

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2012

Public Authority: Nottingham City Council
Address: Loxley House
Station Street
Nottingham
NG2 3NG

Decision

1. The complainant has requested:

Correspondence between named individuals in relation to an earlier information request.

2. The Commissioner's decision is that Nottingham City Council (the council) has failed to satisfy him, based on a balance of probabilities, that it has disclosed all recorded information held within the scope of the complainant's request. He also finds that the council breached sections 1(1) and 10(1) of the Act.
3. The Commissioner requires Nottingham City Council to take the following steps to ensure compliance with the legislation.
- Retrieve the email dated 25 October 2010 together (with attachments) between Jamie O'Malley and Stephen Barker from its archive and disclose a copy to the complainant or issue a refusal notice. If this is not possible, the council should explain why, with reference to its Retention and Disposal Schedule and archiving process
 - Carry out further enquiries including asking those relevant individuals to whose email accounts the council does not have access, including Stephen Barker (who left the council in January 2012) and Jamie O'Malley (who is still employed by the council) to carry out searches of their gmail accounts to ascertain whether they hold any recorded information falling within the scope of the complainant's request and if so, to disclose that information to the complainant or issue a valid refusal notice

- Disclose to the complainant a copy of the email from Stephen Barker to the council's Information Governance Manager dated 20 October 2010 or issue a valid refusal notice.
4. The public authority 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.

Background information including earlier related request (council reference: IGO/10-7552)

5. By way of background information the Commissioner believes it would be useful to identify the individuals relevant to the complainant's request together with details of their roles and where relevant, contact details.
6. At the time of the request Stephen Barker was the council's Director of Communications and Marketing and Jamie O'Malley was its Communications Manager.
7. The Commissioner notes from a recent Google search¹ he carried out that it would appear both Stephen Barker and Jamie O'Malley were holding out their gmail addresses on the council's website as points of contact for its official business.
8. At the time of the request Jane Todd was the council's Chief Executive, Carol Mills Evans was the Deputy Chief Executive, Jon Collins was the Leader, Toni Price was his Executive Officer, Graham Chapman was the Deputy Leader, Ian Curryer and Jennifer Dearing were Corporate Directors and Dave Liversidge, Katrina Bull, Jane Urquhart, Dave Trimble, David Mellen, Eunice Campbell and Alan Clark were all councillors and portfolio holders.

1

<http://www.google.co.uk/search?q=stephen.barker.nottinghamcity%40gmail.com&hl=en&safe=active&gbv=2&prmd=ivns&ei=nLxMT6y4J9Co8QOMqlzWAg&start=0&sa=N>

http://www.google.co.uk/search?q=jamie.omalley.nottinghamcity@gmail.com&btnG=Search&hl=en&source=hp&gbv=2&gs_sm=3&gs_upl=215941449381014523515915710145121014691310810.4.2.3.211110&safe=active&safe=active&safe=active&safe=active

9. Harold Tinworth of Regional and Legal Consultants Limited was a private consultant employed by the council from about 2006 to provide policy and communications support to the Leader.
10. The council's community strategy for 2006 including its vision and ambition for a 'safer, cleaner and ambitious' city and one to be 'proud' of is set out in its Corporate Plan for 2006-2011².
11. In 2007 the District Auditor issued a report stating that the content of the council's publicity was similar to that of the local Labour party. However, he was unable to find evidence to link both campaigns.³ The District Auditor's report was considered by the council's Executive Board on 22 May 2007⁴.
12. On 20 September 2010 the complainant wrote to the council and made a request which included:
 6. *All documents to, from or copied to Harold Tinworth relating to communications strategy from January 2006; February 2006; March 2006; April 2006; May 2006*
 7. *All documents to, from or copied to Stephen Barker relating to communications strategy from January 2006; February 2006; March 2006; April 2006; May 2006,*
13. The council responded on 25 October 2010 and pointed out that the only recorded information it held within the scope of the above request was a document entitled the 'Communications strategy Update as at 13.3.06' which it disclosed.

² <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=1366&p=0>

³ See <http://www.thisisnottingham.co.uk/Nottingham-s-Proud-history/story-12180570-detail/story.html>

<http://www.thisisnottingham.co.uk/spin-doctor-items-went-missing-night/story-14984689-detail/story.html>

<http://10.11.25.1:8080/ProgressMessages/download3.asp?proxy=10.11.25.1&action=complete&index=45&id=215573596&filename=download3.asp>

⁴ <http://open.nottinghamcity.gov.uk/comm/agenda.asp?CtteMeetID=2064>

<http://10.11.25.1:8080/ProgressMessages/download3.asp?proxy=10.11.25.1&action=complete&index=24&id=222121910&filename=download3.asp>

14. In an attempt to ascertain the existence and location of any recorded information held within the scope of the complainant's request, the council said that it had made the following searches and enquiries:
- i. It searched the existing email accounts of Harold Tinworth and Stephen Barker
 - ii. It brought back the old mail servers and the relevant 'S' (shared) and 'U' (personal) drives for the individuals concerned and interrogated both to search for relevant information
 - iii. It checked 'Stephen Barker's horde mailbox'⁵
 - iv. Finally, it contacted both its Communications and Marketing Section and Stephen Barker (in relation to question 7)
15. The result of the above searches and enquiries was that no recorded information was found apart from the 'Communications strategy Update as at 13.3.06' which was disclosed. Specifically in relation to question 7, Mr Barker confirmed in an email to the council from his 'gmail' account⁶ dated 20 October 2010 that so far as he was aware there were 'no documents to, from or copied to me relating to communications strategy regarding those dates on the system'.

Request and response (council reference: IGO/10-7899)

16. On 29 November 2010 the complainant wrote to the council and requested information in the following terms:

'1) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Stephen Barker relating to Fol request 10-7552

2) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Harold Tinworth relating to Fol request 10-7552

3) Please could you supply me with all of the correspondence (email

⁵ The Commissioner understands that this is Mr Barker's web-based email account

⁶ Stephen.barker.nottinghamcity@gmail.com

and written, including any attached, or associated, documents) to and from Communications and Marketing Department relating to Fol request 10-7552

4) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Carol Mills Evans relating to Fol request 10-7552

5) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Jon Collins relating to Fol request 10-7552

6) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Toni Price relating to Fol request 10-7552

7) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Graham Chapman relating to Fol request 10-7552

8) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Jane Todd relating to Fol request 10-7552

9) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Council Corporate Directors excluding Jane Todd and Carol Mills-Evans relating to Fol request 10-7552

10) Please could you supply me with all of the correspondence (email and written, including any attached, or associated, documents) to and from Council Portfolio Holders excluding Jon Collins and Graham Chapman relating to Fol request 10-7552'.

17. The council responded on 26 May 2011. It disclosed the information it held within the scope of the complainant's request (comprising of a number of internal and external emails between 20 September⁷ and 29 November 2010⁸) with the mobile phone numbers of certain individuals redacted under section 40(2) of the Act.

⁷ The date when information request 10-7552 was submitted

⁸ The date when the current request (10-7899) was made

18. On 15 June 2011 the complainant requested an internal review. He said that one email was missing and others might exist in relation to the final sign off for the council's response letter between 29 October and 8 November 2010 (which he requested), others had been deleted in whole or part (for which he requested an explanation) and finally three emails were incomplete as a result of having been archived. In relation to the latter emails, the complainant said that these should be retained as 'records' under the council's Retention and Disposal Schedule v3 March 2009⁹ and accordingly requested full copies.
19. Following an internal review the council wrote to the complainant on 1 July 2011. It stated that in attempting to locate the requested information it had searched the (official) email accounts of its officers named in the request.
20. With regard to the missing email it provided a file copy as it said it was not possible to obtain the original version from the archive. With regard to the others it said that no further information existed. It said that it was possible that the final response letter might have been amended without a further sign off form being completed.
21. With regard to the deleted email or deletion from the email chain, the council explained that the name, job title and phone number at the bottom of the chain (suggesting that some information had been removed) was 'an erroneous addition to the particular sequence of emails. It therefore confirmed that no further emails existed to those already disclosed.
22. With regard to the three archived emails, the council firstly explained its archiving policy. It said that each mailbox user would have one of three archiving policies assigned to it; The 'Default policy' which archives all emails over three months old; The council's standard policy which archives emails when the mailbox storage capacity exceeds 67% but not emails younger than 1 week; The council's high usage policy which archives emails when the mailbox storage capacity exceeds 50% but not emails younger than 4 days.
23. In view of the above policies the council said that it was not extraordinary for emails to be archived within 4 weeks. In relation to the

⁹ <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=8235&p=0> see paragraph 12.2

first archived email it said that it was unable to retrieve the original from the archive. However, it did confirm that the email archive stub disclosed on 26 May 2011 did not have any text missing, making it a complete document. In relation to the second and third emails it said that the archive stubs disclosed were not separate emails in their own right; they were simply records referring to the archiving of the original two emails which were disclosed in full on 26 May 2011.

Scope of the case

24. The complainant contacted the Commissioner in 2010 and 2011 to complain about the way his request for information had been handled. In particular, he expressed the view that the council should hold further recorded information falling within the scope of his request.
25. The complainant has confirmed that he accepts the council's application of section 40(2) of the Act in relation to the redactions made for individuals' mobile phone numbers.
26. The scope of the Commissioner's investigation is therefore limited to deciding whether, on the balance of probabilities, any additional information is held by the council in relation to the request by the complainant of 29 November 2010.

Analysis and reasons for decision

27. Section 1(1) of the Act provides that 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.
28. Section 3(2) of the Act provides that 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.
29. The Commissioner's view is that information held in non-work personal email accounts (e.g. Hotmail, Yahoo and Gmail) may be subject to the Act if it amounts to the official business of the public authority. Clearly it is necessary for information to be held in recorded form at the date of

the request for it to be subject to the Act. In this situation it is very likely that the information would be held on behalf of the public authority in accordance with section 3(2)(b) of the Act¹⁰.

30. In situations where a public authority believes that information falling within the scope of a request is held on its behalf in a private email account the Commissioner would expect that public authority to ask the individual concerned to search the account for any relevant information and make a record of it. This would allow the public authority to demonstrate that it had carried out appropriate searches.
31. Even if information is held on behalf of a public authority in a private email account it will still be subject to the exemptions under the Act and therefore not automatically disclosable.
32. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072] ('Bromley'), the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The standard of proof has been recently confirmed by the Tribunal decisions of *Innes v Information Commissioner* [EA/2009/0046], *Thompson v Information Commissioner* [EA/2011/0144] and *Oates v Information Commissioner* [EA/2011/0138].
33. The Commissioner has also been assisted by the Tribunal's explanation of the application of the 'balance of probabilities' test in the *Bromley* decision. To determine whether information is held requires a consideration of a number of factors, including the quality of the public authority's final analysis of the request, the scope of the search it made on the basis of that analysis, the rigour and efficiency with which the search was then conducted and any other relevant reasons offered by the public authority to explain why the information is not held.
34. In the decision of *Oates v Information Commissioner* [EA/2011/0138] the Tribunal stated that: 'As a general principle, the (Commissioner)

¹⁰ See the Commissioner's Guidance on 'Official information held in private email accounts'.
http://www.ico.gov.uk/news/latest_news/2011/ico-clarifies-law-on-information-held-in-private-email-accounts-15122011.aspx

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 (Commissioner) 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'.

35. The Commissioner has applied the test in the *Bromley* and the principal referred to in the *Oates* to this case and has also considered the arguments of both sides.
36. The complainant has argued that further recorded information should be held by the council.
37. The complainant has questioned the adequacy of the council's searches, especially in relation to 'private email' accounts, its reluctance to carry out certain searches regarding the private email accounts and its motives to withhold the information requested.
38. With regard to the council's motives to withhold the requested information the complainant believes that Stephen Barker as the Director of Communications and Marketing may have been involved in both the council's communication strategy/publicity campaign, which was publicly funded, and that of the local Labour party in 2006/07.
39. The council believes that the enquiries and searches it has carried out were reasonable and adequate to identify and locate any further recorded information falling within the scope of the complainant's request.
40. The Commissioner believes it is likely that the council would have been aware that it's Director of Communications and Marketing, Stephen Barker, and its Communications' Manager, Jamie O'Malley, both used private gmail accounts for council related business in 2010 and 2011. The reason for this belief is that a Google search has suggested that both individuals published their gmail accounts on the council's website¹¹. Also the Commissioner has seen emails from Mr Barker's

11

http://www.google.co.uk/search?hl=en&gbv=2&gs_sm=12&gs_upl=1328130860101335941481481013411015001404910.1.8.3.1.111410&safe=active&q=stephen.barker.nottingham%20city@gmail.com&spell=1&sa=X

gmail account to the council's Information Governance Manager dated 20 and 29 October 2010 which were sent in response a request for any recorded information held in relation to the complainant's request.

41. The Commissioner notes that any information (in the form of correspondence including any attachments) held by the council within the scope of the present request would have been created during the 10 week period between 20 September (when request 10-7552 was submitted) and 29 November 2010 (when the present request was made). In effect, the complaint was requesting all correspondence created by the council in relation to its search for information falling within the scope of the earlier request, 10-7552.
42. The Commissioner also notes from the information disclosed to the complainant on 26 May 2011 that the council carried out various enquiries and searches to locate any documents falling within the scope of the complainant's request. These included its IT department carrying out a consensual automated search of the official email accounts of the individuals named in the complainant's request with the exception of the external consultant (Harold Tinworth) and the council's leader (Jon Collins)¹². With regard to the latter, a manual search was carried out by his Executive Assistant. The information discovered by these searches has been disclosed to the complainant.
43. The council has not produced any evidence to demonstrate that Stephen Barker's and Jamie O'Malley's have been asked to search their private gmail as opposed to their official council email accounts.
44. The Commissioner takes the view that the style and content of the gmail addresses used by Stephen Barker and Jamie O'Malley and in particular the use of 'nottinghamcity' in the actual address and the fact that the addresses appeared on the council's website suggests that they were being held out and used for council business.

http://www.google.co.uk/search?q=jamie.omalley.nottinghamcity@gmail.com&btnG=Search&hl=en&source=hp&gbv=2&gs_sm=3&gs_upl=215941449381014523515915710145121014691310810.4.2.3.211110&safe=active&safe=active&safe=active&safe=active

¹² See an email from the council's Acting Director of IT dated 2 December 2010 addressed to Stephen Barker, Jane Todd, Carol Mills-Evens, Jon Collins, Graham Chapman, Toni Price, Jennifer Dearing, Ian Curryer, Dave Liversidge, Katrina Bull, Jane Urquhart, Dave Trimble, David Mellen, Eunice Campbell and Alan Clark

45. The Commissioner met with the council's Chief Executive and others on 6 September 2011 at its offices to discuss this case. At this meeting the Commissioner presented the council with a detailed written submission prepared by the complainant. In this submission a number of issues were raised including the council's records management, the use of private email accounts and the archiving and deletion of emails. The council took time to consider the issues raised and responded in detail on 20 October 2011. The Commissioner has taken into account the issues raised in the complainant's submission and the council's response to these in arriving at his decision.
46. As part of these discussions the council further clarified its archiving policy and the nature of the terminology used. It explained that an archived email was one which had been compressed and stored in its Enterprise Vault system. A shortcut (the 'stub') to the original email was then placed in the account holder's email account. It added that if the stub was then deleted the original email would be deleted from the vault. The council went on to point out that it was possible for the original email to be restored to its originating account and for the stub to be retained. However, subsequent deletion of the original email would just leave the stub. This stub would then be designated by the system as an 'orphan' and would automatically be deleted when the system conducted its next 'sweep' for orphans.
47. Dealing with the specific issues raised by the complaint regarding the missing emails, the archived emails and the use of private email accounts suggesting the existence of further information not yet disclosed, the Commissioner has made the following findings.
48. The Commissioner is satisfied on a balance of probabilities that there are no missing emails of the type suggested by the complainant in his internal review request dated 15 June 2011. The Commissioner accepts the explanation given by the council as described above in paragraphs 21, 22 and 23 above.
49. With regard to the deleted email or deletion from the email chain, the Commissioner is satisfied on a balance of probabilities with the council's explanation in paragraph 21 that no further recorded information exists.
50. With regard to the three archived emails, the Commissioner is satisfied with the council's explanation in relation to the second and third ones as explained in paragraph 23 above that the stubs are simply records of the original two emails which were disclosed in full on 26 May 2011. However, the Commissioner is not persuaded on a balance of probabilities, from the explanation given by the council that first email (together with all of its attachments) cannot be retrieved from the archive or that there is no missing text. The council has not explained

why this email together with its attachments cannot be restored to the account from which it was archived.

51. With regard to the use of private email accounts and the probability of further recorded information being held within them, the Commissioner is not satisfied on a balance of probabilities that the council has carried out adequate searches. Although it conducted a consensual search of the official email accounts of those individuals listed in the complainant's request (with the exception of the Leader, whose Executive carried out a manual search on his behalf and Harold Tinworth who is a private consultant and not a council employee) there is no evidence that the council searched the private gmail accounts for Stephen Barker and Jamie O'Malley. The Commissioner has seen evidence that Mr Barker used his gmail account for official council business (see paragraph 40 above) and is aware from a Google search that both Stephen Barker and Jamie O'Malley gave details of their gmail accounts on the council's website.
52. The Commissioner has seen an email from Stephen Barker's gmail account to the Information Governance Manager dated 20 October 2010¹³ which clearly falls within the scope of the present request but was not disclosed to the complaint.
53. The Commissioner has contacted Mr Tinworth in connection with an associated case and has been informed that has not retained any correspondence with the council regarding the communication strategy. The Commissioner therefore does not believe there would be any benefit to the council approaching him.
54. The Commissioner has also approached Stephen Barker who left the council in January 2012 and he has expressed a willingness to assist with any further enquiries in relation to the Commissioner's investigation.

Procedural Matters

55. The Commissioner finds that the council breached section 10(1) of the Act by failing to respond to the complainant's request promptly and in any event within twenty working days following the date of receipt and
-

¹³ This email was disclosed to the Commissioner by the council in relation a related complaint investigated by him

also breached section 1(1)(b) of the Act by failing to disclose recorded information within the scope of the request.

Right of appeal

56. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

57. 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.
58. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF