



Neutral citation number: [2025] UKFTT 00234 (GRC)

Case Reference: EA/2023/0399

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

**Heard by Cloud Video Platform  
Heard on: 18 November 2024  
Decision given on: 24 February 2025**

**Before**

**JUDGE STEPHEN ROPER  
MEMBER DAN PALMER-DUNK  
MEMBER STEPHEN SHAW**

**Between**

**JOHN MITCHELL**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**Representation:**

For the Appellant: in person

For the Respondent: did not appear and was not represented

**Decision:** The appeal is Allowed

**Substituted Decision Notice:**

The Tribunal's Decision Notice in case reference EA/2023/0399, set out below, is substituted for the Commissioner's Decision Notice reference IC-241696-P0N1, dated 24 August 2023, with regard to the requests for information made to Stoke Surgery in Stoke, Plymouth by John Mitchell dated 14 March 2023 and 23 May 2023.

*Substituted Decision Notice*

1. Stoke Surgery breached section 10(1) of the Freedom of Information Act 2000 by

not responding to those two requests for information within the timescales set out in that section.

2. Stoke Surgery breached section 16(1) of the Freedom of Information Act 2000 by not providing reasonable advice and assistance in connection with the first of those requests for information.
3. Stoke Surgery must make a fresh response in respect of the following aspects of those two requests for information:
  - a. the annual cancer statistics specified in the first of those requests;
  - b. the annual chest infection statistics specified in the first of those requests; and
  - c. the annual number of deaths specified in the second of those requests, in respect of each of the health conditions specified in the first of those requests.
4. Subject to paragraph 5 below, the fresh response must:
  - a. specify what further searches were undertaken, including details of what systems and records were searched and what key words were used as search terms in respect of any searches for information which is held electronically;
  - b. make clear whether or not any further information (beyond that already disclosed) is held within the scope of those aspects of the requests; and
  - c. disclose any such further information if it is held, or claim any relevant exemptions to disclosure pursuant to the Freedom of Information Act 2000.
5. Stoke Surgery is not obliged to respond in accordance with paragraph 4 above if and to the extent that the duty to confirm or deny does not arise in accordance with any applicable provision of the Freedom of Information Act 2000. However, if the duty to confirm or deny does not arise then Stoke Surgery must cite the applicable exemption and its reasons in its fresh response.
6. Stoke Surgery must issue the fresh response within 35 days of this decision being sent to it in accordance with the directions below, or (if there is an application to appeal this decision) within 28 days after being notified of an unsuccessful outcome to such application or any resulting appeal.
7. The fresh response (and any applicable disclosure of further information pursuant to paragraph 4 above) will be subject to the rights given under section 50 of the Freedom of Information Act 2000 to make a new complaint to the Information Commissioner.
8. Failure to comply with this decision may result in the Tribunal making written

certification of this fact pursuant to section 61 of the Freedom of Information Act 2000 and may be dealt with as a contempt of court.

- References in this Substituted Decision Notice to 'Stoke Surgery' mean the following three GP partners of Stoke Surgery in Stoke, Plymouth: Dr Simon Anderson, Dr Hannah Colman and Dr Miriam Blemings.

#### *Directions*

- The Information Commissioner is directed to send a copy of this decision to Stoke Surgery within 14 days of its promulgation.

## **REASONS**

### **Preliminary matters**

- In this decision, we use the following terms to denote the meanings shown:

Appellant: John Mitchell.

Authority: Has the meaning given in paragraph 5.

Commissioner: The Information Commissioner (the Respondent).

Decision Notice: The Decision Notice of the Commissioner dated 24 August 2023, reference IC-241696-P0N1, relating to the Requests.

First Request: The request for information made to the Surgery by the Appellant dated 14 March 2023, as set out in paragraph 8.

FOIA: The Freedom of Information Act 2000.

Requested Information: The information which was requested by way of the First Request and/or the Second Request (as the context permits or requires).

Requests: The First Request and the Second Request.

Second Request: The request for information made to the Surgery by the Appellant, dated 23 May 2023, as set out in paragraph 15.

Surgery: Stoke Surgery of Belmont Villas, Stoke, Plymouth PL3 4DP.

- Unless the context otherwise requires (or as otherwise expressly stated),

references in this decision:

- a. to numbered paragraphs are references to paragraphs of this decision so numbered (excluding those in the Substituted Decision Notice);
  - b. to any section are references to the applicable section of FOIA.
3. Unless expressly otherwise stated, nothing we say in this decision should be taken as an indication as to whether or not any further information within the scope of the Requests is held by the Authority.

## **Introduction**

4. This was an appeal against the Decision Notice, which (in summary) decided that, on the balance of probabilities, the Authority does not hold any further information within the scope of the Requests. The Decision Notice did not require the Authority to take any steps, but it recorded that the Authority had breached section 10(1).
5. In the Decision Notice, the Commissioner stated that he had identified that the public authority for the purpose of FOIA was the following three GP partners of the Surgery: Dr Simon Anderson, Dr Hannah Colman and Dr Miriam Blemings. In this decision, we use the term "Authority" to refer to those three partners. For convenience, we also use that term when referring to the background to the appeal, including the Appellant's correspondence with the Surgery.

## **Background to the Appeal**

6. The background to the appeal is as follows.

### ***The Requests***

7. It is appropriate to provide some detail regarding the Requests and the related correspondence between the Appellant and the Authority, in order to provide relevant context.
8. On 14 March 2023, the Appellant wrote to the Authority and requested information in the following terms:

*"Please provide the surgery's annual cancer statistics from 2014 to 2023  
To include the number of Patients that have suffered from gallbladder, liver,  
pancreas and biliary system cancers.*

*Please provide the surgery's annual statistics from 2014 to 2023 for*

*Asthma*

*COPD*

*Chest infections*

*RSV*

*Still births*

*Stroke*

*Heart disease +conditions  
Covid 19."*

9. On 30 March 2023, the Appellant contacted the Authority for an update on the First Request (despite the statutory timeframe for a response not having passed). The Authority responded on the same date, stating:

*"...this information is not easily or quickly available and we would ask how the information is relevant for just one practice.*

*We suggest you approach Public Health for a figure relating to a whole area as data from a sole practice is not a true indication of the whole picture. We are a small practice with small numbers whereas other local practices have twice as many patients and their prevalence may be very different to ours."*

10. The Appellant replied, also on 30 March 2023, stating:

*"I have been investigating for the last four years the negative health effects of industrial air pollution on Plymouth City Residents from the MVV Incinerator Site Facility.*

*PCC has provided me with high mortality data for the stoke area of Plymouth*

*The winds have been predominantly from the north over this period of time.*

*I do appreciate that the information is not easily or quickly available but I believe that I can trust the figures that will be provided from [Stoke Surgery].*

*I do apologise if this causes any inconvenience your cooperation would be appreciated.*

*Please supply the information that has been requested."*

11. On 16 April 2023, the Appellant sent an email to the Authority asking for a response to the First Request. Having not received a response, he contacted the Authority again by email on 25 April 2023 and then again on 5 May 2023.

12. The Authority replied on 5 May 2023, stating it was "still working on collating the figures" and would send them in due course.

13. On 22 May 2023, the Appellant sent a further email asking for a response to the First Request.

14. The Authority responded by email later on 22 May 2023, attaching some information in respect of the First Request and stating as follows:

*"I have attached the annual data for each year since 2014 for new diagnoses for each of the requested diseases/illness. This has been completed to the best of my ability and the limitations of the computer system.*

*Please note it is not possible to search for chest infection occurrences.*

*Also it is worth noting some searches I am able to run to include patient numbers of patients who are no longer registered at stoke (either moved away or deceased). I have put an asterisk (\*) on those searches as it will make the figures e.g. for cancer. The figures could look misleadingly low the further back you go - as it will only show patients diagnosed in 2014 who are still alive and still registered with Stoke surgery.*

*This information is only as accurate as the people who are recording it at either this surgery or any previous surgery the patients have been registered at, and whether or not their notes have transferred across to us electronically."*

15. On 23 May 2023, the Appellant replied to the Authority, quoting its response from the day before and adding comments by way of bold font. The following shows the Appellant's comments to that, as originally set out in bold font (and it is those comments which we refer to as the 'Second Request'):

*"I have attached the annual data for each year since 2014 for new diagnoses for each of the requested diseases/illness. This has been completed to the best of my ability and the limitations of the computer system.*

***Please expand in detail regarding the limitations of the computer system***

*Please note it is **not possible** to search for chest infection occurrences.*

***Can you please explain why ? as antibiotics and hospital referrals would have been recorded.***

*Also it is worth noting some searches I am able to run to include patient numbers of patients who are no longer registered at stoke (either moved away or deceased). I have put an asterisk (\*) on those searches as it will make the figures e.g. for cancer. The figures could look misleadingly low the further back you go as it will only show patients diagnosed in 2014 who are still alive **and** still registered with Stoke surgery.*

***Please provide :***

***The number of registered patients at the surgery for each year in the table supplied***

***The breakdown of cancer information as requested***

***The annual number of deaths for each listed health condition***

*This information is only as accurate as the people who are recording it at either this surgery or any previous surgery the patients have been registered at, and whether or not their notes have transferred across to us electronically.*

***When the requested information is supplied please indicate the level of data % accuracy."***

16. On 1 June 2023, the Authority responded stating that it had tried to provide the Requested Information to the best of its abilities. It went onto say:

*"We now feel we are unable to provide any more data due to the time involved in extracting information which, on its own, is not a true representation.*

*In addition, as the numbers are so low, the information could, especially if used in conjunction with other information, identify individual people. Disclosure of this personal information would not constitute fair processing under the Data Protection Act 2018. This is because the information was provided to us in the expectancy that it would remain confidential and because of the possible consequences to the individuals. For this reason, the information is exempt from disclosure under Section 40 of the Freedom of Information as disclosure would breach the first principle of Data Protection Act 2018.*

*I am sure you will be disappointed that we cannot help you further, however, you can contact the Freedom of Information team at Devon ICB who will have access to information for all practices and may be able to help you further."*

17. On the same date, the Appellant responded to the Authority and requested an internal review. The Appellant was unhappy with the links which had been supplied by the Authority, complaining that they were not links to the Surgery's statistics. He queried some of the other information which had been supplied and asked the Authority to supply all outstanding explanations and Requested Information. The Appellant also disputed the Authority's citation of the exemption under section 40, considering that it would not be possible to identify the individuals concerned from the Requested Information, especially as he had not requested district post code information.
18. Following an internal review, the Authority emailed the Appellant on 22 June 2023. It disclosed the number of registered patients at the Surgery between 2014 and 2023. The Authority considered that it was unable to provide any further information, stating that it had now "exceeded our time and capability" in respect of the Requests. It also stated the following:

*"With regard to the breakdown of cancer diagnoses, and the number of deaths requested, we are unable to provide this information. The numbers that would be generated would be very low and, if used in conjunction with other information already in the public domain, could possibly be able to identify individual people. The information is exempt from disclosure under Section 40 of the Freedom of Information Act 2000 disclosure would breach the first principle of the Data Protection Act 2018."*

19. On 27 June 2023, the Appellant contacted the Commissioner to complain about the Authority's response to the Requests. In particular, the Appellant complained that the Authority had withheld: (a) the Surgery's annual cancer statistics from 2014 to 2023, including the number of patients who suffered from gallbladder, liver, pancreas and biliary system cancers; (b) the Surgery's annual statistics from 2014 to 2023 for chest infections; and (c) the annual number of deaths for each of the health conditions specified in the First Request.

### ***The Commissioner's investigation***

20. During the course of the Commissioner's investigation, the Authority confirmed that it held further relevant information relating to the breakdown of cancer figures which had been requested. However, the Authority expressed concerns regarding disclosing that information to the Appellant, specifically surrounding the accuracy of the data. It reiterated that those figures would not include patients who were no longer registered with the Surgery. It also stated that those figures may include patients who were based elsewhere in the country when they received their diagnosis and had since registered with the Surgery, suggesting that their diagnosis could not be linked to the incinerator which the Appellant was investigating. The Authority also advised that the diagnoses of the four listed cancer types could be secondary cancers and not necessarily the primary source.
21. The Commissioner advised the Authority that a public authority is not obliged to determine the accuracy of the information it holds before disclosing it in response to a request under FOIA. The Commissioner queried with the Authority how any individual could be identified from the Surgery's cancer diagnosis figures, for the purposes of section 40(2).
22. During the course of the Commissioner's investigation, the Authority disclosed to the Appellant the overall (but not annual) figures which it holds for diagnoses of gallbladder, liver, pancreas and biliary system cancers from 2014 to 2023.
23. The Commissioner accordingly considered that the scope of his investigation was to determine if the Authority holds any further information for the remaining parts of the Requests. These were identified by the Commissioner as being the chest infection figures as requested in the First Request; and the following parts of the Second Request:

*"Please expand in detail regarding the limitations of the computer system*

*Can you please explain why [it is not possible to search for chest infection occurrences]? as antibiotics and hospital referrals would have been recorded.*

*The annual number of deaths for each listed health condition*

*When the requested information is supplied please indicate the level of data % accuracy."*

24. The Commissioner subsequently issued the Decision Notice.

### ***The Decision Notice***

25. As we have noted, in the Decision Notice:
  - a. the Commissioner decided that, on the balance of probabilities, the Authority does not hold any further information within the scope of the Requests;



- b. the Commissioner did not require the Authority to take any steps;
- c. the Commissioner found that the Authority had breached section 10(1).

## **The appeal**

### ***The grounds of appeal***

26. The Appellant's grounds of appeal were, in essence, that:
- a. as the Authority had provided overall figures of the cancer statistics from 2014 to 2023 for gallbladder, liver, pancreas and biliary system cancers, then the annual figures must be available;
  - b. the Authority should be able to provide the relevant links to its own online information in respect of annual statistics for chest infections for 2014 to 2023; and
  - c. the annual number of deaths of each of the nine conditions specified in his First Request should be provided.
27. The Appellant also asserted in his ground of appeal that the Decision Notice had erroneously recorded the failings of the Authority to respond to the Requests. In particular, the Appellant's view was that the Decision Notice had wrongly recorded only one failure by the Authority to comply with the relevant timescales in FOIA, whereas the Appellant considered that the Authority breached the requirements of FOIA in respect of the timescales for responses to both Requests as well as for internal reviews.

### ***The Tribunal's powers and role***

28. The powers of the Tribunal in determining this appeal are set out in section 58, as follows:

*"(1) If on an appeal under section 57 the Tribunal considers—*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

*(2) On such an appeal, the Tribunal may Review any finding of fact on which the notice in question was based."*

29. In summary, therefore, the Tribunal's remit for the purposes of this appeal was

to consider whether the Decision Notice was in accordance with the law. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts. Essentially, the Tribunal is empowered to undertake a 'full merits review' of the appeal before it (so far as the Decision Notice is concerned).

### ***Mode of hearing***

30. The proceedings were held by the cloud video platform. The Tribunal Panel joined remotely, with the Appellant joining by telephone (rather than via video). The Tribunal was satisfied that it was fair and just to conduct the hearing in this way. The Commissioner did not appear and was not represented.
31. There were no interruptions of note during the hearing.

### ***The evidence and submissions***

32. The Tribunal read and took account of an open bundle of evidence and pleadings. We also received and took account of some other documents which were not included in the bundle but were provided to the Tribunal Panel and the Information Commissioner separately. We also heard oral submissions from the Appellant during the hearing.
33. All of the contents of the bundles and those additional documents were read and considered, even if not directly referred to in this decision.

### **The relevant statutory framework<sup>1</sup>**

#### *General principles*

34. Section 1(1) provides individuals with a general right of access to information held by public authorities. It provides:

*"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 the request, and*

*(b) if that is the case, to have that information communicated to him."*

35. In essence, under section 1(1), a person who has requested information from a public authority is entitled to be informed in writing whether it holds that information. If the public authority does hold the requested information, that person is entitled to have that information communicated to them. However,

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<sup>1</sup> We acknowledge the Practice Direction dated 4 June 2024 (<https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-senior-president-of-tribunals-reasons-for-decisions/>) and particularly paragraph 9, which refers to the First-tier Tribunal not needing to specifically refer to relevant authorities. We include references to the applicable legislative framework, to provide relevant context, but have accordingly not referred to the applicable case law.

those entitlements are subject to the other provisions of FOIA, including some exemptions and qualifications which may apply even if the requested information is held by the public authority. Section 1(2) provides:

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

36. Accordingly, section 1(1) does not provide an unconditional right to be told whether or not a public authority holds any information, nor an unconditional right of access to any information which a public authority does hold. The rights contained in that section are subject to certain other provisions of FOIA.

#### Section 16 - Duty to provide advice and assistance

37. Section 16(1) provides:

*"It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it."*

#### The relevant legal test for whether or not information is held

38. It is important to note that, notwithstanding section 1(1), it is not the role of either the Commissioner or the Tribunal to determine conclusively (or, in other words, with certainty) whether or not information is actually held by a public authority for the purposes of that section. The legal test to be applied by the Commissioner and the Tribunal is the 'balance of probabilities'. In simple terms, the 'balance of probabilities' means that something is more likely than not to be the case.
39. Accordingly, in determining whether or not information is held on the balance of probabilities, a decision is often reached based on an assessment of the adequacy of the public authority's searches for the information and any other reasons explaining why the information is not held.

### **Discussion and findings**

40. As we have noted:
- a. the Appellant's complaint to the Commissioner specifically identified aspects the Requested Information which the Appellant alleged had not been disclosed by the Authority (see paragraph 19);
  - b. the Authority subsequently disclosed further information (see paragraph 22); and
  - c. the scope of the Commissioner's investigation related to whether the Authority holds any further information for certain aspects of the Requests (paragraph 23). This remaining information was therefore the subject matter of the Decision Notice.

41. During the hearing, we sought clarification of the Appellant's views regarding the Requested Information which was the subject of the appeal (essentially, the information which he considered had not been disclosed in respect of the Requests). He confirmed that this was the following (as outlined in his complaint to the Commissioner and in his grounds of appeal):
- a. the annual cancer statistics (from the First Request);
  - b. the annual chest infection statistics (from the First Request);
  - c. the annual number of deaths (from the Second Request) in respect of each of the health conditions specified in the First Request.
42. Our decision therefore focusses on those aspects of the Requested Information, taking into account the evidence and the parties' submissions (as well as the contents of the Decision Notice) in respect of such Requested Information. We address each aspect under those headings, for ease of reference.
43. Before we address those, though, we first set out our observations regarding the aspects of the Second Request and the application of section 16.

#### *Section 16*

44. As we have noted, the Second Request included the following aspects:

*"Please expand in detail regarding the limitations of the computer system*

*Can you please explain why [it is not possible to search for chest infection occurrences]? as antibiotics and hospital referrals would have been recorded.*

*When the requested information is supplied please indicate the level of data % accuracy."*

45. In our view, those aspects were not in fact requests for additional information but rather the Appellant seeking to better understand the response which had been provided by the Authority in respect of the First Request, especially given that the Authority had referred to potential deficiencies in the information it had disclosed in response to the First Request.
46. Indeed, the Commissioner recorded at paragraph 22 of the Decision Notice that the first two of those aspects were *"seeking explanations rather than recorded information held by the Authority at the time when it received the request, therefore it was not obliged to respond to either part under FOIA."* Whilst we agree with the Commissioner that those were indeed seeking explanations, the Commissioner neglected to address in the Decision Notice whether there was any other obligation on the Authority under FOIA in respect of those aspects. In particular, the Decision Notice did not address section 16(1), pursuant to which (in summary) the Authority had a duty to provide reasonable advice and assistance to the Appellant in respect of the Requests.

47. Whilst the Authority provided some information set out in the Second Request, it did not respond to those queries from the Appellant. We find that those queries were understandable and measured responses in respect of the identified potential deficiencies in the Requested Information which had been provided to the Appellant. We also find that it would therefore have been reasonable for the Authority to at least provide some explanation regarding those potential deficiencies, which it itself had identified. However, as no such advice or assistance whatsoever was provided by the Authority, we find that the Authority was therefore in breach of section 16(1).

#### *Annual cancer statistics*

48. The Commissioner acknowledged that the First Request sought annual cancer statistics for 2014 to 2023 and also that the Authority was able to provide the Appellant with totals for the four different cancers for the nine years between 2014 and 2023. In his response to the appeal, the Commissioner conceded that it was *"not apparent to the Commissioner how the [Authority] was able to locate and extract the overall information and thus whether it holds or would be able to collate a breakdown of cancer statistics by each specific year"*.

49. The Commissioner accordingly invited the Tribunal to exercise its case management powers to seek specific submissions from the Authority on this point.

50. In our view, this demonstrates a failing on the part of the Commissioner to identify the relevant issues and gather sufficient evidence in order to make an appropriate decision for the purposes of the Decision Notice. It should be remembered that the Decision Notice related to whether or not (on the balance of probabilities) the Authority held further information within the scope of the Requests. The Commissioner's conclusion in the Decision Notice was, of course, that (on the balance of probabilities) the Authority does not hold any further information within the scope of the Requests.

51. It is difficult to see how the Commissioner can have come to that conclusion, given that there was a self-evident issue which he needed to first resolve – namely, how the Authority could provide the overall statistical information if it claimed it did not have the information recorded annually.

52. As we have alluded to, we consider that this is something which the Commissioner should have addressed as part of his section 50 investigation. In any event, though, in our view the Commissioner should have addressed this issue himself as part of his response to the appeal, in order to justify the conclusions that he reached in the Decision Notice, as opposed to inviting the Tribunal to seek submissions from the Authority.

53. The Tribunal did seek (pursuant to Case Management Directions dated 26 January 2024) and receive submissions from the Authority on that point (and others). Its submissions stated, with reference to some of the information

which had been provided by it in respect of cancer figures: *"It may be possible to review the figures and provide a further breakdown if this is required."* It is perhaps ironic that, following the Authority's submissions, the Commissioner contacted the Tribunal to comment that those submissions did not adequately address matters and that, given that statement, the Tribunal may be unable to reach a view on the issues in dispute.

54. That comment from the Commissioner appears to be missing the point that the appeal related to whether or not, on the balance of probabilities, further information is held by the Authority. In our view, the Commissioner has essentially accepted the possibility that the Authority may have relevant information in its possession and we would query why the Commissioner continued to resist the appeal (at least in respect of this issue) at that point. We find that the Commissioner, in the Decision Notice, based his decision - so far as the annual cancer statistics are concerned - on insufficient evidence and accordingly should not have come to the view that, on the balance of probabilities, the Authority does not hold any further information within that part of the First Request.
55. We also note that the Commissioner, in his response to the appeal, considered the possibility that, even if the Authority did hold those statistics, there may be an exemption (under section 40) to the duty under FOIA to disclose information which is requested. We accept that possibility, but again it is the Decision Notice itself which is the subject of the appeal (which concluded that no further information was held by the Authority on the balance of probabilities). Accordingly, for the purposes of the appeal, it is not necessary for us to address the possibility of relevant exemptions should any more of the Requested Information be held by the Authority.

#### *Annual chest infection statistics*

56. The Commissioner referred to the Decision Notice regarding the basis on which the Authority concluded that it did not hold annual statistics on chest infections. In essence, the Decision Notice recorded the Authority's explanation that:
  - a. generic chest infections are not routinely coded (and that clinical coding is the system by which unique and precise 'codes' are used to record diagnoses or various aspects of patient care); and
  - b. searches, as suggested by the Appellant, for antibiotic prescriptions and hospital referrals would not identify occurrences of chest infections alone. This was because both antibiotic prescriptions and hospital referrals occur for a wide variety of health concerns, and a suspected chest infection would not necessarily require antibiotics or a hospital referral.
57. In our view, the Authority did not meaningfully engage with the Appellant, on the basis required by section 16(1), regarding this aspect of the First Request or his subsequent request for clarification via the Second Request. It was clear

from the Appellant's Second Request that he wanted to know why it was not possible to search for chest infections. The Authority's primary response to this, as noted above, was that chest infections are not routinely coded on the clinical system. However, plainly that is not an explanation as to why searches could not be done for chest infections. In essence, the Authority merely stated that it did not record the relevant Requested Information in a particular way (namely, by reference to the coding) and we consider that to be an unduly narrow view, given what was requested. At the same time as taking that narrow view, the Authority did not provide the Appellant with advice or assistance as to any alternatives regarding the relevant Requested Information.

58. We recognise that the Authority did subsequently explain the issues regarding how antibiotic prescriptions and hospital referrals would not identify occurrences of chest infections, but that response was led by the Appellant's own suggestion of potential searches and it did not address any other reasons regarding the alleged inability to search for chest infections.
59. Further, the Authority's position (as noted) was that chest infections were not routinely coded. The Authority actually stated that "*chest infections are **not always** coded on the clinical system*" (emphasis added). Evidently, therefore, chest infections were sometimes coded and recorded on the system. As the Commissioner explained to the Authority during his investigation (and as recorded in the Decision Notice), for the purposes of FOIA records held by a public authority do not need to be accurate - but what matters is the information which the public authority actually does hold. In this instance, the Authority clearly does hold some recorded information regarding chest infections - and it is immaterial whether or not that information is an accurate representation of every patient that has presented to the Surgery with a chest infection.
60. For those reasons, we find that the Commissioner erred in concluding that, on the balance of probabilities, the Authority does not hold any further information within the scope of the Requests relating to the chest infection statistics.
61. In our view, there was also insufficient evidence regarding any other searches which the Authority did do (or could have done) in order to identify whether or not further information relating to chest infections was recorded by the Authority.
62. Again, we note that Commissioner, in his response to the appeal, also invited the Tribunal to seek submissions from the Authority as to whether, notwithstanding that chest infections are not routinely coded, it is possible to identify a chest infection diagnosis from other recorded information. In this regard, we would repeat our points above to the effect that the Commissioner should have satisfied himself of this possibility before issuing the Decision Notice - although in this particular instance, as we have noted, it was already clear from the information provided by the Authority to the Commissioner that relevant information was in fact recorded.

63. The Commissioner also referred, in his response to the appeal, to the possibility that the Authority may be able to rely on section 12 in respect on this aspect of the Requested Information. Again, we accept that possibility, but (for the same reasons given in paragraph 55) that is not an issue we needed to determine in the appeal.

#### *Annual number of deaths*

64. The Decision Notice recorded the Authority's explanation that it did not hold annual death statistics on each of the nine specified conditions, which (in summary) was because:

- a. the cause of death is recorded on the death certificate which is handwritten and sent to the Registry Office;
- b. patients are deducted from the Surgery at the time of death and their records are returned to the local health Authority.

65. The Commissioner therefore concluded that this aspect of the Requested Information is no longer held by the Authority from the point of returning the records.

66. We consider that the Commissioner's view on this aspect also lacks sufficient analysis and scrutiny. The obvious question is what happens before the point of returning those records. We did not have relevant evidence for us to determine that issue, but it seems reasonable to assume that at some point before the records are returned the Authority must have a record that the patient has died. Indeed, at some point there must be some communication to the Surgery of the death of a patient, in order to trigger the Surgery's release of the records and it is plausible that that communication could be in recorded form.

67. We consider that it is also possible that any such communication and/or any other record of death (i.e. aside from the deceased patient's own records), is held by the Authority for its own purposes. If, for example, a deceased's representative or the police contacted the Surgery after the patient's records were returned then, based on that explanation by the Authority, the Authority would have no record that the deceased was ever a patient (indeed, no record that the deceased had even ever existed). That may well be the case (and we make no finding on it either way), but we find that this was not adequately scrutinised by the Commissioner in order to conclude that, on the balance of probabilities, the Authority does not hold any further information within the scope of the Second Request relating to the death statistics.

68. Indeed, in support of our view that it is more likely than not that the Authority does hold some data regarding the deceased, the Authority's email to the Appellant dated 22 May 2023 (set out in paragraph 14) referred to the Authority being able to run searches which include numbers of patients who are no longer registered at the Surgery because they are deceased. Evidently, the



Surgery would not be able to run those searches and/or identify those records if it held no data whatsoever on the deceased, to some degree or another. We accept that this does not necessarily mean that the Authority holds the records of deaths referred to in the Second Request. However, given the contents of that email, it is again difficult to see how the Commissioner can have come to the conclusion that (on the balance of probabilities) the Authority does not hold any further information within the scope of the Second Request relating to the death statistics.

69. Moreover, the Authority's email to the Appellant dated 22 June 2023 (which we referred to in paragraph 18) stated: "*With regard to the breakdown of cancer diagnoses, and **the number of deaths requested**, we are unable to provide this information. **The numbers that would be generated would be very low** and, if used in conjunction with other information already in the public domain, could possibly be able to identify individual people.*" (emphasis added). Given the contents of that email, we find that the Authority did consider that it held information recording the number of deaths, albeit with the caveats it gave that the numbers would be low and that this could comprise personal data.
70. We consider the Authority's approach to this aspect of the Requested Information may be similar to that regarding the annual chest infection statistics, in that a very narrow view may have been taken as to what the Authority actually has records of, or the purposes for which it may hold different types of records.
71. As we have noted, the Authority has categorically stated that it did not hold any information within the scope of the request for annual chest infection statistics, when it is obvious that it did at least hold some information within that scope (even by its own narrow view of what was recorded, by reference to the coding system). It is also evident from the Authority's responses to the Requests that it was not fully aware of its obligations pursuant to FOIA and accordingly we consider that the Commissioner should have been more rigorous in assessing the Authority's explanations regarding whether or not it holds the relevant Requested Information.
72. Whilst the Commissioner queried with the Authority about the potential relevance of the exemption in section 40, he did not interrogate the nature of the response indicating that the Authority did hold records relating to the number of deaths. In our view, that email alone meant that the Commissioner should not have concluded that the Authority does not, on the balance of probabilities, hold any further information within the scope of the Requests relating to the death statistics.
73. We would also make the point, incidentally, that any potential exemption under section 40 would not apply to records of deaths (given that personal data only relates to living individuals). We accept the possibility that, depending on the information in question and other relevant factors, disclosing records of deaths and/or the reasons for deaths could potentially identify other, living, individuals

- but this would need to be carefully assessed, taking into account the fact that records of the deceased are not personal data.

### *Other points*

74. We briefly turn to the other points from the Appellant's grounds of appeal.
75. We do not accept the Appellant's arguments that the Commissioner erred by recording the failure by the Authority to comply with the relevant timescales in FOIA for responses in respect of only one of the Requests. We agree with the Commissioner's arguments that it is implicit that the findings in paragraph 27 of the Decision Notice in respect of section 10(1) are applicable to both Requests, because the Decision Notice covers both Requests.
76. We also do not accept the Appellant's arguments that the Authority breached the requirements of FOIA in respect of the timescales for internal reviews. This is because (in contrast to the Environmental Information Regulations 2004) FOIA does not oblige a public authority to conduct an internal review. It is good practice to do so, under the code of practice issued pursuant to section 45, but it is outside of our jurisdiction to make any findings in respect of the standard of the Authority's handling of the Requests.
77. However, as we have noted, we consider that the Authority breached section 16(1) by not providing reasonable advice and assistance to the Appellant in connection with the Requests.

### **Final conclusions**

78. For all of the reasons we have given, we find that the Decision Notice involved an error of law by concluding that, on the balance of probabilities, the Authority does not hold any further information within the scope of the Requests.
79. We also find, for the reasons we have given, that the Decision Notice involved an error of law in not concluding that the Authority had breached section 16(1).
80. We therefore allow the appeal and we make the Substituted Decision Notice as set out above.

Signed: Stephen Roper  
Judge of the First-tier Tribunal

Date: 17 February 2025