

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 March 2023

Public Authority: Care Quality Commission

Address: Citygate
Gallowgate
Newcastle-upon-Tyne
NE1 4PA

Decision (including any steps ordered)

1. The complainant requested from the Care Quality Commission (CQC), information relating to a doctor and the names of the organisations contained in his dossier regarding Non-therapeutic male circumcision (NTMC). The CQC withheld the requested information under section 40(2) (personal information), section 41 (information provided in confidence) and section 44 (prohibitions of disclosure) of FOIA.
2. The Commissioner's decision is the CQC was entitled to rely on section 40(2) and section 41 of FOIA to refuse to provide the information requested. Therefore, the Commissioner does not require the CQC to take any steps as a result of this decision.

Background, request and response

3. The complainant previously requested from the CQC, information about how it had responded to, and acted upon a reported dossier. The Sunday Times had published an article on 21 December 2014 about the dossier, which related to NTMC being carried out by General Practitioners (GPs).
4. Further to the CQC's response to the complainant's information request, on 14 October 2022 the complainant submitted a follow-up request in the following terms:

- "Could you please tell me which registered services were investigated; when they were investigated; where I can find published reports of these investigations; and where I can find published follow up 'focused inspection[s] of these investigations?"
5. On 3 November 2022 the CQC responded and withheld the requested information under section 43(2) (commercial interests) of FOIA.
 6. On 4 November 2022 the complainant asked the CQC for an internal review.
 7. On 2 December 2022 the CQC provided its review response and withdrew its application of section 43(2) of FOIA as it considered this exemption had been incorrectly applied to the request. However, the CQC maintained its position to withhold the information but under section 40(2) (personal information), section 41 (information provided in confidence) and section 44 (prohibitions on disclosure) of FOIA.

Reasons for decision

8. The following analysis focuses on whether the CQC was entitled to withhold information under sections 40(2), 41 and 44 of FOIA.

Section 40(2) – personal information

9. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
10. Section 3(2) of the Data Protection Act 2018 defines personal data as: "any information relating to an identified or identifiable living individual." The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
11. In this case, the complainant requested information regarding concerns raised by a doctor which relate to NTMC being carried out by GPs. The Commissioner is satisfied that the requested information relates to the personal data of third parties and would identify individuals. He therefore considers the information requested falls within the definition of 'personal data' in section 3(2) of the DPA.
12. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

13. 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.
14. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
15. The Commissioner considers that in this instance, the complainant is pursuing a legitimate interest, as the request is about raised concerns to the CQC regarding registered services where NTMC is carried out, and allegations of poor medical practice. The Commissioner accepts disclosure of the requested information is necessary to meet that legitimate interest. However, he considers the individuals; families that shared their experiences with the doctor, the GPs at the registered services (i.e. GP clinics and medical practices) and the doctor himself, would have a reasonable expectation that their information would not be made public under FOIA without their consent.
16. The Commissioner recognises that disclosure of the requested information would reveal the identities of the registered services in question, and it would allow the likely identification of individuals about whom concerns were raised. The Commissioner considers disclosure under FOIA would be a breach of the doctor's confidentiality and a risk of detriment to his interests and/or to the interests of families that raised concerns to or through the doctor.
17. The Commissioner notes that the CQC responded to the concerns raised by the doctor, through the statements already made by CQC regarding this matter. The Commissioner accepts the remaining public interest to be served by disclosure of the information, would not outweigh and justify the breach of privacy and potential detriment to the interests of the doctor and the families involved which would be likely to arise from disclosure.
18. The Commissioner has determined there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the third parties referenced. Therefore, he deems that there is no legal basis for the CQC to disclose the requested information and to do so would be in breach of principle (a).

19. The Commissioner's decision is that the CQC is entitled to rely on section 40(2) of FOIA to refuse to provide the requested information.

Section 41 – Information provided in confidence

20. Information is exempt from disclosure if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.
21. The withheld information in this case, identifies registered services (i.e. clinics and medical practices) which the doctor raised specific concerns about, prior to the Sunday Times article in December 2014, and also details of investigations. The Commissioner is therefore satisfied the information (registered services) is information obtained from another person and this element of the exemption is met.
22. When determining if disclosure of information constitutes an actionable breach of confidence, the Commissioner will consider the following:
 - Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
23. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible to the general public, and if it is more than trivial. In this instance the information is clearly not trivial as it relates to NTMC being carried out by GPs. The Commissioner accepts the issue of NTMC for reasons of faith, is a subject that may cause significant and heated response.
24. The withheld information would have been imparted in circumstances giving rise to an obligation of confidence. The Commissioner is satisfied there is an implicit obligation of confidence where information is provided, in this instance, by families that reported their concerns to the doctor.

25. The Commissioner recognises that if the information requested was disclosed, there is a realistic possibility some person(s) with existing knowledge would be able to deduce the likely identities of families that spoke with the doctor about their concerns. The Commissioner acknowledges the nature of the concerns raised, the process by which they were raised and the general time period during which the alleged incidents occurred are already a matter of public record. Therefore, the disclosure of the information (registered services), would add a further piece of information to allow re-identification.
26. The Commissioner considers the withheld information will retain the necessary quality of confidence owed to the doctor, the families (who reportedly raised concerns) and registered services (i.e. GPs).
27. The Commissioner is satisfied that details of the registered services in question, would reveal the identities of the GP clinics and medical practices and is likely to also identify individual GPs about whom concerns were raised. This would contain information imparted in circumstances importing an obligation of confidence.
28. The Commissioner is mindful of the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v AN Clark (Engineers) Limited* [1968] FSR 415, specifically:

“...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence”.
29. With regard to the third element required to bring an action for a breach of confidence, the Commissioner considers there would be detriment to third parties if there was an unauthorised use of the information. This would be to the doctor, the families and the GPs working at the registered services at the time the concerns were raised.
30. Section 41 of FOIA is an absolute exemption and is not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
31. The Commissioner accepts there is a general public interest in public authorities being open and promoting transparency and accountability. In this case, the matter concerns investigations/inspections of registered services and the regulated activity of a surgical procedure.

32. The Commissioner considers there is greater public interest in the CQC being able to maintain good relationships with registered services and retaining trust in not revealing sensitive/confidential information. There is not sufficient public interest in this case to warrant the CQC breaking the obligation of confidence.
33. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. He recognises the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one which should be overridden lightly.
34. Having considered all the circumstances of this case, and the withheld information, the Commissioner's decision is there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. He does not consider there are compelling reasons for overriding the duty of confidence in this case.

The Commissioner's conclusion

35. The Commissioner is satisfied the information meets the conditions under section 41(1) of FOIA, and the CQC was entitled to rely on this exemption to withhold the information. In view of this, the Commissioner has not gone on to consider the CQC's application of section 44 of FOIA.

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: 0300 1234504

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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF