

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2020

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

Decision (including any steps ordered)

1. The complainant has requested the Care Quality Commission (CQC) to disclose all the information it holds relating to production and subsequent withdrawal of fixed penalty notices issued at three locations. Initially, the CQC refused to confirm or deny if the recorded information is held citing section 44(2) of the FOIA. During the Commissioner's investigation, however, this was withdrawn and replaced by section 31(3).
2. The Commissioner's decision is that the CQC is entitled to refuse to confirm or deny whether the recorded information is held in accordance with section 31(3) and she is satisfied that the public interest rests in maintaining this exemption. The Commissioner does not therefore require any further action to be taken.

Request and response

3. On 27 March 2019, the complainant wrote to the CQC and requested information in the following terms:

"Please send me in relation to the following locations:

[Location and location ID redacted]

1. All information relating to the production and subsequent withdrawal of Fixed Penalty Notice RGP1-6376801391

[Location and location ID redacted]

1. All information relating to the production and subsequent withdrawal of Fixed Penalty Notice RGP1 – 6376933102

[Location and location ID redacted]

1. All information relating to the production and subsequent withdrawal of Fixed Penalty Notice RGP1 – 6376391138
2. All information relating to the production and subsequent withdrawal of the Notice of Proposal RGP1 – 5184148202”
4. The CQC responded on 12 April 2019. It refused to confirm or deny whether the requested information is held citing section 44(2) of the FOIA.
5. The complainant requested an internal review on 12 April 2019.
6. The CQC carried out an internal review and notified the complainant of its findings on 28 May 2019. It again refused to confirm or deny whether the requested information is held citing section 44(2) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 12 July 2019 to complain about the way his request for information had been handled. He believes the CQC has a duty to confirm whether or not the requested information is held and, if it is, to disclose it to him.
8. During the Commissioner’s investigation the CQC withdrew its application of section 44(2) and confirmed that it now wished to rely on sections 31(3).
9. The Commissioner considers the scope of her investigation to be to determine whether the CQC is entitled or not to refuse to confirm or deny whether the requested information is held in accordance with section 31(3) of the FOIA.

Reasons for decision

Section 31 – law enforcement

10. Section 31(1)(g) states that information is exempt from disclosure if its disclosure 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).

11. The relevant purposes applicable to this request, referred to in subsection (2), 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, and
 - c. the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
12. Section 31(3) states that the duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) (the duty to confirm whether or not the requested information is held) would, or would be likely to prejudice any of the matters mentioned in subsection (1).
13. The Commissioner considers it is important for public authorities to apply the 'neither confirm or deny' provision (the NCND provision) in the legislation consistently. If a public authority denied holding information in cases where no recorded information is held and then applied the NCND provision when information was held, this would become apparent over time and defeat the purposes behind the exemption.
14. The Commissioner's guidance on section 31 can be accessed here:
<https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

This highlights that typically where a request identifies an individual or 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 the investigation.

15. The complainant is also reminded that the FOIA is applicant blind. So the relevant consideration is not whether confirmation or denial or even the provision of the information (if we were not considering the NCND provision) should be provided to the applicant, the relevant consideration is whether confirmation or denial (or the provision of the information, if this is what is being considered) can be released into the public domain for anyone to see. A complainant's personal reasons and motives for requiring the information or knowing what recorded information is held or not are not relevant factors.

16. The CQC confirmed that revealing whether or not the requested information is held would be likely to prejudice its regulatory functions which are designed to ascertain and enforce compliance with the law and to protect the health and safety of people who use registered services. It went on to say that disclosing the existence or not of unpublished and withdrawn notices would be likely to undermine the fairness of these functions by removing the principle that such notices are not published until due process is complete and it has been established that the serving of those notices was lawful and proper.
17. The CQC explained further that it would not disclose the existence or not of unpublished enforcement notices to a member of the public. To confirm or deny whether this information is held would be likely to prejudice the exercise of its functions and enforcement powers. It explained that it was established under the Health and Social Care Act 2008 and it has a range of functions and powers under that Act. These include the powers of entry and inspection and a range of enforcement powers – including the powers to issue fines for certain offences and to vary or cancel registration so as to stop care services from being able to lawfully operate.
18. The CQC advised that section 86 of the Act allows that “where the commission [CQC] is satisfied a person has committed a fixed penalty offence, the Commission may give the person a penalty notice in respect of the offence”. The person (the registered provider or manager of the service) may chose to pay the penalty. If they do so, they may not be convicted of the offence to which the penalty notice relates. A fixed penalty notice is therefore a part of its enforcement powers in relation to the prosecution of offences. It argued that it uses these powers to discharge its main objective (under section 3 of the Act) to “protect and promote health, safety and welfare of people who use health and social care services”.
19. The CQC referred to the Care Quality Commission (Registration) Regulations 2009, which relates to its enforcement powers. It explained that schedule 2 of the regulations relate to prescribed information about enforcement that it must publish. The publication of the prescribed information therefore being part of the enforcement action itself. Paragraphs 5, 6 and 7 state that the CQC must not publish that prescribed information in certain circumstances. It is prohibited from publishing the prescribed information where a notice of proposal has been successfully appealed or where a penalty notice has been withdrawn after it has been paid.
20. It argued that the clear purpose of these legal provisions is to maintain natural justice by avoiding the publication of notices where the offence has been discharged or where the notice has been successfully

challenged. Disclosure under FOIA (which is disclosure into the public domain for anyone to see not just the requester) isn't too different to publication under the regulations; the same principles apply.

21. It confirmed that confirming or denying whether or not the information is held (or disclosure if this was what was being considered) to the world at large would be likely to be prejudicial to natural justice. If the CQC confirmed the information is held, or worse disclosed it if it was, it would give the public the impression of failure or wrongdoing on the part of the provider where the CQC is not in a position to enforce.
22. Being reminded of the necessity for public authorities to take a consistent approach to the NCND provision in the legislation, the Commissioner is satisfied that confirming or denying whether the requested information is held in this case would be likely to prejudice the CQC's ability to carry out its regulatory functions. The CQC relies on its ability to use certain powers to ensure that the health and wellbeing of all health and social care users is protected. If the CQC confirmed whether or not it held the requested information it would be revealing whether or not a named organisation had been subject to fixed penalty notices or dependent upon when such a request was made and how it is phrased whether or not an organisation is subject to certain lines of enquiry or investigation which may lead up to the issuing of a notice. Disclosure of this confirmation or denial could assist those subject to such lines of enquiries or those that have been issued with a fixed penalty notice to take steps to conceal or alter records or change its actions if it knew it was under scrutiny. This would be likely to prejudice the CQC's ability to carry out its regulatory functions effectively and penalise and hold those providers to account where this is necessary.

Public interest test

23. The CQC confirmed that it recognised the general public interest in understanding the CQC's enforcement processes and in transparency about the circumstances in which enforcement action is or is not taken. It appreciated confirming whether or not this type of information is held relating to service providers would provide valuable information to the public and allow the public to potentially monitor the performance and standard of care of service providers.
24. However, in this case it felt the public interest rested in maintaining the NCND provision under section 31 of the FOIA. It argued that it is not in the wider interests of the public to disclose information which would be likely to prejudice its ability to carry out its enforcement powers in a timely and effective manner.

25. The Commissioner appreciates the public interest in openness and transparency and in ensuring that where enforcement powers are being used, they are being used appropriately and in accordance with the law. Confirming whether or not this type of information is held when requests are received about particular providers would enable the public to scrutinise and evaluate individual providers, hold them to account and promote and encourage potentially higher care standards.
26. However, in this case she considers there is a very strong public interest in protecting the ability of public authorities to enforce the law and to carry out their regulatory functions effectively. Confirming whether or not the requested information is held in a given case would reveal to the world at large whether or not the CQC is investigating or has investigated a particular provider and therefore whether or not it has sufficient concerns to take enforcement action. In the cases where it may be actively investigating, confirmation would enable those individuals or organisations under investigation to potentially conceal, alter or even destroy records or evidence of the contravention. It would enable them to change the actions that are under particular scrutiny. The Commissioner is also of the opinion that confirming whether or not this type of information is held is likely to hinder its ability to conduct enquiries and investigations as it sees fit, without undue external influence.
27. The Commissioner does not consider such consequences are in the wider interests of the public. Instead it is in the wider public interest to protect the CQC's ability to carry out its enforcement functions and maintain high standards and to protect the health, safety and wellbeing of service users.
28. The Commissioner also notes that the regulations clearly outline when information should be published in relation to fixed penalty notices. She considers the rules on publication set out the particular circumstances in which this is required for a reason. It holds providers and individuals to account where this is necessary and prevents members of the public from assuming wrongdoing or failure in relation to other individuals and providers where this is not required or indeed justified. This would be damaging and unfair to an individual or company. The Commissioner considers the current provisions for publication in the regulations go some way to meeting the public interest arguments in support of disclosure of this type of information.
29. For the above reasons, the Commissioner is satisfied that the public interest in favouring of confirming whether or not the requested information is held is outweighed by the public interest in maintaining the NCND provision in this case.

Right of appeal

30. 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

31. 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.
32. 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

Samantha Coward
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