

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2021

Public Authority: Worcestershire County Council
Address: County Hall
Spetchley Road
Worcester
WR5 2NP

Decision (including any steps ordered)

1. The complainant has requested information regarding cases of coronavirus (COVID-19) in care homes.
2. Worcestershire County Council withheld some information on the basis of section 43(2) (commercial interests) of the FOIA; and denied holding some information.
3. The Commissioner found that section 43(2) was not engaged. However she has exercised her discretion to consider whether section 38(1) (health and safety) is engaged.
4. The Commissioner considers that the information is exempt from disclosure under section 38(1). Furthermore she finds that the council is not withholding any other information within the scope of the request
5. The Commissioner does not require any steps.

Request and response

6. On 11 June 2020, the complainant wrote to Worcestershire County Council ('the council') and made a request for information in the following terms:

"1. A full list of care homes & nursing homes in Worcestershire County who reported suspected or confirmed cases of coronavirus (COVID-19) to Worcestershire County 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

2. A full list of care homes & nursing homes in Herefordshire County whose services are commissioned or used by Worcestershire County Council and who reported suspected or confirmed cases of coronavirus (COVID-19) to Worcestershire County 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 Worcestershire County Council became aware of coronavirus and its appearance in The UK

4. The first reported incident of coronavirus in Worcestershire County reported to Worcestershire County Council"

7. The council responded on 26 June 2020 and provided answers to questions 3 and 4. It refused to provide the information in regard to questions 1 and 2 on the basis of section 43(2) (prejudice to commercial interests).
8. The complainant requested an internal review on 7 July 2020.
9. Following an internal review, the council wrote to the complainant on 2 September 2020. It stated that it upheld the position set out in the original response.
10. During the course of the investigation, the council changed its response to question 2, stating that the information is not held by the council. This was communicated to the complainant on 17 June 2021.

Scope of the case

11. The complainant contacted the Commissioner on 15 September 2020 to complain about the way his request for information had been handled. Specifically disputing that section 43(2) is engaged for question 1. Following the revised response of 17 June 2021, the complainant also disputes the council's position that it holds no information in scope of question 2.
12. Upon review of this case, the Commissioner's assessment was that the arguments provided by the council do not address the full criteria required to engage section 43(2).
13. The Commissioner has discretion to consider exemptions not cited by the public authority. In a recent decision notice, referenced IC-51462-C1T4¹, similar information was requested from a different council and the Commissioner found that section 38(1) was engaged.
14. In this case, the Commissioner has therefore found it appropriate to exercise her discretion to consider whether the information requested by the complainant would be exempt under section 38(1) of the FOIA.
15. The scope of this case is to establish whether section 38(1) is engaged for question 1; and whether, on the balance of probabilities, the council holds any information in scope of question 2.

Reasons for decision

Section 38 – Health and Safety

16. The Commissioner has reviewed her decision in regard to question 1 which is recorded in the decision notice referenced IC-51462-C1T4. In that case precisely the same questions were asked, on the same date but from a different authority, being Herefordshire Council.
17. She finds, therefore, that there are no considerations required regarding the timing of the request nor the type of information requested.
18. The Commissioner therefore refers to the previous decision recorded in IC-51462-C1T4 and finds that the release of the information requested

¹ [ic-51462-c1t4.pdf \(ico.org.uk\)](https://ico.org.uk/decision-notice/51462-c1t4)

would be likely to endanger the physical and mental health of an individual, or group of individuals. On the balance of the public interest, she finds that this favours maintenance of the exemption for similar reasons as stated in the previous decision notice. Therefore, in this case section 38(1) is engaged, and the public interest is in favour of withholding the information.

Section 1 general right of access

19. Section 1 of the FOIA states that:

"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."*

20. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.

21. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

22. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the council and other information or explanation offered by the council which is relevant to her determination.

The complainant's view

23. The complainant disputes the council's position that no information is held that is in scope of question 2. No further supporting arguments were given.

The council's response

24. The council advised that the care homes in Herefordshire were under no obligation to report or notify them of their coronavirus status, even if there were residents of the council placed there.

25. The council advised that it, therefore, had not received any information regarding care and nursing homes in Herefordshire County with reported suspected or confirmed cases of coronavirus.
26. The council advised that the "Commissioning Manager", has confirmed that no such information had ever been received. It had not undertaken any searches as it was confident that no such records were ever held.
27. The council stated that there are neither statutory, nor business reasons for it to hold the requested information.
28. It also confirmed that no information in scope of the request had ever been held and subsequently deleted, or destroyed.

Conclusion

29. The Commissioner is mindful that the council did not undertake any searches in order to locate the requested information.
30. However it has provided a rational response that there was no obligation for the care homes in Herefordshire County to report such cases. Furthermore the lack of information has been confirmed by the "Commissioning Manager" who is responsible for the contracted care home services that are commissioned from the homes in Herefordshire.
31. No grounds were suggested to the Commissioner upon which the council's position could be disputed. On the other hand, the council has provided assurances that it had no purpose for holding the information, nor had it deleted any information in scope of request. The Commissioner therefore finds there to be no evidence to the contrary.
32. Having considered the evidence and arguments presented, the Commissioner is satisfied that, on the balance of probabilities, the council does not hold any information within the scope of question 2 of the request.
33. The Commissioner therefore considers that the council complied with its obligations under section 1(1) of the FOIA.

Right of appeal

34. 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

35. 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.
36. 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

Janet Wyles
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF