

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 March 2013

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

#### **Decision (including any steps ordered)**

---

1. The complainant has requested copies of all communications between a company and Nottingham City Council ("the council") relating to the unsuccessful sale of a particular property. The Commissioner previously issued a decision notice, in respect of this request, finding that the council had failed to comply with section 10(1) of the Act and ordered it to provide a response to the complainant. The council has now disclosed all of the information which it states it holds, without applying any of the Act's exemptions to withhold or redact any of the information. On the balance of probabilities, the Commissioner is of the view that the council has now provided the complainant with all of the information which it holds falling within the scope of the request.
2. The Commissioner does not require any steps to be taken.

#### **Request and response**

---

3. On 8 November 2010, the complainant wrote to the council and requested information in the following terms:

*"... a copy of all communications between ArtReach and Nottingham City Council concerning the unsuccessful attempt to sell Radford Unity Complex to Nottingham Studios."*

4. The Commissioner issued a decision notice in respect of this request on 26 July 2011 ([FS50374082](#)). The notice found that that council had failed to comply with section 10(1), and ordered it to confirm or deny

whether the information sought was held and, if so, to either provide it or issue a valid refusal notice under section 17(1) of the Act within 35 days. On 3 August 2011, the council issued a refusal notice. This refusal notice withheld the requested information under section 43(2) on the basis that "*disclosure may prejudice future negotiations... and thus cause damage to the council's commercial interests*".

## Scope of the case

---

5. The complainant contacted the Commissioner on 4 August 2011, expressing dissatisfaction with this council's response. Following the complaint being brought to the Commissioner's attention, the council then explained that it had misread the request and no longer sought to rely on section 43(2); as that particular exemption was cited in consideration of information not forming part of the complainant's request. On 29 June 2012, the council advised that it had located 82 pages of information falling within the scope of the request. It supplied 70 of these pages to the complainant ("disclosure 1") and withheld 12 citing section 42 of the Act.
6. On 9 August 2012, the Commissioner wrote to the council asking it to justify its reliance on section 42. The Commissioner pointed out that some of the information withheld consisted of internal communications between council staff which would therefore not fall within the scope of the request. It also appeared that pages 10, 11 and 12 of the withheld information had actually been provided to the complainant within the main disclosure.
7. In response to disclosure 1, the complainant raised legitimate concerns that the council may hold further information. Accordingly, the Commissioner also asked the council, in his correspondence of 9 August 2012, to answer a series of questions addressing this issue of whether it had located all of the information it holds falling with the scope of the request.
8. On 14 September 2012, the council advised the Commissioner that due to staffing issues there would be a delay in it being able to provide a formal response. An interim response was provided on 28 September 2012, with a final response aimed for by 5 October 2012. Following various communications between the Commissioner and the council, a further disclosure was provided on 7 November 2012 ("disclosure 2").
9. This disclosure comprised of 108 pages falling within the scope of the complainant's request, many of which were duplications. The council appeared to no longer be relying on section 42; and instead redacted parts of the information citing sections 40(2) and 43(2). The council

provided the complainant with a brief explanation for its reliance on section 43(2). Beyond stating that some of the information would identify individuals and breach the Data Protection Act 1998 (the DPA), it did present arguments for its reliance on section 40(2).

10. In the Commissioner's correspondence of 9 August 2012, he made clear that if the council were seeking to rely on new exemptions it should supply him with "*full and final*" arguments as to its basis for doing so. As the Commissioner was of the view that the council had not complied with this request, on 5 December 2012 he issued an information notice seeking the council's full and final arguments in respect of the information it sought to withhold. The Commissioner also asked the council to answer various questions regarding what information it held falling within the scope of the request.
11. On 6 January 2013, the council provided a response to the information notice. It withdrew its reliance on sections 40(2) and 40(3) and located some additional information (disclosure 3). Due to a technical problem, the council asked the Commissioner to forward disclosure 3 to the complainant which he did on 15 January 2013. The council also sent a follow up response on 11 January 2013 providing further information on the searches which it has conducted in order to establish that it had located all of the information falling within the scope of the complainant's request.
12. In light of the fact the council has withdrawn its reliance on any of the Act's exemptions; the Commissioner considers that the scope of this decision notice should be to consider whether the council has now located all of the information it holds which is relevant to the request. As the Commissioner has already issued a decision notice finding the council to have breached section 10(1) in its handling of this request ([FS50374082](#)), he has confined his comments on this point to the 'other matters' section of this notice.

## Reasons for decision

---

### Section 1

13. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and if that is the case to have that information communicated to them.
14. The Commissioner notes his guidance, '[Determining what information is held](#)', which states:

*"When the Commissioner receives a complaint that a public authority has not provided any or all of the requested information, it is seldom possible to prove with absolute certainty that there either isn't any information or anything further to add. The Commissioner will apply the normal civil standard of proof in determining the case, i.e. he will decide on the balance of probabilities whether the information is held..."*

15. The Commissioner sought to clarify whether the information was held as manual or electronic records. The council explained that when the request was submitted, it was in a period of transition from paper to electronic records. Consequently, there information may be held in both paper and electronic formats.
16. Accordingly, in order to compile the information constituting disclosure 3, the council has confirmed that the relevant departments have undertaken the following steps to locate information pertaining to the request:
  - (a) A physical search of relevant individual's filing cabinets;
  - (b) A search of their electronic and archived files;
  - (c) A search of its document storage database; and
  - (d) Interrogation of both electronic and paper records within the area.
17. The oldest document which has been provided to the complainant is an email of 24 November 2009. In this email, the council refers to "... [a named individual], acting on behalf of Nottingham Studios". Also disclosed was an email dated 23 March 2010 which states: "Last autumn the Studios group was invited by NCC to consider the purchase of Radford Unity Complex at a price of £150k..." Both of these emails raise the possibility that the council was in discussions with ArtReach prior to 24 November 2009, and may therefore hold further information falling within the scope of the request. (For the sake of clarity, the email of 24 November 2009 did not form part of disclosures 2 or 3. The Commissioner presumes that this is because the email constitutes internal communications within the council and therefore, upon further consideration by the council, was deemed not fall within the scope of the request.)
18. In order to assist with his section 1 analysis, the Commissioner sought to establish the date on which the council first entered into correspondence with Artreach. The council has explained that it does not hold records which would identify the specific date. Nevertheless, it acknowledged that in light of the correspondence referred to above, it would appear the council was in contact with Artreach prior to 24

November 2009. However, it also noted that there is no guarantee that these initial discussions were conducted in writing.

19. For the purposes of this notice, the key point is that the council has confirmed that no time parameters were placed the searches for information falling within the scope of the request; with the oldest document returned being the email of 24 November 2009. This, combined with the scope of the searches which the council has stated it conducted, leads the Commissioner to the view that on the balance of probabilities the council does not hold any relevant information predating 24 November 2009.
20. Another reason why the council is not able to establish the precise date on which it first entered into discussions with Artreach, is that the authors of the two emails referred to above have now left the council. However, the council conducted a particular search of these two email amounts using the following search parameters: "*Artreach, Art reach, 'Art Reach', Radford, Unity, Complex, 'Radford unity', 'Unity complex', 'RUC', all emails created over 30 months ago and emails to/from [two named email addresses]*". The Commissioner would note that, if the council did hold information predating 24 November 2009, the email accounts of those who sent the emails referred to in paragraph 17 above would appear the most likely location for such information. However, the council has confirmed that these searches returned no further relevant information.
21. This appears to be explained by the council's retention policy. In respect of "*records relating to the management of the disposal process for real property... should be retained for at least 7 years*". However, the council has stated that that communications with potential clients are not covered by this seven year period which is intended to apply to documents such as "*legal documents relating to the sale, particulars of sale documents, tender documents [and] conditions of contracts*". Instead, communications of the type identified in paragraph 17 above would be caught by the council's general email policy that "*emails [which] relate to the council's business should be retained for 3 months before archiving indefinitely*". However, the council has explained that its IT system has only recently gained the ability to retain emails indefinitely and that "*deleted correspondence from 2010 was not archived*".
22. The Commissioner is satisfied by the quality and scope of the searches which the council has conducted for the requested information. In light of the fact these searches were not limited to a particular timeframe, and the council's comments regarding its retention policy, the Commissioner considers that it is likely the council does not hold any relevant information predating 24 November 2009.

23. In conclusion, the Commissioner does not consider there is evidence which would justify him refusing to accept the council's position that it has now disclosed all of the information falling within the scope of the request which it holds.

### **Other matters**

---

24. As has been noted above, the Commissioner has already issued a decision notice finding a breach of section 10(1) in respect of the council's handling of this request ([FS50374082](#)).
25. Further to that notice, he would simply observe that the complainant's request was submitted on 8 November 2010 and it was not until 15 January 2013 that he was provided with the information sought. Clearly, three years is an exceptional delay and one which the Commissioner would urge the council to ensure does not occur again.
26. The delay is perhaps exacerbated by the fact that, in the end, the council has not actually applied any exemptions to the information.
27. However, the Commissioner would note that that the council engaged positively following the issue of his information notice and has acknowledged that the handling of this request has fallen below the standards which it would expect.

## Right of appeal

---

28. 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)

29. 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.
30. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**