

# Decision Notice 076/2021

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## Number of deaths in care homes in West Dunbartonshire

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**Applicant: The Applicant**

**Public authority: Social Care and Social Work Improvement  
Scotland**

**Case Ref: 202000698**



## Summary

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The Care Inspectorate was asked for the number of deaths that had occurred in West Dunbartonshire's care homes in 2020, broken down by month, whether the death was related to Covid-19 or not, and which care home the death occurred in.

The Care Inspectorate withheld the information under a number of different exemptions in Part 2 of FOISA.

The Commissioner investigated and found that the Care Inspectorate was not entitled to withhold the information requested. He required the Care Inspectorate to give the information to the Applicant.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 33(1)(b) (Commercial interests and the economy); 36(2) (Confidentiality); 39(1) (Health and safety)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 18 May 2020, the Applicant made a request for information to Social Care and Social Work Improvement Scotland (the Care Inspectorate). The information requested was:  
“... the number of total deaths that have occurred in West Dunbartonshire's care homes in 2020, broken down by month, whether the death was related to Covid-19 or not, and which care home the death occurred in.”
2. The Care Inspectorate responded on 19 June 2020. It advised the Applicant that information regarding deaths in care homes, including those attributed to Covid-19, is published on the National Records of Scotland's website, broken down by local authority and NHS Board level.
3. However, the Care Inspectorate did not consider it was in the public interest to disclose figures broken down by individual care services. It was therefore withholding the information under the following exemptions:
  - section 33(1)(b) (Commercial interests and the economy): disclosing information at care provider level may substantially prejudice the commercial interests of the care services
  - section 36(2) (Confidentiality): the information had been provided to the Care Inspectorate in confidence

The Care Inspectorate's submissions on both of these exemptions are considered in more detail below.

4. On 22 June 2020, the Applicant wrote to the Care Inspectorate, requesting a review of its decision. She considered it was in the public interest for the information to be disclosed and

said she would be happy for numbers to be described as “less than five” if disclosure would identify individuals.

5. The Care Inspectorate notified the Applicant of the outcome of its review on 25 June 2020. It upheld the original response without modification.
6. On 2 July 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant argued that disclosure of the information was in the public interest.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 16 July 2020, the Care Inspectorate was notified in writing that the Applicant had made a valid application. The Care Inspectorate was asked to send the Commissioner the information withheld from the Applicant. The Care Inspectorate provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Care Inspectorate was invited to comment on this application and to answer specific questions, focusing on the exemptions being applied by the Care Inspectorate.
10. In its submissions to the Commissioner, the Care Inspectorate maintained that the information requested was exempt from disclosure in terms of section 33(1)(b) and 36(2) of FOISA. In addition, the Care Inspectorate advised the Commissioner it wished to rely on the following exemptions to withhold the numbers of deaths by care home:
  - Section 35(1)(a) and (b) (Law enforcement): the Care Inspectorate referred to the investigation, instigated by the Lord Advocate and conducted by the Crown Office and Procurator Fiscal Service (COPFS), of all deaths in care homes as a result of Covid-19.
  - Section 39(1) (Health, safety and the environment): the Care Inspectorate expressed concern that disclosure would, or would be likely to, endanger the physical or mental health or the safety of individuals, for examples of the staff of the care homes involved. The Care Inspectorate’s submissions on section 39(1) are considered in more detail below.
11. During the investigation, the Care Inspectorate provided further lengthy submissions to the Commissioner, explaining further why it considered the information held to be exempt in terms of the exemptions claimed. It advised that it had received representations from relevant third parties and drew the Commissioner to various submissions by those third parties and to publications available online. These included examples of the large amount of media coverage the subject matter has received.
12. The Commissioner also received submissions from SOLACE (Society of Local Authority Chief Executives) in which it advised the Commissioner that it supported the submissions provided by the Care Inspectorate.

13. The Care Inspectorate advised the Commissioner that the submissions by SOLACE were independent from its submissions to the Commissioner, which it confirmed had been informed by its discussions with relevant parties, including SOLACE.
14. During the investigation, the Care Inspectorate was advised that West Dunbartonshire Council (the Council) had also been asked for information concerning deaths in care homes, and it had disclosed the information it held. While the request to the Council had been made after the review conducted by the Care Inspectorate, and the information disclosed was not the same information as was being withheld by the Care Inspectorate, the Council did disclose the number of deaths against named care homes. The Care Inspectorate was given the opportunity to comment on this disclosure by the Council. The Care Inspectorate acknowledged the disclosure by the Council, but commented that this was a matter for the Council and that the source of the information was different from that held by the Care Inspectorate.
15. On 12 March 2021, the Care Inspectorate told the Commissioner that, two days earlier, COPFS had, in response to an information request, disclosed the number of Covid-linked deaths reported in each of the individual care homes (broken down by name and location of the care home) being assessed by its Covid Deaths Investigation Team.
16. It commented that the information disclosed by COPFS had been a “snapshot in time” and was data collated differently to that held by the Care Inspectorate. It submitted that the provenance of the information disclosed by COPFS, and the figures, were therefore likely to be different. However, as a result of the disclosure by COPFS, the Care Inspectorate no longer wished to apply the exemptions in section 35(1) of FOISA to the withheld information.
17. It maintained that the exemptions in sections 33(1)(b), 36(2) and 39(1) of FOISA still applied.

## **Commissioner’s analysis and findings**

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18. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Care Inspectorate (including those by the Care Inspectorate on behalf of third parties). He is satisfied that no matter of relevance has been overlooked.
19. The Commissioner will consider each of the exemptions claimed by the Care Inspectorate in turn.

### **The information held by the Care Inspectorate**

20. The Care Inspectorate explained that, in March 2020, in response to the pandemic, it used its power under regulation 4(2) of the Social Care and Social Work Improvement Scotland (Registration) Regulations 2011 (SSI 2011/28)<sup>1</sup> to require care services to notify it of all confirmed or suspected Covid-19 deaths of persons experiencing care in the service (against a background of services being required to make notifications of all deaths of service users).
21. It also advised that, on 27 May 2020, the Coronavirus (Scotland) (No.2) Act 2020<sup>2</sup> (the 2020 Act) modified the Public Services Reform (Scotland) Act 2010 (the 2010 Act) (inserting

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<sup>1</sup> <https://www.legislation.gov.uk/ssi/2011/28/made>

<sup>2</sup> <https://www.legislation.gov.uk/asp/2020/10/schedule/1>

section 79A) and required any person providing a care home service to report to the Care Inspectorate every day on:

- the number of deaths of residents in the care home from coronavirus
- the number of deaths of residents in the care home that are suspected to be attributable to coronavirus
- the total number of deaths in the care home irrespective of whether or not they are attributable to coronavirus

### **Section 33(1)(b) - Commercial interests and the economy**

22. The Care Inspectorate submitted that the numbers of deaths requested by the Applicant were exempt from disclosure under section 33(1)(b) of FOISA. This provides that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the commercial interests of any person (including a Scottish public authority). Section 33(1)(b) of FOISA is set out in full in Appendix 1. This is a qualified exemption and is therefore subject to the public interest test in section 2(1)(b) of FOISA.
23. There are certain elements which an authority needs to demonstrate are present when relying on this exemption. In particular, it needs to identify:
  - whose commercial interests would (or would be likely to) be harmed by disclosure;
  - the nature of those commercial interests; and
  - how those interests would (or would be likely to) be prejudiced substantially by disclosure.
24. The prejudice must be substantial, in other words of real and demonstrable significance. Where the authority considers the commercial interests of a third party would (or would be likely to be) harmed, it must make this clear: generally, while the final decision on disclosure will always be one for the authority, it will assist matters if the third party has been consulted on the elements referred to above.
25. On being asked for submissions regarding this exemption, the Care Inspectorate was strongly advised to consider the Commissioner's briefing on section 33<sup>3</sup>, which provides further guidance on the tests to be met in applying this exemption.
26. In its submissions to the Commissioner, the Care Inspectorate drew attention to the content of its response and review outcome, in which it advised the Applicant that disclosure could have significant impact on the ability of service providers to function commercially in already challenging economic circumstances caused by the pandemic. It stated that disclosure was likely to impact on service providers' ability to engage new staff and/or attract new residents, which would have a direct impact on their being able to operate commercially and maintain sufficient standards of care for their existing residents, ultimately undermining the care sector.
27. It added that the rate of Covid-19 infections and number of deaths might not necessarily be related to a service's quality of care, hygiene standards, use of PPE etc., so to release information (even at provider level) could have significant impact on the ability of the

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<sup>3</sup> <http://www.itspubliknowledge.info/Law/FOISA-EIRsGuidance/section33/Section33.aspx>

provider, and consequently their services, to function commercially in the current challenging economic circumstances.

28. The Care Inspectorate submitted that it was justifiable to disclose information following an inspection it had carried out at care homes, where it had identified specific issues with care and suggested improvements. It stated that this was not the case here, as the information sought does not relate to an actual identified consequence of care service failings. It submitted that disclosure of the information would result in the public and the media making inaccurate judgements about the care services, which would be likely to substantially prejudice the commercial interests of the services.
29. Taking account of all of the submissions by the Care Inspectorate in relation to the application of section 33(1)(b) of FOISA, and having taken a broad view, the Commissioner accepts that the information in question is commercial in nature.
30. As mentioned above, in order to rely on this exemption, an authority has to evidence why disclosure would, or would be likely to, prejudice substantially the commercial interests of any person.
31. As indicated above, where an authority is claiming disclosure would, or would be likely to, prejudice substantially the commercial interests of a third party, the Commissioner would expect that the third party is consulted and their views obtained. In this case, there are a number of third parties. Initially, the Care Inspectorate submitted that, while it did not seek third party views specifically in relation to this request, there had been ongoing dialogue with third parties, such as Scottish Care (a body representing a group of independent sector social care providers across Scotland) in addition to individual care providers, in relation to the pandemic and the effects on care services, their staff and residents. It understood the challenges and concerns of the providers, therefore, and highlighted statements from providers and Scottish Care supporting its position.
32. In further submissions, the Care Inspectorate drew attention to submissions it had received from relevant third parties, including the Coalition of Care and Support Providers in Scotland (CCPS). It explained that the adverse reporting in the media had damaged public confidence in the care home sector, which had led to difficulties in staff retention, difficulties for some care providers in remaining financially viable and to some providers withdrawing from the industry.
33. On the question of harm, the Commissioner must be persuaded by the submissions he has received from the Care Inspectorate. In his view, these do not explain how the disclosure of the requested information would have had, or would have been likely to have (at the time the Care Inspectorate responded to the Applicant's request or her requirement for review), a substantially prejudicial impact on the commercial interests of the care services.
34. The submissions by the Care Inspectorate explain the challenges being encountered by the service providers during the Covid-19 pandemic, and the Commissioner acknowledges the resulting commercial difficulties. He also acknowledges the press coverage that has been drawn to his attention and again notes the difficulties that the care sector as a whole, and individual care providers, are experiencing.
35. In relation the actual information being withheld, however, the submissions provided by the Care Inspectorate are speculative in nature. The Commissioner would emphasise that he can only consider the information actually sought by the Applicant, and whether disclosure of that would be the catalyst to cause the harm claimed. The question to answer is how

disclosure of the information being withheld in this case would lead to the substantial prejudice required for this exemption to be engaged.

36. The Commissioner has considered all of the submissions made by the Care Inspectorate regarding the difficulties service providers, and care homes in particular, have faced since the appearance of Covid-19. The Commissioner has to consider whether disclosure of the information requested would exacerbate those problems to the extent that disclosure itself would be the catalyst that would, or would be likely to, prejudice substantially the commercial interests of any person.
37. Taking account of the submissions received from the Care Inspectorate in relation to the actual information under consideration (as opposed to the wider consideration of the problems facing the care industry), the information actually withheld at the time of review, and the information already in the public domain at that time, the Commissioner does not believe he has any option but to find that the Care Inspectorate has not evidenced the required substantial prejudice for section 33(1)(b) of FOISA to be engaged.
38. It is for the Care Inspectorate to provide the required evidence of harm, not for the Commissioner to go out and find it. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under this exemption. Having reached that conclusion, the Commissioner is not required to consider the public interest test in section 2(1)(b) of FOISA.
39. For completeness, however, the Commissioner will consider the public interest test, which he would be required to do if he were to accept that section 33(1)(b) was engaged.

*Public interest submissions by the Care Inspectorate*

40. In this case, the Care Inspectorate advised the Commissioner that it had considered the following factors as favouring the public interest in disclosing the information:
  - a) The public are entitled to know what care services are doing to prevent the spread of Covid-19 (source – specific care services).
  - b) The public are entitled to know if care services are maintaining their standards in the midst of a Covid-19 pandemic (source – Care Inspectorate). This data is published.
  - c) The public are entitled to know if a death that has occurred in a care service could have been prevented i.e. if the care service was at fault (source – investigation directed by the Crown Office and Procurator Fiscal Service (COPFS) into all deaths in care homes as a result of Covid-19).
  - d) When choosing a care service, or considering whether their loved one should stay in a care service, the public would wish to know how many deaths have occurred in that particular care service, compared to others in the area.
41. In relation to point d) above, the Care Inspectorate noted the lack of evidence or intelligence to identify a correlation between care service actions and number of deaths at each care service. It submitted that it was not in the public interest to disclose information that could be classed as hearsay; where disclosure would be unlawful; where it was likely to undermine the day to day running and the long-term viability of a care service; where disclosure would not be consistent with the Scottish Regulator's Strategic Code of Practice, and where it would be likely to cause harm (anxiety, stress) to residents, care workers and their families.
42. It further claimed that disclosure was likely to impact local communities, with consequent effects on the ability of the care service to retain residents and attract new residents, recruit

and retain staff and secure the services of others who might be called upon from time to time to work in the care service.

43. The Care Inspectorate submitted that, in balancing the public interest considerations, it concluded that disclosing the information requested is likely to lead to members of the public drawing unjustified conclusions about care services. This, it stated, had already been documented in the media; disclosing a breakdown of deaths by care service would be of great detriment to the care services concerned and would subsequently impact negatively on people experiencing care in services.

#### *Public interest submissions by the Applicant*

44. The Applicant identified a public interest in disclosing the information, on the basis that the Covid-19 pandemic had severely affected care homes in Scotland, and in particular those in West Dunbartonshire, and continued to do so. She advised that a number of issues had surfaced about the ways in which Covid-19 had been handled within care homes. She considered that family members, who must make the difficult decision of choosing a care home for their elderly relative, both during the pandemic and in the future, had the right to be presented with the Covid-19 information for each care home to help inform their decision.

#### *Commissioner's conclusions*

45. Having considered all of the public interest arguments provided by Care Inspectorate, the Commissioner is of the view that a number of the submissions are speculative, to say the least. The Commissioner would consider that the information held by the Care Inspectorate is factual – there being no evidence or suggestion otherwise. On that basis, the Commissioner fails to see how disclosure of the information held by the Care Inspectorate could be classified as hearsay. Neither can he see how disclosure would be unlawful (unless exempt in terms of FOISA). The Commissioner has already set out his views in relation to prejudice of commercial interests.
46. The Commissioner has issued guidance on applying the public interest test under FOISA.<sup>4</sup>, Paragraph 21 lists factors that should **not** be taken into account when applying the public interest test. This includes the risk of the requester misinterpreting the information.
47. Paragraph 22 states:
- Just because information is complex, or might be difficult for the requester to interpret, does not mean that the information should be withheld on public interest grounds. If a public authority is concerned that information might not be easily understood, or would be misinterpreted, there is nothing to stop the authority from explaining the information.*
48. The Commissioner agrees with the Care Inspectorate that the figures requested by the Applicant are not necessarily a direct indicator of the quality of the care given in any care home. As mentioned above, the figures that are recorded and held by the Care Inspectorate will include deaths that are suspected to be attributable to coronavirus. The information withheld also relates to deaths that are recorded as not related to coronavirus, as outlined in the Applicant's request. As outlined in the Commissioner's guidance, to avoid misinterpretation or the public drawing wrong conclusions from the information, explanation

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<sup>4</sup> <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx>

as to the context of the information could be provided to the Applicant, thus negating the claim that disclosure would lead to the public drawing wrong conclusions.

49. In considering the public interest, the Commissioner has also given consideration to a report by Amnesty International on the protection of older people in care homes during the pandemic<sup>5</sup>, which (at page 44) states:

*In late August 2020 the CQC [the Care Quality Commission, which regulates health and social care services in England], in response to freedom of information requests by The Guardian newspaper, refused to make public which care homes or providers recorded the most coronavirus fatalities, reportedly citing fears that the information could negatively impact the commercial viability of care home providers.*<sup>6</sup>

*COVID-19-related deaths are not necessarily a direct indicator of the quality of the care in a given care home. There are a range of other factors associated with COVID-19 transmission in care homes, including notably the level of community transmission, the testing regime, the movement of staff between and within care homes, the implementation of IPC [infection prevention and control] measures, access to and correct use of PPE [personal protective equipment], and transmission of the virus from those entering the homes from hospitals or other settings. However, the absence of the above-mentioned data deprives those who have lost loved ones of information related to their deaths, whilst also depriving older people and their relatives of necessary information to make an informed decision when choosing a care home or care home provider. Crucially, such lack of transparency also impedes accountability for decisions taken by the relevant officials and bodies and hampers efforts to ensure lessons are learned and failures are not repeated, and that people's human rights are respected, protected and upheld.*

50. The Commissioner considers here is a strong public interest in disclosure of the information to ensure that older people and their relatives have the necessary information to make an informed decision when choosing a care home or care home provider. He considers that to deny those individuals the access to this relevant information would indeed be a lack of transparency, which is not in the public interest. The Commissioner therefore concludes, that, even if section 33(1)(b) of FOISA were considered to be engaged, the public interest would favour the disclosure of the information in this case.
51. The Commissioner therefore concludes that the Care Inspectorate is not entitled to withhold the information in terms of section 33(1)(b) of FOISA.

## **Section 36(2) – Confidentiality**

52. Section 36(2) of FOISA provides that information is exempt from disclosure if:
- it was obtained by a Scottish public authority from another person (the first test) **and**
  - its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person (the second test).

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<sup>5</sup> <https://www.amnesty.org.uk/files/2020-10/Care%20Homes%20Report.pdf?kd5Z8eWzj8Q6ryzHkcaUnxfCtqe5Ddg6>

<sup>6</sup> <https://www.theguardian.com/world/2020/aug/27/data-covid-care-home-deaths-kept-secret-protect-commercial-interests>

53. "Person" means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
54. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest (this is commonly known as "the public interest defence").
55. The Commissioner is satisfied that the information was obtained by the Care Inspectorate from the care providers in question and so the first test has been satisfied.
56. The second test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
57. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
  - the information must have the necessary quality of confidence;
  - the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
  - unauthorised disclosure must be to the detriment of the person who communicated the information.

#### *Necessary quality of confidence*

58. Having considered the information withheld and the arguments put forward by the Care Inspectorate, the Commissioner is satisfied that the breakdown of the figures requested has the necessary quality of confidence: the information is not common knowledge.

#### *Obligation to maintain confidentiality*

59. The Care Inspectorate submitted that the information was provided on the understanding that it would remain confidential.
60. The Care Inspectorate submitted that nothing in the statutory regime it administers under the 2010 Act, any secondary legislation made thereunder, the 2020 Act or elsewhere, requires or expressly authorises publication of information obtained from individual providers of care services, save for the requirement, under section 57(3) of the 2010 Act, that the Care Inspectorate make copies of inspection reports available and take other steps to publicise inspection reports.
61. The Care Inspectorate recognised that the circumstances in which it obtained the information (the information was obtained by a regulator from regulated services which are compelled by law to provide the information) militated against an express obligation of confidence, but submitted that there was an implied duty of confidence. It considered it inconceivable that a service provider would voluntarily place the information into the public domain and again stated that there is neither a specific statutory duty nor power to publish the information. It submitted that there appeared to be a compelling public policy argument for the existence of an implied duty of confidentiality.

62. The Care Inspectorate further submitted that representatives of care services, including the Chief Executive of Scottish Care, had confirmed they considered there was an expectation of confidentiality.
63. The Commissioner has considered the submissions provided by the Care Inspectorate on this issue. It appears that the Care Inspectorate is relying on the absence of any specific authority to publish as evidence of an obligation of confidentiality. To follow the logic of these submissions, the Care Inspectorate would only be obliged to make information public following one of its statutory inspections – and its claims of an expectation of confidentiality appear to be founded on little more than the absence of such an obligation. This is not a position that can be accepted by the Commissioner, as to follow such logic would – to a very large extent – relieve the Care Inspectorate from its legal responsibilities under FOISA.
64. The Commissioner notes that the care providers are required by the 2010 Act to provide the information to the Care Inspectorate. There is nothing in the 2010 Act, or elsewhere, which suggest that the information is provided in confidence. In the circumstances, the Commissioner does not consider that the legislation provides any support to the Care Inspectorate’s argument that there is an obligation of confidentiality – either explicit or implicit.
65. The Commissioner further notes that those providing information to Scottish public authorities should by now be well aware of the provisions of FOISA and the possibility of disclosure.
66. Having given full consideration to the matter, the Commissioner is not satisfied that the Care Inspectorate has evidenced that the information was provided to it in circumstances which imposed an obligation of confidentiality. Consequently, in this case, the Commissioner is not satisfied that the information requested was properly withheld under section 36(2) of FOISA.
67. Notwithstanding that the Commissioner does not accept that the information was provided in circumstances that imposed an obligation of confidentiality, for completeness, he will consider the remaining tests required for this exemption to apply. That is whether disclosure would cause detriment to the person who provided the information, and whether the public interest defence applies.

*Detriment to the person who communicated the information*

68. The Care Inspectorate submitted that, in the event of disclosure, detriment was likely to be caused by the information being used as a measure of quality of service or performance, in a way that was unjustified (there being no correlation between previous inspection outcomes and number of deaths experienced by any given care home in the pandemic).
69. It further advised that disclosure would lead to distress to providers and staff, may lead to withdrawal of credit (and, as a consequence, deliveries) by suppliers, tradesmen declining to work on the premises (both of which would also impact negatively upon residents), and might lead to unjustified loss of confidence on the part of residents, commissioners, placing authorities, suppliers, investors and lenders, threatening the continued solvency and, indeed, existence of the care services concerned.
70. The Care Inspectorate also considered likely that, if it were to release the information in a way that caused unfair or unwarranted commercial harm to a provider, then the provider or its owners/shareholders might take action against the Care Inspectorate to recover their losses.

71. Even if there were a possibility of publication, the Care Inspectorate believed this would be likely to create a disincentive to full and frank disclosure (even against a background of legal obligation) which, if realised, would impact negatively upon the ability of the statutory regulator to obtain a full and detailed picture of what is taking place in individual regulated care services and in the sector as a whole.
72. The Commissioner has considered the submissions made by the Care Inspectorate. He considers they are speculative and general in nature and do not relate to how the detriment would be caused by disclosure of the actual information under consideration here. As explained above, disclosure of the actual information being withheld has to be the catalyst for such detriment. In this regard, the Care Inspectorate's submissions amount to the fact that the care providers have not consented to disclosure and the absence of any explicit statutory duty or power to disclose.
73. Taking account of all of the submissions provided by the Care Inspectorate, the Commissioner does not accept it has evidenced that disclosure would cause the detriment required for this exemption to apply.

#### *Public interest defence*

74. As mentioned above, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is necessary in the public interest ("the public interest defence").
75. The Care Inspectorate submitted no conclusions could be drawn as to the quality or performance of care services, based only on information as to the number of deaths from Covid-19 among persons in receipt of the service. Even if such conclusions could be drawn (which it did not accept), it submitted that failings in service quality, where not demonstrably flowing from criminality or wrongdoing, would not be of sufficient seriousness to establish a "public interest" defence.
76. In considering whether there would be a public interest defence, the Commissioner has considered the submissions made by the Applicant, who identified a public interest in disclosure on basis that the Covid-19 pandemic had severely affected care homes in Scotland, in particular those in West Dunbartonshire, and continued to do so. She submitted that family members, who must make the difficult decision of choosing a care home for their elderly relative, both during the pandemic and in the future, have the right to be presented with the Covid-19 information for each care home to help inform their decision.
77. The Commissioner notes that the figures requested by the Applicant are not necessarily a direct indicator of the quality of the care given in any care home. As recognised above, the figures will include deaths that are suspected to be attributable to coronavirus. The Commissioner also acknowledges, however, that there is a strong public interest in older people and their relatives having the information to make an informed decision when choosing a care home or care home provider. He considers that to deny those individuals access to this relevant information would be a lack of transparency, which, in this case, is not in the public interest.
78. The Commissioner therefore considers that there is a strong public interest defence to disclosure of the information and there is, in any case, little or no prospect that an actionable breach of confidence would be entertained. As such, he finds that the Care Inspectorate was not entitled to withhold the information under section 36(2) of FOISA.

### **Section 39(1) – Health, safety and the environment**

79. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA. The Commissioner's briefing on section 39(1)<sup>7</sup> notes that the exemption does not contain the usual harm test. Instead of the "substantial prejudice" test found in various other exemptions contained in Part 2 of FOISA, this exemption refers to the "endangerment" of health or safety. The briefing also notes that the test of "endangerment" is less demanding than the "substantial prejudice" test applied in other exemptions.
80. The Commissioner considers that the term "endanger" is broad enough to apply where there is a (direct or indirect) threat to the safety of a person which would foreseeably arise in the future, as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner believes that, for endangerment to be considered likely, however, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
81. The Care Inspectorate referred the Commissioner to a decision of the First-Tier Tribunal, *British Union for the Abolition of Vivisection v Information Commissioner and Newcastle University (EA/2010/0064)*<sup>8</sup>, which considered the equivalent exemption in section 38(1) of the Freedom of Information Act 2000 (FOIA). In paragraphs 18 and 19 of this decision, the First-Tier Tribunal described the threshold for section 38(1) of FOIA in the following way:
- ... We must take into account that in s38(1) Parliament chose to use the word "endanger" and did not refer either to "injury" or to "prejudice". On the other hand, considering the statutory purpose of freedom of information, balanced by exemptions, we are not persuaded that it would be right to read the word "endanger" in a sense which would engage the exception merely because of a risk. A risk is not the same as a specific danger. Every time a motorist drives on the road there is a risk that an accident may occur, but driving is only dangerous when a particularly risky situation arises. So, for example, there is always a risk that a researcher might become a target for persons opposing animal research by unlawful and violent means, but the researcher's physical health would not be endangered unless a specific attack were made. We need to consider the likelihood of such an attack, and the likelihood of other conduct which would endanger mental health or other aspects of safety.*
- There is also a causation criterion to be met. We are not required to consider in the round the likelihood of the researchers or other persons being endangered, but specifically the likelihood of such endangerment as a result of disclosure of the requested information.*
82. From this, the Care Inspectorate submitted that it is necessary to show the following matters before the exemption is engaged:
- that there is one or more specific danger(s) to the physical or mental health or the safety of an individual;
  - that there is a sufficient link between the danger and the disclosure of the requested information.

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<sup>7</sup> <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

<sup>8</sup>

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i605/\[2011\]\\_UKFTT\(GRC\)\\_EA20100064\\_2011-11-11.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i605/[2011]_UKFTT(GRC)_EA20100064_2011-11-11.pdf)

83. The Commissioner fully accepts that the First-Tier Tribunal case referred to by the Care Inspectorate is relevant, and that section 38(1) of FOIA is essentially the same as section 39(1) of FOISA. He accepts, therefore, that, for section 39(1) of FOISA to be engaged, the two elements identified in the previous paragraph must be present.
84. This is mirrored in the Commissioner's own guidance on the application of section 39(1) of FOISA, in which he states (at paragraph 7) that:
- The exemption can only be applied where disclosure would, or would be likely to, endanger an individual's health or safety. There must be at least a significant probability that health or safety would be endangered for the exemption to be applied. There must also be a genuine link between disclosure and the endangerment: it cannot simply be a remote or hypothetical possibility.*
85. The Care Inspectorate referred the Commissioner to previous examples, and third party submissions, to show that previous disclosure of the number of deaths had led to anxiety amongst staff, residents and family members. It submitted that it was imperative for care homes to be able to communicate with families individually regarding the circumstances of the residents whose direct care was their responsibility, without the added burden of press and community intrusion.
86. The Care Inspectorate also submitted that the examples it provided to the Commissioner demonstrated the adverse impact on care services of releasing data of this kind at a time when they were financially insecure and which therefore could result in closures and residents being moved (moving being highlighted as having a particularly negative impact on elderly residents).
87. In additional submissions provided during the investigation, the Care Inspectorate drew attention to staffing levels within the industry and the difficulties in filling staff vacancies, which had been increasing over time. It also provided submissions obtained from interested third parties, who provided evidence as to the impact that Covid-19 was having on staff members and their physical and mental well-being. Those submissions raised concerns as to the levels of anxiety and stress and the impact of the deaths and media coverage on service providers and staff. It provided examples of media reports and their effects on the industry and specific individuals. The Commissioner does not consider it necessary to reproduce these submissions in any further detail for the purposes of this decision.
88. The Care Inspectorate drew attention to the submissions it had received regarding disclosing information without context or further explanation; for example, that many of the deaths took place within the first wave of the pandemic: patients were being discharged from hospital into care home without testing; PPE was in short supply and staff were not being trained initially in enhanced protection control measures needed to control the virus.
89. The Commissioner recognises the historical events surrounding the impact of the Covid-19 pandemic on care services and the consequent impact on staff and the public alike. He also acknowledges the media coverage, including those items drawn to his attention by the Care Inspectorate and others, and the impact that this has had on the industry, on individuals and on society as a whole. Clearly, these events and the media coverage have caused stress and anxiety in the various groups identified.
90. As mentioned above, however (and as outlined in the First-Tier Tribunal decision referenced by the Care Inspectorate), before section 39(1) of FOISA can be engaged it has to be established that there is a sufficient link between disclosure of the withheld information

and the required harm. It has to be established that disclosure – of the withheld information – would at least be likely to lead to the harm referred to by the Care Commission. That such harms may be present already is irrelevant, unless disclosure of this information is likely to have an impact of some significance on the harm in question.

91. The Commissioner has considered the submissions provided on this point. In his view, it does not follow that disclosure of the information requested would hinder communications between the care homes and families individually. Neither does it necessarily follow that the adverse impacts on the care services, staff members, residents and families, as claimed by the Care Inspectorate, would be the result of disclosure.
92. As noted elsewhere in this decision, the Commissioner cannot accept that the numbers of deaths in specific care homes can, on their own, be correlated to any failings in service. To make such a connection based solely on the numbers would be purely speculative. In this case, therefore, the Commissioner is not persuaded by the arguments presented by the Care Inspectorate. In his view, these arguments do not demonstrate why the actual information the Applicant is seeking here would be likely to increase the risk of endangerment to the health or safety of individuals. The authority needs to establish a link between disclosure and such endangerment: in all the circumstances of this case, the Commissioner does not find such a link to have been established.
93. Having concluded that disclosure of the withheld information in this case would not, and would not be likely to, endanger the physical or mental health or safety of any person, the Commissioner finds that the exemption in section 39(1) was incorrectly applied to the withheld information by the Care Inspectorate. Having reached this conclusion, the Commissioner is not required to consider the public interest test in relation to this information.
94. The Commissioner acknowledges that any disclosure of similar information by other authorities, including by COPFS, took place during this investigation and, therefore, could have no direct bearing on the Care Inspectorate's decision to withhold the information at the time it dealt with the request or conducted its review. It is apparent, however, that those other authorities have not deemed it necessary to withhold similar information. This may reflect the strong public interest in disclosing information relative to this subject matter.
95. Given that the Commissioner has concluded that none of the exemptions applied by the Care Inspectorate can be applied to the withheld information, he finds that the Care Inspectorate was not entitled to withhold the information.

## Decision

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The Commissioner finds that Social Care and Social Work Improvement Scotland (the Care Inspectorate) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. The Commissioner finds that the information was incorrectly withheld under all the exemptions claimed, with the result that the Care Inspectorate failed to comply with section 1(1) of FOISA.

The Commissioner notes that, in her request for review, the Applicant told the Care Inspectorate that she would be happy for the numbers to be described as “less than five” if disclosure would identify individuals. In the absence of any submissions regarding identifiability, the Commissioner requires the Care Inspectorate to disclose the actual numbers to the Applicant.

The Commissioner therefore requires the Care Inspectorate to provide the information requested to the Applicant by **28 June 2021**.

## **Appeal**

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Should either the Applicant or the Care Inspectorate wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

## **Enforcement**

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If the Care Inspectorate fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Care Inspectorate has failed to comply. The Court has the right to inquire into the matter and may deal with the Care Inspectorate as if it had committed a contempt of court.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**13 May 2021**

## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

#### 33 Commercial interests and the economy

- (1) Information is exempt information if-

...

- (b) its disclosure under this Act would, or would be likely to, prejudice substantially the commercial interests of any person (including, without prejudice to that generality, a Scottish public authority).

...

#### 36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and
- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

### **39 Health, safety and the environment**

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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