



**NCN: [2023] UKFTT 00299 (GRC)
Appeal Number: EA/2022/0118**

**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Between:

Janet Clitheroe

Appellant:

And

The Information Commissioner

First Respondent:

Lancashire and South Cumbria NHS Foundation

Second Respondent

Date and type of Hearing: - 6 March 2023 - hearing on the papers.

Panel: Brian Kennedy KC, Suzanne Cosgrave, and Stephen Shaw.

Date of Decision: - 9 March 2023.

Result: The substituted Decision. For the Reasons set out below the Tribunal allow the appeal as an error of Law was established in the impugned Decision Notice, however no action is required.

REASONS

Introduction:

- [1]** This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 14 April 2022 (reference IC-117994-Z8W5), which is a matter of public record.

Factual Background to this Appeal:

- [2]** Full details of the background to this appeal and the Commissioner’s decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns requested information about a review project associated with the work of associate hospital managers. Lancashire and South Cumbria NHS Foundation (“The Trust”) disclosed some relevant information. It originally applied section 36 of FOIA (prejudice to the effective conduct of public affairs) to one part of the request and refused to comply with the remaining part under section 12 FOIA (cost exceeds appropriate limit). The Trust subsequently withdrew its reliance on those exemptions.
- [3]** The Commissioner is the regulator of the FOIA and the public authority subject to FOIA is the Trust. The Commissioner’s decision was, on the balance of probabilities, the Trust disclosed all the relevant, recorded information it holds that falls within the scope of parts 1, 2, 5, 6, 7, 8, 9 and 10 of the request and has complied with section 1(1) of FOIA. Further, the Trust communicated some of the requested information outside of the 20-working day requirement and therefore breached section 10(1) FOIA.

History and Chronology:

- [4] On 4 May 2021 the complainant wrote to the Trust requested information of the following description:

"I understand LSCFT engaged Verita Consultancy Ltd, Head Office at City Road London EC1V 2PY to undertake a review and advisory project for LSCFT into the work of Associate Hospital Managers, (AHM's) under the Mental Health Act. This occurred towards the end of 2020. The project has included the interview of a number of AHM's during 2021.

1) Please provide me with a) the procurement, tendering or other documentation used to invite Verita to bid for this work and b) indicate whether and how this was a competitive process and under what procurement authority it was made.

2) If not included in the response to 1), please provide all the documentation showing all dates or indicative dates relevant to the tendering process and the expected timescales for the project or for any identified phases or other arrangements for the delivery of the project.

3) If not included in the response to 1) please provide documentation identifying which senior and/or executive members of LSCFT commissioned and approved a) the decision to tender for the project and b) the project itself, if different.

4) Please provide me with the anticipated value/cost to LSCFT of this project a) as tendered/invited, and b) at inception if different.

5) Please provide me with the anticipated timescale of this project or phases of this project a) as tendered/invited, and b) at inception if different, c) as of this date 4th May 2021.

6) Please provide me with the total costs charged by Verita to LSCFT for this project, a) to 31st March 2021, or end of FY 2020/21, and b) to 30th April 2021, if available, or, if these figures are not available c) why they are not available and the monthly charges or anticipated charges incurred and to what date.

Such information to be broken down by any detailed categorisation of charges required by LSCFT.

7) Please provide me with a copy of any unpublished or a reference to any published documentation providing the rationale for this specific review of the operations of AHM's by Verita for LSCFT including any reference to any inspection or analysis of the functioning or effectiveness of AHM's in LSCFT or elsewhere, justifying this project.

8) Please provide me with a copy of any documentation approved by any executive member(s) of LSCFT or other member(s) of LSCFT approving a) this project and b) the expenditure for this project and c) any changes to the terms or timing of this project. Please ensure the relevant members are identifiable by name and post held.

9) Please provide me with copies of any interim or final reports prepared by Verita for LSCFT arising from this project.

10) please provide me with copies of the briefing papers provided to Verita by LSCFT at any time in order to guide, inform, direct or otherwise ensure Verita addresses the issues that the contract is expected to deliver.

11) Where any information forming the response to in 1-10 above is unavailable, please indicate to the best degree what that information is described as and why it is not available and when/whether it will be made available in the future. Where such information is being withheld, please provide all other information relevant to 1-10 so that this can be considered pending the release of any withheld documentation.”

[5] On 7 June re 2021 the Trust responded, as follows:

“Q1a) – no information held as there was no procurement or tendering process.

Q1b) addressed.

Q2 – no information held as there was no tendering process.

Q3 – names of individuals involved in commissioning the project provided.

Q4a) and b) – information provided.

Q5a) – information provided.

Q6a) – information provided. Q6b) and 6c) addressed.

Q7 – information withheld under section 36 of FOIA.

Q8 – question addressed.

Q9 – inappropriate to share information as review still underway; relevant information will be shared in the future.

Q10 – a terms of reference document provided.”

- [6]** The complainant wrote to the Trust on 7 June 2021. They first advised that the terms of reference document had not been attached to the Trust’s email. The remaining points were as follows:

“Q1a) – Trust to release other documentation used to invite Verita to bid for the work, and 1b) under “what procurement authority it was made”.

The complainant advised that they considered their request included correspondence between the Trust and Verita.

Q2 – the complainant confirmed that they are seeking particular dates, information which may also fall within scope of Q1.

Q5 – Trust to provide anticipated timescales and advised that Q5 reiterates Q2.

Q6 – Trust to provide total cost charged by Verita.

Q7 – the complainant disputed the Trust’s reliance on section 36.

Q8 – Trust to provide copy of any documentation approved by any executive member(s).

Q9 – Trust to provide any interim or final reports Verita prepared.

Q10 – Trust to provide briefing papers it gave to Verita.”

- [7]** On 16 June 2021 the Trust sent the missing terms of reference document to the complainant.

- [8]** The Trust provided an internal review on 11 August 2021. With regard to Q1, the Trust advised why it had selected Verita to undertake the work in question and gave more detail on the associated procurement process and guidelines. It provided a timeline for the instigation of the work and information on the amounts Verita invoiced from December 2020 to June 2021.

- [9] With regard to Q2, the Trust provided more detail and advised that the review had been presented to the Board of Directors on 29 July 2021. The Trust provided the complainant with a link to the published review.
- [10] With regard to Q6 the Trust again provided a breakdown of the invoices received from December 2020 to June 2021.
- [11] With regard to Q8 the Trust released a 'Statement of Need' document that was approved by two of its Executive Directors and provided further detail on how the project was approved.
- [12] With regard to Q9 the Trust again provided the complainant with a link to the published review.
- [13] Finally, the Trust confirmed it was relying on section 12 to refuse to comply with Q10.

Relevant Law:

S1 FOIA General right of access to information held by public authorities.

- (1) 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.

When determining whether or not information is held the Commissioner and Tribunal applies the normal civil standard of proof, on the balance of probabilities. The Tribunal in Linda Bromley v the Information Commissioner and the Environment Agency EA/2006/0072 held that in determining a dispute as to whether information is 'held' at [13]:

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records.

This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

The Tribunal has repeatedly confirmed that the relevant test is whether the information is held on the balance of probabilities: see, for example, Malcolm v Information Commissioner EA/2008/0072 at [24]; Dudley v Information Commissioner EA/2008/008 at [31], and Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 at [21]-[22]).

In Oates v IC and Architects Registration Board EA/2011/0138 at [11] the Tribunal recognised that “As a general principle, the IC was, in the Tribunal’s view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full-scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.”

In Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 [38] the Tribunal recognised that, “*The issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained.*”

Section 8 FOIA

Section 8 FOIA confirms the requirements for a valid FOIA request. It states that:

(1) In this Act any reference to a “request for information” is a reference to such a request which—

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.

Section 10 FOIA

Section 10 FOIA provides the statutory time for compliance with a FOIA request. It states that:

(1) 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.

Section 50 FOIA

Section 50 FOIA states that:

“(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.”

Section 57 FOIA

Section 57 FOIA states that:

“(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.”

Section 58 FOIA

Section 58 FOIA states that:

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

Section 77 FOIA

Section 77(1) FOIA, which is found in Part VIII of FOIA, states:

“Where—

(a) a request for information has been made to a public authority, and

(b) under section 1 of this Act the applicant would have been entitled (subject to payment of any fee) to communication of any information in accordance with that section, any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

Request and the Commissioner’s Decision Notice:

- [14] On 15 July 2021 the Appellant complained to the Commissioner about the way her request for information had been handled. This was prior to receiving the internal review. The Commissioner accepted the case for substantive investigation on 24 August 2021 once the internal review had been provided.

- [15] The Commissioner was aware that the Appellant submitted three further FOIA requests to the Trust in September 2021. The Commissioner informed the Appellant that the complaint submitted on 15 July 2021 had been accepted to investigate the Trust's handling of the requests made on 4 May 2021. The Appellant was informed that she was able to submit complaints about any further subsequent requests she had made following the Commissioner's procedure for submitting section 50 complaints. No further complaints have been submitted.
- [16] Turning back to the case in question, during the Commissioners' investigation the Trust informed the Commissioner that it wished to withdraw its application of section 36 FOIA to part 7 of the request and section 12 FOIA to part 10 of the requests. The Trust confirmed that in relation to part 7 of the request, the only information held was the Statement of Needs form (SoN) disclosed on 11 August 2021 and some other previously disclosed information and in relation to part 10 of the request it confirmed it held no further information other than that which had already been provided,
- [17] As the Appellant had only expressed dissatisfaction with parts 1,2, 5, 6, 7, 8, 9, and 10 of the request on 7 June 2021 and the Trust withdrew its application of section 12 and section 36 FOIA, the Commissioner considered that the scope of the investigation was to establish whether the Trust holds any further information falling within the scope of these parts of the request other than that which had been provided.
- [18] The Commissioner carefully considered the submissions of both parties and has taken into account the arguments he deemed to be relevant to the matter in hand. Having done so, it accepted that, in the circumstances of this case, on the balance of probabilities, no further information was held falling within the scope of the request.

Appellant's Grounds of Appeal:

- [19] The Appellant explained that the request relates to a contract between the Trust and Verita Consultancy (an investigation agency). The Appellant has concerns

about an investigation which Verita was appointed to conduct under this contract. She has provided detailed background information regarding her concerns and explained that this is the reasoning behind making the FOIA request on 4 May 2021.

- [20] In terms of the scope of the Commissioner's investigation, the Appellant has explained that she was not satisfied with the responses she had received to parts 3 and 4 of the request and that part 11 of the request had been completely ignored by the Trust and the Commissioner.
- [21] The Appellant has argued that public sector contracts such as this one should have an end-to-end audit trail. The Appellant considers that the contract in question is over the threshold to be exempt and that other special exemptions from following procurement rules do not apply, so she concluded that a competitive procurement process should have been followed. As such she considers that further information should be held to document this. The Appellant does not accept that formal procurement rules were not followed, however had the relevant procedures been breached she considers there should be recorded information documenting the breach over and above the SoN provided. The Appellant also considers the SoN provided is incomplete and inaccurate. The Appellant considers that her request has been worded broadly and so the Trust must hold further information falling within scope recording the "*end to end audit trail*".
- [22] The Appellant considers that the Trust's application of section 12 and 36 FOIA was a deliberate attempt to evade its statutory obligations. She asserts that she has not been provided with the information originally withheld under section 36 FOIA and the information which could not be provided due to section 12 FOIA. She has argued that if no further information is held this should have been confirmed earlier.
- [23] The Appellant considers that the searches undertaken by the Trust were defective and has identified particular email addresses which the Appellant considers should have been searched. She has argued that information which has been provided or is publicly available, for example the Veritas Report, demonstrate that further information is held.

- [24] The Appellant considers that the delays in the handling of this case by the Trust are not acceptable. The Appellant has referred to a section 77 FOIA allegation she raised with the Commissioner regarding this request as well as a FOIA request she submitted to the Commissioner regarding this matter.
- [25] The Appellant is dissatisfied that the Commissioner has not investigated three subsequent requests she made to the Trust in September 2021 as part of this investigation and has also referred to a subject access request made to the Trust under the Data Protection Act 2018.

The Commissioner's Response:

- [26] The Commissioner resisted the appeal and relied on her DN for its findings. However, in response to the Appellant's Grounds of Appeal, the Commissioner made the following further contentions.
- [27] The Commissioner submitted that the detail and concerns which led up to the Appellant submitting the FOIA request dated 4 May 2021 are not directly relevant to this appeal. Whilst this provides context to the request the only issue for the Commissioner to consider was whether or not, on the balance of probabilities, more information is held.
- [28] In terms of the scope of the Commissioner's investigation, the Appellant accepts that she did not specifically raise a concern with the handling of parts 3 and 4 of the request with the Trust or the Commissioner. The Commissioner therefore submitted that he was entitled to scope parts 3 and 4 out of his investigation. In relation to part 11 of the request, the Commissioner does not consider that this is a valid request for information under section 8 FOIA. Rather than clearly describing the recorded information requested, part 11 asks for submissions to explain why, if any information is not available, and where any information is withheld it asks that other information that can be disclosed is provided. Even if this were to be deemed to be a valid request under section 8 FOIA, the Commissioner submitted

that it is highly unlikely the Trust would hold any recorded information relevant to part 11 of the request.

[29] In relation to whether or not a procurement process was followed, the Commissioner reiterates that the Trust explained to the Appellant that the value of the contract was under procurement thresholds and that it was fully in line with Trust Standing Financial Instructions (SFIs) for such a contract to be awarded without the need for a competitive process, Whilst the Appellant has made it clear that she considers a competitive procurement process should have been followed in this case the Trust has been clear from the outset that it has not. The Commissioner submitted that in accordance with Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190, his remit is not to assess what information should have been recorded and retained but what information was recorded and retained. In this case the Appellant has not presented any evidence that a competitive procurement process was followed and therefore there is no evidence that further information associated with such a process was in fact recorded and retained. Furthermore, it is not the Commissioner's, or the Tribunal's, role to determine whether or not the right procurement rules were followed.

[30] In terms of the adequacy of the searches conducted, noting Linda Bromley v the Information Commissioner and the Environment Agency EA/2006/0072 the Commissioner considered all relevant factors, including the adequacy of the searches conducted, before making his decision based upon the established civil standard of proof, i.e., on the balance of probabilities. The Trust confirmed the roles of the personnel relevant to the searches and the key terms used in those searches. Considering Oates v 1C and Architects Registration Board EA/2011/0138, the Commissioner submits that he was entitled to rely upon the representations of the Trust made to him during the course of his investigation. In her grounds of appeal, the Appellant has suggested additional specific email accounts that could have been searched which she does not consider have been searched by the Trust. Should the First-tier Tribunal be assisted by further submissions on the breadth and adequacy of the searches conducted, the

Commissioner invited it to consider requesting written submissions from the Trust or joining the Trust to these proceedings.

- [31]** The Commissioner acknowledged that the Trust withdrew its application of section 36 FOIA and section 12 FOIA which were applied to parts 7 and 10 of the request respectively. It is open to a public authority to amend its position, including withdrawing the application of exemptions during the course of the Commissioner's investigation. The Appellant has argued that she has not been provided with the information originally withheld under section 36 or which the Trust said it was unable to provide due to section 12. The Trust has confirmed that in relation to part 7 of the request the only information held was the SoN form disclosed on 11 August 2021 and some other previously disclosed information and in relation to part 10 of the request it confirmed it held no further information other than that which had already been provided, The Appellant has, according to the Trust, therefore been provided with all information held relevant to parts 7 and 10 of the request.
- [32]** In relation to the SoN, whilst the Appellant has raised issues with the accuracy and completeness of this document, it is outside of the Commissioner's remit to consider the accuracy of the recorded information provided.
- [33]** The Commissioner addressed the delay in some information being provided to the Appellant in this case, acknowledging the breach of the statutory time for compliance under section 10 FOIA, There was however no steps required as a result of this breach as the information had already been provided albeit outside of the statutory time for compliance.
- [34]** The Commissioner submitted that the section 77 FOIA allegation falls outside the scope of this appeal. Section 77, in brief, sets out an offence for, inter alia, the deletion of information as a result of a request for information under FOIA. Section 50 FOIA permits any person to apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. Section 57 FOIA sets out that there can be an appeal to the Tribunal of a Decision Notice issued by the Commissioner. Section 77 is not however found in

Part I but in Part VIII of FOIA. Accordingly section 77 FOIA is not a matter over which the Tribunal has any jurisdiction. Accordingly, the Commissioner submitted that this ground including all arguments put forward by the Appellant relating to a section 77 allegation must be struck out by the Tribunal as per rule 8(2)(a) of the Tribunal Rules, which states: “The Tribunal must strike out the whole or a part of the proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them”.

[35] The Commissioner submitted that the information access request to the ICO also falls outside the scope of this appeal. Should the Appellant wish to submit a section 50 complaint to the Commissioner regarding the way in which her information access request was handled, it is open to her to do so.

[36] In this case the complaint was submitted to the Commissioner on 15 July 2021, the complaint related to the 4 May 2021 request. The case was accepted by the Commissioner as eligible for investigation on 24 August 2021 following communication of the internal review on 11 August 2021. The Commissioner is aware that three further requests were made by the Appellant to the Trust in September 2021. The Commissioner made it clear to the Appellant that this investigation was limited to the 4 May 2021 request however it was open to her to submit separate complaints regarding the new requests following the procedure for making section 50 complaints to the Commissioner. The Appellant has not submitted any further section 50 complaints to the Commissioner.

[37] As the Commissioner stated in his DN, he is satisfied that further information is not held in relation to parts 1, 2, 5, 6, 7, 8, 9 and 10 of the requests. It is submitted that, considering Bromley, the Commissioner was correct in accepting, that on the balance of probabilities, the public authority did not hold the information requested (over and above that which has been provided).

Appellant’s Reply:

[38] The Appellant provided a substantial and extensive amount of information in response to the Commissioner’s first response to the Appeal. The Appellant made

various statements against the Commissioner's conclusions and analysis. The Appellant argued that "*at no stage ever have I indicated satisfaction with any part of the trust's responses*". The Appellant argued that the present case can be distinguished from those of *Clyne and Oates*. The Appellant detailed how experienced she was in this field and outlined her dissatisfaction with how statutory procurement rules have been abused.

[39] The Appellant argued that It is manifestly not the case that the appeal falls outside the Tribunal's jurisdiction. The Appellant averred that the circumstances are captured by both Section 50 FOIA and section 57 FOIA. The Appellant argued, this disingenuous assertion by the Commissioner suggests a continuing failure to approach this case with the seriousness of its merits.

[40] Furthermore, the Appellant stated her appeal application made very clear that the Commissioner and the Trust has repeatedly and systematically acted in breach of the principles of the FOIA, in breach of the Commissioner's guidelines, and in breach of the FOIA itself by acting unreasonably and incoherently as public authorities.

[41] The Appellant contended that the DN is incoherent, unreasonable and 'non-sensical' given the documented actions of the Trust to deceitfully avoid disclosure of public records. The Appellant stated that It is a concern that the Commissioner appears to have 'spoken' with a representative of the Trust and used that information to reach a conclusion.

[42] Regarding *Bromley*, though relevant, there is no comparison between the Trust in this case and the Environment Agency. The timescales, the processes and the actions of the parties are totally different. The Appellant reminded the Commissioner that the Tribunal in *Bromley* was commenting on the oral evidence it heard as well as written submissions; that the time span of the requested material was over 40 years (1963-2007), that substantial disclosures had been made over an extended period by the Environmental Agency. Further, that convincing oral evidence was given of the very substantial efforts the Environment Agency had gone to, to recover requested material collated by no less than five different

agencies. According to the Appellant, It is apparent that the Environmental Agency made extraordinary efforts and were complimented by the chair for those efforts, in particular “the quality of public authority’s initial analysis of the request.” There was no evidence of concealment by the Environment Agency, the circumstances of *Bromley* bear no resemblance, indeed the opposite, to this case.

[43] Moreover, the Commissioner argues that the Trust is a relatively small public authority, not “a large national agency.... whose records are inevitably spread across a number of departments in different locations”. Further, the requested information was processed recently and was still being processed at the time of the application. The Appellant argued that it was ‘immediately to the hand’ of the three directors involved and with a conflict of interest in the continued ‘deflection’ of the FOI and SAR applications, as well as the ongoing but delayed conclusion of the investigation report.

[44] The Appellant contended these papers were being concealed at the time the requests were made and ‘refused’. The Appellant stated they were not ‘lost’ in the archives of a large national authority which had made significant efforts to satisfy the application. Those directors included the CEO/Chairman, and the investigation, related to their personal misjudgements/inactions and the procurement, ‘ultra vires’ authorised by them, in breach of NHS and Trust policies designed to protect public funds and the integrity of the NHS.

Appellant’s Further Response:

[45] The Appellant provided a further response to the Tribunal on the 23 September 2002. The Appellant addressed the Trust’s assertion that there were repeat requests. The Appellant referred to “*recently discovered*” documents and how they apply to the request before the Tribunal. The Appellant identified three new issues to be considered by the Tribunal. Firstly, in light of the “*recently discovered*” documents, the Appellant asked the Tribunal to examine how the Trust claims to be able to operate as public body and how they are dealing with the appeal at hand. Secondly, the Appellant contended that the Trust does not abide by its duties under FOIA or its own Constitution. Further, that they are failing to disclose

information. Thirdly, the Appellant criticised the Trust's decision to release a redacted Verita Review and stated that they have consistently refused to remedy this. The Appellant argued that this is an issue of significant public interest. Further, that the Trust have breached various rules.

Second Respondent's Response:

- [46]** The Trust identified three documents within the scope of the Request that it has not disclosed previously. These all relate to item TB 075/21 on the agenda for the Part 2 meeting on 25 March 2021, as referenced by the Appellant. They comprise:
- a. An Interim Verita Report providing an update on progress of the review (the contents of which are to a substantive extent included within the Final Verita Report which has previously been disclosed to the Appellant);
 - b. A covering report summarising the content of the Interim Verita Report; and
 - c. Minutes of the presentation/discussion of the above at the Part 2 meeting.
- [47]** The Trust did not identify any other Part 2 Papers falling within the scope of the Request that were held at the time of the Request.
- [48]** For the avoidance of doubt:
- a. The Trust does not consider the agenda document itself to contain information of the description specified in the Request. However, an extract of the agenda is included in the bundle in the interests of completeness and transparency.
 - b. The Trust holds some other Part 2 Papers that contain information of the description specified in the Request, but these were not held at the time of the Request so are not within the scope of the Request or this appeal.
- [49]** The Trust considered that it has now complied with section 1 of FOIA in respect of the specific Part 2 Papers falling within the scope of the Request. However, the Trust acknowledged that it had not done so at the time of its original handling of the Request or of the Decision Notice. The Trust also acknowledged that, as a

result, it has not complied with section 10 FOIA (time for compliance with request) in respect of such Part 2 Papers.

[50] The Trust apologises to all parties and the Tribunal for any confusion or inconvenience caused. The Trust emphasised that its omission to identify and disclose the Part 2 Papers was due to a misunderstanding by the Trust. The Trust drew the parties' attention to the fact that:

- a. The content of these documents is, to a substantial extent, the same as information that has previously been disclosed prior to the DN. The additional information within these documents is very limited, particularly when considered against the express terms of the Appellant's request.
- b. On 11 August 2021 the Trust informed the Appellant that "*An interim position was presented to the Board of Directors in March 2021*". Therefore, the Appellant was previously made aware of the Part 2 meeting to which these documents relate.
- c. The Trust originally relied upon exemptions to withhold information; when the Trust ceased its reliance upon such exemptions it acknowledges that it should then have ensured that the Part 2 Papers in question were disclosed.

[51] In light of the above, the Trust has already changed its internal procedures to ensure that Part 2 Papers are included within its searches for information when dealing with requests for information under the FOIA. The Trust is also undertaking a review of its freedom of information policies and procedures and commissioning training on freedom of information for its Corporate Governance Teams including the Company Secretary and Freedom of Information Teams.

The Appellant's Response to the Second Respondent

[52] The Appellant provided a response to the Trust dated the 21 October 2022. The Appellant proffered several arguments on how dissatisfied she was with the Trust's handling of the Request. The Appellant contended that further information must be held on her reading of the SFI's. The Appellant detailed and outlined the disclosure

of the “Part 2” papers. Further, the Appellant stated her frustration at the Trust’s error in failing to disclose them. The Appellant argued that the Trust have continually concealed documents.

The Appellant’s Additional Response

- [53] The Appellant provided a commentary on her perceived issues arising from the material included in the bundle. The Appellant referred to the provisional hearing bundle and stated that it did not include all of the communications between the Trust and the Commissioner. The Appellant repeatedly referenced missing correspondence as highlighting the deceit on the part of the Trust. The Appellant criticised the revised bundle to which she believes contains duplicated pages and lacks what is expected in this appeal. The Appellant contended that the Trust have continued to conceal documentation. The Appellant stated that the Trust has delayed and misstated in this instance. The Appellant challenged the candour of the Trust during the course of this appeal. The Appellant maintained that the Trust are continuing to withhold information.
- [54] The Appellant stated that the Trust are not applying the law. Further, the Appellant argued the provisional bundle was incomplete and that the Trust were incorrect in their view of what was in the scope of the request. The Appellant contended that the Verita Project was a corrupt process and the Trust are acting irrationally.

The Second Respondent’s Final Submission

- [55] The Trust outlined that they disclosed the following information to the Appellant which falls wholly or partly within the scope of her request:
- a. Email and response letter dated 04 June 2021 [pages 119 – 124];
 - b. Email dated 16 June 2021 [pages 132 – 133] attaching a letter to AHMs dated 16 December 2020 [pages 135 to 136] and the terms of reference [pages 137 – 141];
 - c. Email and response letter dated 11 August 2021 [pages 155 – 163] attaching the following documentation:

- d. Brief: Review of the Trust's Associate Hospital Managers arrangements [pages 164 – 166];
- e. Verita proposal dated November 2020 [pages 167 – 179];
- f. Statement of Need to Purchase Goods and/or Services form dated 7 January 2021 [180] (with a further copy of the Verita proposal attached) [pages 181 – 195];
- g. Verita summary report dated July 2021 [pages 196 – 217]; and
- h. Bundle of "Part 2" papers [pages 358 – 385].

In response to the Appellant's appeal:

- [56]** The Trust argued that the Appellant has advanced her arguments in an extremely lengthy and repetitive fashion. The Trust stated it would be disproportionate for them to address those arguments on a point-by-point basis. Instead, the Trust made the following brief submissions in response to what it understands to be the primary themes of the Appellant's case.
- [57]** Firstly, the Trust stated that the Appellant is incorrect in her contention that further information must be held because of the Trust's procurement obligations. Further that the Trust was not required by law to undertake a tender process, and it decided that it was appropriate to waive the requirement to obtain additional quotes in this case. The Trust contended, in those circumstances, and given the relatively low value of this contract, it is unsurprising that the Trust holds nothing beyond that which it has disclosed to the Appellant.
- [58]** Secondly, the Trust stated the Appellant relied to a large extent on the belated disclosure of the "Part 2" papers, and the Trust's error in failing to disclose them originally. The Trust argued that reliance is misplaced: that error, while regrettable, was an oversight that has been put right. The reasons, as well as the further search steps undertaken, have been extensively explained already. This issue provides no basis for the Tribunal to conclude that the Trust in fact holds further undisclosed information.

- [59] Thirdly, the Trust averred that it appears that the dominant theme of the Appellant's case is her allegation of deliberate concealment. Further, that the Appellant has regrettably and persistently made serious allegations that the Trust has deliberately flouted its legal obligations both as regards commissioning the Verita review and as regards her FOIA request.
- [60] The Trust argued such allegations are serious and lack factual foundation, i.e. they rest on speculative conclusions that the Appellant draws from the events outlined above. It is of some concern that the Appellant persists with such allegations before this Tribunal. Such suspicions and allegations are similarly reflected in the Appellant's criticisms of the Commissioner's investigation of this case (in particular as to any communications between the Trust and the Commissioner during the course of that investigation), as reflected in her complaints about the bundle for this appeal. The Trust does not, however, propose to engage with those allegations of that nature in these proceedings, save to put on record that those allegations are denied in their entirety.
- [61] Relatedly, the Tribunal will no doubt be mindful that these proceedings – which are concerned with a discrete issue concerning a particular FOIA request – are not a forum for ventilating whatever criticisms the Appellant has (and which the Trust does not accept) of how and why the Trust commissioned Verita to undertake this review.
- [62] Fourthly, according to the Trust, the Appellant's arguments depart to a substantial extent from the actual terms of her request, as objectively and fairly construed. For example, the Appellant characterises her request as being *“for all documentation preceding and permitting as well as informing the Verita Review and its subsequent management”*. That is not correct. That, however, is not what she in fact requested: this appears to be a reference to part 2 of her request, but (a) that request expressly referred to a tender process (which did not take place), and (b) asked for information as to the *“expected timescales for the project”*.
- [63] The Trust averred on a fair and objective interpretation of the Appellant's request, she was requesting information in the form of answers to specific questions and

for specified documents – or more accurately the information contained in those documents – which the Trust again provided.

[64] In summary, the Trust submitted that it has provided the requested information it held in answer to the questions the Appellant posed, and provided her with the specific documents she requested.

[65] Fifthly, the Trust claimed the Appellant made various criticisms of the searches undertaken by the Trust, even going so far as to accuse the Trust of curtailing searches by way of “*systemic and purposeful enduring concealment*”. This ground is again baseless: the Trust has already explained the searches it undertook in some detail, which the Commissioner rightly concluded were adequate. There is no basis for the Appellant to seek to add yet further email custodians where there is no reason to think that they were involved in this matter or hold any information within the scope of this request that has not already been disclosed. It is notable that the Appellant’s request did not seek the disclosure of any particular categories of emails, but instead asked questions and requested specified types of document other than emails.

[66] In summary, the Trust argued they have undertaken adequate searches and has disclosed everything it has found within the scope of this request. Further, the Trust stated if one leaves aside the Appellant’s baseless allegations and speculations, there is no reason for any rational suspicion that other information exists that has not already been provided. The Trust maintained that its account – namely that it has disclosed all relevant information it holds – makes sense, based on the factual account of the Verita review as outlined above. The Trust does not admit any of the allegations made against it by the Appellant.

The Appellant’s Final Submission:

[67] The Appellant outlined her disappointment at the Trust’s delay in this case. The Appellant detailed her dissatisfaction at how the Trust and the Commissioner have handled her request. The Appellant maintained that further information is held by the Trust, despite the Trust’s claims. The Appellant referred to the Verita Report

and the allegation of institutional racism. The Appellant referenced conduct on the part of Trust directors which discovered documentation shows. The Appellant contended that the Trust have misapplied the cited exemptions. The Appellant argued that the Trust have deliberately failed to act in this case to provide the Appellant with all the information. The Appellant stated that the Trust have been disingenuous.

Conclusions:

[68] The Tribunal have considered the lengthy submissions from the Appellant and are of the view that they have strayed wider and wider as time passed to cover much more than simply her original data request, into areas of dissatisfaction with the Trust, criticism of how it is run and into gross accusations of malfeasance. In our initial consideration of the appeal, we considered the following documents.

1. The final submission of the Appellant dated 20 January 2023 (3 pages) as the basis of what her Appeal now covers and at para 16, what she is asking us to do.
2. The Response of Second Respondent dated 20 January 2023 (8 pages) with its careful referencing of the bundle, e.g., Responses to the request as detailed in para 23 and the summary of the Trusts' position at paras 24-37; and
3. The DN.

Final submissions of the Appellant – 20 January 2023:

[69] The Appellants' views, as set out in the 'Final Submissions' dated 20th Jan 2023' are summarised as follows together with the Tribunal's response:

"The Trust's response has been "manifestly incomplete" and "totally implausible". "Beyond all reasonable doubt further information was and is held and is being concealed by the Trust".

The Tribunal does not recognise this. It accepts that there were failings in the first response in that searches of 'Part 2 Papers' were not conducted but this was subsequently remedied. As a result, the briefing document, the proposal, and the

final reports are all now in the public domain dealing with serious and sensitive matters.

- [70] The Appellant argues requests were "*met with resistance and delay because it (the Trust) wished to conceal what had been undertaken*". "*They were attempting to 'cover-up' the issue...an action itself indicative of institutionalised racism*". The delay in forwarding the Part 2 papers is acknowledged but the Tribunal has not seen evidence that the Trust has been determined to conceal information - rather it is content that a great deal of relevant information has now been disclosed in response to a lengthy and detailed request. In any event delay is a procedural matter related to compliance and not a substantive matter in the course of an appeal.
- [71] The Appellant argues that Commissioner "*misrepresented the nature and details of my applications*". The Tribunal does not agree with this and was impressed by the substantial correspondence between the Commissioner and Appellant in the course of the investigation leading to the DN.
- [72] The Appellant argues that in relation to the procurement of Verita the Trust were "*in breach of the Conflict-of-Interest Rules and the mandatory Trust's Standing Financial Instructions' and NHS Financial Instructions*". The Trust have explained its procurement process clearly and refute that it is in breach. The Tribunal has no jurisdiction in determining whether or not this is the case but confirms that it has no evidence, that on the balance of probabilities further information relating the process is available or is being withheld by the Trust. Having read all the papers and considered all the above we are persuaded that adequate searches have been undertaken to respond to the Appellants' requests.
- [73] The Appellant argues that "*The Trust has since sought to narrow the scope of my applications*". Again, having considered all the evidence and all the above matters, the Tribunal is satisfied that the Trust, following the disclosure of the relevant Part 2 papers in existence at the time of the request, have approached the response appropriately in terms of information within the scope of the request.

[74] The Appellant argues that *"The Tribunal must accept this appeal in full and acknowledge the systematic deceit of the Trust"*. On careful consideration of all before us, the Tribunal does not recognise such behaviour and regrets the use of such terms. We take the view that, whether or not the Appellant is dissatisfied with the conduct of the Trust, we have considered carefully all the evidence and submissions before us and are persuaded that no further relevant information remains held by the Trust for disclosure.

The Response of Second Respondent 20 January 2023.

[75] The Bundle of documents was extensive, 492 pages plus 5 pages of Index and other documents totalling more than 50 pages. The Tribunal were greatly assisted by the Response provided by the Second Respondent and the helpful summaries of the issues with Bundle page references that it provided, and we include the Final helpful Submission of the Appellant of 20 January 2023.

What did the Trust hold at the date of the Request?

[76] We refer to the Final Submission of the Appellant of 20 January 2023, Paras 9 and 10. The Appellant refers here and elsewhere to what, in her opinion, was the incorrect approach by the Trust to the contracting of Verita. The Appellant stresses in her Grounds of Appeal her own extensive experience of procurement (Bundle p14). She stated that one of the underlying motives for the request was: *"I wished and intended to examine every element of the contracting procedure"*. It is clear to us that the Appellant has, and had at the time of her Request, considerable misgivings about the approach the Trust had taken, and she has repeatedly suggested that the Trusts' approach was not correct. The Appellant believes that the Trust should have undertaken *"tendering"* of the contract and their failure to do so was deliberate and wrong. In her Grounds of Appeal (Bundle p15) she says: *"I suspected that something very irregular had occurred in Commissioning Verita."* The Tribunal has no jurisdiction in relation to the processes this, or any public authority, should employ and hence this is not a matter on which we can make any comment. It has however unfortunately flavoured the Appellant's approach in these proceedings.

- [77] The Trust refutes the Appellants' assertion that they should have followed a particular process and that the approach they took was wrong and in breach of its own Standing Financial Instructions. The Trust stated that the procurement procedures referred to did not apply and provided by way of evidence their Statement of Need to Purchase Goods and/ or Services (Bundle page 180). In addition, they stated that the requirement under their SFI was waived, with that waiver documents by the Statement of Need Form (Bundle p180).
- [78] The remit of the Tribunal is very narrow in this Appeal. It is to consider what information the Trust held at the date of the Request in May 2021 and whether on the balance of probabilities it has disclosed all information it held. The detail that the Appellant has provided on processes that could, and in her opinion, should have been employed and the documents/information had they been would have existed, is not within the scope of this Appeal.

Did the Trust follow the correct procedure in relation to the Verita contract?

- [79] We refer to the Final Submission of the Appellant on 20 January 2023 paras 9 and 16. As we have indicated, the Tribunal has no jurisdiction in determining this matter. The Trust like all public authorities will be subject to scrutiny by other bodies such as their external auditors and it is to such bodies that the responsibility for determining if the Trust is, and has been, acting correctly.
- [80] The Appellant adopts the extreme phrase "*systematic deceit*" in her 20 January 2023 document and has made similar allegations elsewhere but has not supported these allegations with the evidence upon which she makes such assertions. The Trust has acknowledged and apologises for an error relating to material from a Part 2 Agenda of a meeting on 25 March 2021. This was acknowledged in the amended response to the Grounds of Appeal (Bundle page 66) and repeated in the Response of the Second Respondent dated 20 January 2023.
- [81] A bundle of further material was disclosed to the Appellant in October 2022 (Bundle pages 358 – 395). The Tribunal has seen no evidence of the Trust being deliberately obstructive much less any intent to deceive and accept the explanation

and the apology. We do not accept the Appellants' assertion concerning intent or deceit on the part of the Trust. There is no evidence to support these serious assertions.

[82] The late identification of additional material falling within scope of the request does mean the DN produced in April 2022 was in error and incorrect. The material disclosed in October 2022 related to a meeting on 25 March 2021 and so was within scope of the request made in May 2021.

[83] This also resulted in the Commissioner accepting the adequacy of the searches outlined in the Trust letter of 7 April 2022 (bundle page 299) must be viewed as being in error. However, following the information supplied by the Trust in its Amended Grounds of Appeal (Bundle page 66) and the email dated 12 September 2022 (Bundle p316) the Tribunal do not consider, on the balance of probability that there is now further information within scope of the request that is held. We find it improbable in all the circumstances and on the evidence before us that there is further information in scope of the request, at the time of the request, held by the Trust.

Reliance on S12 - DN para 16:

[84] In August 2021 the Trust claimed reliance on s12 in relation to some of the information requested (Bundle p162). However, on 13 April 2022 (Bundle page 308) in an email to the ICO the Trust withdrew that exemption as it had satisfied itself that following further searches and enquiries of Verita there was no further relevant information held.

Reliance on s36 - DN para 16:

[85] The Trust withdrew its reliance on this exemption having found no basis for that initial application. (Bundle p 302)

Public interest in the report:

[86] The Appellant clearly believes the scope and content of the report and the context in which it was commissioned is a matter of considerable public interest. The

narrow extent of this Appeal dealing simply with the information request means the reasons for the Report and the issues it was examining is not something which falls for the Tribunal to consider or to comment upon. The material which has been disclosed under FOIA is to the world at large and so the public will be able to see and comment on those issues.

Communications between the Commissioner and the Trust:

- [87] The Appellant comments with some criticism on the fact that the Commissioner communicated with the Trust or individuals therein before reaching some of its decisions, we find nothing in this to criticise. Rather we would find it more surprising and more worthy of criticism if the Commissioner had reached the decisions without establishing the answers to queries arising from the investigation.

Narrowing of the scope:

- [88] The Appellant made a number of requests after the subject matter Request (4 May 2021) those matters cannot be considered in scope by the Tribunal. As the Commissioners' DN (paras 15 and 17) made clear those matters are not within the scope of the investigation and hence not within the scope of the Appeal. We accept and adopt this assertion.

Substituted Decision:

- [89] As stated above, the Trust considered that it has now complied with section 1 of FOIA in respect of the specific Part 2 Papers falling within the scope of the Request. The Tribunal accept this assertion. However, the Trust acknowledged that it had not done so at the time of its original handling of the Request or of the DN. Therefore, we must allow the Appeal in part as there was an error of Law in the DN. That said, and for the reasons set out above and on the evidence before us we find on the balance of probabilities that the Trust do not hold any further information that was within the scope of the request at the time of the request and accordingly make no direction that the Trust take any further action. In relation to

all other parts of this appeal we indicate that we accept and adopt the Commissioner's reasoning and findings in the DN inter-alia any application under a s77 allegation as set out a Paragraph 34 above.

Brian Kennedy KC

10 March 2023.

Promulgated: 16 March 2023