



Scottish Information
Commissioner

Decision 007/2005 – Mrs S and the Scottish Commission for the Regulation of Care (Care Commission)

Request for a list of questions and answers used by Care Commission Officers when conducting a fit person assessment

Applicants: Mrs S

Authority: Scottish Commission for the Regulation of Care (Care Commission)

Application: 200500801

Date of Decision: 6 July 2005

**Kevin Dunion
Scottish Information Commissioner**

Kinburn Castle
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Decision 007/2005 – Mrs S and the Scottish Commission for the Regulation of Care (Care Commission)

Request for a list of questions and answers used by Care Commission Officers when conducting a fit person assessment – information withheld under section 35(1)(g) of the Freedom of Information (Scotland) Act 2002 – disclosure would, or would be likely to, prejudice substantially the exercise by the Care Commission of its functions for the purposes mentioned in section 35(2)(a), (b), (c) and (d).

Facts

Mrs S requested a list of questions and answers used by Care Commission Officers when conducting a fit person assessment. The Care Commission refused to disclose the information on the grounds that it is exempt under section 35(1)(g) of the Freedom of Information (Scotland) Act 2002. The Care Commission argued that disclosure of the information requested would significantly impair its ability to assess fitness through fit person interviews in the future and that this would prejudice substantially the effectiveness of this aspect of regulation.

Outcome

The Commissioner found that the authority had correctly applied the exemption in section 35(1)(g) and related purposes under section 35(2) of the Freedom of Information (Scotland) Act 2002.

Appeal

Should either the Scottish Commission for the Regulation of Care (Care Commission) or Mrs S wish to appeal against this decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.



Background

1. On 1 January 2005, Mrs S wrote to the Scottish Commission for the Regulation of Care (“the Care Commission”), asking to be provided with a list of questions and answers used by Care Commission Officers when conducting a fit person assessment.
2. The Care Commission acknowledged receipt of Mrs S’s request for information in a letter dated 6 January 2005. A refusal notice was sent by the Care Commission to Mrs S on 19 January 2005. In its notice the Care Commission stated that it would not provide the information requested on the basis that such information is exempt under section 35 of the Freedom of Information (Scotland) Act 2002 (“FOISA”). A summary of the exemption was included in the Care Commission’s notice and this was accompanied by details of its reasons for applying the exemption and its consideration of the public interest test in relation to the application of the section 35 exemption. The Care Commission also informed Mrs S of her rights under FOISA to request a review of its decision.
3. Mrs S wrote to the Care Commission on 14 February 2005, asking for a review of its decision to withhold the information. She argued that section 35 of FOISA did not apply since no reference to a “Fit Person Check” is stated in any of the Statutory Instruments that relate to the Care Commission, no formal qualifications are required for the position of nanny, childminder or crèche assistant, and the requirement of the Care Commission to submit Mrs S to a fit person assessment is outwith the terms of the National Care Standards.
4. The Care Commission acknowledged receipt of the request for review on 17 February 2005. A letter explaining the outcome of the Care Commission’s review, which upheld the original decision to withhold the information, was sent to Mrs S on 28 February 2005. The Care Commission stated that it has a duty to assess fitness under the Regulation of Care (Scotland) Act 2001 and the Regulations made under it. A copy of the relevant Regulation was provided to Mrs S. The Care Commission also informed Mrs S of her right to appeal to my office if she was dissatisfied with the outcome of the review or with the way that her information request had been processed.
5. Mrs S contacted my office on 1 March 2005. It was not clear from her letter whether Mrs S simply wanted me to comment on the information that had been provided by the Care Commission or whether she wanted me to investigate the way in which her request had been dealt with by the Care Commission. My office therefore contacted Mrs S, asking her for clarification. On 9 March 2005 I received a letter from Mrs S stating that she wished to make an application for a decision in relation to the refusal by the Care Commission to provide her with the information she had requested.
6. The case was then allocated to an investigating officer.



The Investigation

7. Mrs S's appeal was validated by establishing that she had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to her request.
8. A letter was sent to the Care Commission on 13 April 2005, giving notice that an appeal had been received and that an investigation into the matter had begun.
9. The Care Commission was asked to provide:
 - (a) copies of any internal guidance or policy relied upon when considering whether to release questions and answers used in fit person assessments;
 - (b) any information relating to the Care Commission's use of the section 35 exemption under FOISA. For example, reasons for applying the exemption (and associated purposes under section 35(2) of FOISA) and a detailed analysis of the "substantial prejudice" and "public interest" tests in relation to the application of the exemption;
 - (c) a copy of the questions used in a fit person assessment;
 - (d) details of how and when such assessments are used. For example, whether the questions remain the same or if they change;
 - (e) copies of any internal documents or correspondence relating to Mrs S's request for information or her subsequent request for review. These were to include e-mails, minutes of meetings, briefings, notes of conversations, or memos that refer to the request and the Care Commission's response;
 - (f) details of the process followed in responding to Mrs S's request for review. For example, whether it was handled by the same person who dealt with the initial request for information; and
 - (g) any other information that the Care Commission believed to be relevant to the case.
10. The Care Commission provided comments relating to Mrs S's request in a letter dated 29 April 2005. However, the additional information requested in my investigating officer's letter of 13 April 2005 was not supplied. The Care Commission was contacted by e-mail on 29 April 2005 and was asked to provide the documentation listed above.
11. The Care Commission responded on 17 May 2005 and provided the documentation requested, accompanied by a schedule of documents listing the information sent. The information provided included copies of:



- (a) the original information request from Mrs S and the Care Commission's acknowledgement and subsequent response;
 - (b) a similar request made by Mrs S for the same information to the Data Protection Officer at the Care Commission;
 - (c) e-mail correspondence and internal memos concerning Mrs S's request;
 - (d) the information that had been sent to Mrs S and the information that had been withheld;
 - (e) Mrs S's letter requesting a review of the Care Commission's decision to withhold information;
 - (f) the outcome of the Care Commission's review and internal e-mails concerning the review.
12. The applicant was contacted on 5 July 2005 and asked for her views on the release of the information requested. Mrs S asked a relative to put her views forward on her behalf. Her view was that the questions and answers used in previous fit person assessments should be provided to applicants to allow them to prepare for fit person interviews in the same way that past papers are available for persons sitting exams at school and university.

The Commissioner's Analysis and Findings

Background

13. Before I consider the Care Commission's decision to withhold the information requested by Mrs S, it would be useful to describe the role of the Care Commission and the process of carrying out a fit person assessment.
14. The Regulation of Care (Scotland) Act 2001 (as amended) sets out the key duties and responsibilities of the Care Commission. Its main role is to regulate care services in Scotland and to work to improve the quality of these services. The Care Commission regulates care services by registering them, inspecting them, dealing with complaints and taking enforcement action. Before the Care Commission can decide to register a care service it must be satisfied that the care service will comply with all relevant legislation – by law, the Care Commission must ensure that a care service is of an acceptable quality before it can be registered and open for business.
15. In its role as a regulator of care services, the Care Commission can insist a service makes changes to improve the quality of care. Such regulation is based upon the National Care



Standards as issued by Scottish Ministers. These standards provide the framework for assessing the service as a whole. They cover a wide range of care services from very young children to teenagers. The way in which the standards are to be met in a particular case will depend on the type of provision being inspected and the Care Commission has discretion to apply the standards flexibly, taking into account the nature of the service.

16. If, at inspection or at other times (for example, as a result of the Care Commission looking into a complaint) there are concerns about the service, the Care Commission will take the National Care Standards into account in any decision on whether to take enforcement action and what action to take. This is especially important in extreme cases where there is serious risk to a person's life, health or wellbeing.
17. All providers must provide a statement of function and purpose when they are applying to register their service. On the basis of that statement, the Care Commission will determine which standards will apply to the service that the provider is offering. One question that can arise is whether the provider of a care service is considered to be a fit person to provide that service. The Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 set out the requirements that must be met in relation to the fitness of a care provider. Regulation 6 relates to fitness of providers and, under Regulation 7, managers of care services are subject to additional criteria.
18. Where someone applies to be a childminder, as is the case with Mrs S, they would be both a provider and a manager for the purposes of the Regulations. The Care Commission must inspect such services to make sure that they are meeting the National Care Standards and the Regulations. Issues may arise, for example, because of concerns that have resulted from an inspection or the investigation of a complaint. Where fitness is an issue the Care Commission may interview an applicant or provider of care services.
19. In order to assess the fitness of a person for their role an interview is conducted by Care Commission staff. This is part of the Care Commission's statutory duty as a regulator and the fitness test to be applied covers character and integrity, physical and mental fitness, qualifications, skills, and experience.
20. If a person is not considered fit for their role the Care Commission can refuse an application to register a service, or, if the service is already registered, can take formal steps to cancel registration or impose conditions on the registration.

Use of the section 35(1)(g) exemption

21. In refusing to disclose the information requested by Mrs S, the Care Commission cited section 35(1)(g) of FOISA as being the relevant exemption to be applied in this case. Section 35 states that –
 - (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially –
 - (g) the exercise by any ... Scottish public authority of its functions for any of the purposes mentioned in subsection (2).



22. The Care Commission cited the following purposes under section 35(2) of FOISA as being relevant in this instance –
- (a) to ascertain whether a person has failed to comply with the law;
 - (b) to ascertain whether a person is responsible for conduct which is improper;
 - (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
 - (d) to ascertain a person's fitness or competence in relation to –
 - (i) the management of bodies corporate; or
 - (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on.
23. In citing the section 35(1)(g) exemption, the Care Commission stated that the purpose in section 35(2)(d)(ii) is relevant when a person applies to register a care service and the purposes under sections 35(2)(a) to (c) are relevant in circumstances where the Care Commission is investigating the fitness of a registered service provider.
24. In its refusal notice to Mrs S dated 19 January 2005, the Care Commission stated that the release into the public domain of the list of questions and answers used by Care Commission Officers in fit person assessments would significantly reduce the benefit of a fit person interview. It argued that, since the person being interviewed would be able to study the questions and answers in advance, the process would not fulfil its basic function of testing a service provider's knowledge and ability to answer questions about the provision of a care service.

The substantial prejudice test

25. The Care Commission also argued that disclosure would be likely to prejudice substantially its ability to assess fitness since, in registering a care service, the Care Commission is assessing the provider's fitness to be authorised to carry on a care service.
26. In order for a public authority to argue that the release of information would prejudice substantially the interest in question it must be able to show that the damage caused by disclosing the information requested would be real or very likely, not hypothetical. The harm caused must be significant, not marginal, and it would have to occur in the near future not in some distant time.
27. In its response of 29 April 2005, the Care Commission stated that fit person assessments are an important part of its operations: they constitute a key aspect of its role as a regulator under the Regulation of Care (Scotland) Act 2001. The users of care services are at the heart of what the Care Commission does and if it is not able to assess the fitness of applicants, providers and managers effectively – to enable it to take any steps necessary to deal with issues of fitness – regulation would be less effective and service users may not receive an acceptable service.



28. If disclosing this information would significantly impair the Care Commission's ability to assess fitness through fit person assessments now and in the future, this would certainly prejudice substantially the effectiveness of this aspect of its regulatory duties.

Conclusion

29. I am therefore satisfied that disclosure of the information requested by Mrs S would indeed prejudice substantially the ability of the Care Commission to perform its function to carry out fit person assessments.
30. Having established that the test of substantial prejudice has been met under the terms of section 35(1)(g) of FOISA, a qualified rather than an absolute exemption, I now turn to the consideration of the public interest test.

The public interest test

31. The Care Commission then considered the public interest test, in terms of section 2 of FOISA, since the exemption cited under section 35 is not an absolute exemption. It stated that "a refusal to disclose this information must also meet the test that the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption."
32. In the Care Commission's view "the public interest is met as it is clearly in the public interest for the Care Commission to be able to conduct robust and fair fit person interviews, without some providers having had the opportunity to access and review the questions in advance."
33. The fit person assessment takes into account a person's character and integrity, physical and mental fitness, qualifications, skills, and experience. Background checks are also carried out. In order to assess a person's suitability for the position a number of questions are presented to that person in an interview setting. Responses to these questions are then rated in an assessment exercise to gauge the person's knowledge, understanding, and awareness of the issues involved in providing and managing a care service.
34. The aim of a fit person assessment is to enable the Care Commission to carry out its function to regulate the providers and managers of care services. Regulation 6(1) of the Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002, states that "A person shall not provide a care service unless the person is fit to do so." Regulation 7(1) states "A person shall not act as a manager in relation to a care service unless the person is fit to do so."
35. For the purposes of the Regulations the test for fitness goes much further than simply considering a person's qualifications. Without submitting such persons to an interview process which tests their knowledge, awareness, and understanding of their duties and responsibilities as providers of care services, it is difficult to see how a person's fitness could otherwise be effectively assessed.



36. Mrs S contends that the questions and answers used in a fit person assessment should be made available to providers of care to allow them to prepare for fit person interviews. The suggestion here is that without this information a care provider cannot prepare properly for a fit person assessment.
37. The Care Commission recommends that service providers should obtain copies of the National Care Standards relevant to the care service they provide or plan to provide. These highlight the minimum standards expected, the levels that they will be expected to work to when registered, and will also be the basis for inspections.
38. Anyone who wishes to register a care service with the Care Commission (or anyone who must attend a fit person assessment in order to meet the fit person requirements) is provided with an information pack which includes guidance notes from the Care Commission as part of the application process. "Guidance to Care Providers – Fitness of Managers of Registered Care Services" sets out the procedures that service providers must have in place to meet the Regulations and is available on the Care Commission website or from any Care Commission office. It also contains a section which details the legal requirements of fitness and includes references to related legislation.
39. Guidance on the Care Commission website states that persons considering becoming a childminder should obtain a copy of the "National Care Standards - Early Education and Childcare up to 16 years". The Scottish Childminding Association website also states that registered childminders must demonstrate how they meet the criteria outlined in the National Care Standards document, which was first published in 2002. It clearly states that all providers should make themselves fully aware of fitness requirements since it is the role of the Care Commission to inspect care services to ensure that they are meeting the terms of the standards and regulations.
40. If the purpose of a fit person assessment was simply to test a care provider's knowledge of what is involved in the provision of a care service there may have been a stronger argument for disclosing past questions and answers. However, if such questions are intended to assess a person's character and integrity, physical and mental fitness, qualifications, skills, and experience it is difficult to see how the questions and answers could be disclosed without substantially affecting the Care Commission's ability to assess the suitability of persons for providing or managing a care service.
41. In other words, if the questions and answers used in a fit person assessment were to be disclosed this would allow individuals to prepare their answers in advance of an interview, thereby defeating the intended purpose of the questions. This would effectively impede the Care Commission's ability to regulate care services and it is difficult to see how such an outcome could be judged to be in the public interest. A more serious consequence could be where inexperienced or, in some cases, inappropriate people are deemed to be "fit" for the role of care provider or manager and this could put people using care services at significant risk.



42. The overriding public interest must be for the Care Commission to be allowed to perform its statutory duties in such a way as to ensure that its regulatory functions are carried out as proficiently as possible. It is also in the public interest for persons who are providing and managing care services to be regulated effectively and to be stringently assessed in order to ascertain whether or not they meet the necessary requirements to be considered as fit persons to provide or manage care services.

Conclusion

43. In my view the public interest in maintaining the exemption, and so withholding the information, outweighs the public interest in disclosure of the information.

Decision

I am satisfied that a fit person assessment serves as a core part of the Care Commission's statutory duty to check that people are fit persons to provide or manage care services in Scotland.

Provision of the questions and answers of a fit person assessment to applicants and managers in advance of an interview would serve to defeat the very purpose of such an assessment and would prejudice substantially the authority's ability to exercise its functions, such as its regulatory duty to assess a service provider's fitness to be authorised to provide or manage a care service.

I find that the authority has dealt with Mrs S's request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002.

Kevin Dunion
Scottish Information Commissioner
July 2005