

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:

Documents relating to the council's communication strategy between 2006 and 2007.

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 within the scope of the complainant's request. He also finds that the council has breached section 10(1) of the Act.

3. The Commissioner requires Nottingham City Council to take the following steps to ensure compliance with the legislation.

- Carry out further searches and enquiries of the type it did in relation to the complainant's initial request (as listed in its letter dated 25 October 2010) in respect of the complainant's new and extended request and then disclose any recorded information found or issue a refusal notice
- Carry out further enquiries including asking those individuals in respect of 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 any such information to the complainant 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 an 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. 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.
9. 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.
10. 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.

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<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

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

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.

11. 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,*
12. The council responded on 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.
13. 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

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=26&id=198367744&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>

- iv. Finally, it contacted both its Communications and Marketing Section and Stephen Barker (in relation to question 7)
14. 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/10-7735)

15. On 27 October 2010 the complainant wrote to the council referring to his earlier request dated 20 September 2010 (see above for full details) and requested further information in relation to questions 6 and 7 as follows:

'Further to our conversations can I clarify that requests 6 and 7 are intended to cover all formats including documents held in physical files and any documents held electronically in any format as well as in e-mail accounts.

Can I further clarify that the description "communications strategy" is intended to cover a range of communications including but not limited to communications on the themes of proud, safe, clean and ambition. These could also include any documents leading to press output and Arrow and post office distribution. It is also intended to cover community strategy, and involvement: events programmes: achievement campaigns: democratic renewal campaigns and proud of locality campaigns. it also includes any documents referring to Labour Listens and Labour Proud of Nottingham campaigns.

Whilst the requests relate to the months Jan - Feb 2006, I would be grateful if you would extend that period to include all of 2006 and the first three months of 2007.'

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

⁶ Stephen.barker.nottinghamcity@gmail.com

16. On 1 April 2011 the complainant wrote to the council's Chief Executive stating that he was still waiting for a response to his request dated 27 October 2010.
17. The council responded on 20 April 2011 stating that it held no further information in relation to the 'extended' questions 6 and 7.
18. On 21 April 2011 the complainant requested an internal review. He said it would appear that the council had not attempted to look for anything other than documents specifically referring to the communications strategy.
19. Following an internal review the council wrote to the complainant on 1 July 2011 stating that no further information was held. To clarify the searches and enquiries it carried out to locate any further information it referred to (and subsequently disclosed on 6 July) a copy of the memo it sent to the relevant departments and relevant potential information holders, dated 2 November 2010. This memo reiterated the information requested by the complainant in questions 6 and 7 of his original request dated 20 September, as expanded in his subsequent request dated 27 October 2010 which is the subject of this Decision Notice.
20. On 9 September 2011 the council provided the complainant with details of the departments and individuals to which it sent its memo. These were the Resources FOI Team, Carol Mills-Evans (Deputy Chief Executive), Glen O'Connell (Director of Legal Services), Graham Chapman (Deputy Leader), Jamie O'Malley (Head of Communications), Jane Todd (Chief Executive) and Toni Price (Executive Assistant to the Leader).

Scope of the case

21. 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 it was not credible that the council did not hold any further documents relating to the communications strategy produced by its Communication and Marketing department in 2006 and 2007.
22. The scope of the Commissioner's investigation is limited to deciding whether, on the balance of probabilities, the council holds any further information within the scope of the complainant's request dated 27 October 2010.

Chronology

23. On 15 February and 17 March 2011 the Commissioner wrote to the council and requested it to issue a response to the complainant's information request.
24. On 6 September 2011 the Commissioner attended the council's offices to discuss a number of complaints made under the Act including the present one and also requested its comments in relation to a detailed 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.
25. On 20 October 2011 the council responded to the Commissioner with its comments in relation to the matters raised in the complainant's submission and those discussed at the meeting on 6 September.

Analysis and reasons for decision

26. 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.
27. 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.
28. 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.

29. 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 Act⁷.
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 may 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)

⁷ 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 must be held by the council. He does not believe it is credible that there are no additional documents of any kind relating to the Communications Strategy produced by the council's Communications and Marketing Department and the references to it in the Corporate Plan 2006-2011⁸. Specifically he believes that that both Harold Tinworth and Stephen Barker were involved in the council's communications plans during the period from 2006/07 and both used 'private email' accounts in relation to these. He is of the opinion that the reason why the council has failed to discover any further information is because it has not searched these private email accounts.
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.

⁸ <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=1366&p=0>

40. In addition to the enquiries and searches carried out in relation to the initial request (reference: IGO/10-7552) as listed in paragraph 13 above the council has pointed out that it carried out a further search in relation to the present 'expanded' request by sending a memo in the form and to the individuals listed in paragraphs 19 and 20 above.
41. The council has informed the Commissioner that although the memo described above was not specifically sent to Stephen Barker it was sent to his colleague, Jamie O'Malley in the Communications department. Furthermore, the council has clarified that FOI Resources team to which the memo was sent would have carried out a search of Stephen Barker's official (as opposed to gmail) email account.
42. The council's Information Governance manager has also confirmed that she received confirmation from the then acting head of IT that all relevant searches has been carried out.
43. The Commissioner notes that the council has not produced any specific evidence to suggest that a further search was carried out of Harold Tinworth's account or the old mail servers or the 'S' and 'U' drives for him and Stephen Barker, searches that were carried out in relation to the previous, narrower, request.
44. The Commissioner also notes that no search was carried out of Stephen Barker's gmail account and no approach was made to him direct to carry out the search.
45. 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.
46. 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 website⁹.

Also the Commissioner has seen emails from Mr Barker's gmail account to the council's Information Governance Manager dated 20 and 29 October 2010 which were sent in response to a request for any recorded information held in relation to the complainant's request.

47. As the council has not repeated all of the enquiries and searches it carried out in relation to the initial request (10-7552) as suggested by the complainant on 11 November 2010 or taking steps for Stephen Barker's gmail account to be searched, the Commissioner is not satisfied that it has carried out adequate searches.
48. 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 in the council approaching him.
49. 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

50. 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

51. 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

52. 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.
53. 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