

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2021

Public Authority: South Tyneside and Sunderland NHS Foundation Trust

Address: South Tyneside District Hospital
Harton Lane
South Shields
Tyne & Wear
NE34 0PL

Decision (including any steps ordered)

1. The complainant has requested the total number of COVID-19 deaths in the South Tyneside Area from February 2020 to November 2020.
2. South Tyneside and Sunderland NHS Foundation Trust (the Trust) explained that to provide the information would exceed the cost limit outlined in section 12(1) of the FOIA (cost of compliance exceeds the appropriate limit).
3. The Commissioner's decision is that the Trust is entitled to rely on section 12(1).
4. However, he also finds that the Trust failed to provide any advice and assistance to the complainant in the making of their request and has therefore failed to comply with its obligations according to section 16(1) of the FOIA (duty to provide advice and assistance).
5. The Commissioner therefore requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide advice and assistance to the complainant in relation to their request.

Request and response

6. On 23 November 2020, the complainant wrote to the Trust and requested information in the following terms:

"I am trying to gather information regarding actual deaths within the Trust from COVID-19 for the period February 2020 to November 2020."

7. The Trust responded on 8 December 2020 and confirmed that 498 patients died between February 2020 and November 2020 whilst in the Trust's facilities and *'had either tested positive for COVID-19 or where no positive test result was received, COVID-19 was felt to be a contributory factor and therefore disclosed on their death certificate.'*

8. The complainant requested an internal review on 12 December 2020 on the grounds that the Trust had misinterpreted their request. The complainant explained:

"Your answer related to patients who had died but had also had a positive test, which suggests they died with covid not from it...I would like to accept your offer of an internal review and request information about how many patients within the Trust have died solely from covid."

9. The complainant then made a further request, asking for a breakdown of the months in which these patients died.
10. The Trust provided the outcome to this internal review on 25 January 2021, stating that to provide information in response to the request would exceed section 12(1).

Scope of the case

11. The complainant contacted the Commissioner on 25 May 2021 to complain about the way that their request for information had been handled.
12. The complainant explained to the Commissioner that they would be happy to remove the latter addition to their request, relating to the monthly breakdown in which patients died from COVID-19. The complainant confirmed that they just wished to receive the total figure of patients who had died from COVID-19 between February 2020 and November 2020.
13. The Commissioner therefore considers the scope of his investigation to be to determine whether the Trust has correctly refused to provide the information requested as to do so would exceed the appropriate cost

limit as set out in section 12(1) and whether it has complied with its obligations according to section 16.

Reasons for decision

Section 12 – cost of compliance

14. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that to do so would exceed the appropriate limit – 18 hours for a public authority such as the Trust.
15. When considering whether section 12(1) applies, the authority can only take into account certain costs as set out in the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 ('the Regulations'). These are set out at Regulation 4(3) and are:
 - (a) *'determining whether it holds the information,*
 - (b) *locating the information, or a document which may contain the information,*
 - (c) *retrieving the information, or a document which may contain the information, and*
 - (d) *extracting the information from a document containing it.'*
16. In order to determine whether compliance with the request would exceed the appropriate limit, the Commissioner asked the Trust to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of the request.

The Trust's position

17. Firstly, the Trust explained to the Commissioner how it had been able to easily provide the figure of 498 patients who, between February 2020 and November 2020, died whilst in the Trust's facilities and *'had either tested positive for COVID-19 or where no positive test result was received, COVID-19 was felt to be a contributory factor and therefore disclosed on their death certificate.'*
18. During the pandemic NHS Trusts in England are required to provide daily reports via a system administered by NHS England. Each Trust must report each instance in which a patient dies in hospital and has also tested positive for COVID-19 within the 28 days before their death. However, there is no requirement for COVID-19 to have directly caused or contributed to the patient's death; only that the patient has died in hospital and was included as part of the daily report in question.

This is the information, collated by each devolved healthcare body, which has been reported daily by the government during the pandemic.

19. However, this is not what the complainant is asking for. The Trust has estimated that, to determine how many of these 498 patients died and had COVID-19 listed as the cause of death on their death certificate would take approximately 124.5 hours.
20. The Trust has explained that when a patient dies in hospital a Medical Certificate of the Cause of Death (MCCD) is completed. This is a hard copy certificate which records the cause of death as determined by a doctor.
21. The Trust has also explained that *'Once the MCCD has been completed, the Trust's bereavement office scans and provides a copy of the full certificate to the Registrar. There has previously been no need for the Trust to perform searches for information contained within the electronic copies of the full MCCDs and therefore this information is not named or stored in a consistent way or in an electronic filing system.'*
22. With the above in mind, the Trust has determined that it would be extremely difficult to perform electronic searches of the MCCDs held, instead it would need to perform manual searches in an attempt to locate the 498 patients referred to *'in order to ascertain whether COVID-19 was the sole cause of death.'*
23. When the Commissioner wrote to the Trust to outline this investigation, the Commissioner explained that estimates relating to compliance should be realistic, sensible and supported by cogent evidence. The Commissioner encouraged the Trust to carry out a sampling exercise in order to reach its estimate.
24. The Trust has explained that it *'manually checked the MCCDs of 10 patients, all of whom died during the specified timescale. The Trust confirms that this process took 2 hours and 30 minutes.'*
25. The Trust has further explained that, for the 498 patients in question, *'Once the MCCDs for the patients were located, the detail recorded on each MCCD would need to be studied to determine whether COVID-19 was the sole cause of death.'*

The Commissioner's view

26. The Commissioner concurs with the Trust when it says *'...even if the process became twice as affect it would take the Trust a minimum of 62 hours to check the MCCD's of the 498 patients in question. In order to complete the review within the timeframe, the process would need to be almost seven times more effective.'*

27. Furthermore, the Commissioner accepts that a manual review of all MCCDs would be the most efficient way of locating and retrieving the relevant information.
28. The Commissioner therefore accepts the Trust's explanation relating to the time it would take to locate each MCCD which identifies COVID-19 as the sole cause of death for a patient. Having considered the Trust's submission, the Commissioner is of the opinion that the authority is entitled to rely on section 12(1) of the FOIA.

Section 16 – advice and assistance

29. Section 16 of the FOIA states that:

- (1) *"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.*
- (2) *Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."*

30. Paragraph 2.10 of the section 45 Code of Practice¹ states:

'Where it is estimated the cost of answering a request would exceed the 'cost limit' beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit.'

31. In both the Trust's refusal notice of 8 December 2020 and its internal review outcome of 25 January 2021 it failed to advise the complainant of how they may narrow the scope of their request to fall within the limit referred to within section 12(1) – 18 hours.
32. The Trust has explained to the Commissioner that *'The Trust did not offer any further advice and assistance to the complainant as it was felt that the request was straightforward and could not be refined.'* However, the Commissioner does not consider this to be the case.

¹ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

33. The Commissioner notes that, in line with the explanation given by the Trust and outlined in paragraph 18, during the pandemic the Trust has reported daily on each instance in which a patient dies in hospital and has also tested positive for COVID-19 within the 28 days before their death.
34. Therefore, the Trust may have wished to study its reporting figures and liaise with the complainant to ascertain if they would be happy to reduce the timeframe of their request to a smaller timeframe.
35. For example, the complainant may wish to revise their request to represent the month in which the Trust reported the highest amount of deaths in order to be presented with the biggest sample size relating to their request.
36. Alternatively, if the Trust advised that compliance with this month would still exceed the appropriate limit, the complainant may wish to revise their request to represent the month in which the Trust reported the fewest number of deaths.
37. If the MCCDs cannot be studied by the month, the Trust can still study a reasonable sample size of the information, as it did to justify its application of section 12(1). From the Trust's own calculation, it could study approximately 72 MCCDs in 18 hours to determine the proportion of patients who died from COVID-19.
38. The Commissioner therefore considers the Trust could have offered some meaningful advice and assistance to the complainant to assist in reframing the request to potentially bring it under the cost limit.

Other matters

39. In both the Trust's internal review outcome and its submission to the Commissioner, the Trust explained that it believes *'to access individual healthcare records for the purposes of fulfilling a Freedom of Information Act breaches the principles of the Data Protection Act.'*
40. Whilst an exemption, section 40(2), exists within the FOIA to exempt information from disclosure where complying with the request would breach any of the principles in the UK GDPR, this is not likely to apply in this instance. This is because information must relate to an identifiable living individual and the Commissioner does not consider that any figure disclosed in response to this request would fall into that category.
41. Furthermore, the Commissioner would like to assure the Trust that considering any request for personal information under the FOIA does

not in itself breach the principles of the Data Protection Act. The Commissioner has published detailed guidance² on when the disclosure of personal information under the FOIA is appropriate.

² [s40 Personal information \(section 40 and regulation 13\) version 2.3 \(ico.org.uk\)](https://ico.org.uk/for-organisations/articles-and-guidance/subject-access/s40-personal-information-section-40-and-regulation-13-version-2.3)

Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

43. 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.
44. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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