

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2024

Public Authority: Equality and Human Rights Commission
Address: Arndale House
The Arndale Centre
Manchester
M4 3AQ

Decision (including any steps ordered)

1. The complainant has requested details about an investigation. The above public authority ("the public authority") relied on section 31 of FOIA (law enforcement) to refuse to confirm or deny that the information was held.
2. The Commissioner's decision is that the public authority was entitled to rely on section 31 of FOIA to refuse to confirm or deny holding the information. He also finds that the public authority breached section 17 as it failed to issue an adequate refusal notice.
3. The Commissioner does not require further steps to be taken.

Background

4. The complainant has explained to the Commissioner that his request relates to [an incident in 2016](#). An employee at Staffordshire Police provided a list of what the organisation deemed to be "persistent complainants" to Midlands Partnership NHST Trust. The employee asked the Trust whether any of the individuals on the list were "known to mental health services and what for."
5. The Trust appears to have shared some information – though later accepted that the sharing was done "outside of Trust protocol."

Request and response

6. On 14 February 2024, the complainant wrote to the public authority and, referring to a complaint previously submitted to that body, requested information in the following terms:

"please provide;

1: Your decision on any actions taken or intended actions to be taken.

2: Copies of any documents issued to and or received from the organisations identified above regarding the described breach of the ECHR?

3: If no actions have been commenced or will not be commenced then the legal reasons and rationale as to why that position has been adopted?."
7. The public authority responded on 26 February 2024. It refused to confirm or deny holding any information and relied on section 31 of FOIA in order to do so. It upheld this position following an internal review.

Reasons for decision

8. Section 31 of FOIA allows a public authority to refuse to confirm or deny that it holds particular information if the mere act of confirming (or denying) that that information is held would, in itself, make it harder for a regulator to carry out its regulatory functions.
9. The public authority noted that Part 1 of the Equality Act 2006 gives it various regulatory powers to ensure organisations comply with equality and human rights legislation. It argued that confirming or denying that the information was held would harm its ability to decide whether someone had complied with the law or harm its ability to decide whether it needed to carry out regulatory action, or both.
10. This harm would be likely to occur because:

"Confirming that a particular line of enquiry is (or is not) active, or confirming who or what is (or is not) the subject of potential regulatory action, would be likely to harm the outcome of any such action now and in the future. If the organisations identified ... were to become aware that we may be considering regulatory action, but have not been formally contacted by the Commission, they may have the opportunity to destroy or conceal key evidence whilst the case is

being triaged, which would prejudice our ability to ascertain whether they have failed to comply with the law and / or whether the circumstances justify regulatory action, should we determine such action to be necessary.

“Further, consideration must be had to the mosaic effect. If we were to routinely confirm or deny whether we held information of the description specified...this would provide a means for any parties which suspected that they may be subject to regulatory action now or in the future to have this confirmed. The parties could then take steps to conceal evidence, thereby prejudicing the outcome of any such action and the ability for it to reach a fair conclusion. We must therefore ensure that any requests for information relating to regulatory action are issued with a consistent refusal to confirm or deny unless such action is both taking place and has been publicised.

11. The Commissioner is satisfied that there is a reasonable chance of the harm occurring. At the point that the request was responded to it was not unreasonable to suppose that, the public authority might either have yet to decide whether to take regulatory action or might have decided to take action but still been in the process preparing its investigation, prior to contact the complained-about organisation.
12. Confirming that the information was held would confirm that the public authority was (or was intending to) investigate the organisation concerned.
13. The Commissioner accepts that, where a regulator is intending to carry out an investigation – particularly one likely to require the seizing of evidence – it is important that it does not give advance warning to the subject of that investigation. If the subject of the investigation knows in advance that they are likely to be investigated, they will have the opportunity to destroy or conceal evidence before it can be seized.
14. Whilst there are strong incentives for organisations to not do this – as they might be committing a criminal offence – the Commissioner accepts that the chance of this happening is more than hypothetical.
15. The Commissioner also accepts that, during the stage where this preparatory work would be carried out, if it were necessary (and the Commissioner is not suggesting that such work was or was not being carried out in respect of the complaint referred to in the request), then the public authority needs to adopt a consistent approach to confirming or denying that such information is held.
16. If the public authority were to refuse to confirm or deny when it actually **did** hold information, but deny holding information when it **didn't**, this

would quickly become obvious and would undermine the purpose of refusing to confirm or deny in the first place.

17. The Commissioner is therefore satisfied that the exemption is engaged.

Public interest test

18. Even where confirming or denying that information is held would harm the ability of a regulator to regulate, the public authority must still do so, unless it can demonstrate that the balance of the public interest favours maintaining the exemption.
19. The complainant has pointed to the seriousness of the original incident. He argues that the individuals involved had their human rights breached and there is a strong public interest in understanding what action the regulator of human rights has taken, or intends to take.
20. The Commissioner recognises that, whilst the number of individuals involved is relatively small, the impact on their lives is potentially severe.
21. He further notes that some of the individuals involved, if they were known to mental health services at the time, would have been in a vulnerable position.
22. However, in the circumstances of this case, he is persuaded that the balance of the public interest should favour maintaining the exemption. This is primarily because he accepts that, at the time the request was responded to, the public authority may (had it decided to carry out an investigation) have still been preparing for its work.
23. The public authority needs a private space to consider and prepare for an investigation without the subject of the investigation knowing. It is not in the public interest to harm the public authority's ability to investigate thoroughly and fairly.
24. Once again, whilst the complaint may or may not have reached such a stage, there is a public interest in allowing the public authority to maintain a consistent stance to as not to undermine the purpose of the exemption.

Procedural matters

25. In its refusal notice, the public authority informed the complainant that it was relying on section 31 of FOIA (though not the specific sub-section) to refuse to confirm or deny that the information was held, but

refused to provide any further detail because it said that to do so would undermine its use of the exemption.

26. Section 17 of FOIA requires a public authority to issue a refusal notice if it is relying on any exemption. It must inform the requester:
 - that the request has been refused; and
 - the exemption it is relying on; and
 - why that exemption applies; and
 - (where appropriate) details of its public interest considerations
27. Section 17(4) allows a public authority to not provide an explanation of why a particular exemption applies, or why the public interest should favour maintaining it, or both, if doing so would in itself disclose exempt information.
28. Whilst the Commissioner recognises that the public authority could not have revealed some of the information it revealed to him during the course of the investigation, he is not persuaded that there was nothing further it could have said in its refusal notice.
29. There was nothing to prevent the public authority from setting out the hypothetical scenarios in which its ability to regulate might have been harmed (as this decision notice does) without revealing anything about the particular complaint the request referred to.
30. There was also nothing to prevent the public authority from presenting public interest arguments which, in the circumstances, would have been relatively generic anyway, rather than specific to the complaint.
31. The Commissioner is therefore satisfied that the public authority breached section 17 of FOIA in responding to this request.

Right of appeal

32. 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

33. 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.
34. 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
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Wilmslow
Cheshire
SK9 5AF