

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 February 2016

**Public Authority:** Whittington Hospital NHS Trust

**Address:** Magdala Avenue  
London  
N19 5NF

### Decision (including any steps ordered)

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1. The complainant has requested information from Whittington Hospital NHS Trust ('the Trust') about a consultation regarding the restructuring of its gynaecology service. The Trust released some information. The complainant considers that the Trust holds further information that it has not released.
2. The Commissioner is satisfied that, on the balance of probabilities, the Trust has complied with the requirements of section 1(1) of the FOIA (general right of access) and has released all the information that it holds that falls within the scope of the request.
3. The Commissioner has also decided that the Trust breached section 10(1) of the Act because it did not provide a response within 20 working days.

### Request and response

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4. On 31 July 2014 the complainant submitted a five part request to the Trust. Three parts of the request were for her own personal information; two parts were for other information and therefore covered by the FOIA. These were:

1. *All minutes of meetings and emails relating to the consultation surrounding the closure of Betty Mansell Ward from May 2013 to date.*

2. *All minutes of meetings and emails, relating to the possible amalgamation of the Women's Diagnostic Unit and Clinic 4C from August 2013 to date..."*
5. The Trust managed the complainant's request for her personal information as a subject access request (SAR) under the Data Protection Act (DPA). Its handling of this aspect of the request, although referred to in this notice, is not formally included within the scope of the current investigation.
6. The Trust did not provide a substantive response to any aspect of the complainant's request and the complainant submitted a complaint to the Commissioner. Following the Commissioner's intervention, the Trust wrote to the Commissioner on 11 March 2015. The Trust said that on 22 January 2015 the complainant had collected some personal information from the Trust, released in response to her SAR. Within this, there appears to have been a small amount of information that is also relevant to the FOI element of her request, namely an email dated 23 December 2013 to a group of staff (the 'consultation email'). The email details a proposal to move the Trust's Women's Diagnostic Unit (WDU) from Betty Mansell Ward to the Gynaecology Clinic (4C), and requests responses to this proposal.
7. In its 11 March 2015 correspondence, the Trust said it had now received consent to disclose further relevant information, namely correspondence, and had invited the complainant to collect this. It is not clear whether this information related to the complainant's SAR or FOI request.
8. With regard to part 1 of the FOI request specifically, the Trust said that the Betty Mansell ward is still open but that it had identified further information – meeting minutes – that it would disclose to the complainant. The Trust said it would need further clarification – search parameters such as names, dates, meeting names – if it was to search for additional information.
9. During his investigation, the complainant told the Commissioner that the minutes of 10 consultants' meetings had, in fact, been included in the file of information that the Trust had released to her on 22 January 2015.
10. In its 11 March 2015 correspondence, the Trust told the Commissioner that, on 22 January 2015, the complainant had also collected the consultation response paper which included comments and concerns raised by staff.

11. The complainant subsequently confirmed to the Commissioner that she does hold this report but that it was released to her prior to her SAR/FOI request, as part of a separate staff investigation procedure.
12. With regard to part 2 of the request, the Trust said it had provided the complainant with relevant information it holds as a result of her SAR and that it would again need clarification if it was to search for more.
13. During his investigation, the Trust provided the Commissioner with a list of the information it says it has released. The Trust appears to have released more personal information to the complainant, also on 11 March 2015. On a later date, unspecified on the list, the Trust appears to have released additional information – including email correspondence regarding Betty Mansell Ward – but again, it is not clear if this was released in response to the SAR or FOI element of the request.
14. The complainant says that, in response to her FOI request, she has received the minutes of 10 consultants' meetings, referred to at paragraph 8, and nothing else.
15. There is some disparity between the information the Trust says it has released in response to the FOI request and the information the complainant says she has received, and when she received it. The Trust does not appear to have drawn a clear distinction between the DPA and FOIA elements of the complainant's request. A confused situation consequently developed. In the circumstances, the Commissioner is prepared to accept the complainant's position that the only information she has received in response to her FOIA request is the meeting minutes, which the Trust released to her on 22 January 2015. However, the Commissioner does note that the Trust also released the consultation email to her on 22 January 2015 as a result of her SAR – see paragraph 6.
16. Following the Commissioner's further intervention, the complainant requested an internal review of the Trust's response to her FOI request on 13 April 2015. The Trust sent her the outcome of its review on 2 June 2015. It acknowledged that it had not responded to the complainant's FOI request within the 20 working days that is a requirement of the Act.
17. With regard to part 1 of the complainant's request, the Trust said that, although no longer an inpatient ward, Betty Mansell ward does remain a functioning ward. It confirmed that it does not therefore hold any additional information relating to this part of the request and is not withholding any.

18. With regard to part 2 of the request, the Trust confirmed that, having undertaken a search, it does not hold any additional information relating to the 'background work relating to the planned merger of Clinic 4C and the Women's Diagnostic Unit' and again, has not withheld any.

## Scope of the case

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19. The complainant originally contacted the Commissioner on 1 April 2015 to complain that she had not received a response to her wider request.
20. Following the internal review, the complainant continues to dispute that Betty Mansell ward is still open and considers the Trust should hold more information about its closure as a gynaecological in-patient ward. With regard to part 2 of the request, the complainant says that she would also expect the Trust to hold information on the consultation exercise that it undertook approximately six months before she submitted her FOIA request, such as responses to the consultation email, which informed the consultation report.
21. The Commissioner has consequently focussed his investigation on whether the Trust has released all the information that it holds that falls within the scope of the FOI request, and on the time the Trust took to respond to this request. He has also considered the Trust's handling of the internal review.

## Reasons for decision

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### Section 1(1) – information held/not held

22. Section 1(1) of the FOIA says that when a person submits a request for information to a public authority, that person is entitled to be informed in writing by the authority whether it holds the requested information and, if it does, to have that information communicated to them.

### The complainant's arguments

23. The complainant has provided the Commissioner with her arguments. As detailed in the scope of the case, she has specific queries regarding the status of the Betty Mansell ward and the particular consultation exercise. With regard to Betty Mansell ward, the complainant is of the view that the ward is closed and that this has been the case for the majority of the time since its closure two years ago. She considers the Trust should therefore hold emails and meeting minutes regarding the consultation on its closure, and the transfer of its services to Clinic 4C.

24. The complainant considers that the Trust should also hold information such as the consideration of financial benefits of the amalgamation of services, the impact on the gynaecology service, staffing and patient safety issues. The Commissioner notes however that the complainant requested only meeting minutes and emails on the consultation process and the transfer of a particular service.
25. In addition, the complainant disputes that all the relevant members of staff were asked to carry out a search and mentions specific individuals by name. The Commissioner notes that two of these individuals appear to have left the Trust in November 2014 ie before the Trust emailed staff in December.

### **The Trust's submission**

26. In its submission, the Trust has told the Commissioner that, in order to make sure that it captured all the information relevant to the request, it shared the request with staff members from those areas of the Trust named in the request. It asked those staff members to return any communications and documents that relate to the subject areas covered within the request.
27. With regard to the meeting minutes and emails that have been requested, the Trust has confirmed that the relevant staff did return with all the documents that they had found as part of their individual searches of their email accounts, electronic and hard copy records. It says these had been released to the Complainant where appropriate.
28. The Trust says it did not search on laptops, phones and other portable devices. Instead it undertook a search of its network drive, where Trust data, including information held on laptops, phones and portable devices, is backed up. As described above, it did this by asking individuals to search their email inboxes and other electronically stored documents and their hard copy records. It did not ask individuals to search against specific terms as it considered they all had first-hand knowledge of where they would hold relevant information. The Trust says it did not want to inhibit the scope of the search by placing strict search terms on it.
29. The Commissioner has seen the email the Trust sent to staff, asking them to search for relevant information, and can confirm that it is as described. He notes, however, that the email is dated 23 December 2014. This suggests that staff were asked to search for relevant information almost five months after the Trust received the request.
30. With regard to email generally, the Trust has advised the Commissioner that the Trust uses an external email system provider: NHS Mail. NHS

Mail holds full emails (header information and body) and any attachments for 90 calendar days. After this time and up to 24 months, only the header information (subject, from, to, date, time) is available. The body of the email or any attachments are not retrievable after this point.

31. In addition to the NHS Mail system, the Trust operates its own email archiving system: Quest. Staff must activate their own Quest archive. In cases where staff have activated their archive, any email that has not been deleted and is older than 60 calendar days will be archived. In cases where staff have not activated their archive, emails are either deleted manually by the user or any email older than 60 calendar days is automatically deleted.
32. The Trust says that NHS Mail is provided and managed by a third party organisation – the Health and Social Care Information Centre (HSCIC) and that it is unable to conduct blanket keyword searches on all emails.
33. The Trust has told the Commissioner that it is not aware that any information that would fall within the scope of the request has been deleted or destroyed and that none of the information that was released had been retrieved from the Trust's archiving system.
34. However, it says it is possible that some information held on the Trust's email systems could potentially have been deleted in accordance with the Trust's automatic deletion policy. The Trust says it has no way of knowing whether this is the case, as deleted emails are irretrievable. It does not stipulate which specific emails staff should retain for the purposes of their jobs, and which ones they should not. It expects Trust staff to know what information they need in order to do their jobs. The Trust has provided the Commissioner with a copy of its 'Email and Internet Acceptable Use' policy.
35. The Trust says that it is possible that email correspondence falling within the scope of the request has been archived in the Quest system but that it cannot access that archive.
36. The Trust says that there is a statutory requirement for it to retain a small amount of the requested information, which is held by its human resources team, and that it has already released this to the complainant. The Commissioner assumes this concerns the complainant's personal information. In conversation, the Trust confirmed that there is no business need for which the requested information should have been held.

### **The Commissioner's investigation**

37. The Trust has told the Commissioner that the Betty Mansell ward is open and functioning, and was at the time of the request; however previously it was an in-patient ward and now it is a maternity triage ward.
38. As discussed at paragraph 6, the consultation exercise regarding the transfer of the WDU from Betty Mansell ward appears to have been the email from two members of Trust staff to other staff members, sent in December 2013. The email details the proposal for moving the Women's Diagnostic Unit from Betty Mansell Ward to Clinic 4C and invites those staff to respond with their thoughts on this proposal.
39. The Trust confirmed to the Commissioner that it has carried out a thorough search for any information (including both electronic and hard copy documents and correspondence) concerning this consultation exercise. It says it has released to the complainant all the relevant information that it retrieved and holds no further information.
40. The Commissioner asked for clarification on HSCIC's role as manager of the Trust's email systems: NHS Mail. The Trust initially said that because of this arrangement, it cannot conduct blanket searches of this system. On further questioning, it said that it *could* instruct HSCIC to do this but had not considered doing so as the effort would be disproportionate for a "routine Subject Access Request". The Commissioner considers that the Trust did not sufficiently explain to him its relationship with HSCIC. He also notes that it erroneously referred to the matter in question as a DPA/SAR matter, and not an FOIA request.
41. In response to further questioning about its Quest email system, the Trust told the Commissioner that it cannot undertake a search of the Quest archive itself and that the supplier of the Quest software would need to do this. The Trust provided the Commissioner with a copy of its 'Records Management' policy. The requirement for public authorities to search for deleted emails is discussed at paragraph 59.
42. The Commissioner also put to the Trust that to reopen as a maternity triage ward, the Betty Mansell ward had to first close as a female general surgical ward. It is this that is the focus of the first part of the complainant's request. The complainant considers the Trust must hold more information on this closure than it has released to her. The Commissioner notes however, that the complainant has requested information, specifically emails and meeting minutes, on "*the consultation surrounding the closure*" and not on the closure of the ward, more generally, as a general surgical ward. However, the complainant has told the Commissioner that she is aware of staff

members who took part in the consultation and who the Trust did not approach to provide relevant information in response to her request.

43. The Trust has released to the complainant some information within the scope of this part of her request, which the Commissioner understands to be the consultants' meeting minutes and the consultation email. The Commissioner asked the Trust to explain why it could be sure that, at the time of the request, it did not hold any additional information. In response, the Trust has simply said that, having liaised with relevant staff members it can confirm that it has released to the complainant all the relevant information that it holds.
44. With regard to the second part of the complainant's request, and as discussed previously, the complainant says that Clinic 4C and Women's Diagnostic Unit staff and consultants were asked to comment on the proposal to move this service from Betty Mansell Ward. She says that not all the members of this group were subsequently asked to search for information.
45. Again, when asked by the Commissioner to explain why it could be sure that it did not hold any additional information with respect to this part of the request, the Trust said that it had liaised with relevant staff members and confirmed that it has released to the complainant all the relevant information that it holds.
46. In addition, on 12 January 2016 the Trust confirmed that the current Head of Nursing had conducted a search of her office and had not found any information within the scope of complainant's request.
47. With regard to staff members who may have been absent at the time of the request and/or the search for information, the Trust told the Commissioner that it is not its policy to contact staff who are temporarily or permanently away from the Trust with regard to FOIA requests. Staff who are absent long term are commonly on long-term sick leave or maternity leave and the Trust says it would not be appropriate to contact these staff on work related matters. The Trust says that it holds its electronic information centrally on the Trust's network drives. It therefore does not have the expectation that staff, including those who are on long term absence for any reason, will hold any corporate information at home. The Trust's 'Staff Code of Conduct on Confidentiality Policy' advises staff that information should be stored on the Trust's network drives and confidential data should not be stored on non-Trust computers without approval. Its 'Confidentiality Guidelines for Working Off-Site and from Home' provides staff with supporting guidance. The Trust confirmed that, for this reason, it did not contact relevant individuals who were absent from the Trust long term about this request.



48. The Trust had, however, contacted one member of staff who was on long term leave around the time that the complainant submitted her FOI request, with regard to the complainant's separate SAR. The Trust had done this in order to get that particular staff member's consent to release their personal data as a result of the above SAR.

### **Summary**

49. The Commissioner has reviewed the complainant's request of 31 July 2014. He notes that she specifically requests meeting minutes and emails concerning the consultation on the closure of Betty Mansell Ward, and meeting minutes and emails concerning the amalgamation of particular services. The complainant reasonably considered that email responses to the consultation would therefore be released.
50. During the investigation, the complainant has told the Commissioner that she was also expecting to receive information relating to the Trust's financial considerations of this restructuring, any staffing and patient safety issues, and work that went into decisions on staffing posts. In the Commissioner's view, however, this information does not clearly fall within the scope of her request, which was for emails and meeting minutes.
51. As requested, the Trust undertook a search for meeting minutes and emails. However, it did not begin to conduct its search for any related information until 23 December 2014, some five months after receiving the request. It released the consultation email and the minutes of 10 meetings on 22 January 2015. The complainant already held a copy of the consultation report, which the Trust says incorporates staff comments and concerns.
52. By the time the Trust began its search for information, some relevant staff members had left the Trust. These individuals could not therefore be approached to search for any relevant information that they may have held.
53. By 23 December 2014, the consultation email and any electronic responses to it would, if held, have been approximately 12 months old. Other information within the scope of the request, if held electronically, would have been over 18 months old (the complainant requested information from May 2013). At this point, only the header information of emails in the Trust's NHS Mail system would have been held. Emails managed through the Quest system that staff had not deleted themselves, would have been automatically archived or deleted.
54. Consequently the Trust's position is that it does not hold any additional information, including any staff members' responses to the consultation.

55. The Commissioner notes that even at the time of the request on 31 July 2014, the consultation correspondence would have been approximately seven months old. It seems to the Commissioner that the email situation described at paragraph 53 may have been largely similar had the Trust responded within 20 working days.
56. Nonetheless, in the Commissioner's view, the Trust has not handled this particular request well and the Trust itself has acknowledged that there have been shortcomings. He has carefully considered the Trust's submission and the complainant's arguments in order to understand a confusing picture.
57. The Commissioner has considered the following factors: the age of some of the requested information, the date of the complainant's request, the date of the Trust's response, the Trust's information management practices and its staffing situation.
58. The Commissioner accepts that the Trust did carry out a search for information falling within the scope of the complainant's FOI request and was able to release some information. Members of staff that the complainant says should have been asked to search for information but who were not include individuals who had left the Trust when the search was carried out. The Commissioner notes the Trust's records management policy regarding staff members who are absent from the office, discussed at paragraph 47.
59. The Commissioner's view is that electronic information, such as email, that has been properly and intentionally deleted, either by an individual member of staff or through an automatic deletion process in line with an organisation's records management policy, may still be regarded as held by a public authority under FOIA. However there is no duty to communicate this information and as a consequence no requirement to recover the information.<sup>1</sup> Public authorities are entitled to delete information they no longer require – indeed they should do so as this is good records management practice.
60. Given these factors, the Commissioner considers it possible that the Trust no longer held some relevant material in July 2014, and that further relevant information may no longer have been held by December 2014. This is because it may have been properly and intentionally

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foi\\_eir.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf)

deleted by individual members of staff or have been deleted automatically.

61. When a public authority claims that information is not held, the Commissioner will decide whether this is the case on the balance of probabilities. He will reach a decision based on the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held, such as there being no business need to record it.
62. The complainant requested meeting minutes and emails regarding a particular consultation exercise. Although the search was carried out some five months after the Trust received the request, the Trust was able to find and release some information – meeting minutes and the consultation email. However, the Commissioner is prepared to accept that, by December/January 2015, some information falling within the scope of the request – such as email – may no longer have been held.

### **Section 10 – time for compliance**

63. Section 10(1) of the Act says that public authorities must comply with section 1(1) within 20 working days of receiving the request.
64. In this case, the complainant submitted her SAR and FOI request on 31 July 2014. She did not receive a response to her FOI request until 22 January 2015. This is a clear breach of section 10, which the Trust acknowledged in its internal review.
65. Had the Trust complied with section 10 of the Act, it would have provided a response by 1 September 2014. At that point, some information within the scope of the request may still have been held in active accounts from where it could have been retrieved. In addition, one or more relevant staff members who could have been approached for information would still have been in post.
66. As it was, the Trust did not respond until 22 January 2015, almost six months after the request. By that time, some relevant staff members had left the Trust. From the Trust's explanation of its records management procedures at paragraphs 30 - 35, it is possible that some information relevant to the request that the Trust may have held at the time of the request had been deleted. As discussed above, the Trust says it cannot retrieve information that has been deleted or archived and the Commissioner has noted that this is not a requirement.
67. In correspondence to him dated 1 November 2015, the complainant also acknowledges herself that due to the Trust's delay in starting to collate a response to her request, its apparent failure to approach all the relevant staff members and particular staff members having left the Trust, it is

logical to assume that much of the information she requested has been deleted.

68. The Commissioner reminds the Trust of its obligations under section 10 of the Act. As in this case, breaches can seriously undermine the public's confidence that a public authority is committed to the principle of promoting public access to information that it holds.

#### **Other matters – internal review**

69. In its correspondence to the Commissioner of 11 March 2015, the Trust said it would need further clarification from the complainant if it were to identify any additional information it may hold.
70. The complainant has disputed that the Trust went on to approach her for clarification to help in its search for information she has requested. The Trust has acknowledged that although it had initially told the Commissioner that it *had* requested clarification, after double checking its correspondence with the complainant, it conceded that this was not the case and that it had not asked the complainant to clarify aspects of her request. The Commissioner considers the Trust should have done this as part of its internal review of 2 June 2015. Because it did not, the review was not as effective as it could have been.
71. During the Commissioner's investigation, the Commissioner has clarified aspects of the complainant's request to the Trust. As a result, the Trust has reconsidered its response, with its findings detailed in this notice.

## Right of appeal

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72. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. 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 .....

**Pamela Clements**  
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