

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

### **Decision notice**

**Date:** 19 May 2021

**Public Authority:** Herefordshire Council  
**Address:** Plough Lane  
Hereford  
HR4 0LE

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

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1. The complainant has requested information held by Herefordshire Council (the council) about various matters relating to the COVID-19 pandemic.
2. The council provided the complainant with a response to parts 3 and 4 of his request. However, it advised that it was refusing to provide information relevant to part 1 of the request, which asked for the names of care, and nursing, homes based within Herefordshire which had reported suspected, or confirmed, cases of COVID-19, citing the exemptions at section 38(1) and 43(2) of the FOIA. It also confirmed that it was refusing to comply with part 2 of the request, which was for the same information but in relation to care homes used by the council within the county of Worcestershire, on the same basis.
3. During the course of the Commissioner's investigation, the council then confirmed that it did not hold any information that was relevant to part 2 of the request. In addition, it advised that it now regarded section 40(2) to also be applicable to the information it had withheld in response to part 1 of the request.
4. It is the Commissioner's decision that the council is entitled to rely on section 38(1) of the FOIA in respect of all that information which it holds that is relevant to part 1 of the complainant's request.
5. The Commissioner does not require the council to take any steps as a result of this decision notice.

## Request and response

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6. On 11 June 2020, the complainant wrote to the council and requested information in the following terms:
  1. *A full list of care homes & nursing homes in Herefordshire County who reported suspected or confirmed cases of coronavirus (COVID-19) to Herefordshire Council between 1<sup>st</sup> January 2020 to 10 June 2020*

*Please present separate lists, i.e.*  
*Names of homes with suspected infection*  
*Names of homes with confirmed infection*
  2. *A full list of care homes & nursing homes in Worcestershire County whose services are commissioned or used by Herefordshire Council and who reported suspected or confirmed cases of coronavirus (COVID-19) to Herefordshire Council between 1st January 2020 to 10th June 2020*

*Please present separate lists, i.e.*  
*Names of homes with suspected infection*  
*Names of homes with confirmed infection*
  3. *The exact date Herefordshire Council became aware of coronavirus and its appearance in The UK*
  4. *The first reported incident of coronavirus in Herefordshire County reported to Herefordshire Council*
7. The council responded to the complainant on 3 July 2020, providing an answer to both points 3 and 4 of the request; however, it advised that the information relevant to parts 1 and 2 of the request was to be withheld. It firstly referred to section 43(1) of the FOIA (it would appear that the council's intention was to make reference to section 43(2), as it refers to commercial interests when applying the exemption) as its basis for refusing the request.
8. The council explained its reasons for applying this exemption to the withheld information before going on to advise that it regarded part 1 and 2 of the request to also be subject to the exemption at section 38(1) of the FOIA.
9. The council set out its consideration of the public interest test in relation to both exemptions, concluding that it believed that this lay in favour of withholding the information in this instance.

10. The complainant requested an internal review on 7 July 2020, and the council provided its response on 30 July 2020. With regards to points 1 and 2 of the request, the council maintained its view that disclosure of the requested information would adversely affect the commercial relationship between the council and the providers of nursing and care homes (both to be referred to as care homes for the remainder of this decision notice for simplicity).
11. The council also upheld its previous application of section 38(1) of the FOIA to points 1 and 2 of the request, before confirming that it still believed that the public interest weighed in favour of withholding the information under both exemptions.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 4 August 2020, to complain about the way his request for information had been handled. He was primarily concerned that the council had failed to provide any information in response to part 1 of his request. He stated that it was his understanding that when applying a prejudice based exemption, it is necessary to show an evidential burden, not a hypothetical one, which he believed that the council had failed to do.
13. During the course of the Commissioner's investigation, the council advised that it now wished to revise its position in respect of part 2 of the request; it stated that it did not hold this information. The council also contacted the complainant directly to confirm this, recommending that he make a request to Worcestershire County Council, should he still require information about that area.
14. The council also notified the complainant and the Commissioner that in addition to applying section 43(2) and section 38(1) to part 1 of the request, it now wished to also rely on a further exemption, that being section 40(2) of the FOIA (personal data). It then went on to explain to both parties its reasoning for applying this additional exemption.
15. The complainant remained dissatisfied with the council's handling of his request; in particular he stated that given that media articles in the public domain had named specific care homes, he believed the council's decision to be unsound.
16. The Commissioner considers the scope of her investigation to be whether the council is correct to have withheld information that is relevant to part 1 of the complainant's request. She intends to firstly consider whether the council is entitled to rely on section 38(1) when refusing to provide such information. If necessary, the Commissioner

will then go on to consider whether the council is entitled to rely on section 43(2), and then finally section 40(2) of the FOIA.

## Reasons for decision

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### Section 38 – Health and Safety

17. Section 38(1) of the FOIA states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to-*

- (a) endanger the physical or mental health of any individual, or*
- (b) endanger the safety of any individual.'*

18. The Commissioner's published guidance on section 38<sup>1</sup> states that endangering physical health usually means an adverse physical impact and often involves medical matters; this can relate to individuals or groups. It goes on to say that endangering mental health implies that the disclosure of information might lead to a psychological disorder, or make mental illness worse, and therefore must have a greater impact than causing upset and distress.

19. With regards to section 38(1)(b) the Commissioner's guidance states that endangering safety could also endanger a person's mental or physical health; therefore, in some circumstances both parts of the exemption can be relied upon.

20. Unlike a number of other exemptions set out within the FOIA, in section 38(1) the term '*endanger*' is used, rather than prejudice. In the Tribunal case of *Lownie v IC*, the National Archives and the Commonwealth Office EA/2017/0087<sup>2</sup>, the view was taken that any attempt to assimilate the two tests of prejudice and endanger '*merely muddies the waters*' and therefore for '*the purposes of s 38 we must apply the words of section 38, not the words of different exemptions*'. Given the Tribunal's comments, the Commissioner concludes that the prejudice test that is

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<sup>1</sup> <https://ico.org.uk/for-organisations/section-38-health-and-safety/>

<sup>2</sup> [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087\\_Decision\\_2018-07-11.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087_Decision_2018-07-11.pdf)

used in many FOIA exemptions cannot simply be considered as a substitute for the word '*endanger*'.

21. The Tribunal went on to say that a '*real risk*' is not enough to satisfy the application of the exemption. It also made it clear that the term '*would*' endanger refers to something '*more likely than not*' to occur (that is the probability is greater than 50%). With regard to '*would be likely to*' endanger, the Tribunal stated that this is only applicable where there is a '*very significant and weighty chance*' of occurrence, such as that the occurrence '*may very well*' occur.

### **The council's position**

22. The council has confirmed that it is relying on the lower threshold that disclosure '*would be likely to*' cause endangerment to an individual. or group of individuals, when applying section 38(1) to the withheld information. It has provided a number of reasons for taking this view.
23. Firstly, the council states that it considers that the disclosure of the requested information would be likely to cause distress to both care home residents, and their families. It has said that at the time that it received the complainant's request, the guidance issued to the care homes by the Care Quality Commission (CQC) was that information about any suspected, or confirmed COVID-19 cases, was better shared with affected families by the care home itself; this is because the latter would be able to provide important context to such information, and would also be in a position to provide any appropriate support to the families. The council also confirmed that, at the time of its response to the Commissioner, the CQC guidance on this point remained unchanged.
24. The council goes on to say that it had considered that, at the time of the request, the disclosure of the requested information to the '*world at large*' in response to an FOIA request would not have been in keeping with the CQC guidance. It believes that the public and media attention which would be likely to arise as a result could drive behaviour which would be detrimental to the wellbeing of vulnerable people, and to wider public health. It also argues that disclosure risked creating confusion as to the prevalence, spread, or impact of the virus in a named location at that time; such disclosure may have led to a perception that a care home was not safe, and as a result, the social care user may have left that care home, or be removed from the family.
25. The council also makes the point that the social care users' medical needs are met by the care homes (and that this is why they are placed there). It states that there would be no guarantee that if a resident was suddenly removed, that their needs could be sufficiently met elsewhere, particularly given that at the time of the request, care homes were

restricting the number of placements which they were accepting (to allow for greater social distancing within the care home, and to restrict the potential for COVID-19 outbreaks). The council argues that if care needs were not sufficiently met, then this would be likely to endanger an individual's health. Furthermore, it suggests that changes to surroundings would be likely to be '*especially distressing*' to those with dementia.

26. The council has also referred to the fact that, at the time of the request, there was limited testing capacity, and there were no approved vaccinations. There was also concern about the impact of future waves of COVID-19 in the UK. The council has said that it was felt that the disclosure of the withheld information would be likely to set a precedent for future disclosure of this type of information, with requests for more up to date lists of care homes with COVID-19 cases. It believes that if this were to have occurred, against the guidance of the CQC, then certain residents could decide to move care homes; if they are asymptomatic at the point of removing themselves from the care home, then they would be more likely to infect their families if they returned to the family home and, in turn, the general population in the area. Furthermore, if an individual transferred to another care home which they had considered to be safe, then they could potentially have taken the virus into that setting, endangering the health of residents and staff at that home. The council has claimed that it would therefore be likely that public health would be endangered through a community outbreak of COVID-19, which would not have occurred had the resident remained in their original setting.
27. The council has also argued that disclosure would also be likely to discourage individuals who need the type of care that can be provided from a care home from entering care in the first place, or deferring this for the present. It advises that it may not be possible to meet their medical needs sufficiently in the community and as such, it is likely that their health would be endangered, as they would not be receiving the level of care they require.

### **The Commissioner's view**

28. As the council has made several references to the distress which would be caused, should the information be released, the Commissioner has further considered the case of *Lownie v IC*, the National Archives and the Commonwealth Office (previously referred to in paragraphs 20-21 of this decision notice). The Tribunal commented that whilst distress can be a trigger leading to mental ill-health, it did not consider that distress, in itself, should be equated with mental ill-health for the purposes of section 38. It stated that a healthy or unhealthy person may experience distress without suffering any, or additional, mental ill-health.

29. Therefore, the Commissioner would need to be satisfied that endangerment to mental health *'may very well occur'*; claims and evidence of distress alone would not be sufficient.
30. The Commissioner is aware that at the time of the request there was significant media attention about the increase in COVID-19 infection rates within care homes, and the consequences of this. Indeed, on the date of the council's response to the complainant, one of the main headlines on the BBC<sup>3</sup> website concerned a report about concerns relating to the high death rates from COVID-19 in care homes.
31. The CQC published a document<sup>4</sup> in July 2020 (close to the time of the complainant's request) which advised that its research had shown that there had been a reduction in admissions to care homes during the pandemic. It is the Commissioner's opinion that the public concern about the risks of infection of COVID-19 within the care home environment at the time of the request was real and of substance, and is highly likely to have been a significant factor in the reduction of admissions to care homes.
32. The Commissioner is of the opinion that the disclosure of the requested information would contribute to the negative public perception of certain care homes which already existed at the time of the request. She is also persuaded by the council's submissions that there was a realistic possibility that this would, in turn, have an adverse impact on decisions reached in relation to placement of those in need of residential care, and admissions to some care homes. Furthermore, she accepts that if the information were to be released, certain individuals are likely to make comparisons between care homes, and would also make inaccurate assumptions about the safety and standards within certain care homes on the basis of such information. This could then lead to families making ill informed decisions about which care home would best meet the particular care needs of their relative.
33. Given the level of media attention on care homes at the time of the request, the Commissioner also considers that it is not unreasonable to conclude that, had the information been released at the time of the

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<sup>3</sup> <https://www.bbc.co.uk/news/uk-53280011>

<sup>4</sup> <https://www.cqc.org.uk/sites/default/files/20200715%20COVID%20IV%20Insight%20number%203%20slides%20final.pdf>



request, certain care homes would have been subject to some scrutiny by the public, and the media.

34. The council has advised the Commissioner that care homes within the county are generally small in size, and many are located within rural settings or market towns which have relatively small populations when compared to larger towns or cities elsewhere in the UK.
35. As the council has pointed out, care homes are the private homes of vulnerable individuals and the Commissioner is mindful that it is important that such individuals should feel safe, well cared for, and protected in this environment. She therefore has some concerns that the attention which will be drawn to some specific care homes as a consequence of the release of the information, and the scrutiny which will be likely to follow, would not only cause some distress, but is likely have a detrimental impact on the mental health of some residents.
36. The Commissioner is satisfied that it is likely that the information, if released, would have led some families to decide to make arrangements to transfer their relative from one care home setting to another, or bring them into the family home, in the hope that this would help to protect them from the risk of COVID-19 infection. The Commissioner accepts that such disruption would be likely to have an impact on both the mental and physical health of vulnerable individuals. In addition, given that movement from one home to another would also increase the risk of transmission of COVID-19, it is also likely to affect the physical health of others.
37. The Commissioner has also considered whether the disclosure of the requested information would be likely to cause endangerment to the physical and, or, mental health of the staff working within the care homes.
38. An article<sup>5</sup> published by the GMB union states that research carried out before the COVID-19 pandemic found that care workers were at a significantly higher risk of dying by suicide. It also provided details of a survey conducted during the pandemic which found that of the 1200 care workers that had participated, three quarters had reported that they had experience worsened mental health as a result of their work during the pandemic.

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<sup>5</sup> <https://www.gmb.org.uk/news/three-quarters-care-workers-mental-health-has-worsened-during-pandemic>



39. The Social Care Institute of Excellence (SCIE), which is a charitable organisation that provides support and improvement on social care in the UK, published an article<sup>6</sup> that reports that conversations with care home managers, staff, providers and sector leaders have identified common issues which are negatively affecting the wellbeing of care home and supported living staff. One such issue is anxiety around a first, or another, outbreak in their care home. The article goes on to provide examples of how a number of care homes are trying to improve the mental health of their staff since the start of the COVID-19 pandemic.
40. Having taken into account all relevant factors, including most importantly the timing of the request, the Commissioner is satisfied that there is a *'very significant and weighty chance'* of endangerment to the physical and mental health of individuals using, or wishing to use, the services of care homes, should the withheld information relevant to part 1 of the request be released. She is also satisfied that endangerment to the physical and mental health of the staff at the care homes *'may very well occur'*. As a result, the Commissioner has concluded that the lower bar of *'would be likely'* to cause endangerment as described in section 38(1) has been met in this instance.
41. Given that the Commissioner is satisfied that the release of the information requested would be likely to endanger the physical and mental health of an individual, or group of individuals, and that section 38(1) is engaged, she will now go on to consider the public interest test.

### **Public interest test**

42. In cases where the Commissioner accepts that section 38(1) is engaged, she must go on to consider the application of the public interest test associated with this exemption. This provides that even when the exemption is engaged, information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
43. The scheme of the FOIA itself envisages that there is always some public interest in the disclosure of information. This is because it promotes the aims of transparency and accountability, which in turn promotes greater

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<sup>6</sup> <https://www.scie.org.uk/care-providers/coronavirus-covid-19/care-homes/supported-living/staff-wellbeing>

public engagement and understanding of the decisions taken by public authorities.

44. The council has stated that it accepts the need for openness and transparency in this case, and that disclosure of the requested information would provide further public understanding of issues affecting public health and safety in relation to COVID-19. It states that it also recognises that if the public is made aware of those care homes which have had a suspected, or confirmed, case of infection, it would enable them to take certain actions. It goes on to say that it may also enable public scrutiny as to how the pandemic has been handled by the government, health and social care services.
45. However, the council has gone on to argue that it believes that the general interest in transparency and further public understanding has largely been met by information which is already made available. It has confirmed that it publishes data on numbers of cases in the county and the general geographical areas cases have occurred, as well as detailing the work it has undertaken, in conjunction with the health service and central government, to reduce cases, control the virus and keep residents safe.
46. The council goes on to say that specific interests in a care home are met on a need to know basis for residents, staff and families and, on a personal level, individuals can make legitimate enquiries themselves when choosing care homes. In these situations, context could be provided and up to date information given. It states that the public interest in being able to judge if a care home provides a good quality of care is better met by existing inspection regimes and reports published by the CQC and Healthwatch.
47. The council has also advised that whilst in the future more detailed statistical data may be released by the Office for National Statistics, once the pandemic is over, to enable public scrutiny of how the pandemic was handled, it is considered that disclosing more granular information at the time of the request would endanger public health.
48. The council argues that it would be likely that the release of speculative information (the information would not explain why there had been a case), which is out of date, could mislead the general public and cause them to fail to act, or act against their own interests, and undermine the functioning of a system established to protect health and safety.
49. The council also refers to the detrimental affect which the disclosure of the information would have on both mental health, and physical health, of those who require support within a care home environment, and that this would not be in the public interest. In addition, it states that

movement of any asymptomatic care home residents to another home, or into the community, could trigger a community outbreak of the virus, which would be likely to endanger public health and put pressure of health and social care services in the area.

50. The council concludes by saying that, given the level of COVID-19 infection which is already in the public domain, and the likely harm to individual physical health and public health through the hampering of public health control, it considers the reason for non-disclosure to be in the public interest, and that this outweighs the reasons for disclosure.
51. The Commissioner considers there to be some strong arguments both in favour of the release, and the withholding, of the information in this instance; this has resulted in this being an extremely finely balanced case.
52. The Commissioner considers that there is a strong public interest in the council being accountable and transparent about the health and well being of individuals which have been placed within a care home environment. Disclosure of details relating such matters could, in some instances, help to drive up standards by providing another layer of scrutiny of care homes in addition to those already in place.
53. In this instance, the information requested relates to the health and welfare of vulnerable individuals at a time when there was some serious concern about COVID-19 infection rates within care homes. It is therefore understandable that the public would wish to be reassured as much as possible about the quality of care on offer, and the effect that the current COVID-19 pandemic may be having within the care home environment.
54. Furthermore, the requested information would allow the public to easily differentiate between those care homes within the county that have recorded a suspected or confirmed case of COVID-19, and those that have not. Many would see this to be extremely important, believing it could, for example, assist with making informed choices about a care placement for a relative.
55. However, the Commissioner has some concerns that as the withheld information shows recorded cases of suspected and confirmed cases over a relatively short period of time, and at the start of the pandemic in the UK, it is unlikely to provide a true and accurate reflection of how the various homes were really coping with the COVID-19 pandemic at that time. Furthermore, she regards it to be extremely likely that the information would, at the time of the request, have been incorrectly interpreted by some to be a list of care homes that are not safe, and of a lower standard than others which had not had any recorded cases.

56. At the time of the request there were a number of significantly different reasons for COVID-19 outbreaks within care homes in the UK. For example, there was considerable media attention<sup>7</sup> about the release of patients from hospitals into care homes without testing being carried out. It was claimed that this had led to outbreaks of COVID-19 in some care homes that were unable to demand testing checks be carried out before patients were transferred to the care of the home.
57. The complainant has argued that the names of certain care homes have already been made publicly available, and that therefore the information that has been requested should not be regarded to be confidential.
58. The Commissioner does acknowledge that there are details within the public domain about the COVID-19 infection rates within some identifiable care homes. However, these details relate to a small number of very exceptional cases and, in the main, concern care homes where there has been an extremely high death rate caused by COVID-19. There is no evidence, as far as the Commissioner can see, that bodies such as the CQC, Clinical Commissioning Groups or Public Health England (who are all likely to hold some information about how COVID-19 is being managed within care homes), release information which would allow every care home to be identified (other than those extreme cases already referred to).
59. The Commissioner has found that the CQC has published regular bulletins<sup>8</sup> about care homes during the pandemic which provide the public with details of how care homes are being affected by area, and nationally. It includes details of visits that are being carried out, inspection reports, and monitoring of care homes to make sure that standards are being reached and to ensure that the service users are well cared for and protected during these difficult times. It also confirms that it will investigate any concerns that are brought to its attention by any member of the public, or agency.
60. Whilst it is right and proper that care homes should be accountable for the standards of welfare and care of residents that are receiving care, it is the Commissioner's opinion that the release of the information at the

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<sup>7</sup> <https://www.bbc.co.uk/news/uk-politics-53574265>

<https://news.sky.com/story/coronavirus-care-homes-faced-funding-cut-if-they-didnt-take-in-covid-19-patients-11986578>

<sup>8</sup> <https://www.cqc.org.uk/publications/major-report/covid-19-insight-issue-3>

time of the request would be likely to have had a detrimental affect on the care home providers' ability to run their homes effectively and without outside interference; this, in turn, is likely to have had a negative impact on the physical and mental health of residents.

61. It is the Commissioner's view that the care homes primary duty is the welfare, care and protection of vulnerable individuals that have been entrusted into their care. She accepts that, should the information be released, not only would it have an affect on the public's perception of how well any one care home may be coping with the pandemic, it could also lead to upset and anxiety of residents and their families. This is likely to have a detrimental impact on the mental health of those receiving care, and also some families may choose not to use the services of a good care home; neither of these outcomes would be in the public interest.
62. Whilst the Commissioner fully accepts that there should be some transparency and openness about how care homes have been affected by the COVID-19 pandemic, as with the disclosure of any information there is always a question of degree; it is not always necessary, or proportionate, to disclose every last piece of information in order to satisfy the public interest. There is an appropriate balance to be considered with any decisions reached about disclosure made on a case by case basis, depending on the circumstances.
63. Furthermore, the Commissioner regards it to be of some relevance that there are other mechanisms available to members of the public who require direct knowledge of a particular care home that they may be considering for a relative, and to whom the information may have particular significance.
64. The Commissioner firmly supports transparency and accountability in relation to the level and quality of care which is provided to vulnerable adults. However, having considered the circumstances at the time of the complainant's request, and that information which was already being released into the public domain by various agencies including the council, the Commissioner regards the endangerment that would be likely to be caused to the physical and mental health of residents, prospective residents, and staff, within care homes, to tip the balance of the public interest in favour of withholding the information in this particular case.
65. Given that the Commissioner is satisfied that the council is entitled to rely on section 38(1) when withholding the information relevant to part 1 of the request, she does not regard it necessary to go on to consider section 43(2) and section 40(2) of the FOIA in this case.

## Right of appeal

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66. 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](mailto:grc@justice.gov.uk)

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

67. 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.
68. 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 .....**

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