

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 October 2021

**Public Authority:** East Kent Hospitals University NHS Foundation Trust

**Address:** Kent and Canterbury Hospital  
Ethelbert Road  
Canterbury  
Kent  
CT1 3NG

### Decision (including any steps ordered)

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1. The complainant requested data on hospital-acquired instances of Covid-19. East Kent Hospitals University NHS Foundation Trust ("the Trust") relied on section 21 of the FOIA to withhold information as it was reasonably accessible to the complainant.
2. The Commissioner's decision is that the Trust was correct to deal with the request under the FOIA and, having done so, was entitled to rely on section 21 of the FOIA to withhold some of the requested information. On the balance of probabilities, the Commissioner is also satisfied that the Trust holds no further information within the scope of the request. However, the Trust failed to inform the complainant, within 20 working days, that it did not hold some of the requested information and therefore breached section 10 of the FOIA.
3. The Commissioner does not require any further steps.

### Request and response

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4. On 6 January 2021, the complainant wrote to the Trust and requested information in the following terms:

*"This is an Environmental Information Request made in accordance with the Regs 2004."*

*"Please provide me with the monthly figures for patients who have caught covid-19 while in the Trusts care for the period March 2020 to Jan 6th 2021."*

5. The Trust responded on 3 February 2020. It stated that data on infections was already in the public domain and that the requested information could be calculated from that information. It therefore relied on section 21 of the FOIA to withhold the information.
6. The complainant sought an internal review of the Trust's response. He considered that the request should have been dealt with under the EIR and that the Trust had not complied with Regulation 6 of the EIR (Form or Format) because the requested information was not "easily accessible" to him.
7. Following an internal review the Trust wrote to the complainant on 28 February 2021. It upheld its position that it was correct to deal with the request under the FOIA and that the requested information was reasonably accessible.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 1 March 2021 to complain about the way his request for information had been handled. In particular, he was adamant that the request should have been dealt with under the EIR.
9. The Commissioner wrote to the complainant on 4 August 2021 to set out her preliminary view of the complaint. She noted that she was not persuaded that the information would be environmental, but also noted that this was an irrelevant consideration as the requested information was reasonably accessible anyway. Therefore the complainant was not entitled to receive the information – regardless of the access regime used.
10. The complainant did not accept the Commissioner's view that the requested information was not environmental and asked for a decision notice. He also noted that the published data only went as far back as August 2020, when his request had sought data stretching back to March 2020.
11. The Commissioner considers that the scope of this investigation is to:
  - a) Determine the correct access regime

- b) Determine whether the requested information is already available to the complainant
- c) Determine whether the Trust holds any further information within the scope of the request.

## Reasons for decision

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*Is the requested information environmental?*

12. Regulation 2(1) of the EIR defines environmental information as being information on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;*
- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);*

13. The complainant argued that transmission of the SARS-Cov-2 virus (which causes Covid-19) was primarily airborne – namely via infected droplets. Because the virus was transmitted, he said, via the air, the

virus was a “factor” within the definition of element (b) of the Regulation.

14. When the Commissioner pointed out that the spreading of the virus – and in particular the chance of catching it in a hospital setting – appeared to depend at least as much on human behaviour than the elements of the environment, the complainant pointed out that she was not medically trained and that this fact (airborne transmission) was well-documented and had been confirmed by numerous eminent scientists.
15. The Trust – which presumably was able to draw on advice from individuals with medical qualifications – argued that the effect on the environment was transitory and therefore the information was not environmental.
16. The Commissioner accepts that this particular virus can be spread by airborne particles – although she notes that this is not the only way that the virus can spread. However, she does not consider that this means that Covid-19 “affects” the elements of the environment.
17. The complainant’s argument is that because the virus (or droplets containing it) moves through the air, it “affects” the air. If the Commissioner were to accept such a broad definition it would bring virtually every human (and many non-human) activity within the scope of the EIR.
18. The mere fact that an object or substance has momentarily passed through the air does not mean that it has affected the air it has passed through. There is a clear distinction to be drawn here between an emission of carbon dioxide into the atmosphere or crude oil into the sea (where the chemical balance will be altered) and a substance or object passing through the air without altering its composition in any way besides a momentary disturbance.
19. Furthermore, even if the Commissioner were to accept that droplets passing through the air did affect an element of the environment, the requested information seeks data on hospital acquired infections. The frequency of hospital acquired infections is not primarily determined by the frequency with which infected droplets pass through the air, but by the adequacy of the hospital’s infection control procedures and the rigour with which they are followed. If infection control measures are poor or are not properly followed, even a small number of droplets could cause infection.
20. Therefore the Commissioner is satisfied that the information that the complainant has requested does not have a sufficiently close connection to the elements of the environment to make it environmental

information. She therefore considers that the Trust was correct to deal with this request under the FOIA.

**b. Was the Trust entitled to rely on section 21 of the FOIA to withhold information?**

21. Section 21 of the FOIA states that:

- (1) *Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*
- (2) *For the purposes of subsection (1)—*
  - (a) *information may be reasonably accessible to the applicant even though it is accessible only on payment, and*
  - (b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*

22. The FOIA says that information must be “reasonably accessible” to the requestor for section 21 to apply – not that it must be equally as accessible to the requestor as it is to the public authority.

23. The Commissioner considers that the purpose of the section 21 exemption is to protect the scarce resources of public authorities by shielding them from replying to requests for information which the requestor could have found elsewhere. It also acts as an incentive for public authorities to be proactive in publishing information as part of their publication schemes.

24. For information to be “reasonably accessible” it does not need to all be found in a single location. So long as all the information requested can be accessed, it will usually be “reasonably accessible” to the requestor.

25. In *Benson v Information Commissioner* (EA/2011/0120)<sup>1</sup>, the requestor appealed the Commissioner’s decision (that section 21 was engaged) on the basis that the email addresses that he had requested were strewn

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[http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i628/\[2011\] UKFTT G RC EA-2011-0120 2011-11-10.pdf](http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i628/[2011] UKFTT G RC EA-2011-0120 2011-11-10.pdf)

across multiple pages of the public authority's website and would require considerable time to collate into a complete list.

26. The Tribunal in *Benson* concluded that:

*"The information requested was not said by the Appellant to be difficult for him to find on the website, merely that it was spread across a number of web pages so that he found it inconvenient to harvest and re-use the information. The Tribunal finds that this is not a relevant consideration in relation to the question of whether the information requested was 'reasonably accessible' to the Appellant in this case."*

27. In this case, the Trust drew the complainant's attention to national datasets published by NHS England on a Trust-by-Trust basis. The datasets were published and updated on a rolling basis and covered the period from August 2020 to the present day. The Trust accepted that the complainant would have to do some work to extract the information he required and perform some basic calculations, but it still considered that the information was reasonably accessible.

28. The Commissioner does not consider that subtracting one column of figures from another is such a complex mathematical operation that it would prevent the information from being reasonably accessible. Furthermore, she notes that the complainant has already published a blog post using the same data, which rather undermines any suggestion that the information is not reasonably accessible.

29. Therefore in respect of the part of the request covering data from August 2020 onwards, the Commissioner is satisfied that the information is reasonably accessible to the complainant and therefore the Trust was entitled to rely on section 21 of the FOIA to withhold it.

30. The Commissioner also notes that, even had she found the information to be environmental information, she would have found that the information was publicly available and easily accessible to the complainant. Therefore the substance of this part of the decision would have been the same regardless of the access regime used.

### **c. Was further information held?**

31. In correspondence with the Commissioner, the complainant noted that his request had sought data for the period March 2020 to July 2020 – as well as data from August 2020 onwards. He noted that, regardless of whether the data from August 2020 onwards was considered *reasonably* accessible, the data from the earlier period was not, by any objective measure, available at all.

32. Furthermore, the complainant argued, there was evidence which indicated that the Trust *would* hold some data relating to this period – even if it had not been required to provide this data to NHS England or the Department of Health and Social Care.
33. Firstly, the complainant drew the Commissioner's attention to an article which appeared on Kent Online which referred to a statistic of 58% of Trust Covid-19 patients having "probably" or "definitely" acquired their infection whilst in hospital.<sup>2</sup> That article in turn appeared to draw on research by the Health Service Journal, which published an article on 31 July 2020, apparently based on figures from the Trust.<sup>3</sup>
34. Secondly, the complainant noted that the Trust had, in Summer 2020, been the subject of an inspection by the CQC. That inspection had focused on the Trust's infection control measures. The complainant argued that it was reasonable to assume that the CQC would not have conducted such an inspection unless it had concerns about the Trust's infection control methods and that it would have wanted to have appropriate data to assess performance.
35. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
36. 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.

#### *The Trust's position*

37. The Trust maintained that it did not hold "robust" data prior to August 2020, when it was required to submit this data to NHS England. When challenged to elaborate on what this data was and why it was not "robust", the Trust explained that prior to August 2020, routine

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<sup>2</sup> <https://www.kentonline.co.uk/canterbury/news/womans-covid-19-death-in-hospital-struggling-to-contain-virus-231534/>

<sup>3</sup> <https://www.hsj.co.uk/coronavirus/trust-with-record-covid-deaths-sees-high-rate-of-hospital-acquired-infection/7028160.article>



community testing for Covid-19 was patchy and that many of its patients were not tested on arrival and had not received a recent community test. Therefore, even where patients were later found to have the virus, there was no way of determining whether they had acquired the infection whilst in hospital or had brought it into the hospital from outside.

38. The Trust noted that it had collected data on the number of patients who had had a positive Covid-19 test eight or more days after being admitted but, because of the incubation period of the virus, it could not say with certainty how many of those individuals had acquired their infection prior to being admitted. As the request specifically sought data on those who had caught Covid-19 whilst in the Trust's care, the Trust did not consider that this data fell within the scope of the request.
39. In respect of the Health Service Journal article, the Trust said that the HSJ had been unwilling to share its raw data. Therefore the Trust could not comment on where the HSJ had acquired its figures from.
40. Whilst the Trust noted that some relevant information might be found in patient notes, those notes would suffer from the same lack of testing – as well as requiring a significant amount of time to collate.

*The Commissioner's view*

41. On the balance of probabilities, the Commissioner is satisfied that it is more likely than not the Trust does not hold the specific information that the complainant has requested for the period prior to August 2020.
42. The request specifically sought data on patients who had caught Covid-19 whilst in the Trust's care. Whilst the Trust holds data showing the number of patients who had tested positive eight days or more after admission, the Commissioner accepts that, whilst most of those patients are *likely* to have acquired their infection whilst in hospital, it cannot *definitively* be said that they have. Therefore the Commissioner considers that this information falls outside the scope of the request – although the complainant is entitled to make a fresh request for that information, should he so wish.
43. The complainant appeared to accept that a search of medical notes would be of little value. The Commissioner accepts that there might be sufficient evidence to isolate *some* patients as having definitively acquired Covid-19 whilst in the Trust's care, but it would not establish definitively "how many" such instances there were. In any case, the Commissioner considers it likely that such a broad expansion of the Trust's searches would cause the request to exceed the cost limit.



44. The Trust has explained the information that it does hold and there does not appear to be any compelling reason to believe that it holds the particular information that the complainant is requesting.
45. The Commissioner is therefore satisfied, on the balance of probabilities, that the Trust does not hold the requested information for the period March 2020 to July 2020.

### **Procedural Matters**

46. Section 10 of the FOIA requires a public authority to discharge its duties under section 1 (to confirm or deny whether information is held and to communicate information) "*promptly and within 20 working days of receipt.*"
47. As the Commissioner has found above, the Trust did not hold some of the requested information. It was therefore under a duty to inform the complainant that it did not hold that information.
48. The Trust issued a refusal notice on 3 February 2021. It stated that:  
  
*"The information you have requested can be found on the following link."*
49. The Commissioner considers that the way in which the Trust's response was expressed would have given a reasonable person the impression that *all* the information they had requested was available via the link. The Trust did not make clear that the link only provided some of the information and that this was the only information the Trust held.
50. The Commissioner therefore considers that the Trust did not properly discharge its duty under section 1(1)(a) of the FOIA within 20 working days and has thus breached section 10 of the FOIA.

## Other matters

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51. The Commissioner wishes to place her view on a particular matter on the record.
52. On 26 February 2021, a particular blog published a post titled "is this the stupidest woman in England?" The post appears to have been based on the Trust's internal review response to this request as it both names the officer of the Trust in whose name the response was provided and contains a quote from that response.
53. The post notes that this officer "is in our honest opinion the stupidest person in England." Its entire justification for such a statement is that the officer in question had stated that information on hospital-acquired infections should not be dealt with under the EIR as it was not environmental information.
54. The post did not contain the name of the author, but the Commissioner has seen sufficient evidence to demonstrate that the complainant is one of the blog's contributors. Given the strong connection between the post and the content of the internal review response (which had been provided just two days earlier), the Commissioner considers that it is highly likely that, even if the complainant did not write the article himself, he either contributed to it or was aware of it.
55. Even if the Commissioner had not found that the Trust was correct not to deal with the request under the EIR, she would have deplored such an abuse of the right of access to information. However, given that she has found that the Trust was *entirely* correct to deal with the request under the FOIA, such a post is not only derogatory and demeaning, but also fundamentally flawed in its analysis.
56. The Commissioner would remind both the complainant and the Trust that the harassment of a public authority's employees – particularly when that harassment is directed at a particular employee or small group of employees – is one of the factors she looks for when determining whether or not a request is vexatious. The full list of factors can be found in the Commissioner's guidance on section 14(1) of the FOIA.<sup>4</sup>

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

## Right of appeal

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

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

58. 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.
59. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**