

From: Minh Alexander <REDACTED>

Subject: Your Office's attempt to apply FOIA Section 31 exemption regarding documents about its performance

Date: 17 November 2022 at 11:44:59 GMT

To: Jayne Chidgey-Clark <REDACTED>

Cc: National Guardian's Office <REDACTED>

Reply-To: REDACTED

BY EMAIL

Jayne Chidgey-Clark
National Freedom To Speak Up Guardian

17 November 2022

Dear Jayne,

Your Office's attempt to apply FOIA Section 31 exemption regarding documents about its performance

I have received a response from your Office, forwarded below, claiming that it cannot disclose a copy of the internal audit by your Office in 2021, looking at case handling and the handling of whistleblower confidentiality.

Whistleblower confidentiality is a hugely serious issue with overwhelming public interest.

In some jurisdictions, breaching whistleblower confidentiality or revealing a whistleblower's identity is now a criminal offence.

For example, such offences were created in recent years under Australian and Irish legislation.

Your Office indicates that you have personally made the decision to apply FOIA Section 31 exemption - law enforcement - and that this is on grounds as follows:

"The National Guardian's Office was established under the Secretary of State for Health and Social Care's powers under the National Health Service Act 2006 as part of the implementation of the recommendations from the Freedom to Speak Up review (2015) with these overall purposes.

Internal audits are a way for organisations to test and improve their processes and improve their effectiveness and efficiency in performing their roles. A disclosure that would prejudice the effectiveness of future internal audits would therefore prejudice the future effectiveness and efficiency of the NGO in delivering on its purposes.

These prejudices would be likely to arise where disclosure of internal audit reports resulted in concern about the likely impact of disclosure of similar reports in the future. This would be likely to have the effect of prejudicing the candid and open approach of colleagues in their future interactions with auditors, and prejudicing the candid and open reporting of auditors findings in future reports. These prejudices to the effectiveness of the internal audit process would therefore be likely to prejudice the overall effectiveness and efficiency of the NGO in supporting Guardians in their work for the ultimate purpose of protecting the health and safety of people who speak up and patients.

The NGO also reserves the right to apply the exemption under section 36 of FOIA (prejudice to the effective conduct of public affairs) on the same basis as set out above. The section 36 exemption

requires that the prejudice would, or would be likely to, occur in the opinion of the 'qualified person'. Due to the arrangements by which the NGO is hosted by CQC, the qualified person for the NGO is the CQC Chief Executive.

Under the NGO's hosting arrangements, we do receive FOIA advice from CQC's Information Access Team, however decisions on disclosure are made within the NGO. In this case, the decision to apply the section 31 exemption was made by the National Guardian."

I reject these claims seeking to apply Section 31 FOIA exemption.

1. I believe they are highly speculative and not evidence based

To claim in public life that internal audits must not be published because they would reduce future participation and candidness is an unsustainable claim.

Public bodies must be accountable and all sorts of quality assurance data on whether public bodies are meeting standards is published everyday.

It is not an adequate argument to claim that assurance data should not be published essentially because some officers might not like scrutiny.

This is particularly so where there is immense public interest, such as whether the National Guardian is keeping adequate whistleblower case records and handling extremely sensitive whistleblower personal data appropriately and securely.

2. Your Office owes a particular duty of transparency to whistleblowers who may seek help from your Office. They should be in a position of being able to give informed consent to contact with your Office and your Office's dealings with them.

They have a reasonable right to know how appropriately and securely their cases will be handled.

A badly handled whistleblowing case, especially with breach of confidentiality or the potential for breaches, is a life changing matter that can seriously harm the prospects and health not only of the whistleblowers but their families too.

You should be proactively sharing your assurance data about your Office's performance, so that NHS staff can decide if they wish to take the risk of contacting your Office.

3. I do not believe that you and your Office genuinely hold the opinion that disclosing internal audit data would be harmful to the health and safety of individuals, as claimed:

"These prejudices to the effectiveness of the internal audit process would therefore be likely to prejudice the overall effectiveness and efficiency of the NGO in supporting Guardians in their work for the ultimate purpose of protecting the health and safety of people who speak up and patients. "

I do not believe that you and your Office genuinely hold this view because

A) It has always been your Offices to transparently publish your case review reports on provider bodies. These case reviews are de facto audits of the whistleblowing governance of these provider bodies.

The Office has stated that all NHS organisations should learn from your case reviews, and this is only possible if they are transparently published.

B) In your own self review tool for NHS Trusts, your Office repeatedly urges NHS trusts to internally audit their whistleblowing governance:

<https://minhalexander.files.wordpress.com/2018/11/national-guardian-self-review-tools-for-nhs-trusts-20180423-fts self review tool may2018-1.docx>

Crucially, this self review tool also urges NHS trusts to share the results of their internal audits externally, to support learning by others:

Page 11: ***"Reviews and audits are shared externally to support improvement elsewhere."***

I believe that your Office's claim of anticipated prejudice is arbitrary and not based on a genuine fear of real and meaningful prejudice.

4. Although your Office has claimed that disclosure would *"prejudice the future effectiveness and efficiency of the NGO in delivering on its purposes"*, I believe it is in fact your refusal to disclose the 2021 audit that is damaging to the integrity of the Office.

It is failing to live its own values and the values that it claims to expect of others.

Your Office has made numerous statements about the importance of leadership.

The National Guardian is explicitly supposed to lead on Freedom To Speak Up in the NHS, and to model and drive better culture.

<https://minhalexander.files.wordpress.com/2016/09/cqc-national-guardian-specification-v2-29-april-2016-final-799675.pdf>

Failure to disclose calls into question your leadership of the Freedom To Speak Up project.

When you apply such obvious double standards and avoid proper accountability for how your Office treats whistleblowers, this is much more likely to have a chilling effect on whether NHS whistleblowers feel they can rely on your Office for safe harbour and assistance, compared with your assertion that disclosure would impair confidence.

Your Office has claimed repeatedly that open learning is healthy and necessary.

It is obvious that if you fail to model this, there will be serious prejudice to public confidence in your Office to protect whistleblowers and therefore patients.

5. I note from your Office's email to me of 15 November 2022 that you reserve the right to apply FOIA Section 36 as well.

I believe similar arguments as above apply regarding the appropriateness of such an exemption.

It is inconsistent of the National Guardian to expect other bodies to share their internal audits externally to disseminate learning, and then to claim that it cannot be applied to your own Office.

This is poor leadership and I believe it is a misuse of power.

In my view, the public interest overwhelmingly favours disclosure, at the very least in part with redactions if absolutely necessary.

Please disclose:

1) The 2021 audit that has so far been withheld

2) The full 2018 audit, of which you have disclosed only a portion so far (see attached the obviously incomplete document disclosed by your Office)

3) All my personal data held by the National Guardian since 12 September 2022 onwards.

Please include all correspondence with the CQC since 12 September 2022 on the handling of my enquiries and FOI request regarding quality assurance of the National Guardian's whistleblower case record keeping and handling of whistleblower confidentiality.

Yours sincerely,

Minh

Dr Minh Alexander