

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2024

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

Decision (including any steps ordered)

1. The complainant has requested information relating to The Christie NHS Foundation Trust. The Care Quality Commission ("the public authority") refused to provide the requested information, citing section 31(1)(g) (law enforcement) of FOIA.
2. The Commissioner's decision is section 31(1)(g) applies but the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the information requested in parts 1 and 3 of the request, with appropriate redactions made under section 40 (personal information).
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 September 2023, the complainant wrote to the public authority and requested:

"1. All draft ratings that were sent to The Christie following the inspection of the trust in Oct/Nov 2022. (Please note I'm requesting the draft ratings, as opposed to the final published ratings). There have been concerns raised with us over the extent to which The Christie was able to successfully challenge its draft ratings, as well as concerns around the overall defensive culture at the trust. I believe there is a strong public interest in this case for understanding how the inspection process was potentially impacted by the trust's representations. (I've also attached a previous FOI response in which the CQC has provided such information)

2. The evidence appendix for this inspection (please redact any words/phrases deemed to trigger an exemption, and provide the rest of the document.

3. Please also provide the post inspection letter."

6. The public authority responded on 26 October 2023. It refused to provide the requested information, citing section 31 (law enforcement).
7. The complainant requested an internal review on 26 October 2023.
8. The public authority provided the outcome to its internal review on 5 December 2023 and upheld its previous position.

Scope of the case

9. The complainant contacted the Commissioner on 10 January 2024 to complain about the way their request for information had been handled.
10. The complainant accepts the public authority's position in relation to part 2 of the request. However, they don't accept the public authority's position in relation to parts 1 and 3 of the request.
11. Therefore, the scope of the Commissioner's investigation is to consider whether the public authority was correct to withhold the draft ratings and the post inspection letter under section 31.

Reasons for decision

Section 31 – law enforcement

12. Section 31 of FOIA states:

“(1) information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).”

13. The relevant functions within subsection 2 that the public authority has cited 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,
- (c) The purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) The purpose of ascertaining a person’s fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) The purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with actions of persons at work.”

14. The public authority is the independent regulator of health and social care in England. It gets its regulatory powers from the Health and Social Care Act 2008, the Mental Health Act 1983 and the Health and Safety at Work Act 1974.

15. The public authority has powers, under the Health and Social Care Act 2008, to enter and inspect premises where regulated activities are being carried out. It then awards each provider a rating; outstanding, good, requires improvement or inadequate.

16. Once the public authority has determined a rating and quality and fact checked the accompanying report, a draft copy is shared with the

provider.¹ Providers have the right to rigorously challenge draft ratings if they disagree with any of the data that the public authority intends to publish. Once this rating has been provided, it can be challenged, but only on the grounds that the public authority has failed to follow its processes for making ratings decisions.

17. Even though The Christie NHS Foundation Trust report was published on 12 May 2023, the public authority maintains disclosure of internal documents relating to the determination of ratings and the copy of the post-inspection letter would still be likely to prejudice the exercise of the functions referred to in paragraph 13.

18. The public authority is concerned that:

“There is a specific risk – demonstrated by the wording used by this requester – that CQC’s draft ratings are seen or portrayed as the genuine rating of the provider, and that the final, published ratings are presented as being tainted by the process of having been challenged by the provider.”

19. The Commissioner is sceptical of this argument. He believes the complainant, and the general public, are capable of understanding that a draft rating is subject to change according to the public authority’s internal processes. That’s why these processes exist. Furthermore, the public authority could provide a supplementary statement which provides context to the withheld information.

20. The public authority has explained:

“Information within these documents will not have been subject to the factual accuracy and challenge process prior to disclosure into the public domain under FOIA. As a matter of natural justice and good administration, CQC does not normally disclose information about providers gathered in preparation for, or during, inspection which has not been through these processes...

We consider that disclosure of these records under FOIA would be likely to undermine CQC’s commitment to fairness and factual accuracy, which is important to its credibility and effectiveness as a regulator.”

¹ [Factual accuracy check - Care Quality Commission \(cqc.org.uk\)](https://www.cqc.org.uk/factual-accuracy-check)

21. It's also explained:

"Assessing, changing, publishing or suspending ratings are regulatory actions. We would argue that there is a general prejudice in a regulator revealing whether or not draft ratings were changed as a result of challenge by the provider through the appropriate mechanisms to ensure accuracy and fairness of regulatory judgments.

In effect, if a provider has successfully appealed a regulatory judgment (a draft rating in this case), then it is unfair for the regulator to subsequently publish that judgment."

22. According to the complainant, the public authority's ratings database 'suggest there were at least four occasions since 2014 where a trust's overall draft rating was successfully challenged.'

23. The Commissioner recognises this is a small number. However, he accepts the public authority's position that it needs to provide consistent responses to such requests under FOIA, 'If we disclose information where we have not changed a draft rating but withhold where we have then this will have an indirect effect of disclosure.'

24. For clarity, the Commissioner isn't confirming whether The Christie's rating was changed or not, but he recognises that certain providers would object to the disclosure of a rating that had successfully been challenged?, and FOIA is a means by which this could be deduced.

25. He also acknowledges the importance of the public authority following its own due diligence during its regulatory processes and, with this in mind, the Commissioner is satisfied the withheld information engages section 31(1)(g). He'll now go onto determine where the balance of the public interest lies.

Public interest test

Factors in favour of disclosure

26. The complainant is concerned that there is a precedent for the public authority to release such information and cited an incident in 2023 where the draft rating relating to Greater Manchester Mental Health Trust was disclosed.

27. In response, the public authority has confirmed 'The ratings for that Trust had been suspended by CQC following concerns that came to light after we completed our inspection visits.' It then made the decision to

release the draft ratings following the broadcast of a Panorama programme and additional inspections.

28. The complainant is also concerned that:

"The CQC has not given enough weight to the particular concerns around The Christie and its alleged culture of seeking to avoid criticism. We have received anecdotal evidence that the Christie put significant pressure on the CQC, and there's a strong public interest in releasing information around that. BBC Newsnight has also featured these concerns."

Factors in favour of maintaining the exemption

29. The public authority maintains that protecting its process serves the greater public interest:

"The production of post inspection letters and the decision on what to include within those letters to be a regulatory action. They are a step in the inspection process. For the letters to serve their purpose of supporting swift action in response to CQC's preliminary feedback, they are by their nature provisional and have not been subject to a factual accuracy challenge process prior to issue.

If CQC and Trusts expected such letters to be routinely published under FOIA it would be likely to prejudice our ability to produce those letters or to ensure that they freely and frankly express those preliminary findings."

30. In turn, this would dilute the robustness of the public authority's role and influence, which, when considering it is the regulator for health services, isn't in the public interest.

31. The public authority has also addressed the complainant's concerns about the attitude of The Christie and its impact upon the inspection process:

"The requester provided a link² to a news article containing allegations regarding leaders within The Christie during the inspection. Those allegations relate to actions of senior leaders towards their own staff.

² [The Christie: World-renowned NHS centre downgraded by watchdog - BBC News](#)

The article does not contain any allegations regarding The Christie's senior leaders applying inappropriate pressure to CQC.

The article specifically recognises that staff were enabled to speak to CQC Inspectors and did do so, and that the information they shared was reflected in the report."

32. This doesn't negate the public interest in the information, in fact, if The Christie created an environment which discouraged staff from speaking out, this is a matter for the public authority during its inspection. But in this case the public authority arranged for an off site consultation to happen with staff who might have felt intimidated in a hospital environment.
33. In fact, the public authority considers its even more important to withhold such information in these circumstances, as it 'would be particularly prejudicial to CQC's regulatory functions if the robustness with which a provider makes representations against our findings, or their success in doing so, was considered as a factor in favour of publishing draft information.'
34. In other words, a provider could lobby for the downgrading, or upgrading, but either way the public authority considers it could prejudice its statutory duties if it were to disclosure such information.

Balance of the public interest

35. The Commissioner has reviewed the withheld information, specifically the post inspection letter. It addresses the complainant's concern about the culture of The Christie and the Commissioner considers it reasonable the complainant would have concerns that this culture had an effect on the inspection process.
36. There is a public interest in protecting the public authority's processes but there is also a public interest in understanding how such a culture affects the level of care at The Christie, which is one of the largest cancer treatment centres in Europe.
37. Usually, the Commissioner would make his decision based on what new information the withheld information would divulge, compared to what is already in the public domain as part of the public authority's final

report.³ He does find that the post-inspection letter addresses the complainant's concerns more than the final report does.

38. However, since the concern here is the effect the culture had on the inspection process in general, the Commissioner considers it's important to be able to compare different stages of the regulatory process and to do so, the withheld information is necessary.
39. Whilst the Commissioner accepts the exemption is engaged, he finds the public authority's arguments in support of the exemption quite vague. This doesn't mean the exemption can't be engaged, but it does mean it might be more easily outweighed by any compelling public interest arguments in disclosure. In this instance, the Commissioner accepts the complainant has valid concerns about The Christie, its culture and the effect this had on the inspection process.
40. For that reason, the Commissioner has decided the public interest would be better served by disclosure.
41. During this investigation, the public authority confirmed that, if the Commissioner didn't support its application of section 31, it would seek to apply section 36 (prejudice to the effective conduct of public affairs) and seek the opinion of its qualified person.
42. However, since no such opinion has been put forward at this stage, the public authority cannot rely on section 36.

³ [Trust - RBV The Christie NHS Foundation Trust \(12/05/2023\) INS2-13923803921 \(cqc.org.uk\)](#)

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Alice Gradwell
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