

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2021

Public Authority: Care Quality Commission (CQC)
Address: information.access@cqc.org.uk

Decision (including any steps ordered)

1. The complainant has requested information relating to the breakdown of all deaths due to confirmed or suspected Coronavirus since April 10 per care home regulated by the CQC. The CQC refused to disclose the requested information under section 31(1)(g), 36(2)(c), 38(1), 41(1) and 43(2) FOIA.
2. The Commissioner's decision is that the CQC was correct to refuse to disclose the requested information under section 38(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 19 June 2020 the complainant made the following request for information under the FOIA for:

"For each individual named care home you regulate, I would like a breakdown of all deaths due to confirmed or suspected Coronavirus since April 10, 2020. To be clear, I am requesting the name of each care home that has had such a death, and the number of deaths they have had."
5. On 19 June 2020 the CQC responded. It refused to disclose the requested information under sections 31(1)(g) (prejudice to CQC's regulatory functions), section 36(2)(c) (prejudice to effective conduct of public affairs), section 43(2) (commercial interests), section 38(1)

(health and safety) and section 41(1) (information received in confidence).

6. The complainant requested an internal review on 19 and 22 June 2020. The CQC sent the outcome of its internal review on 13 July 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 6 August 2020 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether CQC was correct to refuse to disclose the requested information under any of the exemptions cited.

Reasons for decision

Section 38

9. Section 38(1)(a) states that information is exempt if its disclosure would, or would be likely to, endanger the physical or mental health of an individual.
10. Section 38(1)(b) states that information is exempt if its disclosure would, or would be likely to, endanger the safety of any individual. For the exemption to be engaged, it must be at least likely that the endangerment would occur.
11. The Commissioner's guidance¹ sets out under section 38(1)(a), endangering physical health usually means an adverse physical impact and often involves medical matters. This can relate to individuals or groups. Endangering safety (section 38(1)(b)) is usually connected to the risk of accident and the protection of individuals. Information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.
12. 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^[1], the view was taken that any attempt to assimilate the

^[1] http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2252/EA-2017-0087_Decision_2018-07-11.pdf

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

13. 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.
14. The CQC has applied this exemption on the basis that disclosure would be likely to endanger the physical health of residents being relocated within the adult care sector but also the health of other residents and nursing home staff as a result of this. It has also said that disclosure would be likely to endanger the mental health of nursing home staff.

Impact of re-locating residents

15. CQC recognised the anxieties of vulnerable people and their families during the pandemic and the wish to obtain information that could be used to make decisions. It said that some families who are concerned about the welfare of their loved ones have sought to remove people from care homes or establish alternative arrangements for them, including caring for them in their own homes.
16. The CQC noted that the requester himself, in setting out his arguments for disclosure of the data under FOIA, wrote that, "It may well be appropriate for families to move their relatives as a particular care home may have unnecessarily put its residents at risk."
17. Furthermore one group representing hundreds of families wrote to CQC arguing that, "[b]y releasing the data in question, worried families are empowered to choose a setting which suits them and their loved ones best. By withholding this information from the public, the CQC is depriving some of the most vulnerable members of society the right to make informed decisions around their care and treatment."
18. The director of the Residents & Relatives Association was quoted in The Guardian newspaper saying, "It is surely only right that [residents and families] should receive information about the Covid status of the home to help inform their decision about where they live".
19. Based upon the above, the CQC considers that it is therefore clear that the public will see the information as useful and meaningful in making

decisions as to the safest place to receive care and are likely to act upon the information. However the CQC does not consider that the information provides a basis for making informed decisions of this magnitude. This is because whilst a high rate or a spike in deaths may be an indicator of significant problems within a home, it is just one indicator amongst many that CQC is monitoring. Some homes with good infection control practices have seen multiple COVID-19 deaths, whilst other services with poorer processes have had none. There are a number of other factors which appear to influence the number of COVID-19 related deaths in any given location. These factors appear to include;

- the size of the home and number of people living there,
- the age and underlying health conditions of those people,
- local prevalence of the virus,
- localised spread of variants of the virus 4
- resource and staffing issues,
- government and health service COVID-related policies,
- local hospital discharge strategies and patterns.
- local rate and uptake of vaccinations.

Taken on its own, CQC therefore does not consider that the withheld information alone provides a basis upon which people are enabled to make informed decisions on an individual care home or nursing home.

20. The CQC considers that it is unlikely that caveats and explanations would significantly mitigate the likelihood that people will make potentially life-threatening decisions based upon a misunderstanding of the meaning of this data.
21. Following an article in The Guardian which included CQC's explanations about the limitations of the data, letters and multiple social media posts continued to criticise CQC for withholding information that people perceived would allow informed choices about risk.
22. Even outside of a pandemic, relocation of older people from one care setting to another is recognised to be a particularly stressful life event. Relocation carries an associated risk to morbidity and mortality. Those risks are increased where moves are sudden and unplanned, or made without proper assessment of the medical and social needs of the individual.

23. In the midst of the current pandemic, moving vulnerable people would have inevitably exposed them to more contact and would therefore increase the risk of infection and of the spread of the virus. Moving a person from a home that is perceived as 'dangerous', to one that is perceived as 'safe' due to previous death-rates would create a risk for the person themselves and for residents and staff in both locations.
24. CQC therefore considers that disclosure of the data would be likely to result in residents of care homes or nursing homes being moved – either by their own choice, the choice of their families, or due to service closures – on the basis of evidence that does not support an informed decision as to whether they are being moved to a safer location, and that this would endanger the physical health and safety of those individuals, and also of other residents and staff at the locations.

Impact on the mental health of nursing home staff

25. Providers have told the CQC about the strain that the pandemic has placed upon the mental health and wellbeing of their staff and have voiced concerns about the likely further impact that would arise from publication of this information.
26. The director of one care group wrote in a letter to CQC:

We already have staff who are going to need considerable mental health support for what they have gone through, and we are working on various resources to help them do that. We do not need media descending to suggest that our staff were to blame for what happened, when the government told hospitals to discharge without testing.
27. CQC said that there is independent evidence of care workers feeling blamed or guilty for the deaths of those they care for and of the impact of the pandemic on care home staff. Studies have shown a deterioration in the mental health of social care workers during the pandemic. The World Health Organisation (WHO) have also reported upon the risk of care workers being stigmatised and subjected to attacks, and such events have been reported in the UK. Publication of the number of reported COVID-19 deaths in each location is likely to draw significant public attention to those services with the highest numbers of such deaths. It is highly likely that providers and locations will be singled out in national, local and social media with care staff feeling personally blamed for deaths.
28. Publication of the data is therefore likely to result in a significant and harmful increase to the serious stress that care workers are already experiencing. This will include an understandable anxiety amongst these workers that they will be subjected to physical and verbal abuse. Publication of the information would therefore create a direct risk to the physical and mental health of those care workers.

29. Increasing the stress and mental health risk to care workers also creates a further risk to residents. Impact upon workers' mental health will result in increased sickness. These absences would be covered by agency staff, increasing the costs to providers and also introducing further infection risks into homes as these temporary workers come into the homes and work intimately with residents. Further to this, CQC is mindful that care and nursing homes are people's homes. Publication of the information is likely to result in local and national media attention on homes with the highest number of deaths. This media attention is likely to be intrusive upon the privacy of the residents, families and staff of those homes, and is likely to cause significant and harmful distress to them
30. In this case the Commissioner is mindful that the request was made in June 2020 during the first wave of the pandemic. She considers that if the withheld information had been disclosed, the risk of families choosing to relocate residents from adult care settings with high death rates was real, actual and of substance. The figures represent a small snap shot of time during the first wave and do not reflect all of the factors that may have caused high death rates (some of which would have been out of the control of the individual care homes). The impact of a decision to relocate a resident would carry a real risk to the health of the individual relocating, as well as other residents and staff at the new care setting as any mixing poses a risk of spreading Covid-19.
31. The Commissioner also accepts that the pandemic has had a significant impact upon the mental health of adult care staff and that disclosure of the withheld information poses a real risk of further damaging the mental health of staff from homes which do have high death rates and would be likely to be the focus of significant media attention should this information be publicised. Again these figures taken alone without any other proper understanding of the myriad of factors which may have impacted the death rates at a particular home and during a particular snap shot in time is likely to cause unjustified scrutiny of individual care homes. In turn there is a real risk of further endangering the mental health of the staff working there.
32. On this basis the Commissioner considers that the CQC correctly engaged section 38(1)(a) FOIA in this case as disclosure would be likely to endanger the physical or mental health of an individual.
33. As section 38 is a qualified exemption, the Commissioner has gone on to consider the balance of the public interest in this case.

Public interest in favour of disclosure

34. CQC acknowledged that there is a clear public interest in transparency and openness, in allowing detailed scrutiny of the impact of the

pandemic on individual locations, and in informing people who use services and their families about the effects of the pandemic within the services that they use.

35. It also considers that publication of the data may allow others to identify issues of concern or patterns in the data that CQC have not identified. Publication would also allow people who use services and their families to identify where providers have not been honest and transparent about COVID-19 issues and to raise these concerns to CQC.

Public interest arguments in favour of maintaining the exemption

36. CQC considers that the public interest arguments in favour of disclosure are met in part through the publication of official statistics at national and regional level, the sharing of the data with partner agencies and independent researchers, its ongoing inspections and publication of reports where it has concerns about safety and quality of care and the work that it has done to encourage providers to be open and transparent (and by CQC taking action where it finds that this has not happened).
37. The CQC however considers that disclosure, particularly at the time of the request, poses a significant risk to life due to the fact people were understandably likely to act upon such information without knowing the full picture of factors which have contributed to the death rates of an individual care home setting.

Balance of the public interest

38. It is CQC's opinion that the potentially massive impact should the identified risks of publication materialise means that the balance of public interest has, so far, been in favour of withholding the information. However it acknowledged that as the UK comes out of the pandemic, this balance of public interest will change and the CQC will be required to publish the information at some point. It is therefore keeping its position under constant review and engaging with a range of partners and stakeholders to prepare for future publication.
39. The Commissioner considers that there is a very strong public interest in disclosure of the withheld information in this case, even at the height of the pandemic. Due to the significant impact of the pandemic on individuals residing within a care home setting (and their families), the significant number of deaths within care homes and the criticism of the actions taken to tackle the coronavirus pandemic within social care, transparency and accountability are of paramount importance.

40. However at the time the request was made in June 2020, prior to the roll out of the vaccination program, the Commissioner considers that there is also an extremely strong public interest in not disclosing information which would have been likely to cause residents to relocate endangering their own health but also endangering the health of others due to the risk of mixing and spreading the virus.
41. The Commissioner also considers that there is a strong public interest in not disclosing information in June 2020 which would have been likely to further impact the mental health of care staff already significantly affected by the impact of the pandemic.
42. Whilst the Commissioner acknowledges that this is an extremely finely balanced case, she considers that at the time of the request the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. She also notes that the CQC recognises that the balance of the public interest will change and is now actively considering and reviewing when and how the withheld data can be released.
43. As the Commissioner has decided that the CQC correctly withheld the requested information under section 38(1)(a) FOIA, she has not considered the application of any of the other exemptions any further.

Right of appeal

44. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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.....

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