

Freedom of Information Act 2000 (the Act) Decision notice

Date: 9 July 2012

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

Decision (including any steps ordered)

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. The Commissioner's decision is that Nottingham City Council has failed to satisfy him on a balance of probabilities that it has identified and disclosed all recorded information falling within the scope of the complainant's request.
3. 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.
4. The Commissioner requires Nottingham City Council to take the following steps to ensure compliance with the legislation.
5. Carry out further searches and enquiries for recorded information on communications between Stephen Barker and Nottinghamshire Police falling within the scope of the complainant's request including a request for him to search his gmail account and if found, to disclose any such information to the complainant or issue a valid refusal notice.
 - Carry out further searches and enquiries for recorded information on communications between Stephan Richeux and Keri Usherwood at the council and Nottinghamshire Police falling within the scope of the complainant's request, including the emails to and from

Stephan Richeux dated 28 July 2010 and if found, to disclose any such information to the complainant or issue a valid refusal notice.

6. Nottingham City Council 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

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.
9. In March 2006, the Audit Commission published an Inspection Report on NCH. The report found that, at that time, there were significant weaknesses in the processes for allocating properties to tenants:

'The allocations and lettings service is poorly managed. The allocation policy lacks accountability; it is neither demonstrably fair nor effectively controlled.....this has led to inappropriate lettings'.
10. Coinciding with the inspection, allegations were received by the Audit Commission and the council concerning property allocations made between 2003 and 2005 that were either inappropriate and/or not made in accordance with the council's policies and procedures.
11. Given the nature of the allegations the Audit Commission deemed it appropriate to carry out further work as part of the statutory audit.
12. At the same time the council's internal Audit Service also carried out an investigation.
13. On various dates during 2006 the council met with Nottinghamshire Police to discuss the possibility of any criminality involving public officials.
14. In January 2009 the District Auditor issued a Public Interest Report under section 8 of the Audit Commission Act 1998¹ which highlighted

¹Under 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

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.²

15. In July 2010 the council's Director of Legal and Democratic Services (Glen O'Connell) met with the Nottinghamshire Police to discuss 'housing allocations'.
16. In December 2010 the council issued a 'Public Interest Report on Housing Allocations'³ 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

17. 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 council officer **Stephen Barker**⁴ and representatives of Nottinghamshire Police between October 1, 2009, 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 enquiries made by the

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.

²<http://www.audit-commission.gov.uk/inspection-assessment/public-interest-reports/local-gov/Pages/pir09nottingham.aspx>

³<http://open.nottinghamcity.gov.uk/comm/agenda.asp?CtteMeetID=3721>

⁴ Director of Communications (who left the council in January 2012)

Nottingham Post in relation to the District Auditor's report.

Request 2

*Please could you provide me with correspondence, emailed or written, with associated documents or attachments, between council officers **Stephan Richeux**⁵, **Keri Usherwood**⁶ and representatives of Nottinghamshire Police between October 1, 2009, December 1, 2010 in relation to investigations undertaken by Notts Police and 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 enquiries made by the Nottingham Post in relation to the District Auditor's report'.

18. The council responded by email on 1 June 2011 (with a copy to the Commissioner) and stated that it did not hold any recorded information within the scope of the complainant's request.
19. On 8 June 2011 the complainant requested an internal review as he was unhappy with the council's response that it held no recorded information. He therefore asked the council provide him with details of the searches it carried out including access to any private/personal email accounts that may have been used for council business.
20. Following an internal review the council wrote to the complainant on 5 July 2011 (and provided a copy to the Commissioner).
21. 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 search 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

⁵ Corporate Media Manager

⁶Project Manager, Marketing and Communications

concluded by saying that no recorded information was held within the scope of the request.

22. The council has elaborated on the searches is 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 Chapman⁷, Jamie O'Malley⁸, Jane Todd, Jon Collins, Peter Davies Bright⁹, Toni Price and Stephanie Pearson¹⁰. 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 and Adrienne Roberts. 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.

Scope of the case

23. 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 and the apparent lack of recorded information held in relation to it.

Reasons for decision

Does the council hold any recorded information?

24. The main question for the Commissioner to consider in this case is whether the council holds any recorded information falling within the

⁷ Deputy Leader of the Nottingham City Council

⁸ Head of Communications for Nottingham City Council

⁹ Corporate Policy team for Nottingham City Council

¹⁰ Information Governance Manager at Nottingham City Council

scope of the complainant's request based on a balance of probabilities. See *Linda Bromley & Others v Information Commissioner and Environment Agency* [EA/2006/0072].

Section 1(1) of the Act

25. 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.
26. Section 3(2) of the Act proves 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.
27. 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.
28. 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 Act¹¹.
29. 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.
30. 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.
31. It is important to note the standard of proof that the Commissioner uses to determine whether relevant recorded information is held. In

¹¹ 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

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].

32. 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.
33. 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'.
34. 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 Stephen Barker and Nottinghamshire Police)

35. The council has confirmed that as a result of the searches it carried out, as described above, it has not located any recorded information in respect of communications between Stephen Barker and Nottinghamshire Police. It has also confirmed that although its searches would have covered any council email account for the person named it would not have included a personal or private email account as that would not be something it was aware of or in respect of which it would have authority to monitor.

36. 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 Stephen Barker used a gmail account for council business in addition to his official council one.
37. The council has recently confirmed, in an article appearing in 'This is Nottingham' dated April 27th 2012, that private gmail accounts were used by some staff where there were good operational reasons for doing so¹².
38. It is apparent that the council did not ask Stephen Barker to search his gmail account for any correspondence relevant to the complainant's request. Accordingly, the Commissioner is unable to conclude on a balance of probabilities that that email account does not hold any recorded information held on behalf of the council.
39. The Commissioner therefore requires the council to ask Stephen Barker to search his gmail account to see whether he holds any recorded information falling within the scope of the complainant's request number 1.

Request 2 (correspondence between Stephan Richeux and Keri Usherwood and Nottinghamshire Police)

40. The council has confirmed that as a result of the searches it carried out, as described above, it has not located any recorded information in respect of communications between Stephen Richeux and Keri Usherwood and Nottinghamshire Police.
41. The complainant believes that council should hold recorded information in relation to request 2 and has presented the Commissioner with evidence to support this belief.
42. In the email from the Chief Executive of the council, Julia Hodson to the Chief Constable of Nottinghamshire Police, 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 these comments the complainant queries that the council has not produced any further communications in relation to this matter in view of the agreement to share information between the council and the police where media interest overlaps their jurisdiction¹³.

¹²<http://www.thisisnottingham.co.uk/Nottingham-City-Council-accused-email-cover/story-15932273-detail/story.html>

¹³ See the linked Decision Notice FS50400009

43. As a result of a parallel investigation, the Commissioner has seen email correspondence dated 28 July 2010 between Stephen Richeux and the Nottinghamshire Police headed 'nch report'¹⁴. This correspondence relates to the meeting between the council and the Nottinghamshire Police on 29 July 2010 and in the Commissioner's view falls within the scope of the current request.
44. The Commissioner understands that according to the council's Retention and Disposal Schedule (March 2009)¹⁵ the email correspondence concerned would probably be classified as a 'record' (in that it was evidence of council business) as opposed to a 'message' and as such should only be archived after three months and thereafter retained indefinitely.
45. In the circumstances the Commissioner requires the council to carry out further searches and enquiries (including contacting Stephen Richeux and Keri Usherwood direct) with a view to finding the email correspondence referred to above, together with any additional recorded information falling within the scope of the complainant's request.

Other matters

46. 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.

¹⁴ A reference to Nottingham City Homes

¹⁵ <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=8235&p=0>

Right of appeal

47. 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

48. 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.

49. 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