



Neutral Citation number: [2023] UKFTT 894 (GRC)

Case Reference: EA-2022-0341

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard: On the papers

**Heard on: 6 September 2023
Decision given on: 26 October 2023**

Before

**TRIBUNAL JUDGE LIZ ORD
TRIBUNAL MEMBER ANNE CHAFER
TRIBUNAL MEMBER KATE GRIMLEY EVANS**

Between

PAUL JOHN CALVERT

and

**(1) THE INFORMATION COMMISSIONER
(2) CARE QUALITY COMMISSION**

Appellant

Respondents

Decision: The appeal is dismissed

REASONS

Preliminary matters

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the General Regulatory Chamber's procedure rules.

2. This is an appeal against the Commissioner's decision notice IC-154399-S4K4 of 31 October 2022, which held that the Care Quality Commission was entitled to refuse to disclose the requested information in accordance with section 31(1)(g), by virtue of section 31(2)(c) of the Freedom of Information Act 2000 (FOIA). It also held that the CQC breached section 10 of FOIA by failing to respond to the complainant's request within 20 working days of receipt. The Commissioner did not require the CQC to take any further action.
3. The matter of the breach of time limit is not appealed and the tribunal is not required to consider it.
4. The CQC also relied on other exemptions within FOIA. In their representations, the Commissioner and CQC requested that, in the event of the tribunal not upholding the Commissioner's decision in respect of section 31(1)(g), those other sections be considered. Given the Tribunal's decision to dismiss the appeal, the panel have not needed to do so.
5. The Commissioner did not request sight of the withheld information and made his decision without it. This tribunal has considered the withheld information, which was disclosed to us in a closed bundle.
6. There was a reference to a strike out application in the bundle. However, no such application was before us and accordingly we have not considered strike out.
7. At a preliminary hearing on 28 April 2023, the appellant submitted that he was already in possession of the withheld information from another source. If the appellant does already hold the information he seeks, he should not publish or disclose it to any other person.
8. The appellant alleged that the CQC breached his anonymity. However, this is not a matter for determination in this appeal and it is not relevant to the issue of whether his FOIA request is exempt from disclosure.

Role of the tribunal

9. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

10. We had before us the following documents:
 - a. An open bundle (698 pages), which included the parties' submissions and a witness statement from Sarah Dronsfield on behalf of the CQC;

- b. Closed bundle A (40 pages), which was disclosed to the appellant in response to a subject access request and was supplied to us for completeness. It was not disclosed to the public;
- c. Closed bundle B (543 pages), which was not disclosed to the appellant or the public. This is the material withheld from disclosure;
- d. Case management directions and ruling;
- e. Second respondent's final submissions.

Legal framework

General right of access to information

11. The relevant parts of section 1 FOIA provide:

“(1) Any person making a request for information to a public authority is entitled –

(a) To be informed in writing by the public authority whether it holds information of the description specified in in the request, and

(b) If that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) [...]

(4) The information –

(a) In respect of which the applicant is to be informed under subsection (1)(a), or

(b) Which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, [...]

Effect of exemptions in Part II

12. The relevant parts of section 2 FOIA provide:

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that -

(a) [...]

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

13. Section 31(1)(g) is a qualified exemption and is therefore subject to the public interest test under section 2(2)(b) FOIA.

Law enforcement

14. The relevant parts of section 31 FOIA provide:

“(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, [...]

15. The CQC referred to the following caselaw:

16. “Functions” for the purposes of s.31(1)(g) include any power or duty exercised by a public authority for a specified purpose conferred by order under statute, common law or the Royal Prerogative: *WS v Information Commissioner* [2013] UKUT 181 (ACC) at §55(3), which was followed in *DVLA Information Commissioner* [2020] UKUT 334 (AAC); [2021] 1 WLR 2073 (UT) (“*DVLA*”) at §§39-41.

17. Guidance on the application of prejudice-based exemptions under FOIA was given by the Information Tribunal in *Hogan v Information Commissioner* [2011] 1 Info LR 588, §§29-30, 34-35, which was approved by the Court of Appeal in *DWP v Information Commissioner and another* [2017] 1 WLR 1 at §27 *per* Lloyd Jones LJ.

18. The Tribunal described a three-stage analysis, summarised as follows:

Stage one: identify the “*applicable interests*” within the relevant exemption. The prejudice envisaged must be to the particular interest the exemption is designed to protect.

Stage two: consider the “*nature of the prejudice*” being claimed. The “*evidential burden*” on the party relying on the exemption falls in two parts: (i) the requirement to show that “*some causal relationship exists*” between disclosure of the information and the prejudice claimed, and (ii) the requirement to show that the claimed prejudice is “*real, actual or of substance*”.

Stage three: determine the “likelihood of occurrence of prejudice”. The phrase “likely to prejudice” within the prejudice-based exemptions means the chance of prejudice being suffered is more than a hypothetical possibility. There must be a “real and significant risk” of such prejudice such that it “may very well” occur. However, the prejudice need not be more probable than not.

19. The relevant date for the assessment of the public interest test is the date on which the request for information was first refused: *Montague v Information Commissioner & Department for International Trade* [2022] UKUT 104 (ACC) at §25. Facts and matters which existed at the date of the original refusal, as well as facts which have arisen subsequently but which throw light on the grounds now given for refusal, may be admissible and relied upon: *R (Evans) v Attorney General* [2015] UKSC 21 at §73.

Factual background

20. CQC is the regulator of health and social care providers in England and was established under the Health and Social Care Act 2008 (the 2008 Act) with the objective of protecting and promoting the health, safety and welfare of people who use health and social care services.
21. It has a statutory duty to ensure that providers comply with fundamental standards of care, and it must review the carrying on of providers’ regulated activities, assess their performance, and publish a report of its assessment. It may carry out inspections of the carrying on of regulated activities. This includes obtaining and assessing evidence as to compliance, assessing and reporting on the quality and safety of care provided, and taking action where providers do not meet their legal obligations.
22. CQC undertakes continuous monitoring and gathers information, which includes the views of the public, to help them decide when, where and what to inspect. Following an inspection, a draft of its inspection report is sent to the provider for factual accuracy checks. This allows the provider to tell CQC where information is factually incorrect and where evidence in the report may be incomplete.
23. Routine inspections were paused during the Covid pandemic. CQC’s last published report of the North East Ambulance Service (NEAS) was in January 2019, following inspection in September and October 2018. Overall, it was rated as good.
24. Public interest disclosures were made to CQC in May 2020 and July 2021 alleging health and safety and procedural issues with NEAS. CQC has published guidance stating how it handles whistleblowing enquiries, which includes an inspector considering the information when monitoring the provider’s compliance.
25. In response to the disclosures, CQC made enquiries and decided not to take any formal action but to keep the situation under review pending the next inspection of NEAS and publication of its inspection report.

26. On 7 September 2021 CQC wrote an email saying it had not identified any regulatory breaches during its investigation of the whistleblowing concerns and it considered these matters closed. It did not indicate any continuous monitoring of NEAS.
27. However, CQC continued to monitor the situation pending its next routine inspection, which at the time was scheduled for 2022, and which actually took place in July and September 2022, culminating in an inspection report published on 1 February 2023. The inspection found a number of areas where NEAS needed to make improvements and served it with a warning notice telling it to make improvements.

Request, response and review

Request

28. This appeal concerns a request made on 14 November 2021 for information relating to the CQC's investigation and subsequent outcomes, of the two protected disclosures made in May 2020 and July 2021.

Response

29. The CQC acknowledged the request on 16 November and informed the appellant that their statutory deadline for response was 10 December 2021. The CQC confirmed to the appellant on 13 December that it was in breach of its deadline and that they were currently not able to respond to his request.
30. On 14 December the CQC responded substantively, confirming that they held the information, and enclosed some correspondence in a password protected PDF. They withheld the remainder of the information on the basis it was exempt from disclosure under sections 31 (Law enforcement), 40 (Personal Information), 41 (Information provided in confidence) and 44 (Prohibitions on disclosure) of FOIA.

Review

31. On 14 December the appellant requested an internal review and pointed out that CQC should not have supplied him with certain email exchanges which were part of a subject access request.
32. The review, which CQC targeted for 17 January 2022 was delayed, and was sent to the appellant on 27 January. CQC upheld its refusal to supply the remaining information saying the exemptions under sections 31, 40, 41 and 44 had been correctly applied, but that they should have used the provision allowing them to neither confirm nor deny holding the requested information. They also accepted that the emails should not have been disclosed as part of the FOIA request.
33. The appellant referred the matter to the Commissioner on 5 February 2022.

Decision notice, appeal and responses

Decision Notice

34. In the decision notice of 31 October 2022, the Commissioner decided that section 31(1)(g) by virtue of section 32(1)(c) applied to the entire request, and that the public interest in upholding the exemption outweighed the public interest in disclosure. He did not consider the other exemptions raised by CQC. It was recorded that CQC had confirmed it no longer wished to rely on the “neither confirm or deny holding the requested information” subsections of the exemptions cited.
35. The Commissioner decided that disclosure would likely prejudice the exercise of CQC’s regulatory functions. This was because, at the time of the appellant’s request, CQC was engaged in ongoing actions to address the issues raised about NEAS, and disclosure would be likely to discourage NEAS and other registered providers from sharing confidential, sensitive information for fear of public disclosure. Whilst the CQC had powers to require registered providers to disclose information, it relies on them being cooperative and proactive in sharing information with the Commission. Sharing the information with the public would discourage such engagement.
36. In terms of the public interest, the Commissioner accepted that there was clearly public interest in understanding how the concerns about NEAS had been considered to date and how CQC had reached the conclusion that no immediate regulatory action was required. However, matters were still ongoing and would not be complete until CQC undertook its inspection, published its report, and took any further regulatory action it considered appropriate. The request for information fed into those ongoing matters.
37. The Commissioner did not consider it was in the public interest to prejudice CQC’s ongoing regulatory considerations of NEAS or wider. It said that CQC relied heavily on concerned individuals coming forward, and in registered providers cooperating openly, candidly and voluntarily. Disclosure would be likely to hinder these processes and the ability of CQC to carry out its regulatory functions effectively. This was not in the wider interest of the public.
38. For the above reasons, the Commissioner was satisfied that the public interest in favour of disclosure was outweighed by the public interest in maintaining the exemption.

Appeal (31 October 2022)

39. The submissions are summarised as follows:

Grounds

40. Ground 1 - The appellant submits that it is not the case that section 31(1)(g) FOIA by virtue of section 31(2)(c) is engaged because CQC had closed its investigation into NEAS at the time of his request in November 2021. In support, he refers to the CQC’s emails of 7 September 2021, which said they considered the matter closed. Therefore, he says that there was no live investigation taking place and therefore disclosure

would not have prejudiced ongoing matters. The information should have been supplied.

41. Ground 2 - He goes on to argue that, if the tribunal upholds the engagement of the exemption, the public interest favours disclosure. He relies on there being no live investigations, and therefore prejudice to the CQC's function. He says however that there is a substantial public interest in disclosure, given that the subject matter concerns standards of care and patient safety at NEAS. The public interest in such matters is considerable and disclosure of the information due to such interest outweighs non-disclosure.

Commissioner's response (21 November 2022)

42. The Commissioner repeats his findings in the decision notice. With respect to the appellant's reliance on the CQC having concluded its investigation, the Commissioner's understanding is that no investigation had been conducted, but rather the CQC had gathered evidence and information to support its regulatory decisions.
43. The Commissioner referred to the CQC's position, which was that its regulatory response would not be concluded until a full inspection of NEAS had been done and a report published and any further regulatory action completed at that time. Therefore, in the Commissioner's view, whilst there was no ongoing formal investigation at the time of the request, matters were still under some level of review pending an inspection of NEAS, and the withheld information was still current and live in that context.
44. Disclosure would discourage providers from sharing information with the CQC and whilst it had powers to compel disclosure, the efficiency of regulation was greatly assisted by providers' cooperation and being pro-active. Disclosure would be likely to make NEAS and other providers less willing to disclose information in the future.
45. Accordingly, the Commissioner remained satisfied that disclosure would be likely to prejudice the CQC's function of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
46. For the reasons set out in the Decision Notice, the Commissioner maintained that the public interest favoured maintaining the exemption.

CQC's response (29 December 2022)

Regulatory function

47. Inspection reports are the CQC's statutory tool for informing the public as to the safety and quality of care. There are processes in place to ensure the accuracy of reports and to allow providers to challenge the CQC on its evidence, judgments and ratings in advance of publication. This factual accuracy process gives inspectors the opportunity to consider all information forming the basis of their judgments.

48. Where the CQC receives information of concern about a provider between inspections, it will review that information alongside other intelligence it holds, seek further information from the provider as necessary, and make a decision as to the regulatory response. This may include conducting an inspection to gather further evidence and taking enforcement action.

Ground 1

49. The argument is wrong for two reasons.

50. First, the purpose of *“ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise”* is not confined to ad hoc investigations which CQC may carry out in response to complaints submitted to it. The reviews it carries out under section 46 of the 2008 Act encompass both ad hoc and routine inspection activity. CQC may gather information and evidence relating to a service provider in between routine inspections which will be relevant to the CQC’s assessment of performance when the next inspection takes place.

51. At the time of CQC’s initial response in December 2021, it had decided not to take any immediate regulatory action and considered its immediate response to the whistleblowing complaint to be closed. However, its regulatory response to the matters to which the requested information relates would not be concluded until the CQC carried out a full inspection into NEAS and published a final inspection report.

52. Inevitably, matters which had come to CQC’s attention in respect of NEAS as part of its investigations in 2020 and 2021 would be relevant to its assessment of NEAS’s performance in its next inspection report. Such information was, accordingly, relevant to the exercise of CQC’s functions for the purpose listed in section 31(2)(c) FOIA.

53. Secondly, prejudice is not limited to the determination of a live investigation in a particular case. It extends to the exercise of functions for the purpose of ascertaining whether circumstances justifying regulatory action exist or may arise. This must include anything which would prejudice the exercise of CQC’s statutory inspection activity.

54. Disclosure in December 2021 would have been likely to prejudice CQC’s functions taken individually and/or cumulatively:

First, the regulatory response would not be concluded until the next routine review and publication of the inspection report. The information would be relevant to NEAS’s performance for the purposes of ongoing monitoring and the routine inspection activity. Disclosure would be detrimental to further investigations.

Secondly, information in inspection reports is subject to the factual accuracy and challenge processes, which are crucial to ensure published conclusions are credible, fair and accurate. Disclosure would circumvent and undermine these quality assurance processes and prejudice CQC’s reputation as a fair and credible regulator.

Thirdly, NEAS passed confidential information to CQC in confidence following the whistleblowing disclosures. Disclosing this information would undermine CQC's relationship with registered providers. Whilst CQC has statutory powers to obtain information, providers would be likely to be less forthcoming and proactive in sharing information if it were to be disclosed to the world, so that the extent of the information would be less comprehensive and CQC's effectiveness would be reduced.

Fourthly, disclosure would prejudice CQC's functions by undermining the confidence of anonymous whistleblowers who make disclosures on a confidential basis. It is essential to the effectiveness of CQC's regulatory functions that it is able to receive information from third parties on an anonymous basis. Disclosure may discourage other potential whistleblowers.

Ground 2

55. CQC recognises the public interest in disclosure of the requested information and information on how CQC operates and carries out its regulatory functions. However, in December 2021, the time of CQC's initial response, the public interest firmly favoured maintaining the exemption from disclosure for the following reasons:
56. First, there is a powerful public interest in avoiding the prejudice as set out above. Its functions under the statutory scheme provides for published reviews and there is a strong public interest in avoiding disclosures outside of that scheme so as not to undermine CQC's functions.
57. Secondly, in circumstances where CQC's final conclusions on the information and evidence are pending, the public interest is better served by enabling CQC to carry out its statutory functions of scrutinising NEAS in the usual way.
58. Thirdly, the value of the requested information for improving understanding of how CQC preforms its regulatory functions is limited where, at the time of the initial response, the relevant matters had yet to be considered as part of CQC's ordinary inspection mechanism. The public interest in understanding CQC's regulatory decision-making for the purposes of transparency and accountability, is better served by publication of quality-assured inspection reports.

Appellant's reply (1 January 2023)

59. The appellant referred to his grounds of appeal and made the following additional submissions:
60. After the second whistleblowing disclosure on the 16 July 2021, the CQC said it would conduct a review, and its 7 September email unambiguously indicated that, having done so, it did not identify any regulatory breaches and considered these matters as closed.
61. Therefore, section 31 FOIA is not engaged.

62. He goes on to submit that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information.
63. The public interest includes maintaining the good order of society for the wellbeing of the public. The Commissioner and CQC have misapplied the test, placing the interests of public bodies and other government agencies before the interests of the public. Such government agencies and public bodies cannot exist without funding of the public via taxation.
64. The appellant referred to external investigations into NEAS (Audit One and Audit One review) from 2020, which revealed certain failings.
65. He also made reference to Northumbria Police recording a crime in relation to the same whistleblowing disclosures, basing this in part on the unpublished Audit One Report.
66. He said the review and investigations referred to above are now in large part already in the public domain.
67. Also that in May 2020, NEAS advised that the whistleblowing concerns, in part had been upheld.
68. Despite this, malpractice continued and further whistleblowing disclosures were made to NEAS and a further protected disclosure to the CQC.
69. Whilst the Information Commissioner and the CQC say that disclosure would be prejudicial to the CQC's regulatory function, the CQC's regulatory function is questionable given its failure to act on the information provided.
70. It is clear that members of the public have suffered harm as a result of the actions and omissions of the referenced public bodies, and the CQC should have taken steps at the outset of the disclosures made to them. The CQC's submissions and suggestion that they have to wait a prescribed period of time before conducting an inspection, are incompatible with public safety and their role as regulator.
71. The public deserve to know why the CQC undertook the course of action they did in relation to the disclosures.
72. The Information Commissioner and the CQC are making dangerous public interest submissions, inferring that the relationship between regulator and public body outweighs the public interest and patient safety. Public interest must come before the self-interest of any organisation for the good order of society. In any event the CQC has powers to compel providers to assist in investigations.
73. Disclosure is in the public interest as these matters identify failures within CQC processes. Neither the Information Commissioner or the CQC address what impact not disclosing the information would have on staff making protected disclosures in the future.

74. The CQC failed to take regulatory action or carry out a robust investigation into NEAS and this requires scrutiny in the public interest. The CQC requires scrutiny in relation to its handling of whistleblowers. Whistleblowers provide valuable information, perform a vital public service and protect us all from harm.
75. It is naïve to suggest that all providers are open and candid and offer information voluntarily, and indicates a cognitive bias in favour of public bodies. The Information Commissioner and the CQC appear happy with some form of self-regulation and are deferent towards providers.
76. The Commissioner recognises that there are clear public interest arguments in understanding how the concerns about NEAS have been considered to date and how the CQC reached the conclusion that no immediate regulatory action was required. There is public interest in transparency and accountability. Disclosure would assist and promote public understanding and help improve good decision making with public bodies. It would go some way to ensuring the upholding of standards and integrity.
77. Disclosure now of what enquiries the CQC did or did not do in May 2020 and July 2021, would not affect any alleged inspection. Also a large amount of taxpayers' money has been spent on independent review and investigation in 2020. NEAS accepted the findings of these reports and it is therefore questionable as to why CQC did not act upon the information in these reports or why these reports have not been published.

Appellant's supplementary reply (3 January 2023)

78. In this response the appellant referred to an email dated 30 June 2022 sent to him by NHS England, which referred to the CQC investigating the case, albeit they also said it was part of an ongoing investigation.
79. The appellant suggested that the CQC were in possession of sufficient information to make an expedient decision and this was apparent in May 2020 from the Audit One report and the investigation into governance of NEAS. He says NEAS has been dishonest and not candid, as proved by the investigations, yet CQC took them at their word.

Appellant's second supplementary reply (3 February 2023)

80. This response refers to the CQC's inspection report of NEAS published on 1 February 2023, which he says corroborates many of the whistleblowing concerns raised in May 2020 and again in July 2021. Therefore, given CQC's inaction in May 2020 and July 2021, it is entirely relevant and in the public interest to understand why the CQC did not act upon such concerns at the time.

CQC's final submissions (31 May 2023)

81. First, this provides a reminder that the date for considering the exemption is the date of CQC's response and secondly, and with respect to the alleged breach of the appellant's anonymity, it is not for determination in this appeal and is irrelevant to the question of exemption.

Issues for the tribunal

82. At the time of CQC's response to the appellant's request:

- 1- Was CQC carrying out a "function" of ascertaining whether regulatory action was justified with respect to NEAS?
- 2- Had CQC concluded ascertaining whether regulatory action was justified against NEAS, or was it ongoing thereby engaging section 31 FOIA?
- 3- Would disclosure have been likely to prejudice CQC's function of ascertaining whether regulatory action was justified against NEAS?
- 4- Did the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Discussion and conclusions

83. Under S31(1)(g) and 31(2)(c) FOIA, information is exempt if its disclosure would, or would be likely to, prejudice the exercise of CQC's functions of ascertaining whether circumstances, which would justify regulatory action under the 2008 Act, exist or may arise.

84. The correct time for considering prejudice and the public interest balance is the date of CQC's response to the appellant's request, which was 14 December 2022 (*Montague v Information Commissioner and Department for International Trade*).

Issue 1: Was CQC carrying out a "function" of ascertaining whether regulatory action was justified with respect to NEAS?

85. At the time of its response, the CQC was gathering information and monitoring the performance of NEAS, pursuant to its statutory duty of ensuring compliance with fundamental standards of care. This included consideration of information provided by whistleblowers and the request and receipt of information from NEAS and other key stakeholders. This was all part of the process which fed into its deliberations on whether any regulatory action was justified against NEAS.

86. Consequently, CQC was carrying out functions of ascertaining whether regulatory action under the 2008 Act existed or might have arisen.

87. ***Issue 2: Had CQC concluded ascertaining whether regulatory action was justified against NEAS, or was it ongoing thereby engaging section 31 FOIA?***

88. CQC was monitoring and gathering information about NEAS, pending its next inspection, which at the time was scheduled for 2022. As part of this process, it considered the whistleblowing disclosures, and requested and obtained information from NEAS and key stakeholders. Whilst it specifically decided not to take any action at that stage with respect to the disclosed information, it kept the situation under review through the monitoring process.
89. Its 7 September 2021 email, saying the matter was closed, only related to the specific matters contained within the disclosures at the time. The information obtained as a result was, however, relevant to the ongoing scrutiny of NEAS.
90. The decision not to act on the disclosed information at the time did not mean there would not be any action taken in the longer term. The disclosures were part of a wider picture and a greater information gathering exercise that CQC was undertaking, which was to feed into its next inspection and decision on the need for regulatory action.
91. Therefore, CQC had not concluded ascertaining whether regulatory action was justified with respect to NEAS. The situation was ongoing and section 31 FOIA was engaged.

Issue 3: Would disclosure have been likely to prejudice CQC's function of ascertaining whether regulatory action was justified against NEAS?

92. We accept the submissions of the second respondent in this respect, and conclude that disclosure of the withheld information would have been likely to prejudice CQC's functions in the following ways:
93. First, it contained material which would probably be relevant to CQC's next inspection of NEAS. Disclosing it to the world prior to the published inspection report would likely hinder CQC's further investigations.
94. Secondly, releasing raw information would bypass and undermine the quality assurance processes that are built into the statutory inspection procedure, in that there would be no factual accuracy check or ability to challenge. This could impact on how CQC's inspection report was perceived in terms of credibility and fairness to the service provider.
95. Thirdly, disclosure would be likely to undermine CQC's relationships with registered providers, in that they might be less forthcoming with confidential information, which would probably be less comprehensive. Whilst CQC has statutory powers to obtain information, its effectiveness is still reliant on cooperation and the proactive sharing of information.
96. Fourthly, disclosure of the information would be likely to undermine the confidence of anonymous whistleblowers who provide information confidentially.

This might discourage other whistleblowers from coming forward and, in turn reduce the effectiveness of CQC's regulatory functions.

Issue 4: Did the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

Public interest in disclosing the information

97. There is a general public interest in disclosing information on how CQC operates and carries out its regulatory functions, and a specific public interest in information relating to the whistleblowing disclosures with respect to health and safety and procedural issues.
98. However, this is tempered by the fact that CQC provides for disclosure by way of CQC's inspection scheme. Consequently, the public are kept informed of CQC's regulatory processes and decisions through CQC's inspection reports. The incremental benefits to the public of disclosing the raw information at an earlier stage would, at best, be minimal.
99. There is no evidence to support the appellant's contention that CQC failed to take appropriate regulatory action or carry out a robust investigation into NEAS. Whilst he contends that such an investigation ought to have been carried out at the time of the disclosures, releasing the information at the time of the request would not have provided a reliable picture of the wider situation and how CQC was carrying out its regulatory function.

Public interest in maintaining the exception

100. We accept the second respondent's submissions on the public interest in maintaining the exception as follows:
101. First, there is public interest in avoiding the prejudice set out under Issue 3 above.
102. Secondly, where CQC has not finalised its conclusions on the information and evidence, the public interest is better served by CQC undertaking its statutory function and publishing its quality assured inspection reports at the appropriate time.
103. Thirdly, the value of the information to the public in enhancing understanding of how CQC performs its regulatory functions is limited as, at the time of the response, CQC had yet to decide how to take matters forward.

Balance

104. Having balanced all matters raised, we conclude that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Summary of decision

105. For the above reasons, we conclude that the CQC was entitled to withhold the requested information under sections 31(1)(g) and 31(2)(c) FOIA.

Signed Liz Ord

Date: 21 October 2023

Judge of the First-Tier Tribunal

Promulgated

Date: 26 October 2023