

# Decision Notice 022/2022

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## Correspondence with Vanilla Blush

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**Applicant: the Applicant**

**Public authority: Lothian NHS Board**

**Case Ref: 202101013**



Scottish Information  
Commissioner

## Summary

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NHS Lothian was asked for emails from a named employee which referred to Vanilla Blush in 2016 and 2017. NHS Lothian told the Applicant it did not hold the information. The Commissioner was satisfied that NHS Lothian did not hold the information and complied with FOISA in responding to the request.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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

## Background

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1. On 7 May 2021, the Applicant made a request for information to Lothian Health Board (NHS Lothian). He asked for emails from 2016 and 2017 (sent, received, deleted, junk, etc.) from a named NHS Lothian email account which refer to:
  - (1) "Vanilla Blush";
  - (2) "VB" (as the abbreviated name for Vanilla Blush); and
  - (3) "Nicola Dames" (as CEO of Vanilla Blush).
2. NHS Lothian responded on 1 June 2021 and notified the Applicant, in line with section 17 of FOISA, that it did not hold the information.
3. On 30 June 2021, the Applicant wrote to NHS Lothian requesting a review of its decision. He believed NHS Lothian did hold information and provided examples of three emails from 2016 and 2017 which, if still held by NHS Lothian, would fall within the scope of his request.
4. NHS Lothian notified the Applicant of the outcome of its review on 28 July 2021. It confirmed its original decision, but gave more information about the searches which had been carried out and provided the Applicant with screen shots of its searches.
5. On 13 August 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of NHS Lothian's review because he believed that NHS Lothian did hold information.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 1 September 2021, NHS Lothian was notified in writing that the Applicant had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. NHS Lothian was invited to comment on

this application and to answer specific questions. These related to the searches undertaken for the requested information and why NHS Lothian was satisfied that the requested information was not held.

9. NHS Lothian responded to the questions raised and provided responses to support its submissions.

## **Commissioner's analysis and findings**

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10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and NHS Lothian. He is satisfied that no matter of relevance has been overlooked.

### **Section 17 - Information not held**

11. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.

#### *NHS Lothian's submissions*

12. NHS Lothian explained that, if an email is deleted by the user, then it is completely deleted from its systems after 30 days and cannot be recovered. In addition, staff emails are permanently deleted three months after they leave the organisation.
13. NHS Lothian was asked to check and clarify whether the emails identified by the Applicant were still held. NHS Lothian confirmed that checks had been undertaken of the individual's emails and nothing was identified. It told the Commissioner that:
  - all email folders were searched, including inbox, sent items, junk, deleted and archive;
  - the request was specific to an individual member of staff, who no-longer works for NHS Lothian; and
  - searches had been conducted through all available emails, but specifically looking at the dates provided for the emails identified by the Applicant.
14. NHS Lothian reiterated that that it had been provided with access to the individual's emails and carried out the searches of all folders, specifically searches for the emails the Applicant had mentioned by date.
15. NHS Lothian confirmed that no recorded information was held.

#### *The Commissioner's findings*

16. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining whether a Scottish public authority holds information, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.

17. The Commissioner has considered the detailed searches undertaken by NHS Lothian and the submissions why it does not hold the information requested. It is clear that, if the information was still held, it would have been located as a result of those searches.
18. He also notes that the information requested pre-dates the request by a number of years. In the absence of an explanation as to why the emails would still be expected to be held, the age of the emails suggests it is unlikely that the emails would still be held by NHS Lothian.
19. The Commissioner is satisfied that NHS Lothian does not hold the information requested.

## **Decision**

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The Commissioner finds that Lothian Health Board complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

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

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

**18 February 2022**

## Appendix 1: Relevant statutory provisions

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### Freedom of Information (Scotland) Act 2002

#### 1 General entitlement

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

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- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

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#### 17 Notice that information is not held

- (1) Where-

(a) a Scottish public authority receives a request which would require it either-

- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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