

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2019

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

Decision (including any steps ordered)

1. The complainant has requested information associated with a named doctor. The Care Quality Commission (CQC) has withheld the requested information under section 40(2) of the FOIA (third person personal data) and section 41(1) (information provided in confidence).
2. The Commissioner's decision is as follows:
 - CQC is entitled to rely on section 40(2) of the FOIA to withhold the requested information. It is the personal data of a third person and disclosure would contravene a data protection principle.
3. The Commissioner does not require CQC to take any remedial steps.

Request and response

4. On 15 March 2019 the complainant wrote to CQC and requested information in the following terms:

"I am formally requesting a copy, yet again, the Fit and Proper test carried out when CQC interviewed and employed Dr [name redacted] under interested third party and freedom of Information Act"

5. CQC responded on 3 April 2019. It confirmed it holds information falling within the scope of the request but said it considered that the third party referenced would not expect it to release their personal data without their consent and that this information is protected by the General Data Protection Regulation (GDPR) and Data Protection Act 2018 (DPA18). CQC provided the complainant with links to information about 'Fit and Proper Person' procedures.
6. Following an internal review CQC wrote to the complainant on 16 April 2019. It confirmed that it is withholding the requested information under sections 40(2) and 41(1) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 16 April 2019 to complain about the way her request for information had been handled.
8. The Commissioner's investigation has focussed on whether CQC can rely on section 40(2) and/or section 41(1) of the FOIA to withhold the information that falls within the scope of the complainant's request. This has included considering whether the CQC's interpretation of the request, as phrased, is a reasonable one.

Reasons for decision

Background and interpretation of the request

9. In its submission to the Commissioner CQC has explained that it is the regulator of health and social care in England. It makes sure health and social care services provide people with safe, effective, compassionate, high-quality care and it encourages services to improve.
10. CQC was established under the Health and Social Care Act 2008 ("the 2008 Act") and has a range of functions and powers under that Act.
11. Regulations under the 2008 Act – the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the regulations") – provide a set of national standards that all providers of health and social care services must comply with, and which CQC can regulate and enforce.
12. CQC has also explained that it has functions and powers under other legislation, including the Mental Health Act 1983 and the Health and Safety at Work Act 1973. As a part of carrying out its role, it uses its powers to inspect health and social care services. It has specific powers of entry and inspection under sections 60 to 63 of the 2008 Act. Section

62(2) permits CQC to authorise any person to exercise these powers on our behalf.

Specialist Advisors

13. In addition to its own Inspectors, CQC maintains a 'flexible workforce' of people upon whose range of expertise and experience it can call as required. This flexible workforce includes Specialist Advisors (SpAs). SpAs are senior clinicians and professionals who assist CQC with inspections. They bring current practice knowledge and specific expertise to the inspection process.
14. In most cases, SpAs will be currently working in the health and social care sector. CQC engages SpAs on zero-hour contracts so that they can be called upon as and when needed to assist it in its inspection work.
15. As with everyone who takes part in CQC inspections, SpAs are subject to pre-employment checks to ensure that they are qualified and suitable for the role. These checks are subsequently updated at regular intervals to ensure that SpAs remain suitable for the role.

The Fit and Proper Person Regulation

16. Regulation 5 of the regulations requires providers of health and social care services to ensure that any person carrying out the functions of a director in their service is a 'fit and proper person' to carry out that role.
17. This is referred to as the Fit and Proper Person Regulation (FPPR). Regulation 5(3) sets out a range of requirements of a 'fit and proper person'. These include requirements as to the person's character, competence and health.
18. Regulation 5(3)(d) requires that "the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity".
19. CQC has stressed that it is not its role to assess whether all directors of health and social care services are fit and proper persons to hold those roles. This is the responsibility of the provider. It does not hold a register of fit or unfit persons. Nor does the FPPR regulation place legal responsibilities on CQC regarding the recruitment and employment of its own staff or flexible workforce.
20. However, where it receives information that brings into question the character or behaviour of a director, this may indicate that the provider may have failed in their own duty under FPPR.

21. Also, during its registration process (where a new provider applies to be registered, or where there is a significant change in an existing registration) CQC asks providers to notify it of the checks that they have conducted to determine whether their directors are fit for their roles. Following registration, it would not require such information for every change within the provider's board.
22. CQC therefore has an FPPR process whereby such information of concern can be reviewed but it does not test whether every – or even most – NHS service directors are fit and proper persons.

Doctor named in the request

23. CQC has also provided the Commissioner with some information about the doctor named in the request; their current role at an NHS Foundation Trust and roles they have had with the CQC as a SpA and as a National Professional Advisor.

The request for information

24. CQC says that it has taken the view that the complainant has conflated the FPPR process with CQC's own employment checks relating to the doctor's work for CQC as a SpA and National Professional Advisor. In CQC's view it is the latter information (employment checks) that the complainant is seeking.
25. CQC says it came to this view as the complainant's request specifically refers to the test carried out in relation the doctor being interviewed and employed. Later in her email she goes on to write "*You have employed a known abuser. With intent, full knowledge and with impunity*" which further suggests to CQC that the focus of her interest is in the doctor's employment with CQC and what steps it has taken to ensure that they were suitable for that role.
26. CQC therefore considered the information within scope was that which relates to checks it conducted to assess whether the doctor was suitable ('fit and proper') for the roles of SpA and National Professional Advisor with its organisation. CQC says it did, however, provide the complainant with information relating to the FPPR process to assist her in understanding that process's purpose and operation.
27. The Commissioner has considered the explanation that CQC has provided, the request and its wider correspondence with the complainant. She considers that CQC's interpretation of the request is a reasonable one. That is, that the request is for information regarding checks CQC carried out to assess whether the doctor concerned was suitable for the roles of SpA and National Professional Advisor, rather

than for information on any formal FPPR process to which the doctor may have been subject.

28. CQC has provided the Commissioner with the relevant information it holds and that it is withholding under sections 40(2) and 41(1).

Section 40 – personal data

29. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
30. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA18.

Is the information personal data?

31. Section 3(2) of the DPA18 defines personal data as: 'any information relating to an identified or identifiable living individual'.
32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
33. The information in this case comprises various documents that form part of the personnel record of the doctor concerned. The doctor is the clear focus and subject of these documents. As such, the Commissioner is satisfied that this information can be said to relate to the doctor, that the doctor can be identified from this material and that, therefore, the withheld information falls within the definition of 'personal data' under section 3(2) of the DPA18.

Is a condition under section 40(3A) satisfied?

34. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The principle under 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*".
35. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent. 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.

36. CQC says that it has considered whether Article 6(1)(f) of the GDPR provided a lawful basis for disclosing any or all of the requested information.
37. Article 6(1)(f) states that processing shall be lawful only if:
- "...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".*
38. In its submission CQC has said that it considers it reasonable that any person would believe that documents held by their employer within their personnel record would be kept confidential and would not be disclosed into the public domain as the result of a FOI request.
39. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:
- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information
 - (ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question
 - (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
40. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
- (i) Is a legitimate interest being pursued?*
41. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
42. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

43. From her correspondence with CQC it is apparent that the complainant has made serious allegations about the doctor concerned. The Commissioner therefore considers that her interest in CQC's vetting of this doctor is case-specific but is nonetheless a legitimate interest for the complainant.
44. CQC has also acknowledged that there is a general public interest in openness and transparency and in demonstrating (in general) that SpAs authorised to take part in inspections had been checked to ensure that they are appropriate and qualified to do so. CQC also noted the complainant's own, specific interest, discussed above.

(ii) Is disclosure necessary to meet the legitimate interests?

45. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
46. CQC decided that it would not usually be necessary to disclose personal data to meet the first two public interests it identified above. It considers that any general interest in CQC's recruitment and pre-employment checking processes could be met by disclosure of the policies and procedures that it holds in relation to these. The public interest in understanding how comprehensively these policies and procedures are followed by CQC could be met by a request for anonymised, statistical data.
47. Even if these public interests could be met by disclosing documentation relating to employment checks conducted for one SpA, CQC took the view that this would be a disproportionately intrusive way to achieve this outcome.
48. CQC says although it would not usually consider the motive for an FOIA request, it considers that it was clear from the complainant's correspondence that her intention and focus were very much in relation to the doctor and closely linked to her allegations against them.
49. Against this, CQC considered the following factors which spoke against disclosure.
50. First, this is an individual interest of the complainant's rather than a wider public interest. In other words, the same interest in disclosure would not be served if a third party, unconnected to the complainant, was making the same request for information.

51. Second, the complainant's allegations against the doctor were (and, to the best of CQC's knowledge, remain) unproven. These allegations do not relate to the doctor's actions in their CQC capacity.
52. Third, CQC followed the appropriate process to report the complainant's allegations to the appropriate local council's safeguarding team so that they could be properly investigated in accordance with the established process. This referral was made as, if the allegations were true, they would suggest that the doctor would be a significant risk to other vulnerable people within their care. With this process underway, any public interest to be served by disclosing the requested information is greatly reduced.
53. Finally, given the safeguarding process that had just been initiated, CQC determined that it would not be appropriate to contact the doctor to notify them of the request or of any proposed disclosure. It was mindful that doing so would risk prejudicing the safeguarding process. As such, any disclosure would be likely to be particularly unfair in that the doctor would not be aware of it.
54. CQC says it therefore decided that the legitimate interest to be served by disclosing the information would be outweighed by the interests, fundamental rights and freedoms of the data subject (in particular, their right to privacy and their interest in their personal data being fairly processed).
55. CQC has told the Commissioner that it considered this to be a very straight-forward decision for most of the information (given it is clearly private, confidential and personal in nature). It noted, however, that one document consists of information sourced from the public domain (a screenshot of a registration check from the General Medical Council website on a particular date).
56. CQC acknowledges that the content of the website information is already in the public domain, so it was mindful that the potential for prejudice to the interests, fundamental rights and freedoms of the doctor would be significantly lower. However, it considered that the document reveals the date on which CQC carried out a round of employment checks on the doctor. This information is, itself, the doctor's personal data and is not already in the public domain.
57. In addition, CQC says that the doctor is likely to have felt distressed to learn that a document from their CQC personnel file – no matter how innocuous – had been disclosed to a person who was making serious allegations of wrongdoing against them. As CQC noted above, it would not have been able to mitigate this risk by notifying or consulting them in advance.

58. In the Commissioner's view, any general legitimate interest in CQC's recruitment and vetting processes is met through the publication of, and direction to, related policies and procedures. However this general information does not meet the complainant's specific interest, which is CQC's pre-employment checks of the doctor concerned. The Commissioner notes that the request concerns checks associated with particular roles the doctor carried out for the CQC but that the complainant's allegations against the doctor do not concern the doctor in any CQC capacity. Nonetheless, because disclosure would be necessary to meet the complainant's legitimate interests, the Commissioner has gone on to consider the third test; the balancing test.

(iii) Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject(s)?

59. Through this test the Commissioner will balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

60. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause
- whether the information is already in the public domain
- whether the information is already known to some individuals
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

61. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

62. The Commissioner agrees with CQC that the doctor in this case would have the reasonable expectation that information held in their personnel file would not be released in response to a request under FOIA. Releasing this information would be likely to cause that individual distress, particularly given the circumstances of the request and because CQC will not have been able to discuss the matter of the request with them. While it relates to the doctor in their professional capacity, for

the reasons CQC has explained it cannot discuss this matter with the doctor and therefore does not have their consent to disclosure. In any case, the Commissioner considers that, even if they were asked, it is highly unlikely that the doctor would consent to the release of this information.

63. In addition and as has been discussed, the complainant's allegations do not concern the doctor in their CQC capacity and so it is not clear how the requested information would support their case against the doctor. Finally, CQC reported the complainant's allegations to the appropriate local council's safeguarding team and the allegations will be properly investigated through that route.
64. Having considered all the circumstances the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would not be lawful.
65. The Commissioner has decided that CQC is entitled to withhold the information requested under section 40(2), by way of section 40(3A)(a). Since a condition under section 40(3A) has been satisfied it has not been necessary to consider the conditions under section 40(3B) or 40(4A). As the section 40(2) exemption is engaged, it has not been necessary for the Commissioner to consider the section 41 exemption that CQC also applied to the requested information.

Right of appeal

66. 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

67. 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.
68. 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

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