

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 August 2014

**Public Authority:** Care Quality Commission  
**Address:** Finsbury Tower  
103–105 Bunhill Row  
London EC1Y 8TG

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to emails sent or received by named individuals.
2. The Commissioner's decision is that the Care Quality Commission (CQC) has correctly concluded that it does not hold information for some of the requests, but that it incorrectly applied section 14(1) of the FOIA to the remaining requests.
3. The Commissioner requires the public authority to either provide the requested information or issue a fresh refusal notice without relying on section 14(1).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 3 January 2014, the complainant wrote to CQC and requested information in the following terms:
  - i. *"Please provide copies of all emails sent and received by CQC Chairman David Prior in 2013 which contain any of the following terms: 'winterbourne', 'swannington', 'inspiration trust', 'immersive education', 'private eye'."*
  - ii. *Please provide copies of all emails sent and received by CQC Chief Executive David Behan in 2013, which contain any of the following terms: 'winterbourne', 'private eye'.*

*If it is not possible to disclose the full text of the relevant emails, please nevertheless provide copies of the correspondence with non-disclosable parts of the text blacked-out if necessary, citing the FOIA exemptions."*

6. CQC responded on 4 February 2014. It refused to provide the requested information and cited section 14 of the FOIA as its basis for doing so.
7. Following an internal review CQC wrote to the complainant on 20 February 2014 and maintained its original position. In addition, it denied holding information regarding part i. of the request.

## Scope of the case

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8. The complainant contacted the Commissioner on 26 February 2014 to complain about the way his request for information had been handled.
9. He stated that he disagreed with the CQC's citing of section 14. *"They have not said that the FOI would go over the time limitations, but rather, they say the request for emails containing key terms will include some emails that are not "relevant". I have been specific with the information I am after, and I do not believe it is in the CQC's rights to decide what is "relevant" and what is not - something I have explained in the correspondence below.*
10. *Further, I disagree with the citing of section 3(2). The CQC's argument is that the emails are personal, and they are merely being "held" by the authority. However, the request concerns the CQC chairman's CQC email account - not his personal account. I would expect any extracts of text containing personal information to be redacted, but I would*

*nevertheless think it is right to disclose the remainder of the emails. The CQC has said the emails are "personal in nature and unrelated to Mr Prior's role as Chair of CQC." However, I again do not think it is the place of the CQC to make this decision, or refuse an FOI request on this basis. The emails were sent on work email accounts and must surely be fully subject to FOI, regardless of whether they are related to the CQC's work or not (notwithstanding exemptions)."*

11. The Commissioner considers the scope of this case to be to determine if CQC has correctly applied section 14 to the request and if it holds any information relating to part i. of the request.

### **Reasons for decision**

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12. Section 3(2) states:

*"(2) For the purposes of this Act, information is held by a public authority if -*

- (a) it is held by the authority, or otherwise than on behalf of another person, or*
- (b) it is held by another person on behalf of the authority*

13. The Commissioner's guidance<sup>1</sup> states:

- *When a public authority holds information solely on behalf of another person it does not hold the information itself for FOIA.*
- *When a public authority holds information principally or partly on behalf of another person but exercises control over the information, it will also hold the information itself.*
- *When information is held by another person on behalf of a public authority, the information is held by the public authority for the purposes of FOIA.*

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx)

**Information not held by CQC**

14. CQC sought clarification from the complainant of the meanings of several of the search terms on 7 February 2014.
15. The reason the CQC gave for seeking this clarification was that the intended meaning of the request terms may have had a significant impact upon the scope of its searches. For example, if the complainant had intended for any of the search terms (apart from Winterbourne) to relate to regulated services, then CQC would have needed to search records relating to those services for relevant correspondence (which may have been saved there but deleted from the email accounts and records of Mr Behan and Mr Prior). Therefore, it considered that the clarification, which it received from the complainant on the same day, was very helpful in focusing its searches.
16. The complainant had clarified that the search terms 'Swannington', 'Inspiration Trust' and 'Immersive Education' were intended to relate to Mr Prior's business interests outside of CQC.
17. However, in providing that clarification, the complainant did specify that he wished to receive emails containing these search terms even if those references did not relate to Mr Prior's business interests. In accordance with this, CQC conducted a search that was designed to identify any information relating to those business interests, but considered that any occurrence of these search-terms which it found – regardless of the context or meaning – would fall within the scope of the request.
18. Having conducted its searches, CQC concluded that – for the purposes of FOIA - it did not hold any emails, sent or received by Mr Prior in 2013, which contained any of these search terms.
19. CQC advised the complainant that its searches had identified several emails containing these words within Mr Prior's email account, but that these were unconnected to Mr Prior's work for CQC and therefore it considered them to be held solely 'on behalf of' Mr Prior as a private individual in accordance with section 3(2)(a) of FOIA.
20. CQC explained that its policies do allow its employees to use CQC email for limited personal use. The emails with these search terms included personal invites to meetings relating to an educational trust of which Mr Prior is a director, and personal messages relating to social events at Mr Prior's home in the village of Swannington.
21. In his request for internal review, the complainant did not challenge this decision.

22. CQC advised the Commissioner that:

- none of the business interests to which these keywords refer are in the area of health and social care (the sector for which CQC is the regulator);
- none of the relevant emails referred to any link to, conflict with, or relationship with the work of CQC;
- none of the relevant emails contain any information about the work of CQC; and,
- none of the emails touched upon the issue of Mr Prior's declaration of interests as Chairman of CQC. This is the particular area in which the complainant is interested, having published an item in Private Eye pointing out that Mr Prior had failed to publicly declare his outside business interests – an error for which Mr Prior apologised to the CQC Board at the public meeting on 19 February (<http://www.cqc.org.uk/public/about-us/our-people/board-members/board-meetings>)

23. In referring to his own guidance, the Commissioner considered factors that would indicate that the information is held solely on behalf of another person which include:

- the authority has no access to, use for, or interest in the information;
- access to the information is controlled by the other person;
- the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
- the authority is merely providing storage facilities, whether physical or electronic.

24. Having considered CQC's representations, and reviewed the information in question, the Commissioner's decision is that, in relation to the requests for all emails sent and received by CQC Chairman David Prior in 2013 containing the terms 'swannington', 'inspiration trust' and 'immersive education' the information is not held by the CQC for the purposes of the FOIA. This is because he accepts that any such emails are held by the CQC solely on behalf of Mr Prior as a private individual.

25. The Commissioner has therefore gone on to consider the CQC's application of section 14(1) only in relation to the remaining requests; for all emails sent and received by CQC Chairman David Prior and CQC

Chief Executive David Behan in 2013 containing the terms 'winterbourne' and 'private eye'

## Section 14

26. Section 14(1) FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
27. The term "vexatious" is not defined in the FOIA. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests<sup>2</sup>. In short they include:
  - Abusive or aggressive language
  - Burden on the authority
  - Personal grudges
  - Unreasonable persistence
  - Unfounded accusations
  - Intransigence
  - Frequent or overlapping requests
  - Deliberate intention to cause annoyance
28. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
29. The Commissioner's guidance suggests that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request

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[http://www.ico.org.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_special\\_guides/dealing-with-vexatious-requests.ashx](http://www.ico.org.uk/~media/documents/library/Freedom_of_Information/Detailed_special_guides/dealing-with-vexatious-requests.ashx)

upon it and balance this against the purpose and value of the request. Where relevant, public authorities will need to take into account wider factors such as the background and history of the request.

30. In its response dated 4 February 2014, CQC stated it had carefully considered the request and that it did hold information relevant to the request; however it considered it exempt from disclosure under section 14(1) of FOIA, which relates to vexatious requests.
31. CQC explained that it did not contend that the request had been made with vexatious intent; rather it was its view that the *effect* of the request – in terms of the burden that it would place upon CQC – is vexatious. In reaching this decision, it had considered the ICO's guidance on *Dealing with vexatious requests*.
32. The Commissioner has considered the representations of both parties in reaching his position.

### **Purpose and value of the request**

33. The CQC stated that all but a few of the emails for consideration were located using the search term 'Winterbourne'.
34. It went on to explain that Winterbourne View was a private hospital for people with learning disabilities. In May 2011, the BBC Panorama programme revealed shocking abuse of vulnerable people at the hospital. The CQC's subsequent internal management review and a serious case review conducted by South Gloucestershire Safeguarding Adults Board highlighted serious failures in CQC's processes at the time. These failures had resulted in CQC failing to adequately follow up concerns raised with it by a former employee of the hospital.
35. CQC stated that these reviews led to significant changes to its processes and methodologies. The abuse that occurred, and CQC's part in the system failures that allowed that abuse to perpetuate, are deeply distressing. Winterbourne View has therefore had a profound impact upon CQC and all of its employees.
36. CQC further stated that it has previously and separately disclosed large amounts of information relating to its regulation of the service – and its parent company, Castlebeck - under FOIA and on its website (e.g. <http://www.cqc.org.uk/public/our-action-winterbourne-view>). It recognised the high public interest in transparency regarding CQC's regulation of this service.

37. CQC argued that a large number (if not the majority) of the requested emails do not directly relate to Winterbourne View or, if they do, they only relate in part.
38. Because of the impact of the events surrounding Winterbourne View on CQC, the service was referenced and mentioned in relation to a wide range of issues during 2013.
39. However, CQC stated that it is also important to note that the Panorama programme exposing the abuses at Winterbourne View was broadcast in May 2011. Its internal management review was completed in October 2011, and was published at the same time as the serious case review in August 2012. Therefore, the request does not touch upon the main period during which the events surrounding Winterbourne View, and their impact upon CQC, were under consideration.
40. CQC considered that as it is, the request is currently for a very large amount of information where each item is only linked because – somewhere within a chain of emails or an attachment – the word 'Winterbourne' has been used.
41. To demonstrate this, CQC provided the Commissioner with copies of some of the emails in question. The emails cover a range of issues, including papers for public and private meetings of the CQC Board, papers for CQC's Remuneration Committee, draft business plans, an email from a junior member of staff, etc.
42. CQC considered that some of these emails could probably be reviewed and released quite quickly. However, others were likely to require prolonged and detailed consideration.
43. It went on to say that it was likely that the vast majority of this information could be disclosed by CQC and only a couple of these emails would be likely to require prolonged consideration. However, there was little information within these documents that is actually about Winterbourne View.
44. Further to this, in considering all the requests together CQC stated that it could not see any clear link between the 'winterbourne' keyword, and the 'swannington', 'immersive education' or 'inspiration trust' keywords – or between any of these and 'private eye'.
45. Taken together, these appear to CQC to be a 'fishing expedition' where it seems possible that the applicant is not seeking particular information of interest, but rather hoping to trawl a large amount of correspondence



between senior managers. Even if that is not the intent, this would be the effect of his request.

46. CQC stated it appreciated that previous decisions have concluded that 'keyword search' requests are valid, but argued that this request does not simply specify information in which the complainant is interested, but rather it draws information within its scope simply by virtue of that information being contained within the same document as the requested search term, regardless of their relevance.
47. In an email of 4 February, the complainant provided arguments to support his position. These were that:
48. *1) The information requested is highly specific, and regards correspondence at the most senior level of the CQC about the Winterbourne View care home scandal, which it has previously released similar information about.*
49. CQC stated that as described above, and as explained to the complainant at the time, the request is neither 'highly specific', nor is it for information 'about the Winterbourne View care home scandal'. It is for a trawl of emails containing the word 'winterbourne' regardless of the context of the email, or the nature of the remainder of the contents.
50. *2) It also concerns the financial and business links of the CQC's chairman. This is of particular public interest because the chairman has failed to declare any of his business interests in his official declarations.*
51. CQC again stated that as described above, and as explained to the complainant, the information pertaining to these keywords is not held by CQC, for the purpose of FOIA, so the public interest consideration is irrelevant.
52. CQC further stated that the complainant made no argument for the public interest in relation to the 'private eye' keyword. CQC's only assumption is that he is seeking some reference being made to that publication that would, in itself, be deemed newsworthy.

### **Advice and assistance**

53. CQC explained that the complainant had been advised of its reasons for refusing his request, and had been invited to narrow his request so as to focus it upon information that specifically relates to the issue in which he says he is interested 'the Winterbourne View care home scandal', or which would reduce the number of documents requiring review.

54. In its original response, CQC suggested that this may be possible by refining the search using a second keyword (i.e. to request emails which contain both the words 'winterbourne' and the second search term). Alternatively, the complainant could identify what specific information he requires regarding Winterbourne View – for example (and without knowing whether the emails contain information relevant to these issues) information about disciplinary action against CQC staff, or changes to CQC strategy or policy relating to the service, or information about residual risks relating to Winterbourne View.
55. CQC stated that its response also suggested that the complainant could narrow his request by choosing a shorter time-frame, or by identifying specific people or organisations with which Mr Prior and Mr Behan may have communicated.
56. In his email of 4 February, in which he requested an internal review, the complainant stated that he would narrow his request. However, he did not respond when CQC sought clarification on that point (CQC believe, but are not sure, that he was restricting his request to emails containing the search terms sent to and from Mr Prior). CQC stated that, by its estimate a request refined in this way would still require over 20 hours of consideration and preparation.
57. CQC therefore considered that it had done what it could to advise and assist the complainant in relation to this request.

### **Burden on the authority**

58. In its response to the Commissioner, the CQC stated that given its determination that information requested relating to 'Swannington', 'Inspiration Trust' and 'Immersive Education' was not held for the purposes of FOIA, this left two remaining search terms - 'Private Eye' and 'Winterbourne View'.
59. CQC conducted searches of Mr Behan's and Mr Prior's email accounts for these search terms. These searches covered the 'live' CQC email systems for both men, Mr Prior's personal email account (as a non-executive, he does sometimes use this account for CQC business), and folders of archived emails held on CQC's IT systems.
60. These keyword searches produced 192 'hits'. CQC's systems filter out 'spam' email, and the archived emails had previously been 'weeded' to remove some items. CQC therefore considered that the vast majority of these emails were likely to be substantive records relating to CQC business.

61. Many of these items will be email chains. So reviewing one of these items may require consideration of multiple emails. These emails contain 126 attachments. Some of these are multiple attachments and some of the attachments are quite lengthy.
62. CQC explained that last year, it had received a separate FOIA request (from a different requester) for a considerable number of Mr Prior's emails. For that request it had undertaken an exercise using a random sample and identified that it took 3 hours to review and redact 40 emails, excluding attachments.
63. On that basis, CQC estimated that it would take an average of approximately 10 minutes per email (including attachment) to review and redact the information requested– an estimated total of 32 hours' work (erroneously recorded as 34 hours on its original response).
64. CQC advised that the request had asked for approximately 200 emails which fell within the scope of the request. Many of these emails contained attachments, some of which were very large.
65. It further stated that unlike the section 12 exemption, the application of section 14 is not a matter of making a clear-cut calculation of cost. Rather, the above is provided to demonstrate the overall burden that handling the request would have upon CQC. Much more important than the cost, is the impact that responding to this request would have in drawing various members of CQC staff away from other work so as to commit significant amounts of time to handling the request.
66. CQC explained to the Commissioner that the information within the scope of the request was likely to contain information that was subject to legal privilege, commercially sensitive or potentially prejudicial to the exercise of its regulatory functions.
67. In addition, CQC stated that from a sample review of the information it clearly contained other information provided in confidence, and that consideration of disclosure would require consultation and consideration of the views of those people. These items have been identified in a review of a small sample of the emails. CQC has not reviewed all of them in detail.
68. Furthermore, CQC explained that section 76 of the Health and Social Care Act 2008 creates a criminal offence of unlawful disclosure of confidential personal information that has been obtained by CQC. 'Reckless' disclosure of such information would be an imprisonable offence.

69. For these reasons, it is CQC's view that the information within the scope of this request would require close and careful review and consideration prior to disclosure.
70. CQC argued that this work would draw its Information Access Team resources from the handling of other information requests (it receives approx. 1200 a year), therefore placing a significant burden on the organisation.
71. The nature of the correspondence also meant that it was likely that the decision making process would involve diverting senior managers (within CQC and other organisations) from their own duties to consider, review and comment on some of the information for disclosure.
72. For these reasons, it is CQC's view that the information within the scope of this request would require close and careful review and consideration prior to disclosure.
73. CQC stated that in summary it has considered:
  - The effort that would be required to review and prepare the requested documents for disclosure, and the vital importance of carefully and thoroughly undertaking this task; and
  - The range of seemingly unconnected keywords, and
  - The unfocussed and disparate nature of the documents that fall within the scope of the 'winterbourne' keyword request; and
  - The resultant difficulty in identifying and quantifying the public interest to be served in undertaking the work required for disclosure.
74. It is therefore CQC's view that the work required in order to comply with the request would place a disproportionate burden upon CQC.
75. CQC recognised that the Commissioner's guidance has developed to reflect court and tribunal decisions but that there is no clear and definitive line by which the judgment of vexation can be made – rather it is a question of judgment made on a case by case basis. CQC stated that its reason for applying the section 14 exemption is its concern at the significant work that would arise from the request.

### **The Commissioner's decision**

76. With regard to the burden on the authority, the Commissioner's guidance states that it may be permissible to refuse a request as vexatious in the following circumstances:

*"The effort required to meet the request will be so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester."*

This follows the approach of the First Tier Tribunal (Information Rights) in the case of The Independent Police Complaints Commission vs The Information Commissioner EA/2011/0222 which stated in relation to section 14 FOIA that "A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester."

77. The Commissioner has firstly considered the CQC's arguments about the time that would be needed to answer this request. The CQC's submissions are that the 'burden' in this case is largely as a result of the time it would take to redact information and consider if exemptions were applicable.
78. In this case the Commissioner notes that, including attachments, the CQC maintain that there would be approximately 318 documents to review. However he does have some concerns about CQC's arguments.
79. Firstly, from the sample that the CQC have provided him with he notes that the length of the sample attachments varies from two to eleven sides of A4 paper and as such he does not consider them to be particularly lengthy attachments. Some of them are completed forms containing very little content beyond the template content. Secondly, a number of the attachments are in the form of updates which duplicate some content from earlier versions. Any duplicated content would only need to be considered for exempt material once. Finally the email chains also contain some duplicates and most of them are short communications. In light of this he considers that the CQC's estimate of 10 minutes per email, including attachments, to consider exemptions is overstated.
80. The Commissioner does not accept that the CQC have demonstrated that the burden imposed by this request is so grossly oppressive as to render the request vexatious regardless of the requester's lack of vexatious intent (as conceded by the CQC) and the subject matter of the request.
81. The CQC has also suggested that this request has little purpose or value because it is a fishing expedition which catches information that is not actually about the Winterbourne View care home scandal and is therefore of limited value to the requester and the public.

82. The Commissioner accepts that the way that the request has been phrased means that it does bring in a few documents of which Winterbourne View is not the main focus, where it is only mentioned in passing and where there is nothing of any substance relating specifically to Winterbourne View itself. However, the nature of a number of these documents (such as business plans, newsletters, agenda for public meeting) is that they are also unlikely to take up much of the CQC's time in considering exemptions as they are the type of information that is routinely disclosed or published. The request does bring in a small amount of information that is not focussed on Winterbourne View itself and that may require consideration of exemptions, however the overall proportion of this information is small. In the Commissioner's view the majority of the sample information that the Commissioner has been provided with does have the events at Winterbourne View, and the CQC's response to the exposure of these events, as its main focus.
83. The Commissioner's guidance is clear that fishing for information is not enough in itself to make a request vexatious, and that it is the broadest and least focussed keyword requests that are most likely to be found vexatious. This is because broader requests are more likely to bring in large amounts of information of limited public value. In the circumstances of this case the Commissioner considers that the request does have some focus and that the majority of the information within its scope is relevant to that focus. He also considers that there is a considerable public interest in information about Winterbourne View, the CQC's reaction to the BBC Panorama programme, and the CQC's follow up actions resulting from this programme, being made public. He does not consider that the relatively small proportion of less relevant information incidentally caught by this request is sufficient to render the request as vexatious.
84. In light of all of the above, the Commissioner concludes that the request does not impose a grossly oppressive burden upon the CQC and that the impact upon the CQC is justified and proportionate given the purpose of the request and the value to the public of the majority of the information within its scope.
85. Having considered all of the above, the Commissioner concludes that in the circumstances of this case the CQC has incorrectly applied section 14(1).
86. He therefore requires the CQC to either provide the requested information (all emails sent and received by CQC Chairman David Prior and CQC Chief Executive David Behan in 2013 which contain the terms

'winterbourne' and 'private eye') or issue a fresh refusal notice without relying on section 14(1).

## Right of appeal

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87. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

88. 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.

89. 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** .....

**Pam Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**