

Response issued under the Freedom of Information Act 2000

Our Reference: CQC IAT 1920 0743

Date of Response: 10 January 2020

Information Requested:

A. *“Please can you provide the same data again, for all registered providers, for the years 2017/18 and 2018/19”*

Based on the previous request you refer to (CQC IAT 1718 0545), and the questions we provided you data in response to (i.e. that were not subject to one or more exemptions), we have addressed the following sub-questions in relation to this part of your request:

You would like... ***“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”***

You also asked:

B. *“Can you advise if there has been any change in the way that CQC collects, records or stores information on whistleblowing to CQC by the staff of provider organisations since I made the last FOI request?”*

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 first 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 can confirm that CQC does hold recorded information in relation to this matter.

As noted in the accompanying email, we are applying several FOIA exemptions to justify our refusal to provide some information with respect to question A.

These are:

- Section 44 - Prohibitions on disclosure
- Section 40 - Personal information
- Section 41 - Information provided in confidence
- Section 31 - Law enforcement

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.

We now, therefore, provide an explanation of the legal basis of these exemptions and our reasons for applying them. We also provide information about your rights to complain if you are unhappy with our application of these exemptions.

Exemptions from the right to know

Section 44 – Prohibitions on disclosure

Personal information relating to and identifying individual people within the recorded information has been obtained by CQC in confidence from whistleblowers in our role as the regulatory body.

Where personal information has been obtained or received by CQC, in circumstances requiring confidentiality disclosure may be a criminal offence under section 76 of the Health and Social Care Act 2008.

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. Consequently, we consider that disclosure of confidential personal information within the documentation would be an offence.

We therefore consider section 44(1)(a) of FOIA to be engaged.

Section 44(1)(a) 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 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.

Some exemptions within the FOIA require a public interest to be applied, where the use of the exemption must be weighed against the public interest in disclosing the information. This is not the case with section 44, which is an "absolute" exemption and thus does not require a public interest test.

Section 40 – Personal information

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

Individuals who can be identified in the recorded information have a reasonable expectation that a public authority, such as CQC, will not release information into the public domain under FOIA which could identify them.

Section 40 of the FOIA makes specific reference to the Data Protection Act 2018 (DPA), and requires compliance with this Act. The DPA regulates the use of "personal data" and the processing of that data, and in turn makes reference to the six Data Protection principles within Article 5 of the General Data Protection Regulation (GDPR).

We believe that releasing information concerning whistleblowers, as the term is utilised by CQC, could potentially breach the principles in paragraphs (a), (b) and (f) of Article 5(1) of the GDPR.

This exemption applies in any case where disclosure of the requested information into the public domain would be a breach of any of the principles. In particular, the first principle requires that disclosure of the information must be fair and lawful.

CQC, therefore, considers that it would be a breach of section 40 of the FOIA to disclose the names of any individuals who might be relevant to your request. Consequently, we are applying this exemption from disclosure.

No public interest test is required for this exemption.

Section 41 – Information provided in confidence

We consider some of the information 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 includes information about how we will use personal data (information that relates to and identifies living people) and other information to help us to carry out our role as the regulator of health and adult social care services in England:

www.cqc.org.uk/about-us/our-policies/privacy-statement

Our code of practice details how we obtain, handle and use personal information. The code can be viewed or downloaded through the above link.

Whistleblowers 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.

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 are also concerned that providing information that has been shared by individuals, such as whistleblowers, may discourage individuals from providing information to CQC in the future, if they perceive that information that they have provided in confidence to CQC has subsequently been disclosed into the public domain under FOIA.

When we receive information from members of the public, we advise them that we will always make every effort to avoid disclosing their identity. However, in some circumstances, we may have to disclose information that could identify an individual.

For example, we may have to make a disclosure to protect people from harm, to ensure that standards of care are met, or if we suspect that a serious criminal offence may have been committed.

We may make the disclosure to the police or another official body, or if required to do so by a court.

In this scenario we would let the individual know if we were making a disclosure that would identify them to another body.

Although we may potentially identify the individual to another public body or the police, the individual would have a reasonable expectation that CQC would not disclose information into the public domain under FOIA which could identify them.

We therefore consider that release of this information could potentially prejudice our regulatory function.

If individuals are discouraged from sharing information and concerns with CQC, this may impact upon our role as the regulatory body.

We use information of this nature to assist in our role of ensuring the quality and safety of care services.

If individuals are discouraged from sharing information this may impact upon the course of our duties leading to certain events going undetected and a resultant decline in the standards of care provided at care services to members of the public.

We consider the arguments above to also apply to the regulatory function of local authorities who are responsible for conducting safeguarding investigations.

We therefore consider this information 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 a provider is compliant with the regulations and standards.

Section 31 is a qualified exemption which means that CQC is required to consider 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).

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 mis-management.

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

- there is a public interest that CQC are open and transparent in the way we function
- the public interest that public authorities are accountable for their actions

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 and the local authority involved with regards to investigating safeguarding matters

- disclosure of this information would potentially discourage individuals from sharing information of concern with CQC in the future
- disclosure of this information may impact upon the privacy of the individual(s) who shared information with CQC and be a breach of their Data Protection rights
- disclosure of this information would bypass our systems of checks and controls under the Health and Social Care Act 2008
- disclosure of this information could be a criminal offence under section 76 of the Health and Social Care Act 2008 (without any defence being applicable)
- disclosure of this information could obstruct our regulatory function in determining whether registered care providers are compliant with the relevant regulations and standards

Having considered the above factors, it is our 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.

We consider the public interest test to favour withholding the original information.

We also take the that the summary of the information, which we have released in Tab 1 of the spreadsheet, meets the public interest for transparency and openness whilst protecting the data protection and privacy rights of the individual(s) in question.

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