

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 May 2019

Public Authority: Care Quality Commission
Address: Citygate
Gallowgate
Newcastle Upon Tyne
NE1 4PA

Decision (including any steps ordered)

1. The complainant has requested information on notification of deaths and serious incidents in care facilities provided to the Care Quality Commission (CQC). The CQC provided some information but withheld the date it received these notifications on the basis of section 41 and 40.
2. The Commissioner's decision is that the CQC has correctly applied the provisions of section 41 to withhold the remaining information and the balance of the public interest favours maintaining the exemption. She requires no steps to be taken by the CQC.

Request and response

3. On 28 August 2018 the complainant made a request to the Care Quality Commission (CQC) in the following terms:

"Could you please provide a xlsx file format of notifications received from social care locations:

Period: 1st January 2016 to 31st July 2018

Dataset:

- *Regulation 16 Notifications (Organisation ID, Raised Date, Sub Type)*

- *Regulation 18 Notifications (Organisation ID, Raised Month, Raised Year, Sub Type)”*
4. The CQC responded on 25 September 2018 and confirmed the requested information was held. The CQC explained the information it collected under Regulation 16 (notification of death) and Regulation 18 (notification of other incidents) and provided links to notification forms and the regulations in full. The CQC also provided two spreadsheets containing the requested information but with the full dates removed for when the notifications were submitted as this was considered exempt from disclosure under sections 41 and 40(2) of the FOIA.
 5. The complainant asked for an internal review of this decision. She stated that the CQC’s response did not state that providers were asked to tell the CQC the date of death and it was assumed therefore that the date of a notification from a care home is the date the notification was processed by the CQC and not the exact date of death of a person. The complainant also stated that the General Data Protection Regulation (GDPR) did not apply to deceased persons and if a care home has more than one resident they could not be identified by disclosure of the full Regulation 18 notification.
 6. The CQC conducted an internal review and responded on 16 November 2018. The CQC explained that for information related to the deceased it had applied the section 41 exemption and the section 40 exemption had been applied for third party personal data. The CQC further explained that it was unable to report on the date of death or the date of serious injury reported in the statutory notifications as this would require the CQC to manually review each statutory notification and to do this would exceed the appropriate cost limit for complying with the request.

Scope of the case

7. The complainant contacted the Commissioner on 20 November 2018 to complain about the way her request for information had been handled.
8. During the course of the Commissioner’s investigation the CQC clarified the only information it had withheld was as follows:
 - For Regulation 16 notifications, the full date that the notification was raised to CQC. The day and month of each notification was withheld under FOIA section 41 and only the year provided.
 - For Regulation 18 notifications, the month that the notification was raised to CQC. This information was withheld under FOIA section 40 and 41.

9. The reference to cost limits in the internal review response was done to draw the complainant's attention to the fact that if the actual data of death for regulation 16 notifications was requested this would involve manual checks but section 12 of the FOIA was not applied to any part of the request in this case.
10. The regulations referred to throughout this request are the Care Quality Commission (Registration) Regulations 2009 and these create obligations for registered care providers and powers for the CQC. The regulations include a legal requirement for registered providers to notify the CQC of the death of a service user where that death occurs whilst care was being provided or as a possible result of care provided (regulation 16), and to notify the CQC of certain other incidents including those causing serious risk or harm to a service user, allegations of abuse and police incidents (regulation 18).
11. The request specifically asked for the full date that a regulation 16 notification was raised to the CQC and the CQC provided the year but withheld the day and month under section 41. With regard to regulation 18 notifications, the request only asked for the month and year the notification was raised (not the day) and the month was withheld under section 41 and 40.
12. The Commissioner considers the scope of her investigation to be to determine if the CQC has correctly refused to provide the above information on the basis of either section 41 or 40 of the FOIA.

Reasons for decision

Section 41 – information provided in confidence

13. The Commissioner has first considered the use of the section 41 exemption as this has been cited by the CQC as a basis for withholding both the information under regulation 16 and regulation 18.
14. Section 41(1) of the FOIA states that:
"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 that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

15. The information in this case was provided to the CQC by the service providers. The Commissioner is therefore satisfied that information such as dates, months and years is information obtained from another person(s).
16. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
17. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
18. The Commissioner considers that the duty of confidence will continue to apply after the death of a person, therefore it can be applied to the notification of death dates (regulation 16) as well as the notification of other incidents date (regulation 18). This position (that the duty of confidence can apply after death) was confirmed by the Information Tribunal¹ when it found that action for a breach of confidence could be taken by a personal representative of the deceased person. The Commissioner does not consider it necessary to determine whether any of the deceased individuals had a personal representative, or who that personal representative is. It is sufficient that the principle has been established that a duty of confidence can survive death and that an actionable breach of confidence could be initiated by a personal representative.
19. For the regulation 18 information it is argued a breach of confidence could be brought against the CQC by personal representatives, those in care or staff at the service providers.
20. Furthermore, it is important to note that the test established by the exemption is whether a disclosure to the 'public' would constitute a breach of confidence.

¹ EA/2006/0090

21. The Commissioner was concerned that disclosing the remaining information would not allow for identification of individuals. This has an obvious bearing on whether there would be a breach of confidence as there could be no expectation that anonymised dates would be treated as confidential, nor there be any detriment in terms of an intrusion of privacy if individuals could not be identified from the information. Therefore, the Commissioner has firstly examined whether identification of individuals would be possible from the requested information.
22. For the regulation 16 information (day, month, year) that a death was notified to the CQC the argument is that this information could be used to identify the deceased individuals. The CQC considers that death is a matter of public record for the most part; often a deceased person will be identified in published obituaries or press reports may state they lived in a care home, in other cases relative, friends or neighbours may know the person lived in a care home or used a care service. The CQC considers it is therefore likely that releasing the date could link the information to individual service users.
23. However, the Commissioner must consider if disclosing the information to the public would constitute an actionable breach of confidence from the person who provided the information – the care provider. There could be a breach of confidence if the requested information could reveal something new about the deceased individual's care. The Commissioner accepts the CQC's arguments that a member of the public could use the withheld information from the regulation 16 notification to identify a particular individual if they were motivated to do so and she also considers that doing so would place additional information in the public domain over and above what is already known. This is because the CQC already provides information from the regulation 16 notifications. This includes the sub-type which for regulation 16 is whether the death was expected or not. CQC's published guidance for providers on notifications and the instructions within the regulation 16 notification form themselves ask the provider to record the death as expected if the death was the expected outcome of a diagnosed condition or illness. Therefore if an individual could be identified from the date of death then it would also reveal whether or not the deceased person had been diagnosed with a medical condition or illness prior to their death and this would be information not otherwise in the public domain.
24. For regulation 18 notifications, the exempt information is the month and year but not the date of the notification. The CQC considers that a person with knowledge of the relevant service such as a staff member, relative or visitor, may be able to link a notification to a specific incident and therefore become aware of confidential information about a person received care from or working at that service. The CQC provided the example of an individual, perhaps a relative, being aware that an

employee of a specific care home was suspended around the date of the notification. Seeing that a notification of suspected abuse was submitted to the CQC at around the same time would allow that individual to infer confidential information about the employee. The CQC considers even without the exact date being disclosed, the month alone may allow this link to be made.

25. Whilst the CQC has acknowledged that the likelihood of this is small in relation any single notification it has made the point that there were 452, 963 notifications within the scope this request. For any of these notification there may be individuals who are extremely motivated to obtain information for their own purposes, for example to assist in complaints or disputes against care providers. The CQC argues that given the volume of notifications involved it would not be reasonable to assess each individual notification to ascertain the likelihood of identification of individuals.
26. Based on the above, the Commissioner accepts that the information cannot be said to be trivial as it contains information which could be used to identify individuals, both deceased and living which can be used to ascertain further details such as medical conditions or suspected abuse. This information is not publicly available or otherwise accessible. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
27. The CQC states that the information is provided in conditions where there is an obligation of confidence.
28. The Commissioner is mindful of the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".
29. Following this, the Commissioner has considered the circumstances, nature of and way in which the withheld information was supplied to it by care providers and has concluded that information was given as required under the regulations on the understanding this is provided to allow the CQC to carry out its functions and it will not be shared. The Commissioner is satisfied that an obligation of confidence exists in these circumstances.
30. For the regulation 16 notification information the CQC accepts revealing additional information about a deceased person may not always result in

a breach of confidence as it will depend on what other information can be linked to the individual. However, as with the regulation 18 notifications information the number of notifications covered by this request is very high (324, 066) and there is a likelihood that in some of these cases there may be a motivated person who may obtain and use the information in ways that would breach the wishes of the deceased person or would cause distress to their families. For example, a person may not have wanted their family to know they had been diagnosed with a condition and would not have wanted them to know after their death.

31. Disclosing notification data in a way which allows a person to be identified by a motivated individual and could reveal additional information about their death could result in a breach of the person's enduring right to medical confidentiality. The Commissioner accepts that this could result in the registered service provider having a genuine case for action against the CQC and therefore that disclosure of the regulation 16 notification information would be likely to constitute a breach of confidence and the confider (the service provider) would be entitled to take action against the CQC in those cases where additional medical information is revealed.
32. With regard to the regulation 18 information the situation is similar, a breach of confidence can be cited by the service provider against the CQC. As already discussed, disclosing the date of the notification of a serious incident could lead to the identification of employees or to individuals involved in incidents, particularly police incidents that have been reported in the press. It is therefore likely that the patients themselves, employees of the service provider, relatives or visitors would be distressed by this. Disclosure would therefore be likely to constitute a breach of confidence and the service provider would be entitled to take action against the CQC.
33. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the CQC could successfully rely on such a public interest defence to an action for breach of confidence in this case.
34. The Commissioner accepts that there is a general public interest in public authorities being open and promoting transparency and accountability.

35. The complainant considers that without knowing the dates of notification no meaningful analysis can be conducted on care home reporting of notifications.
36. The CQC considers there is a strong public interest in withholding this information as CQC is a regulatory body with an important role to perform that would be undermined by disclosing information which could lead to a breach of confidence.
37. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly.
38. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. She does not consider there are compelling reasons for overriding the duty of confidence in this case.
39. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. She has therefore not gone on to consider the application of section 40.

Right of appeal

40. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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

Jill Hulley
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