

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 July 2021

**Public Authority:** Tavistock and Portman NHS Foundation Trust  
**Address:** 120 Belsize Lane  
London  
NW3 5BA

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to an award made by The National Lottery Community Fund (TNLCF) to Mermaids UK.
2. The Commissioner's decision is that Tavistock and Portman NHS Foundation Trust (the Trust) has failed to issue a response to the request that complies with the requirements of section 1(1) of the FOIA.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the request that does not rely on the assertion that the Trust does not hold information within scope of the request because it was not the originator of the information and would not therefore be held for its own purposes.
4. The Trust must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 30 July 2020, the complainant wrote to the Trust and requested information in the following terms:

*"Could you kindly share with me any and all communications that the Trust / its employees had with any outside organisation(s) in respect of the £500,000 award made to the charity Mermaids UK by the National Lottery in December 2018?"*

*Following the award, the National Lottery received some complaints on which it reported in February 2019. I am hoping therefore that your search would cover the period before the announcement of the award (ie when the National Lottery was deliberating) until the publication of its report."*

6. On 9 October 2020, the Trust responded to the request. It stated that it had considered whether any information within the scope of the request would be held, to any extent, for its own purposes, and whether the information would belong to another public authority who is subject to the provisions of the FOIA. It concluded that the information belonged to the originating body, and therefore suggested that the complainant re-direct his request to TNLCF.
7. The complainant replied on the same day and asked the Trust to carry out a review of its handling of the request. The Trust responded (on the same day), it stated that because it had determined the information belonged to the originating body, it is not able to offer an internal review and again suggested that he make a request for the information to TNLCF.
8. On 12 October 2020, the Trust wrote to the complainant and again stated that the requested information belongs to the originating body, that is, the body who 'initiated any correspondence'.

## Scope of the case

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9. On 12 October 2020, the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the Trust's response to the request complies with requirements of section 1 of the FOIA.

## Reasons for decision

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Section 1 of the FOIA – general right of access

11. Section 1(1) of the FOIA states:

*"any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him"*

12. Section 3(2) of the FOIA states that

*"For the purposes of this Act, information is held by a public authority if –*

*(a) it is held by the authority, otherwise than on behalf of another person, or*

*(b) it is held by another person on behalf of the authority.*

### *The complainant's view*

13. The complainant said that, the Trust has breached s.1(1) of the FOIA because it failed to correctly confirm or deny it held the requested information, or apply an exemption that would permit it to neither confirm nor deny the information was held or withhold it. He also said that he believes the Trust attempted to 'opt-out' of its obligations under the FOIA by advising him to re-direct his request to TNLCF.

### *The Trust's view*

14. The Trust has said that, in its view, where it has not 'initiated' correspondence but has responded to communications sent to it 'in confidence', if held, it does not regard itself the owner of this information, or that it is held for the purposes of the FOIA. It also said that, TNLCF is a public body and the applicant could make his request directly to it.

15. The Trust has obtained a short statement from TNLCF in which it explains to the Trust what it would do if it had received the request for information. It said it 'may have considered' applying section 36 of the FOIA (prejudice to effective conduct of public affairs) to the request.

This is because, if held, the information would pertain to a report produced and published by it. To facilitate the production of said report it would have been necessary to seek the free and frank views / opinions of stakeholders. It would have also considered whether the views expressed by the parties were included in the subsequent paper. It would have therefore considered whether any further disclosure, through the FOIA, of the requested information may inhibit its ability, in future, to canvas the views of stakeholders in relation to its policy decisions.

16. The Trust said that it considered the importance of TNLCF being able to seek the views of other organisations without inhibition, which, would likely arise from concern about potential disclosure of correspondence in which views from other organisations may have been sought and obtained. It said that it would not be fair or reasonable to confirm whether or not the requested information was held, as this in would, in itself, confirm whether or not views had been sought by TNLCF from the Trust and set a precedent which could undermine the authority of another organisation and therefore impact on its functions.

*The Commissioner's view*

17. The Commissioner notes that the Trust has maintained the same position throughout its handling of the request and her investigation, that in its view, it does not hold the requested information because it is not the originator of the information and that it was created in the process of responding to enquiries. However, she also notes that, although in the Trust's initial response and review decision, it appears to confirm some information within the scope of the request is in fact held by it (albeit that it believes that because it was not the originator of the information it is therefore not held), that during the course of her investigation, the Trust has gone on to intimate that to confirm or deny the information is held would inhibit another organisation's ability to seek and obtain views.
18. The Commissioner also notes that the Trust obtained a statement from TNLCF advising the Trust of how it may respond if it received a similar request for information.
19. Having reviewed the Trust's response to her queries, it is the Commissioner's view that the Trust does not appear understand its obligations under section 1(1) of the FOIA and that it has been, to an extent, contradictory in its responses, e.g., first confirming in its initial response that information exists and later saying that it can neither confirm nor deny the information is held.

20. The Commissioner is concerned with the Trust's view that where it is not the 'originator' of information and / or where information was generated in the process of responding to queries, it does not therefore hold the information for the purposes of the FOIA. There is an apparent lack of understanding by the Trust about when information is held by a public authority for the purposes of the FOIA.
21. The Commissioner states at page 2 of her "Information held by a public authority for the purposes of the Freedom of Information Act" guidance that, information will be held by a public authority if the information is held to any extent for its own purposes<sup>1</sup>. Taking into consideration the scope of the request, e.g. communications between the Trust and outside organisations. It is the Commissioner's view that if any information within the scope of the request exists, it will be held as a record of the Trust's own communications in the matter. It would be held in its own archives / on its own servers and in accordance with its own retention schedule and would therefore be held for the Trusts own purposes.
22. In addition, although the Commissioner states at page three of her "When to refuse to confirm or deny information is held guidance" that a public authority's decision to use a neither confirm nor deny response wont be affected by whether or not it does or doesn't hold the information, that the starting point and main focus in most cases will be the theoretical considerations about the consequences of confirming or denying that a particular type of information is held<sup>1</sup>. She notes that the Trust itself has failed to apply an exemption with a neither confirm nor deny provision to refuse the request in this case. She is concerned that the Trust does not appear to understand that the request was made to it as a separate public authority to TNLCF, and that if it wishes to refuse the request on the grounds that it may inhibit the ability for another organisation to seek views and opinions (in a 'safe space'), then it is required to confirm which exemption it (and not the other organisation) is relying on to do this.
23. It is therefore the Commissioner's view that, by failing to confirm or deny whether the requested information is held or apply an exemption itself to refuse the request, the Trust has failed to issue the complainant with a response that complies with the requirements of section 1(1) of the FOIA.

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<sup>1</sup> [When to refuse to confirm or deny information is held \(ico.org.uk\)](https://ico.org.uk)

## **Other matters**

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

24. Section 10(1) of the FOIA states that:

*"subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt"*

25. The complainant made his request for information to the Trust on 30 July 2020. For the reasons above, the Trust has yet to provide the complainant with a satisfactory response compliant with section 1(1) of the FOIA, a response to the request therefore remains outstanding and the Trust has breached section 10(1) of the FOIA.

## **Right of appeal**

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26. 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)

27. 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.
28. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

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<sup>i</sup> [Document history and version control \(ico.org.uk\)](http://ico.org.uk)