

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2022

Public Authority: Care Quality Commission
Address: City Gate
Gallowgate
Newcastle
NE1 4PA

Decision (including any steps ordered)

1. The complainant has requested information about a property that he owns, but does not occupy. The Care Quality Commission ("the CQC") refused to confirm or deny holding information within the scope of the request and relied on section 40(5B) of FOIA (third party personal data) in order to do so.
2. The Commissioner's decision is that the CQC is entitled to rely on section 40(5B) of FOIA to neither confirm nor deny that it holds any information relevant to the request.
3. The Commissioner does not require further steps.

Request and response

4. On 19 August 2021, the complainant wrote to the CQC, requested information about a particular property ("the Property") and explained his interest in the Property and his connection to the occupier of the Property ("the Occupier"). The information sought was as follows:
 - "1) The details of the business insurance policy(s) that CQC and or [the Occupier] have/had to cover use of [the Property] where [the Occupier] lives, for Business use, namely routinely & regularly hosting CQC team meetings.
 - "2) The date when CQC first started using [the Property] as the venue for the business team meetings

- "3) All the dates on which the property was used by CQC as the venue for team meetings.
 - "4) The list of safety checks/certificates CQC requires before allowing domestic properties to be used as a venue for team meetings? ie. Electrical, gas, fire, structural etc
 - "5) How often these checks are requires [sic] to be carried out ?"
5. The CQC responded on 3 September 2021. It stated that confirming or denying that it held any relevant information would, in itself, reveal personal data about a third party – however it stated that it was relying on section 40(5A) of FOIA to refuse to confirm or deny that information was held. Section 40(5A) applies where the information in question would (if it existed) be the personal data of the person requesting it.
 6. Following an internal review the CQC wrote to the complainant on 26 October 2021. It stated that it ought to have relied upon section 40(5B) of FOIA to refuse to confirm or deny that information was held, but was otherwise satisfied with its original refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 12 January 2022 to complain about the way his request for information had been handled.
8. On 27 July 2022, the Commissioner wrote to the complainant to offer his initial view of the complaint. He (the Commissioner) considered that, in the particular circumstances, the CQC would have been entitled to refuse to confirm or deny holding any relevant information. The complainant did not accept the Commissioner's view and asked for a decision notice.
9. The Commissioner considers that the CQC has set out its position adequately in its refusal notice and internal review. Given his own expertise as the Commissioner for Data Protection, he considers that he has sufficient information on which to base a decision without requiring a formal submission from the CQC. However he did ask the CQC whether it wished to add anything to its previous responses – which it did not.
10. The Commissioner considers that the scope of this complaint is to determine whether the CQC was entitled to rely on section 40(5B) of FOIA to neither confirm nor deny holding any information within the scope of the request.

Reasons for decision

Section 40 - personal information

11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
12. Therefore, for the CQC to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

13. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. The complainant argued that the information he was requesting only related to any business use the CQC had made of the Property and that he had no interest in the personal data of any third party.
17. The Commissioner accepts that the information in question (if it were held) would provide details of any business purpose for which the CQC uses the Property (if in fact it does make such use). However, confirming (or denying) that such information was held would, in turn, also reveal something about the way that the Occupier uses their home. If the CQC were to confirm that it holds information of the type requested, it would be revealing to the world at large that the Occupier is using the Property for work purposes. If the CQC were to deny that it holds any information, it would be confirming that the Occupier does not

use their property for work purposes. Whether it issues a confirmation or a denial, the CQC would be revealing something about the Occupier's use of their private home and about their work/life balance.

18. Given that the request specifically identifies both the Occupier's name and the address of the Property, the Commissioner is satisfied that the Occupier is identifiable from the request.
19. As the Occupier is identifiable and as confirming or denying that information was held would reveal something about the Occupier, the Commissioner is satisfied that the CQC cannot issue a confirmation or a denial that it holds relevant information without revealing some of the Occupier's personal data. The first criterion set out above is thus satisfied and the Commissioner must now consider whether there is a lawful basis for processing the personal data in this manner.

Would confirming whether or not the requested information is held contravene one of the data protection principles?

20. Article 5(1)(a) UK GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

21. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.
22. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that processing shall be lawful **only** if and to the extent that at least one of the conditions listed in the Article applies.
23. As there is no evidence that the Occupier has consented to the disclosure of any of their personal data (and they would be under no obligation to provide such consent), the Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and

freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"¹.

24. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-
- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - (ii) **Necessity test:** Whether confirmation as to whether the requested information is held (or not) is necessary to meet the legitimate interest in question;
 - (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
25. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.
26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

¹ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

27. The complainant has explained his particular connection to the property. He is concerned, he says, that the Property may be being used in a manner that is inconsistent with the terms of the mortgage and/or the insurance policy on the Property – both of which are in his name. He is concerned that such use might have (unknowingly to him) either invalidated the insurance policy or breached the terms of the mortgage.
28. The Commissioner recognises that there is also a legitimate in the CQC being transparent and in it ensuring that it has carried out appropriate checks to ensure that staff are working in safe environments.

Necessity

29. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is must therefore be the least intrusive means of achieving the legitimate aim in question.
30. In the circumstances, the Commissioner is not convinced that issuing a confirmation or a denial is necessary to achieve the legitimate interest identified.
31. When a response is made under FOIA, that response is considered to have been made to the world at large. It is the equivalent of the CQC publishing the response on its own website. In this case, the Commissioner is satisfied that there are less intrusive means of achieving the legitimate interests.
32. If the complainant does have genuine concerns about how the Property's usage may affect him, he is at liberty to raise his concerns with either the insurance company, his mortgage lender, or both. Appropriate investigations can then be carried out to determine whether any conditions are being breached. That can be achieved without the CQC issuing a public confirmation or a denial that it holds information. Equally, given the particular circumstances, the complainant may also have recourse to the courts. This, again, would be a less intrusive means of achieving the legitimate interest.
33. On the broader issue of ensuring that CQC employees are working within a safe environment, the Commissioner considers that any CQC employee who had concerns about their working environment would be

entitled to raise those concerns internally with the CQC or – if the concerns were particularly serious – with the Health and Safety Executive. Neither of these avenues require an individual's personal data to be revealed to the world at large, therefore they are less privacy-intrusive than issuing a confirmation or a denial under FOIA that the information is held.

34. The Commissioner is therefore satisfied that, in the circumstances of this case, issuing a confirmation or a denial is not necessary to achieve a legitimate interest and therefore there is no lawful basis upon which the CQC could process the Occupier's personal data in this manner. The processing (ie. the issuing of the confirmation or denial) would be unlawful and would thus breach the first data protection principle.
35. The Commissioner therefore agrees that, in the circumstances of this case, the CQC was not only entitled, but actually required, to rely on section 40(5B) of FOIA to neither confirm nor deny holding information within the scope of this request.

Right of appeal

36. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF