement Authority
Address: 9th Floor
Riverside Tower
Lanyon Place
Belfast
BT1 3BT

Decision (including any steps ordered)

1. The complainant has requested a copy of the 'Contemporaneous Notes' taken during the Finance Inspection of a named residential care home in 2012 and 2013. The Regulation and Quality Improvement Authority (RQIA) refused to provide the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the RQIA has correctly applied section 36(2)(b)(ii) FOIA and that section 40(1) FOIA should also have been applied to some of the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 6 August 2013 the complainant requested a copy of the 'Contemporaneous Notes' taken during the Finance Inspection of The Haven in 2012 and 2013.
5. On 15 October 2014 RQIA responded. It refused to provide the complainant with the requested information under section 36(2)(c) FOIA.

6. The complainant requested an internal review on 25 November 2013. RQIA sent the outcome of its internal review on 6 December 2013. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 13 January 2014 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the RQIA applied section 36(2)(b)(i) and (ii) FOIA in addition to section 36(2)(c). It also became apparent that some of the withheld information is the complainant's own personal data. The Commissioner has therefore considered whether the RQIA was correct to apply section 36(2)(b)(i) and (ii) and section 36(2)(c) to the withheld information and whether section 40(1) FOIA should have been applied also.

Reasons for decision

9. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) 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, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

14. The RQIA has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) to the withheld information. The Commissioner has considered section 36(2)(b)(ii) first in this case.
15. In determining whether section 36(2)(b)(ii) was correctly engaged by the RQIA, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
16. The RQIA explained that the qualified person is Glenn Houston, Chief Executive of the RQIA. It explained that the qualified opinion was originally sought on 15 October 2013 and was provided on 6 December 2013. The qualified person's opinion was that section 36(2)(c) FOIA was applicable in this case. It explained that the qualified person had access to all relevant material including relevant legislation and also the verbal opinion of operational staff involved in the original response and the review panel. It said that counter arguments were discussed verbally around the value of disclosure. The form was typed on behalf of and signed by the qualified person as an accurate record of their reasonable opinion following careful consideration of the materials and opinions above. This was provided to the Commissioner.
17. To summarise the qualified person's opinion is that the ability of RQIA staff to make notes to prepare draft reports for senior RQIA staff is crucial to enable it to maintain an effective regulatory regime. It said that disclosure of information which reflects early and incomplete consideration of courses of action will limit the ability to have relevant and appropriate internal consultation based on submitted draft proposals.
18. The RQIA explained that during the course of the Commissioner's investigation, discussions were had with the qualified person and it was agreed that section 36(2)(b)(i) and (ii) FOIA were also applicable in this case. These discussions were not however recorded.
19. It explained that as the NI Regulator of Health and Social Care, RQIA conduct meetings and inspections with regulated service providers on a regular basis to discuss and assess the safety and quality of services. It is the qualified person's reasonable opinion that the release of material such as the 'contemporaneous notes taken during the finance inspection of the Haven in 2012 and 2013' would be likely to set a precedent for the further release of similar material and as a result other regulated service providers would be likely to limit their participation and contribution to discussions in such meetings/ inspections given the knowledge that the record of these might be disclosed into the public domain. It is his opinion that it is essential

that free and frank exchange of views and provision of advice is upheld so that RQIA can assure the quality and safety of services.

20. The qualified person therefore verbally agreed that section 36(2)(b)(ii) is engaged.
19. The withheld information is the contemporaneous notes taken during the inspection of a particular care home in 2012/2013. The RQIA has explained that such an inspection requires discussion with the regulated service provider to enable it to be able to assess the safety and quality of the services being provided. The Commissioner is of the view that whilst the process of obtaining the qualified opinion is flawed in that the opinion relating to section 36(2)(b)(ii) FOIA was reached retrospectively and verbally, the opinion of the qualified person is a reasonable one considering the process by which inspections are conducted.
21. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
22. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

¹ EA/2006/0011; EA/2006/0013

Public interest arguments in favour of disclosing the requested information

23. The RQIA has acknowledged that there is a public interest in disclosure for the service users, their families and potential users.
24. The Commissioner considers that there is a public interest in the RQIA operating openly and transparently, in relation to the investigation to which the withheld information relates but also more widely in terms of the efficiency and fairness of its regulatory functions. There is a strong public interest in disclosing information which provides the public with a better understanding behind the RQIA's decision making processes and holding the RQIA accountable for decisions made.

Public interest arguments in favour of maintaining the exemption

25. The RQIA has explained that it believes the following public interest arguments favour maintaining the exemption:

The Chilling Effect

The RQIA has argued that within the investigation process it is essential that it is able to exchange free and frank views with the organisations it regulates. It has explained that it regularly conducts meetings and inspections with regulated service providers to discuss and assess the safety and quality of services. It has said that if the withheld information were disclosed it would be likely to have a negative impact upon the service providers' frankness and candour when engaging in this process.

It also argued that officers of RQIA would limit their note taking whilst undertaking their regulatory duties, the official record might be impacted negatively likely leading to less robust regulatory records.

The Timing of the Request

The RQIA has not provided any submissions relating to the timing of the request.

Balance of the public interest arguments

26. The Commissioner considers there is a strong public interest in regulators such as the RQIA operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of the regulatory process and ensures fairness and efficiency.

27. The Commissioner does however consider that the investigatory process requires free and frank discussion between the RQIA and the regulated service providers. Disclosure of information which would be likely to inhibit the frankness and candour of this discussion would not be in the public interest as in turn it would be likely to have a negative impact upon the efficiency of the investigation process. The Commissioner acknowledges that the RQIA regulates a number of different service providers, not just the one relevant to the withheld information in this case. Therefore the frequency of the prejudice claimed, if it were realised, would be likely to be significant. It would be likely to limit the frankness and candour of the many service providers the RQIA regulates, not just the provider relevant to this case.
28. In this case, whilst the RQIA did not provide submissions considering the timing of the request, the Commissioner is aware that the report to which the withheld notes relate was finalised in April 2013 and is publicly available. As the investigation had been finalised at the time of the request in August 2013, the Commissioner considers that this would reduce the weight he would attribute to the chilling affect arguments presented.
29. The Commissioner considers that the public interest in this case is finely balanced, whilst the investigation in question was complete at the time of the request, it had only fairly recently completed. The Commissioner considers that the frequency of the prejudice occurring in this case would be likely to be great, given the many service providers the RQIA regulates. The Commissioner does consider that there is a strong public interest in disclosure, as the information is relevant to users or individuals connected to users of all service providers regulated by the RQIA. However in this case the investigation had only just completed at the time of the request and therefore the Commissioner also considers that there is a very strong public interest in not disclosing information which would be likely to inhibit the RQIA's investigation process by inhibiting the frankness and candour of service providers' engagement.
30. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case.

Section 40(1) – personal data of the applicant

31. Under section 40(1) FOIA, the personal data of the applicant is absolutely exempt from disclosure under FOIA.
32. In this case, upon viewing the withheld information, it became apparent that some of it was the complainant's own personal data. Where the

complainant is named within the withheld information, the Commissioner considers this to be their own personal data. This information would also therefore be exempt under section 40(1) FOIA.

Right of appeal

33. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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