

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested a final inspection report and training records.
2. The Commissioner's decision is that Care Quality Commission (the CQC) was entitled to rely on section 40(2) to withhold the requested information.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 5 July 2022, the complainant wrote to the public authority and requested information in the following terms:

"Final Inspection Report - Royal Manor Nursing Home

I expect CQC inspectors to be more knowledgeable , please can I see training records for your self and the other inspectors involved in this, one of whom was a manager."
5. The public authority responded on 26 July 2022. It stated that it was refusing the request under section 40(2).
6. Following an internal review the public authority wrote to the complainant on 31 August 2022. It stated that it was upholding its original position.

Scope of the case

7. The complainant contacted the Commissioner on 2 September 2022 to complain about the way their request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

Reasons for decision

Section 40 personal information

9. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

13. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

¹ As amended by Schedule 19 Paragraph 58(3) DPA

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. 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.
17. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is satisfied that the information relates to the data subjects. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. 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".

21. In the case of an FOIA request, the 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.
22. 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.

Lawful processing: Article 6(1)(f) of the GDPR

23. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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"².

24. In considering the application of Article 6(1)(f) of the GDPR 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.
25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

26. In considering any legitimate interest(s) in the disclosure of 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.
27. 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.

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

28. The complainant explained that there is a legitimate interest in the CQC inspectors as they are in the public eye and therefore qualifications must be disclosed. They also explain that CQC inspectors are regulating and grading care homes, therefore providers must be reassured that these inspectors are qualified and experienced to do their job.
29. They further advised that it is in the public interest to have confidence in CQC inspectors and therefore it is important the public are reassured that CQC inspectors have the qualifications and experience for their role.
30. The CQC recognised that there is a public interest in generally demonstrating that CQC's inspection staff are qualified and appropriately trained for their roles.
31. The Commissioner is therefore satisfied that there is a legitimate interest in the requested information and will now go on to consider whether disclosure is necessary.

Is disclosure necessary?

32. '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.
33. The CQC explained it did not believe disclosure was necessary as it believed the complainants and the public interest in the requested information could be satisfied by general information regarding training received by CQC inspection staff. The confirmed this information was provided in its responses to the complainant.
34. The Commissioner agrees that disclosure of the requested information, is not necessary to satisfy the interests in the requested information. The Commissioner is satisfied that CQC will conduct internal checks upon recruitment of its staff, and also continue with internal training. Therefore, the CQC will also conduct checks to ensure each employee is appropriately qualified and trained to conduct their role.
35. Disclosure is therefore not the least intrusive means of satisfying the legitimate interest and is thus not necessary. It follows that there would be no lawful basis, under data protection law for this personal data to be published. Section 40(2) of FOIA is therefore engaged.

Right of appeal

36. 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

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

37. 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.
38. 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

Catherine Fletcher
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