



# Investigation into Council's email quarantining practice

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| <b>Agency</b>          | Horowhenua District Council               |
| <b>Complaint about</b> | Email quarantining practice               |
| <b>Ombudsman</b>       | Peter Boshier                             |
| <b>Case numbers</b>    | 459861, 459877, 462166, 465831 and 470152 |
| <b>Date</b>            | 12 November 2018                          |

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## Summary

Between 2011 and 2017, the Horowhenua District Council kept a list of people whose emails were deemed to pose a risk to staff. This list included the names of some of the Council's own elected officials. Anyone on the list who attempted to email Council staff would automatically have their emails diverted to the Chief Executive to be vetted.

During this time, the Council did not have formal policy in place regarding the quarantining of emails, which meant this practice went largely unchecked. A high proportion of the emails that were quarantined did not appear to reach all of their intended recipients.

Five of the individuals who were added to this email quarantine list complained to my Office.

Based on the information before me, I have formed the opinion that the Council acted unreasonably. The Council's email quarantine practice ran contrary to the principles of transparency, accountability and fairness. I recommend that the Council apologise to the five complainants, but I do not consider it is necessary to recommend any further action given the Council has addressed the administrative issues I identified by ceasing this practice and introducing a new email quarantining policy.

## Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act 1975 (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Council.
2. My role is to consider the administrative conduct of the Council, and to form an independent opinion on whether that conduct was fair and reasonable (sections 22(1) and 22(2) of the OA refer).
3. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision maker. Rather, I consider the substance of the act or decision and the procedure followed by the Council, and then form an opinion as to whether the act or decision was properly arrived at and was one that the Council could reasonably make.

## Background

4. The Council first introduced an email quarantining practice in 2011 '*with staff safety and undue interference in mind*'. At the time, the Council did not have a specific email quarantining policy.<sup>1</sup>
5. Early in 2012, two of the complainants were added to the Council's quarantine list without their knowledge. The Council could not find a record of why these two individuals were added.
6. On 12 October 2013, Mr Michael Feyen was elected as a Councillor of the Council.
7. On 29 April 2015, Mr Feyen sent an email to all Councillors and all Council staff raising concerns about an upgrade of the Tokomaru Water Treatment Plant and the perceived credit given for this project. Mr Feyen referred to comments made about this upgrade as '*grandstanding*'.
8. On 4 May 2015, the Chief Executive, Mr David Clapperton, wrote to Mr Feyen raising concerns that his email had upset staff members. Mr Clapperton requested Mr Feyen be added to the quarantine list to avoid further criticism of staff. Mr Feyen maintains that

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<sup>1</sup> Over the six year period that the Council's email quarantine practice operated, the current Chief Executive, Mr David Clapperton, was only responsible for the last three years.

he mistakenly sent this email to all staff. Both Mr Feyen's official council email address and subsequent personal email address were added to the quarantine list.<sup>2</sup>

9. In May 2016, the Council added the fourth complainant to its quarantine list without the complainant's knowledge. The Council could not find a record of why this individual was added.
10. On 19 May 2016, Mr Clapperton advised the fifth complainant that he had added them to the quarantine list due to an email they had sent the Council. The email at issue contained a comment that was critical of a senior Council staff member.
11. On 29 August 2016, the Council removed Mr Feyen from its quarantine list.
12. On 8 October 2016, Mr Feyen was elected as Mayor of Horowhenua District Council.
13. On 10 October 2016, two days after the local election, Mr Clapperton instructed the Council's IT department to remove all remaining email addresses from the quarantine list.
14. In March 2017, an internal auditor reviewed the Council's compliance with its Sensitive Expenditure Policy (this audit was conducted as part of a shared services arrangement with the Manawatū District Council). In their review report, the auditor raised concerns about the Council's email quarantining practice and labelled this as an '*extreme risk*'. The Council was concerned about the quality of this report. Details of this report were leaked to the media.
15. On 11 April 2017, the Council approved a new Electronic Communication Policy. The policy stated that '*email usage is monitored, and emails can be inspected at random without notification (including personal emails) to ensure they comply with expected professional behavioural standards*' and that emails should not be '*derogatory, obscene, offensive or misrepresent other people or organisations*'. However, the policy did not specify a quarantining practice.
16. On 19 May 2017, Mr Clapperton advised the fifth complainant that he had re-added them to the quarantine list due to an '*offensive*' email they had sent the Council. Mr Clapperton stated that the individual's emails would be reviewed for '*legitimate content, queries and [official information] requests and such will be forwarded to the appropriate part of the organisation*' for response.
17. On 20 June 2017, the Council commissioned KPMG to undertake a peer review of the internal auditor's report.
18. On 9 August 2017, KPMG presented its peer review report to the Council. KPMG did not do an in-depth review of the Council's email quarantine process and could not comment on the appropriateness of the practice. However, KPMG did recommend that the Council cease the quarantining of emails '*in order to develop a robust process in order to protect*

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<sup>2</sup> While Mr Feyen's emails to Council staff were vetted by the Chief Executive, his emails to other Councillors or members of the public were not captured by the quarantine practice.

*all staff and elected officials' health and safety'*. KPMG also commented that it had '*seen emails which could be considered offensive or abusive in nature by a recipient*'.

19. On 10 August 2017, the Council suspended its email quarantining practice pending the development of an appropriate policy framework in line with KPMG's recommendation. The fifth complainant was removed from the quarantine list as a result.
20. On 12 October 2017, the Council adopted a new *Electronic Communications (Email Quarantine) Policy*.

## Complaint and investigation

21. Five individuals who were added to the quarantine list complained to my Office raising concerns that the Council's previous email quarantine practice may have:
  - a. interfered with their ability to achieve '*timely and appropriate outcomes*' in iwi negotiations;
  - b. unnecessarily '*censored*' interactions with Council staff; and
  - c. interfered with Resource Management Act ('RMA') processes (including RMA submission processes), local election issues and Environment Court proceedings.<sup>3</sup>
22. In light of the concerns raised, I considered whether a wider systemic investigation of the Council's email quarantining practice was warranted. My staff discussed the issues with Council, along with the Auditor-General's Office and Privacy Commissioner's Office, the Department of Internal Affairs, Local Government New Zealand and the Society of Local Government Managers.
23. During the course of my inquiries, the Council ceased its email quarantining practice (in line with KPMG's recommendation) and developed a new formal email quarantining policy.
24. As a result of the Council's actions, I decided that it was not necessary for me to undertake a systemic investigation. However, I proceeded with investigation of the individual complaints received from the five individuals (who were directly affected by the practice).
25. I conveyed my provisional opinion to the Council on 28 September 2018. The Council accepted my provisional findings and did not wish to provide any further comments. The Council also stated that there were opportunities arising from the opinion to provide learnings to the wider local government sector, particularly in relation to policy development in response to similar issues to those experienced by the Council.

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<sup>3</sup> The complainants also raised concerns about an apparent interference with their privacy. I understand the Privacy Commissioner's Office considered this matter but decided not to take formal action on the basis that the primary issues were best reviewed by the Office of the Ombudsman.

## Analysis and findings

The first part of this section comments on the general difficulties in reviewing the Council's previous email quarantine practice. The second part comments on the findings from a detailed analysis of quarantined emails.

### Email quarantining process

26. Over the period the Council's previous quarantining practice operated, there were four quarantining processes that overlapped at various stages. These processes, while similar, contained different IT rules for capturing the quarantined emails. The quarantine processes also operated over two of the Council's email servers: 'Aftermail' (prior to June 2015), and 'ARCmail' (post June 2015).
27. For all processes, the Chief Executive was responsible for receiving quarantined emails and determining whether they should be forwarded to their intended recipients.
28. My ability to review the quarantined emails at issue, during the course of this investigation, was limited. Firstly, a third party IT contractor for the Council advised that it would take an extensive amount of manual work and be very costly to extract and analyse emails quarantined prior to June 2015 (in Aftermail). Secondly, emails between June 2015 and December 2015 (under the ARCmail server) had been archived as the Council had run out of storage space. Emails quarantined over this period were also much more difficult to extract and review.
29. Although quarantined emails after January 2016 were more readily retrievable, it still required a substantive amount of work by the IT contractor to extract these emails and then determine whether they had been forwarded to their intended recipients. The IT contractor was unable to identify whether emails were modified in any way prior to being forwarded without manually comparing each email. Again, this exercise would have been impractical and costly. Overall, the process of extracting and analysing the Council's quarantined emails was considerably complex and onerous, which has made any review of this practice difficult.
30. However, on the basis of the information available, it is evident that there was a clear lack of transparency and accountability in terms of how the Council's previous email quarantining practice operated. There was no formal policy, the reasons why people were quarantined were not documented and there was a notable lack of records regarding whether the emails were ultimately forwarded to their intended recipients. I am also mindful of the fact that three of the complainants were never informed that their emails were being quarantined (until after the internal auditor's report was leaked to the media).

### Analysis of quarantined emails and findings

31. Despite the difficulties identified above, my staff were able to review two samples of quarantined emails in greater detail (47 emails in total).

32. The first analysis had already been conducted by an IT contractor. The contractor reviewed a sample of quarantined emails between June 2015 and October 2016 and noted that there were 261 emails quarantined over this period – 143 of which did not appear to have a record of being forwarded to their intended recipients and required closer inspection. Out of a sample of 21 emails that were inspected further, ten were identified as not reaching all of their intended recipients.
33. I also requested that the Council provide me with direct access to the IT contractor so that I could set the terms for further analysis, with the results being provided directly to my staff. The Council agreed to this, and I am satisfied that the contractor performed this task professionally and independently, and without interference from the Council.
34. The second analysis reviewed all quarantined emails sent by the five complainants in June 2016. A total of 26 quarantined emails were identified and investigated further. Eight were identified as not reaching all of their intended recipients.
35. While I have no means to determine definitively whether any emails were altered before being forwarded to their intended recipients, there is no clear evidence to suggest that the Council attempted to distort or obstruct any email exchange. In other words, there is no basis to suggest that the Council used its email quarantining practice to somehow interfere with or obstruct iwi negotiations, RMA submission processes, local election processes or Environment Court proceedings (as per the concerns raised).
36. I note that that there is currently a heightened level of conflict in and around the Horowhenua District Council. I also acknowledge that the Chief Executive has an obligation to put in place reasonable measures to protect staff from abusive or offensive messages where necessary. I consider that the Council should have a degree of control over its email server in this respect.
37. However, having viewed the specific examples of *'unacceptable'* email correspondence that led to quarantine action for Mr Feyen and another complainant, I consider the Council's decision to add these two individuals to a quarantine list, without warning and without recourse, to have been disproportionate and unreasonable.
38. Further, the Council was unable to provide any record or examples of emails that led to the other three complainants being added. Having viewed a sample of quarantined emails and other emails from these three individuals over the course of this investigation, it is difficult to identify a clear basis to suggest the Council had reasonable grounds to add these three individuals to the quarantine list.
39. I also consider it was unreasonable for the Council to keep two of the complainants on the quarantine list for over four years with no apparent attempt to review their status.
40. The Council has provided me with two examples of emails that demonstrate behaviour that is particularly problematic. The first example contains explicit and racially-charged language. The second example includes a statement referring to a staff member as being *'the most unprofessional, incompetent "secretary" I have come across'*. These emails were not sent by any of the five complainants at issue.

41. It is not necessary for me to identify an express threshold of unreasonable email communication that would warrant adding an individual to an email quarantine list. Each case would need to be examined on its own merits. However, I consider the above two examples exhibit behaviour that, if continued, would need to be managed appropriately.
42. While the Council may have been concerned about the frequency of the email correspondence received from particular community members, I consider this could have been managed through other means.<sup>4</sup>

### **Quarantined emails that were not forwarded**

43. I am concerned by the high proportion of quarantined emails (sent by the five complainants) that were identified as not having a record of being forwarded to all of their intended recipients. In particular, there were numerous cases where emails were effectively blocked from reaching their intended recipients without any discernible reason. None of these emails contained language or other content that could be described as abusive or offensive. The sender would also have been unaware that their emails were not passed on.
44. It is unclear whether the Council considered that some of these emails were relatively unimportant at the time (for example, acknowledgement emails or 'thank you' messages). However, I would expect these emails to be forwarded to all of their intended recipients unless there was a valid reason not to do so.
45. It is particularly concerning that there were examples of quarantine emails being blocked from reaching elected representatives. In principle, I consider that constituents should be able to communicate with their locally elected representatives over email without undue interference.<sup>5</sup> This is fundamental to democracy.
46. In this case, Mr Feyen resorted to using personal email accounts to ensure he received emails from constituents that might otherwise have been blocked.<sup>6</sup> I consider the Council effectively incentivised the use of personal email accounts in this way.
47. In the absence of a clear organisational policy or internal guidance on the use of personal email accounts for official Council business, the accessibility, visibility and retention of Council communications and official information may be reduced. Poor record-keeping practices fundamentally undermine the operation of the Local Government Official Information and Meetings Act and reduce transparency and accountability.

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<sup>4</sup> The Office of the Ombudsman's [guide](#) on handling unreasonable complainant conduct includes strategies for managing unreasonable persistence.

<sup>5</sup> The Council has a general practice of not opening physical mail prior to it being delivered to elected representatives.

<sup>6</sup> Mr Feyen was given an assurance that emails he sent community members and other elected officials would not be quarantined. However, this exclusion rule did not apply to community members on the quarantined list (who sent emails to him).

48. Overall, I consider the Council took a cavalier approach to forwarding quarantined emails to their intended recipients. As a result, Council staff and elected officials were not privy to the full extent of email conversations and range of concerns raised by the affected individuals.

### **New email policy**

49. I consider the Council's new *Electronic Communications (E-mail Quarantine) Policy* that was introduced on 12 October 2017, addresses the administrative concerns identified above. In particular, the new policy:
- a. defines (insofar as possible), behaviour that will trigger the quarantine process (and defines the process itself);
  - b. introduces appropriate, standardised notification to individuals who are/may become subject to the policy;
  - c. is readily accessible on the Council's website;
  - d. requires the designated Privacy Officer to check quarantined emails for legitimate business content, and pass that on;
  - e. introduces a six-monthly review of the status of quarantined individuals;
  - f. has an appropriate reporting structure (to the Chief Executive and Finance, Audit and Risk Subcommittee); and
  - g. introduces a complaints process for affected individuals.
50. The policy also excludes emails sent to elected officials. However, elected officials may manage inappropriate email communications at their own discretion (with assistance from Council) and taking into account the guidelines in the new quarantine policy.

## **Chief Ombudsman's opinion**

51. For the reasons set out above, I have formed the opinion that the Council has acted unreasonably by:
- a. adding the five complainants to the quarantine list without reasonable or identifiable grounds;
  - b. failing to take steps to review the status of two of the individuals on the quarantine list for over four years; and
  - c. operating a previous emailing quarantine practice, without a clear policy, that ran contrary to the principles of transparency, accountability and fairness.



## Recommendation

52. Pursuant to section 22(3) of the OA, I recommend that the Council apologise to the five complainants. I understand that the Council has accepted this recommendation.
53. I do not consider it is necessary to recommend any further action given the Council has addressed the administrative issues identified above by ceasing its previous practice and introducing a new email quarantining policy.