

## Freedom of Information Act 2000 (the Act) Decision notice

**Date:** 13 August 2012

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

### Decision (including any steps ordered)

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1. The complainant has requested:

*Correspondence between various individuals at Nottingham City Council and representatives of Nottinghamshire Police between October 2009 and December 1, 2010, in relation to investigations undertaken by Nottinghamshire Police and/or by the District Auditor into the misallocation of council houses in the city between 2003 and 2005.*

2. Nottingham City Council has satisfied the Commissioner on a balance of probabilities that it has identified all the recorded information falling within the scope of the complainant's request and made appropriate disclosures.
3. However, the Commissioner has decided that Nottingham City Council was wrong to apply section 40(2) of the Act to certain information it redacted when disclosing an email it received from Nottinghamshire Police.
4. The Commissioner finds that Nottingham City Council has breached section 10(1) of the Act by failing to respond to the complainant's request promptly and in any event with twenty working days but does not require any steps to be carried out in relation to this breach.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose the name of the elected representative redacted from the second paragraph of the email from Julia Hodson<sup>1</sup> to Jane Todd dated 21 September 2010
6. 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

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7. In April 2005 the management of Nottingham City Council's (the council) housing stock was transferred to Nottingham City Homes (NCH), a newly formed arm's length management organisation (ALMO).
8. In November 2005 the Audit Commission began an investigation into the council's housing service and in March 2006 it published an Inspection Report on NCH.
9. On various dates during 2006 the council met with Nottinghamshire Police to discuss the possibility of any criminality involving public officials.
10. In January 2009 the District Auditor issued a Public Interest Report under section 8 of the Audit Commission Act 1998<sup>2</sup> which highlighted various failings in relation to the council's allocation and management of its housing stock and made various recommendations including giving consideration into its findings in relation to individual cases.<sup>3</sup>

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<sup>1</sup> Chief Constable of Nottinghamshire Police

<sup>2</sup> Under Section 8 of the Audit Commission Act 1998, the appointed auditor is required to consider whether to issue a report in the public interest on any significant matter coming to his or her notice in the course of an audit, and to bring it to the attention of the audited body and the public.

<sup>3</sup> <http://www.audit-commission.gov.uk/inspection-assessment/public-interest-reports/local-gov/Pages/pir09nottingham.aspx>

11. In July 2010 the council's Director of Legal and Democratic Services (Glen O'Connell) met with Nottinghamshire Police to discuss 'housing allocations'<sup>4</sup>.
12. In December 2010 the council issued a 'Public Interest Report on Housing Allocations'<sup>5</sup> summarising the action taken on civil legal issues arising from the District Auditor's Public Interest Report on housing allocations issues and other matters. It concluded that legal avenues had been explored to reasonable conclusions and that further investment in officer time and external expertise was not warranted.

## Request and response

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13. On 3 December 2010 the complainant wrote to the council and requested information in the following terms:

### ***'Request 1***

*Please could you provide me with correspondence, emailed or written, with associated documents or attachments, between **Councillor Jon Collins**<sup>6</sup> and representatives of Nottinghamshire Police between October 2009 and December 1, 2010, in relation to investigations undertaken by Notts Police and/or by the District Auditor into the misallocation of council houses in the city between 2003 and 2005? (The District Auditor's investigation eventually concluded with publication of his Public Interest Report into the matter in January 2009).*

*I would like the disclosure to include, but not be limited to, any correspondence relating to Notts Police intention to investigate, or not, the misallocation of council homes. Similarly, I would be grateful if the disclosure included references to a meeting held between Councillor Jon Collins and representative(s) of Notts Police in July this year.*

### ***Request 2***

*Please could you provide me with correspondence, emailed or written, with associated documents or attachments, between **council officer Glen O'Connell**<sup>7</sup> and representatives of Nottinghamshire Police*

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<sup>4</sup> <http://www.thisisnottingham.co.uk/Police-continue-talks-council-homes-scandal/story-12247043-detail/story.html>

<sup>5</sup> <http://open.nottinghamcity.gov.uk/comm/agenda.asp?CtteMeetID=3721>

<sup>6</sup> Leader of Nottingham City Council

<sup>7</sup> Nottingham City Council's Director of Legal and Democratic Services

*between October 2009 and December 1, 2010, in relation to investigations undertaken by Notts Police and/or by the District Auditor into the misallocation of council houses in the city between 2003 and 2005? (The District Auditor's investigation eventually concluded with publication of his Public Interest Report into the matter in January 2009).*

*I would like the disclosure to include, but not be limited to, any correspondence relating to Notts Police intention to investigate, or not, the misallocation of council homes. Similarly, I would be grateful if the disclosure included any references to a meeting held between Councillor Jon Collins and representative(s) of Notts Police in July this year.*

### **Request 3**

*Please could you provide me with correspondence, emailed or written, with associated documents or attachments, between **council chief executive Jane Todd** and representatives of Nottinghamshire Police between October 2009 and December 1, 2010, in relation to investigations undertaken by Notts Police and/or by the District Auditor into the misallocation of council houses in the city between 2003 and 2005? (The District Auditor's investigation eventually concluded with publication of his Public Interest Report into the matter in January 2009).*

*I would like the disclosure to include, but not be limited to, any correspondence relating to Notts Police intention to investigate, or not, the misallocation of council homes. Similarly, I would be grateful if the disclosure included any references to a meeting held between Councillor Jon Collins and representative(s) of Notts Police in July this year.*

### **Request 4**

*Please could you provide me with correspondence, emailed or written, with associated documents or attachments, between **council officer Toni Price**<sup>8</sup> and representatives of Nottinghamshire Police between October 2009 and December 1, 2010, in relation to investigations undertaken by Notts Police and/or by the District Auditor into the misallocation of council houses in the city between 2003 and 2005? (The District Auditor's investigation eventually concluded with publication of his Public Interest Report into the matter in January 2009).*

*I would like the disclosure to include, but not be limited to, any correspondence relating to Notts Police intention to investigate, or not,*

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<sup>8</sup> Executive Officer to the Leader of Nottingham City Council

*the misallocation of council homes. Similarly, I would be grateful if the disclosure included any references to a meeting held between Councillor Jon Collins and representative(s) of Notts Police in July this year.*

**Request5**

*Please could you provide me with correspondence, emailed or written, with associated documents or attachments, between **council officer Carole Mills Evans**<sup>9</sup> and representatives of Nottinghamshire Police between October 2009 and December 1, 2010, in relation to investigations undertaken by Notts Police and/or by the District Auditor into the misallocation of council houses in the city between 2003 and 2005? (The District Auditor's investigation eventually concluded with publication of his Public Interest Report into the matter in January 2009).*

*I would like the disclosure to include, but not be limited to, any correspondence relating to Notts Police intention to investigate, or not, the misallocation of council homes. Similarly, I would be grateful if the disclosure included any references to a meeting held between Councillor Jon Collins and representative(s) of Notts Police in July this year'.*

14. The council responded on 1 June 2011 (and provided a copy to the Commissioner). It stated that no recorded information was held in relation to 'requests' 1, 2, 4 and 5 concerning correspondence between Councillor Jon Collins, Glen O'Connell, Toni Price and Carol Mills Evans and the Nottinghamshire Police. However, it did confirm that it held the 'stub' of an email between Jane Todd and the Chief Constable of Nottinghamshire Police (Julia Hodson) dated 16 September 2010 which it disclosed to the complainant. The council explained that the complete email was no longer available as had been archived and subsequently deleted from its system leaving only the stub.
15. On 8 June 2011 the complainant requested an internal review as he was unhappy with the council's response. He said he was concerned that the complete email between Jane Todd and Julia Hodson dated 16 September 2010 had been deleted and suggested that this might have been in breach of the council's own Retention and Disposal Schedule (March 2009)<sup>10</sup>. He pointed out that under this Schedule the email concerned would probably be classified as a 'record' (in that it was

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<sup>9</sup> Deputy Chief Executive of Nottingham City Council

<sup>10</sup> <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=8235&p=0>

evidence of council business) as opposed to a 'message' and as such should only be archived after 3 months and thereafter retained indefinitely. He therefore asked the council to disclose a fully restored version of the email, provide an explanation as to why it was archived and deleted in apparent breach of its Retention and Disposal Schedule and finally clarify how its email system worked. The complainant also queries that no correspondence was found by the council in relation to the misallocation of its homes between 2003 and 2005. Furthermore, he said he would have expected to see some correspondence with Councillor Jon Collins regarding the meeting with the police that took place in July 2010 even if it was cancelled. He therefore asked the council provide him with details of the searches it carried out including any private/personal email accounts that may have been used for council business.

16. Following an internal review the council wrote to the complainant on 4 July 2011 (and provided a copy to the Commissioner). In relation to its Retention and Disposal Schedule it said that this was not a legally binding document and it was down to the discretion of the account holder to determine whether an email was a 'record' or a 'message'. In relation to the email from Jane Todd to Julia Hodson, it said it would appear that this was determined to be a 'message' (and not a record) which is why it was deleted leaving only a stub. It said it did not hold any information as to when, why or by whom it was deleted but stated that any deletion would have been made by the account holder or another designated person with read and write access to that account. The council then explained its system for archiving emails. 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.
17. With regard to the searches carried out the council stated that a request was made to its Resources Department to conduct a search and additionally a further electronic was conducted by its ICT colleagues. In relation to the latter the council stated its understanding that the search consisted of a cross referencing exercise looking for emails from or to the individuals named in the complainant's request during the time periods specified sent to or from an email address with 'nottinghamshire.pnn' (the designated email for Nottinghamshire Police).

The council clarified that this search would only have covered the named individuals' official council email accounts and not any private or personal ones. It said that if an individual made use of a private email account it was not something it would be aware of or have authority to monitor. The council concluded by saying that apart from the information disclosed no further recorded information was held.

18. The council has elaborated on the searches it carried out as described above in a written communication to the Commissioner. In this communication the council pointed out that on 25 March 2011 its Resources department sent out a 'memo' to its Single Point of contact in which it repeated the four information requests made by the complainant dated 3 December 2010 and requested any recorded information held relevant to them to be provided to its Information Governance department. The council has clarified that its Single Point would have disseminated the memo accordingly. It has also pointed out that the same memo was sent the same day directly to Carole Mills-Evans, Glen O'Connell, Graham Chapman<sup>11</sup>, Jamie O'Malley<sup>12</sup>, Jane Todd, Jon Collins, Peter Davies Bright<sup>13</sup>, Toni Price and Stephanie Pearson<sup>14</sup>. The council has also informed the Commissioner that on 21 April 2011 its information Governance department asked its acting Director of IT to conduct searches of the following individuals' email accounts; Jane Todd, Carol Mills Evans, Glen O'Connell, Stephen Barker, Stephen Richeux<sup>15</sup> and Adrienne Roberts<sup>16</sup>. The results of this search were provided to the Information Governance department on 9 May 2011 and subsequently shared with the complainant and the Commissioner.
19. On 15 July 2011 the council wrote to the complainant and stated that following a further search the full original email between the Chief Executive and the Chief Constable had been found and disclosed a copy with some parts redacted under section 40(2) of the Act.

## Scope of the case

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<sup>11</sup> Deputy Leader of the Nottingham City Council

<sup>12</sup> Head of Communications for Nottingham City Council

<sup>13</sup> Corporate Policy team for Nottingham City Council

<sup>14</sup> Information Governance Manager at Nottingham City Council

<sup>15</sup> Corporate Media Manager

<sup>16</sup> Acting Chief Executive of Nottingham City Council in 2006 who left in 2008

20. On various occasions in 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he complained about the delays in responding to his request, the apparent lack of recorded information held in relation to it and also conflicting statements as to whether a deleted email was retrievable.
21. On 19 July 2011 the council contacted the Commissioner and referred to its responses to the complainant dated 1 June and 5 July 2011.
22. On 21 July 2011 the Commissioner wrote to the council and commented on the apparent lack of recorded information held in relation to the complainant's request and the adequacy of the council's searches to find it. He therefore suggested that further searches and enquiries should be carried out (including contacting the individuals concerned regarding their official and private/personal email accounts) and specifically drew the council's attention to certain information that he believed should be held. He also asked for an un-redacted copy of the email from Jane Todd to the Chief Constable of Nottinghamshire Police.
23. The Commissioner wrote to the council again on 26 July 2011 and said he was aware from a parallel investigation that the Chief Constable for Nottinghamshire Police (Julia Hodson) had replied to Jane Todd on 21 September 2010. He therefore asked the council to let him know whether it held this email and if so, why it was missed by its earlier searches. He also asked the council to explain if the email was no longer held why and by whom it was deleted bearing in mind it should have been classified as a record under its Document Retention and Disposal Schedule.
24. The council responded to the Commissioner on 29 July 2011. It accepted that its automatic search of email accounts was not as thorough as it believed and said in the future it would be introducing a two-stage process; firstly it would carry out an automatic search and if this revealed archived emails it would then ask the relevant account holders to carry out a direct search. The council also acknowledged the Commissioner's concerns regarding the apparent lack of recorded information held by it and said that further searches had revealed additional information which it disclosed to him. (See below).
25. In relation to the use of private/personal email accounts for official business the council said that it had made further enquiries and these confirmed that there were no communications between Councillor Collins and the Nottinghamshire Police in relation to the housing



allocation issue. It therefore confirmed that in relation to 'request 1' no recorded information was held.

26. In relation to 'request 2' the council stated that following a further search by the account holder concerned additional information had been found, which it disclosed to the Commissioner. This comprised of the following:

- a. An email from Glen O'Connell (sent from his PA's email account) to Nottinghamshire Police dated 28 July 2010 (at 14:29) together with an acknowledgement email from the Nottinghamshire Police dated 28 July 2010 (at 15:02) to Glen O'Connell.
- b. An email from Nottinghamshire Police to Glen O'Connell's PA dated 28 July 2010 (at 16:29) with an internal email of the same date attached.
- c. An email from Glen O'Connell (sent from his PA's email account) to Nottinghamshire Police dated 2 August 2010 (at 12:25) with the draft notes of the meeting on 29 July 2010 attached together with an acknowledgement email from the Nottinghamshire Police dated 3 August 2010 to Glen O'Connell's PA's.
- d. Although outside the scope of the present request the council also disclosed four internal emails all dated 28 July 2010 between Glen O'Connell and Councillor Jon Collins' Executive Officer in connection with the meeting on 29 July 2010. These emails explain why Glen O'Connell attended the meeting instead of Councillor Jon Collins.

27. In relation to 'request 3' the council stated that following a further search the following additional information had been located and disclosed:

- a. An email from Nottinghamshire Police to Jane Todd dated 27 July 2010 (at 16:09).
- b. An email from Nottinghamshire Police to Jane Todd dated 21 September 2010 (at 08:10).

28. In relation to 'request 4' and 'request 5' the council reiterated that it held no recorded information.

29. In relation to the additional information found as a result of the further searches, the council indicated that it would look to apply the

exemptions in sections 30, 36 and 40(2) of the Act before considering whether to make a disclose to the complainant.

30. On 2 August 2011 the Commissioner contacted the council and invited it to issue a revised response to the complainant in view of the additional information located following its further searches.
31. On 19 August 2011 the council issued its revised response to the complainant and disclosed the additional correspondence located with some redactions under section 40(2) of the Act. However, it withheld the note of the meeting on 29 July 2010 in its entirety under section 30(1) of the Act.
32. On 22 June 2012 the Commissioner contacted the council and asked it whether it wished to substitute section 31(1) of the Act for section 30(1) as it had done so recently in its grounds of appeal to the First Tier Information Tribunal in a similar case.
33. The council replied on 28 June 2012 and confirmed that it did wish to substitute section 31(1)(a) and (g) for section 30 and also intended to rely on section 36 subject to an opinion being obtained from its qualified person once he had returned from leave.
34. As the council has withdrawn its application of section 30(1) of the Act the Commissioner has limited his investigation whether it holds any further recorded information falling within the scope of the complainant's request and if so, whether the exemptions in sections, 31(1), 36(2) and 40(2) are engaged and whether they can be maintained in the public interest.

## **Reasons for decision**

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### **Information held**

35. The first question for the Commissioner to consider is whether the council has correctly located and identified all of the recorded information it holds falling within the scope of the complainant's request.
36. The council has stated that the only recorded information it holds is that which it has disclosed to the complainant on 15 July and 19 August 2011 in relation to requests 2 and 3 (with redactions under sections 31(1) and 40(2) of the Act) and the notes of the meeting with Nottinghamshire Police on 29 July 2010 which it has withheld under section 31(1)(a) and (g) of the Act.

37. The council has also stated that it does not hold any recorded information in relation to requests 1, 4 and 5.

### **Section 1(1) of the Act**

38. 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.
39. 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.
40. 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.
41. 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 Act<sup>17</sup>.
42. 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.
43. Even if information is held on behalf of a public authority in a private email account it may still be subject to the exemptions under the Act and therefore not automatically disclosable.
44. 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*

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<sup>17</sup> 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](http://www.ico.gov.uk/news/latest_news/2011/ico-clarifies-law-on-information-held-in-private-email-accounts-15122011.aspx)

[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].

45. 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.
46. In the decision of *Oates v Information Commissioner* [EA/2011/0138] the Tribunal stated that: 'As a general principle, the (Commissioner) 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'.
47. 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.

**Request 1 (correspondence between Councillor Jon Collins and Nottinghamshire Police)**

48. The council has stated that as a result of the searches it carried out as described above no recorded information was identified falling within the scope of the complainant's request.
49. The Commissioner is aware from investigations he carried out into two other cases concerning the council which resulted in Decision Notices FS50371156 and FS50371164 that Councillor Jon Collins might have used a gmail account for council business in addition to his official council one.

50. The council has confirmed in a written communication to the Commissioner that Councillor Jon Collins' council and gmail accounts have both been searched but no recorded information was identified falling within the scope of the complainant's request.
51. The Commissioner is therefore satisfied on a balance of probabilities that the council does not hold any recorded information falling within the scope of the complainant's request number 1.

### **Request 2 (correspondence between Glen O'Connell and Nottinghamshire Police)**

52. The table below lists the recorded information identified by the council as falling within the scope of the complainant's request number 2 (with the exception of document 3) as a result of its various searches. The council has confirmed that these searches included the official mail boxes of both Glen O'Connell and his PA, who sent and received communications on his behalf.

<b>No</b>	<b>Description</b>	<b>Date</b>	<b>Disclosed, redacted or withheld</b>	<b>Exemption under the Act</b>
1	Email from Glen O'Connell (sent from his PA's email account) to Nottinghamshire Police	28 July 2010 (at 14:29)	Disclosed in full	N/A
2	Email from Nottinghamshire Police to Glen O'Connell	28 July 2010 (at 15:02)	Disclosed in full	N/A
3	Email from Nottinghamshire Police to Glen O'Connell's PA	28 July 2010 (at 16:29)	Not disclosed	Although sent to Glen O'Connell's PA the message was clearly intended for him as a reply to his earlier email <sup>18</sup>

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<sup>18</sup> This email was disclosed to the complainant following the intervention of the Commissioner and therefore has not been considered in this Decision Notice.

4	Email from Glen O'Connell (sent from his PA's email account) to Nottinghamshire Police with draft notes of meeting attached	2 August 2010 (at 12:25)	Name of an individual investigated redacted	Section 40(2)
5	Draft notes of meeting on 29 July 2010	29 July 2010	Withheld	Section 31(1)(a)&(g)
6	Email from Nottinghamshire Police to Glen O'Connell's PA	3 August 2010 (at 08:33)	Police officer's phone number and leave date redacted	Section 40(2)
7	Amended notes of meeting on 29 July 2010	29 July 2010	Withheld	Section 31(1)(a)&(g)

53. The complainant does not believe that the recorded information listed in the table above represents the entirety of the information held by the council and has explained to the Commissioner why he holds this belief.
54. The complainant has pointed out that the email from Glen O'Connell to the Nottinghamshire Police dated 2 August 2010 (sent from his PA's email account) stated that he would contact them again on 16 August 2010 regarding certain information unless they supplied it in the meantime. He believes this email is evidence that a further communication should exist in relation to this information, either from Glen O'Connell and/or the Nottinghamshire Police.
55. Another point made by the complainant relates to the email from the Nottinghamshire Police to Glen O'Connell dated 28 July 2010 which states that Glen O'Connell's email has been passed to Detective Chief Superintendent Waterfield for a direct reply. The complainant believes this email is evidence that further correspondence may exist.
56. The Commissioner notes the above points and understands why the complainant might believe they are evidence that further recorded information exists. However, the Commissioner has to be satisfied on a balance of probabilities that further recorded information exists and there is insufficient evidence to suggest that this is the case here based on the searches and enquiries stated to have been carried out by the council. The fact that Glen O'Connell has said that he will contact the Nottinghamshire Police or that they will contact him direct does not

mean that such contact (if it took place) was in writing. Contact may have been verbal by phone or in person. Accordingly, the Commissioner is satisfied on a balance of probabilities that the council holds no further information apart from that already disclosed.

57. The complainant has also pointed out that one might reasonably expect to see some correspondence in relation to the Glen O'Connell's attendance at the meeting with Nottinghamshire Police on behalf of the council instead of Councillor Jon Collins. The Commissioner understands why the complainant might believe this to be the case. However, based on a balance of probabilities, there is no evidence to suggest that any further recorded information exists based on the enquiries and searches which the council has said were carried out.
58. The first communication relating to the meeting on 29 July 2010 was the email from the Nottinghamshire Police to Jane Todd dated 27 July 2010. The complainant believes that there must have been some correspondence between the relevant parties prior to this regarding this meeting. (For example, its purpose, date, time, venue and attendees). To support his view the complainant has referred to an email from Detective Chief Inspector Waterfield to Councillor Tony Sutton dated 23 July 2010 regarding Councillor Jon Collins' attendance at this meeting.<sup>19</sup> In this email, Detective Chief Constable stated that:

*"I am in a position to update the Council as to where the investigation is at and indeed I have an appointment with the Leader, together with one of our Assistant Chief Constables next week to do that. I believe that as the responsible officer he should be the person to update interested parties within the Council on that progress rather than doing it piece meal."*

59. The council has explained to the Commissioner why Glen O'Connell attended the meeting in place of Jon Collins and has provided supporting evidence. This email chain has not been disclosed to the complainant.
60. The Commissioner notes that the correspondence which the complaint reasonably believes should exist in relation to Glen O'Connell's attendance at the meeting, does exist, but is not within the scope of his

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<sup>19</sup> <http://www.thisisnottingham.co.uk/unanswered-questions-scandal-council-homes/story-12723710-detail/story.html>

request. This would include any communications between Nottinghamshire Police and Councillor Jon Collins' PA.

### Request 3 (correspondence between Jane Todd and Nottinghamshire Police)

61. The table below lists the recorded information identified by the council as falling within the scope of the complainant's request number 3 as a result of its various searches:

No	Description	Date	Disclosed, redacted or withheld	Exemption under the Act
1	Email from Nottinghamshire Police to Jane Todd	27 July 2010 (16:09)	Disclosed in full	N/A
2	Email from Jane Todd to Julia Hodson (Chief Constable of Nottinghamshire Police)	16 September 2010 (15:40)	Names of 2 of the individuals investigated redacted	Section 40(2)
3	Email from Julia Hodson (Chief Constable of Nottinghamshire Police) to Jane Todd	21 September 2010 (08:10)	Paragraph relating to investigation and name of individual redacted	Sections 31(1)(a)&(g) and section 40(2)

62. The complainant does not believe that the recorded information listed in the table above represents the entirety of the information held by the council and has presented the Commissioner with material which he says supports this belief.

63. In the email from Julia Hodson to Jane Todd dated 21 September 2010 she states 'that our communications people need to get together to mitigate the risks around the publication of the outcome'. In view of this statement the complainant is surprised that the council has not produced any further communications in relation to this statement,



given the agreement to share information between the council and the police where media interest relates to both organisations<sup>20</sup>.

64. As a result of enquiries carried out in a parallel investigation the Commissioner has seen copies of emails dated 28 July 2010 between the Communications' department of Nottinghamshire Police and the council's Corporate Media Manager regarding the investigation into the allocation of council housing. This correspondence is dealt with in a separate Decision Notice FS50400014 but the Commissioner believes it is evidence that communications departments of the respective parties were in contact regarding the media implications of the investigation being carried out.
65. However, the fact that the communications' departments of the respective organisations were in contact with each other is not firm evidence that further recorded information exists between the council's Chief Executive (Jane Todd) and representative of the Nottinghamshire Police. Such communications may well have been oral and not necessarily involved the Chief Executive. Any such discussions would probably have involved the respective communication departments of the council and the police and not Jane Todd. On a balance of probabilities, the Commissioner is not satisfied that any further relevant recorded information exists in relation any communications or discussions with and liaison between the council's Chief Executive and Nottinghamshire Police falling within the scope of the complainant's request number 3.

#### **Request 4 (correspondence between Toni Price and Nottinghamshire Police)**

66. The council has stated that its various searches (as described above) did not reveal any recorded information falling within the scope of the complainant's request. The complainant has not provided any tangible or specific evidence to suggest that such information exists.
67. The council has also stated in a written communication to the Commissioner that Toni Price's council and gmail accounts have both been searched but no recorded information was identified falling within the scope of the complainant's request.

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<sup>20</sup> Communications between the Nottinghamshire Police and specific individuals within the council's media and communications departments is dealt with in another Decision Notice FS50400014

68. The Commissioner is therefore satisfied, on a balance of probabilities, that the council does not hold any recorded information in relation to correspondence between Toni Price and Nottinghamshire Police.

**Request 5 (correspondence between Carol Mills Evans and Nottinghamshire Police)**

69. The council has stated that its various searches (as described above) did not reveal any recorded information falling within the scope of the complainant's request. The complainant has not provided any tangible or specific evidence to suggest that such information exists.
70. The Commissioner is therefore satisfied, on a balance of probabilities, that the council does not hold any recorded information in relation to correspondence between Carol Mills Evans and Nottinghamshire Police.

**The exemptions applied by the council**

71. The council has cited three exemptions to justify its decision to redact and/or exempt some of the requested information. They are section 31(1)(g) in conjunction with sections 31(2)(a) and (b), section 31(1)(a) section 36(2)(b) and section 40(2).

**Section 31(1)(g) in conjunction with sections 31(2)(a) and (b) of the Act – failure to comply with the law - responsibility for any conduct which is improper**

72. Section 31(1)(g) provides that information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection 31(2) .
73. Section 31(2) provides that the purposes referred to in subsection 1(g) are - (a) the purpose of ascertaining whether any person has failed to comply with the law; (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.
74. For the Commissioner to agree that this exemption is engaged the authority must demonstrate that disclosure of the requested information would, or would be likely to, prejudice any one of the subsections cited. The Information Tribunal case *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005] outlined its interpretation of "likely to prejudice". It confirmed, at paragraph 15, that: "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk*".

75. In this case the council has applied section 31(1)(g) in relation to the minutes (both draft and amended) of the meeting with the police on 29 July 2010 and the first paragraph of the email from Julia Hodson to Jane Todd dated 21 September 2010.
76. The council has confirmed that the information withheld under this section records issues raised in its meeting in 2010 with representatives of the Nottinghamshire Police concerning a decision as to whether to proceed with a new investigation into the misallocation of council houses.
77. The council has pointed out that local authorities have certain powers available to them for the purpose of ascertaining whether any person has complied with the law and/or ascertaining whether any person is responsible for any conduct which is improper.
78. Specifically, the council has stated that it has the ability to investigate and undertake prosecutions under the Social Security Administration Act 1992, the Fraud Act 2006, and the Theft Act 1968.
79. Furthermore, the council has stated that even when it is not the responsibility of the local authority itself to ascertain compliance or the impropriety of any conduct it is often the case that the investigation of such matters is both instigated and carried out by the local authority prior to passing the matter to those who do have that responsibility, such as, as in this case, the police.
80. Information gathered in its enquiries are shared with those who have the relevant legal powers and the information that those parties hold is shared with the local authority in order to inform their own investigation. The council has pointed out that this sharing is often a two-way process in which both parties have to collaborate in order to determine the most appropriate way to progress an investigation. In this situation, it is essential that both parties are able to share information without the fear that their information is not going to be released by the other party without good cause.
81. The council believes that disclosure of this information would realise this fear, with the consequent result that future co-operation between relevant parties would be inhibited. It has argued that this inhibition would be likely to prejudice the purposes at sections 31(2)(a) & (b) due to the reduced ability of either party to obtain all the necessary and relevant facts and/or advice from the other party.
82. Taking into consideration the above factors it is the council's opinion that disclosure of this information would be likely to prejudice the purpose of ascertaining whether any person has failed to comply with

the law and the purpose of ascertaining whether any person is responsible for any conduct which is improper and that this prejudice is real and significant.

83. The Commissioner has viewed the withheld information in this case and carefully considered the council's arguments and finds that section 31(1)(g) is engaged on the basis that disclosure of the withheld information would be likely to prejudice the exercise of its functions for the purposes of ascertaining whether any person has failed to comply with the law and whether any person is responsible for any conduct which is improper.
84. Section 31 is a qualified exemption and is therefore subject to a public interest test under section 2(2)(b) of the Act. This provides that information to which certain exemptions apply may only be withheld where, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest arguments in favour of disclosing the requested information**

85. The topic of misallocation of council housing has been a subject of significant public debate since it first came to light and has been the focus of a number of articles in the local press from 2009<sup>21</sup>. It is clear that disclosure of the withheld information would inform that debate.
86. The misallocation issue concerns the misappropriation of a significant value of public money in the form the improper allocation of repairs and upgrades to council properties. There is therefore a public interest in the disclosure of information that would reveal the actions considered and taken by the council and the police in their investigation of these issues.
87. There has been speculation regarding the possible involvement of a number of senior members of NCH in the misallocation of council

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<sup>21</sup> <http://www.thisisnottingham.co.uk/City-Council-leader-appalled-homes-scandal/story-12210461-detail/story.html>  
<http://www.thisisnottingham.co.uk/cases-highlighted-failings-Audit-Committee-report/story-12265092-detail/story.html>  
<http://www.thisisnottingham.co.uk/Investigation-halted-city-council-housing-scandal/story-12250822-detail/story.html>  
<http://www.thisisnottingham.co.uk/Post-comment-scandal-scandal-city-council-houses/story-12202894-detail/story.html>

housing.<sup>22</sup> In such cases where allegations have been levelled against senior officials there is a public interest in knowing what actions have been considered and taken by the council and the police to ensure that individuals have been brought to account as appropriate. Disclosure of the withheld information might provide some assurance to the public that appropriate investigations have been conducted in relation to such individuals.

88. There is a significant public interest in openness regarding investigations into irregularities regarding public spending. Disclosure of the requested information might help to maintain public confidence in the council's monitoring of irregularities to ensure the effective and efficient use of public funds.

### **Public interest arguments in favour of maintaining the exemption**

89. Whilst there has been some speculation as to the individuals and/or organisations involved in the misallocation of council houses, so far, no one person has been charged with an offence and no organisation has been prosecuted. In the light of this it cannot be considered in the public interest to disclose information which might associate, potentially incorrectly, individuals or organisations whose involvement in the matter and actions in relation to it are being considered by the relevant authorities.
90. Disclosure of the withheld information would give the public an insight and understanding of the methods and considerations used by the council and the police in relation to their investigation into the misallocation of council housing. This would not be in the public interest as it might inform those being investigated and others to the detriment of the investigation.
91. There is a public interest in the requested information being withheld to allow the council and the police a safe space to discuss the current matter and future issues without fear that the information each party brings to the discussion being disclosed without good cause. This particularly the case here as the police have applied an exemption under the Act to their own records of the meetings with the council.
92. There is another public interest argument in support of maintaining the exemption which the council has argued carries significant weight. This is mentioned in the confidential annex to this Decision Notice.

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<sup>22</sup> <http://www.thisisnottingham.co.uk/Investigation-halted-city-council-housing-scandal/story-12250822-detail/story.html>

## **Balance of the public interest arguments**

93. The Commissioner recognises that there is a strong public interest in the general issues regarding the misallocation of council properties together with any actions taken to investigate wrongdoing and hold individuals and/or groups to account. However, the Commissioner does not believe that the disclosure of the withheld information will significantly assist in furthering the public debate or the council's accountability to the extent of balancing the public interest in favour of disclosure.
94. The Commissioner has afforded significant weight to relevant public interest factors set out in the confidential annex which unfortunately were only brought to his attention in June 2012. He finds that these factors are sufficiently weighty to balance the public interest in favour of maintaining the exemption under section 31(1)(g) of the Act.

## **Section 31(1)(a) of the Act – the prevention or detection of crime**

95. Section 31(1)(a) provides that information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice - (a) the prevention or detection of crime.
96. As the Commissioner is satisfied that section 31(1)(g) is engaged with the public interest balanced in favour of the information being withheld, he has not gone on to consider section 31(1)(a).

## **Section 36(2) of the Act**

97. As the Commissioner is satisfied that section 31(1)(g) is engaged with the public interest balanced in favour of the information being withheld, he has not gone on to consider section 36(2)(b) and (c).

## **Section 40(2) of the Act**

98. In addition to sections 30(1)(g), 30(1)(a) and 36(2) the council has also stated that it would consider elements of the information requested in requests 2 and 3 to be exempt under section 40(2) of the Act in so far as it amounts to the personal data of a third party, the disclosure of which would not be compatible with principals under the Data Protection Act 1998 (the DPA).
99. Section 40(2) provides an exemption for information which is the personal data of any individual other than the complainant where disclosure would contravene any of the data protection principles as set out in schedule 1 to the Data Protection Act 1998 (the DPA).

100. The first data protection principle in schedule 1 states that personal data shall be processed fairly and lawfully and in particular shall not be processed unless –

1. at least one of the conditions in Schedule 2 is met and
2. in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.

101. The redactions made by the council under section 40(2) of the Act may be divided into three categories; the names of the individuals being investigated, the direct phone extensions and annual leave dates for senior police officers and the name of an elected representative taking an interest in the investigation.

### **The names of the individuals being investigated**

102. These have been redacted from the email from Glen O'Connell to the Nottinghamshire Police dated 2 August 2010 and the one from Jane Todd to Julia Hodson dated 16 September 2010.

103. Although the council has not elaborated on the reasons why the names of those being investigated should be redacted, the Commissioner accepts that it would be unfair to disclose such information for the reasons stated in the confidential annex

104. The Commissioner recognises that any individuals and/or groups of individuals being investigated have a right not to have their personal data disclosed unless and until such an investigation makes adverse conclusions about their conduct and behaviour.

105. The Commissioner also accepts that such individuals and/or groups would have a reasonable expectation of privacy in the above circumstances.

106. Accordingly, the Commissioner is satisfied that section 40(2) of the Act is engaged in relation to the names of these individuals as disclosure of this information would be unfair processing of their personal data under the DPA.

### **The direct phone extensions and leave dates of senior police officers**

107. This information has been redacted from the email from the Nottinghamshire Police to Glen O'Connell's PA dated 3 August 2010.

108. Although the council has not elaborated on the reasons why the direct phone extensions and leave dates of the individual concerned should be

redacted, the Commissioner finds that the disclosure of this personal information would be unfair.

109. The Commissioner finds that the direct phone extension of the senior officer concerned is the individual's personal data and disclosure of this information would be an unwarranted interference in that person's private life and the boundaries between what is required for the purposes of the effective provision of public services.

110. If a member of the public wishes to make contact with the police there are already effective and clearly published ways of doing so including the use of a range of telephone numbers depending on the nature of the enquiry.<sup>23</sup>

111. The publication of a senior police officer's direct extension could be potentially disruptive and could prejudice and hamper the provision of an important public service.

112. The Commissioner also finds that the leave dates of the senior police officer concerned are the individual's personal data and disclosure of this information would be an unwarranted interference in that person's private life and the boundaries between what is required for the purposes of the effective provision of public services.

113. The Commissioner is therefore satisfied that section 40(2) of the Act is engaged in relation to the direct phone extension and leave dates of the senior police officer concerned as disclosure of this information would be unfair processing of the personal data of those associated with it under the DPA.

### **The name of an elected representative**

114. This information has been redacted from the second paragraph of the email from Julia Hodson to Jane Todd dated 21 September 2010.

115. The council has not provided any explanation as to why it believes that the disclosure of this individual's name would be unfair or on any evidence that the individual concerned has been approached to see whether they would object to disclosure.

116. The Commissioner has seen the redacted name and does not believe its disclosure would be unfair. As an elected representative with an interest in the matter the individual would not have a reasonable expectation of

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<sup>23</sup> <http://www.nottinghamshire.police.uk/contact/>



privacy. Accordingly, the Commissioner is satisfied that section 40(2) of the Act is not engaged in relation to the name of this individual.

### **Other matters**

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117. 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.

## Right of appeal

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118. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

119. 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.

120. 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**