

Response issued under the Freedom of Information Act 2000

Our Reference: CQC IAT 1718 0545

Date of Response: 11 December 2017

Information Requested:

“Please provide the following data for 2015/16 and 2016/17:

A list of all whistleblowing concerns received by the CQC in terms of:

- 1. Provider name*
- 2. Organisation name*
- 3. Date received (please redact the dates to show only the year if the CQC is concerned about identifiability through exact dates being revealed)*
- 4. If it is centrally recorded and retrievable within the cost limits, the outcome in terms of whether the whistleblowing contact resulted in:
 - i. Information being noted for a future inspection (review)*
 - ii. Planned inspection (review) brought forward*
 - iii. Inspection triggered in response (responsive review)*
 - iv. No further action*
 - v. Referral to another body**
- 5. If the data is held in is held on your central database and easily retrievable by automated search/ filter within the cost limits, whether the whistleblowing concern related to the care of a person(s) detained under the Mental Health Act*
- 6. If the data is held in is held on your central database and easily retrievable by automated search/ filter within the cost limits, whether the whistleblowing concern related to possible abuse and neglect*
- 7. It the information is held on your central database in a sufficiently anonymised format and the data is easily retrievable by automated search/ filter within the cost limits, please also include data on the broad nature of the whistleblowing concern*

Please disclose this data in the form of two separate spreadsheets, one each for the two years in question, published on your website.”

The Information Access team has now coordinated a response to your request.

CQC has considered your request in accordance with the Freedom of Information Act 2000 (FOIA).

Our main obligation under the legislation is to confirm whether we do or do not hold the requested information.

In accordance with section 1(1) of FOIA we are able to confirm that CQC does hold recorded information in relation to this matter. However, due to the scope of your request we consider that the cost exemption set out at section 12 of the FOIA to be engaged. This is because some of the information you have requested is not centrally recorded and is therefore not reportable. Where this exemption is set out a public authority does not have to comply with any part of a request for information. You can find a full description of the section 12 exemption in the ‘exemptions from the right to know’ section below.

Nevertheless, we have been able to provide some information within the cost limit. We have divided the response into three parts: *Response to points 1-4*, *Response to points 5-7* and *Publication of the data on CQC’s website*. Please see below for more details.

Your Request for Information

It may be helpful to firstly explain how decisions about classifying information as ‘whistleblowing’ are made.

CQC’s guidance for staff on whistleblowing contains the following definition. This is used to decide whether information that we receive should be categorised as ‘whistleblowing’ on our Customer Relationship Management system.

What is whistleblowing?

Whistleblowing is the term used when someone who works in or for an organisation raises a concern about malpractice, risk (for example, to patient safety), wrongdoing or illegality.

The individual is usually raising the concern because it is in the public interest. That is, it affects others, the general public or the organisation itself.

Anyone can share their concerns, anonymously if preferred, if they feel they are not being listened to, or might not feel able to speak directly to those responsible for delivering safe, caring, effective, responsive and well-led services that CQC expects.

Who is defined as a whistleblower?

A person who reports wrongdoing in the place where they work is often called a whistleblower.

In CQC, the term 'whistleblower' describes someone who makes a disclosure and is directly employed by, or provides services for, a provider who is registered with CQC.

Examples of a worker who provides services to a registered provider include, but are not limited to, agency staff, visiting community health staff, GPs, independent activities organisers and contractors.

A whistleblower may also be someone who has left their job after they have made a disclosure and is raising it again, perhaps because they remain concerned about vulnerable people or wrongdoing, and are not confident that the management has dealt with it.

A whistleblower is not a member of the public, a person who uses services, or their representatives, or a volunteer. If such people raise concerns about a provider who is registered with CQC, this should not be described as whistleblowing as they are not protected by PIDA [the Public Interest Disclosure Act].

It is important to note that, under this definition, a whistleblower is not always someone who is employed by the service that they are raising concerns about. A member of care home staff raising concerns about a visiting GP would be recorded on our system as a 'whistleblower' and vice versa.

CQC has published information about whistleblowing on our website:

www.cqc.org.uk/content/report-concern-if-you-are-member-staff

There is a "[Quick guide for health and social care staff about whistleblowing](#)" and "[Guidance for providers](#)" which contain additional information about whistleblowing which you may also find useful.

Response to points 1-4

We attach a spreadsheet which addresses points 1-4 of your request.

Tab 1 of the spreadsheet provides a summary of the outcomes recorded for whistleblowing enquiries received by CQC. The total number of outcomes recorded is higher than a total number of enquiries. This is because more than one outcome can be recorded per each enquiry.

You will see that one of the possible outcomes that can be recorded is 'no other action taken'. This can be for a number of possible reasons, for example:

- CQC had already been made aware of the issue
- The issue was an unsubstantiated concern or
- The matter fell outside of CQC's regulatory process

Some of the enquiries also have 'Outcome TBC' recorded against them. 'TBC' stands for 'to be confirmed', and it could be used because were awaiting additional information, or further information was required but not provided.

Tab 2 of the spreadsheet provides data relating to points 1-3. We have not provided the exact date on which a disclosure was made to CQC as we consider that information to be exempt from disclosure as provided at section 31 of the FOIA. We rely on people who have day-to-day experience of the services that we regulate to share their experience with us to aid us in carrying out our function. Disclosing the requested information into the public domain would discourage people from sharing information with CQC in future, and therefore would likely prejudice our role as a regulator. The exemption is explained in detail in the section 'exemption from the right to know.'

Response to points 5-7

We consider the points 5-7 to be exempt from disclosure as provided at section 12 of the FOIA. The information relating to the nature of the concerns raised, whether it related to a person detained under the Mental Health Act 1983 or whether it concerned possible abuse or neglect cannot be retrieved from our system by an automated search. In order to determine the above, we would need to manually review each of the whistleblowing enquiries. To do so would exceed the cost limit set out section 12 of the Act.

In addition, CQC has a duty to protect information that has been received in confidence and therefore will not disclose any confidential personal information relating to the nature of the concerns shared.

We consider the information exempt from the right to know under FOIA for a number of reasons.

These are:

- Section 76 of the Health and Social Care Act 2008 makes it a criminal offence for CQC to disclose confidential personal information
- Parts of the information is subject to the common law duty of confidentiality
- Parts of the information constitute the personal data of individuals and as such disclosure into the public domain under FOIA would breach one or more of the principles of the Data Protection Act 1998

- Disclosure of the information may discourage individuals from providing information to CQC in the future, and in turn harm our regulatory function of determining whether care services are compliant with the relevant regulations and standards

Our website advises that any feedback CQC receives will be treated confidentially.

Our website also states *“We treat information we receive from the public, professionals and others as confidential”*:

www.cqc.org.uk/content/privacy-statement

Our code of practice details how we obtain, handle and use any personal information.

The individual(s) to whom this information relates would have a reasonable expectation that a public authority such as CQC would not disclose information into the public domain in such a way as to make them identifiable. As such, disclosure into the public domain would be unfair and a breach of their rights under the Data Protection Act 1998.

Information about individuals and care services is shared with and received by CQC with a reasonable expectation of confidentiality. As such, disclosure into the public domain, under FOIA, in such a way as to allow the identification of any individual, is likely to be an actionable breach of that duty of confidence.

Furthermore, such information that could reasonably identify an individual (either on its own, or when combined with other information) is “confidential personal information” as defined at section 76(1) of the Health and Social Care Act 2008.

Disclosure of confidential personal information, except for a purpose listed under section 77 of the Health and Social Care Act 2008, is a criminal offence.

Disclosure in response to a FOIA request does not engage any defence condition under section 77.

Our detailed reasons for refusing to provide the information are explained under the heading “Exemptions from the right to know”.

Publication of the data on CQC's website

There is no legal obligation to publish this information on our website as it does not constitute a dataset.

Datasets

CQC does not consider the data requested to be a dataset. The provisions for datasets state that for information to be a data set it must:

- Have been obtained for the carrying out of our functions
- Be factual information that has not been subject to analysis or interpretation
- Not be an official statistic
- And not have been adapted or materially altered since it was obtained or recorded

Whilst the information meets three of the above points, we do not feel it meets the definition of being “factual information that has not been subject to analysis or interpretation”

For example, a whistleblower will provide information about a factual event, however they will be providing a description of the concern as they have experienced it. The details of the factual event will be subject to interpretation by the person who has experienced it. Equally, if we record the details of whistleblowing as they are shared during a telephone conversation, the person recording information within our CRM system will not have the opportunity to note the conversation down ‘word for word’. The information would be summarised with the focal points, and followed up as required. Therefore, the data you have requested does not constitute a dataset and as such, we have no legal obligation to publish it on our website.

The Purpose of the Freedom of Information Act 2000

The purpose of FOIA is to ensure transparency and accountability in the public sector. It seeks to achieve this by providing anyone, anywhere in the world, with the right to access recorded information held by, or on behalf of, a public authority.

Recorded information includes printed documents, computer files, letters, emails, photographs, and sound or video recordings.

Public authorities spend money collected from taxpayers, and make decisions that can significantly affect many people’s lives. Access to information helps the public make public authorities accountable for their actions and allows public debate to be better informed and more productive.

The main principle behind FOIA is that people have a right to know about the activities of public authorities, unless there is a good reason for them not to.

A disclosure under FOIA is described as “applicant blind” meaning that it is a disclosure into the public domain, not to any one individual.

This means that everyone has a right to access official information. Disclosure should be the default – in other words, information should be kept private only when there is a good reason and it is permitted by FOIA.

An applicant does not need to give a reason for wanting the information. On the contrary, the public authority must justify refusing the information.

Public authorities are required to treat all requests equally, except under some limited circumstances. The information someone can access under FOIA should not be affected by who they are, whether they are journalists, local residents, public authority employees, or foreign researchers.

FOIA also recognises that there may be valid reasons for withholding information by setting out a number of exemptions from the right to know, some of which are subject to a public interest test.

Exemptions exist to protect information that should not be disclosed into the public domain, for example because disclosing the information would be harmful to another person or it would be against the public interest.

A public authority must not disclose information in breach of any other law.

When a public authority, such as CQC, refuses to provide information, it must, in accordance with section 17 of FOIA, issue a refusal notice explaining why it is unable to provide the information.

Exemptions from the right to know

Section 12(1) of the Freedom of Information Act 2000

Section 12 of FOIA applies where the cost to CQC of complying with any individual request would exceed £450. In such cases, CQC is allowed to refuse to comply with the request for information.

Section 12 states:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

As a public authority we wish to be transparent and open about our work, but we have a statutory responsibility to use our resources effectively.

Section 2(3) of schedule 1 of the Health and Social Care Act 2008 states that “It is the duty of the Commission to carry out its functions effectively, efficiently and economically.”

A public authority, such as CQC, is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

In calculating whether this appropriate limit is exceeded, regulation 4(4) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 requires that the time taken in responding to requests (locating, retrieving and extracting the information) must be calculated at a rate of £25 per person per hour.

To locate, extract and retrieve information for both points of the request would therefore far exceed 18 hours and cost more than £450.

To conduct such an exercise would exceed the appropriate limit, as defined under regulation 3(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

CQC does not consider conducting such a search of our records to be an effective and efficient use of our limited resources.

In accordance with section 12 of FOIA, CQC chooses not to conduct such an exercise because of the high cost involved.

This response acts as a refusal notice in accordance with FOIA.

Use of this exemption does not require a public interest test.

Section 44(1)(a) of the Freedom of information states:

"Prohibitions on disclosure.

(1)Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a)is prohibited by or under any enactment,"

Section 76 of the Health and Social Care Act 2008 states:

"Disclosure of confidential personal information

(1)This section applies to information which—

***(a)has been obtained by the Commission on terms or in circumstances requiring it to be held in confidence, and
(b)relates to and identifies an individual.***

(2)A person is guilty of an offence if the person knowingly or recklessly discloses information to which this section applies during the lifetime of the individual.

(3)A person guilty of an offence under this section is liable—

***(a)on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both;
(b)on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both."***

Disclosure is only permitted within the scope of "Defences" provided by section 77 of the Health and Social Care Act 2008.

No defence is applicable in this case therefore we consider that disclosure of confidential personal information relating to dates whistleblowing enquiries were raised and the nature of the, would be an offence.

Section 44 is an absolute exemption which means that if information is covered by any of the subsections in section 44 then it is exempt from disclosure under FOIA. No public interest test is required for this exemption.

Section 40 – Personal Information

We consider the exemption from the right to know provided at section 40(2) of FOIA to be engaged for nature of the whistleblowing enquiries.

Section 40 of FOIA states:

"40 Personal information

(1)Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2)Any information to which a request for information relates is also exempt information if—

***(a)it constitutes personal data which do not fall within subsection (1), and
(b)either the first or the second condition below is satisfied.***

(3)The first condition is—

(a)in a case where the information falls within any of paragraphs (a) to (d)

of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

***(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and***

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).”

The individual(s) to whom the information within the enquiries relates would have a reasonable expectation that a public authority such as CQC would not disclose this information into the public domain. As such, disclosure into the public domain would be unfair and a breach of their rights under the Data Protection Act 1998.

The Data Protection Act 1998 regulates the use of "personal data" and the processing of that data. There are eight Data Protection principles which are listed within schedule 1 of the Data Protection Act 1998.

The exemption provided at section 40(2) applies in any case where disclosure of the requested information into the public domain would be a breach of any of the principles of the Data Protection Act 1998. In particular, the first principle requires that disclosure of the information must be fair and lawful.

The purpose of the Data Protection Act 1998 is to protect people’s private information and to ensure that it is handled properly.

We consider that it would be a breach of the principles of the Data Protection Act 1998 to disclose the redacted information because in the interests of fairness the individuals in question would not expect us to share this information, with the wider public under FOIA. To do so would be a breach of their privacy and rights.

No public interest test is required for this exemption.

Section 41 – Information provided in confidence

We consider the details of the whistleblowing enquiries to be subject to the exemption from the right to know provided at section 41(1) of FOIA because it relates to information provided to CQC in confidence.

Section 41(1) states:

“(1)Information is exempt information if—

(a)it was obtained by the public authority from any other person (including another public authority), and

(b)the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41 applies where information has been obtained from any other person or organisation and where disclosure could constitute an actionable breach of confidence.

Our website advises that we *“treat information we receive from the public, professionals and others as confidential”*:

www.cqc.org.uk/content/privacy-statement

Organisations who have shared information with CQC have done so with a reasonable expectation of confidentiality.

They would not expect CQC to disclose the information into the public domain under FOIA.

A duty of confidence arises when one person (the “confidant”) is provided with information by another (the “confider”) in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected (for instance a person whose details were included in the information confided) may have the right to take action through the courts.

CQC considers that disclosure of this information would be a potentially actionable breach of that duty of confidence therefore CQC will not provide the information covered by this exemption.

Individuals would not expect a public authority such as CQC to share information, which could in turn identify them, with the wider public under FOIA.

We can confirm that in making this decision we have referred to guidance issued by the Information Commissioner’s Office (ICO).

The ICO is the UK’s independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

This guidance is "[Awareness guidance 2 – Information provided in confidence](#)" and is available to view or download from the ICO website:

www.ico.org.uk/for_organisations/freedom_of_information/guide/refusing_a_request

Specifically the guidance recognises that the information need not be highly sensitive. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest.

We consider that there is a strong public interest that CQC, as the regulatory body, has an important role to perform, and should not be seen to be disclosing certain information about individuals and organisations without their consent.

Section 31 – Law Enforcement

We consider details of the whistleblowing that have been shared with CQC to be subject to the exemption from the right to know provided at section 31(1)(g) of FOIA as it relates to 31(2)(c) of FOIA.

Section 31 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)

(2) The purposes referred to in subsection (1)(g) to (i) are—

c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,”

Under this exemption, CQC can withhold any disclosure which would prejudice the exercise by any public authority of its functions relating to protecting the public from misconduct, incompetence, dishonesty or malpractice.

“Prejudice” may be the obstruction of our regulatory function in determining whether any registered provider is compliant with the relevant standards and regulations. It would be prejudicial to our regulatory role to disclose any information relating to our inspection, into the public domain under FOIA, until such time as our final inspection report is published.

Section 31 is a qualified exemption which means that we are required to take into account the public interest in reaching a decision on disclosure. The public interest test requires us to consider whether the public interest in favour of disclosing the information outweighs the public interest in withholding the information.

In conducting this test we have referred to guidance issued by the Information Commissioner's Office (ICO). The ICO is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

Having considered the public interest test, we consider there is a strong assumption that the public interest favours withholding this information as there is genuine danger of prejudice.

The guidance issued by the ICO also recognises that "Given the strong public interest in protecting the activities listed in section 31, it is likely that this will often outweigh the public interest in releasing the information."

However we do recognise that this should not be adopted as a default position and that the public interest must be considered on an individual case by case basis.

This exemption is intended to safeguard the exercise of public functions intended to protect the public from harm caused by wrongdoing, incompetence or mismanagement.

In conducting this test, we have considered the following factors in favour of disclosure:

- Disclosure can assist the public in understanding the basis upon which and how CQC makes decisions and this in turn may foster greater trust
- Disclosure may help the public understand some of the issues considered by CQC
- The principle of transparency which CQC strongly supports and aims to support where possible

Against this, we have considered the following factors against disclosure of the information:

- the strong public interest in avoiding likely prejudice to the regulatory function of CQC
- disclosure of this information could bypass our systems of checks and controls under the Health and Social Care Act 2008
- disclosure of this information could obstruct our regulatory function in determining whether registered care providers are compliant with the relevant standards and regulations
- disclosure of this information may discourage individuals from sharing information with CQC in future

The public interest would not be served by disclosing information which would prejudice our regulatory function.

Having considered the above factors, it is CQC's view that the public interest in withholding the information is greater than the public interest that may be served by disclosure therefore CQC will not provide the requested information.

Advice and assistance

Under section 16 of the Freedom of Information Act 2000 (and in accordance with the section 45 code of practice) we have a duty to provide you with reasonable advice and assistance.

If you need any independent advice about individual's rights under information legislation you can contact the Information Commissioner's Office (ICO).

The ICO is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

The contact details for the ICO are detailed below.

There is useful information on the ICO website explaining how individuals can access official information:

www.ico.org.uk/for-the-public/official-information

CQC Complaints and Internal Review procedure

If you are not satisfied with our handling of your request, then you may request an internal review.

Please clearly indicate that you wish for a review to be conducted and state the reason(s) for requesting the review.

Please be aware that the review process will focus upon our handling of your request and whether CQC have complied with the requirements of the Freedom of Information Act 2000. The internal review process should not be used to raise concerns about the provision of care or the internal processes of other CQC functions.

If you are unhappy with other aspects of the CQC's actions, or of the actions of registered providers, please see our website for information on how to raise a concern or complaint:

www.cqc.org.uk/contact-us

To request a review please contact:

Information Access
Care Quality Commission
Citygate
Gallowgate
Newcastle upon Tyne
NE1 4PA

E-mail: information.access@cqc.org.uk

Further rights of appeal exist to the Information Commissioner's Office under section 50 of the Freedom of Information Act 2000 once the internal appeals process has been exhausted.

The contact details are:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
SK9 5AF

Telephone Helpline: 01625 545 745

Website: www.ico.org.uk