

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 October 2016

Public Authority: Birmingham City Council
Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested information on equal opportunities claims against the council over previous years. The council withheld the information and applied the exemption in section 36(2) (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that council was correct to apply Regulation 36(2) however the public interest in the disclosure of the information outweighs the public interest in the exemption being maintained.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - to disclose the requested information to the complainant
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.

Request and response

5. On 27 January 2016, the complainant wrote to the council and requested information in the following terms:

"Given that the council have spent ten years trying to avoid and delay payments under the Equal Pay Legislation... and failed to provide for such claims. Please provide the following information:

- 1. By date(month) of claim submitted:*
 - 2. How many claims are outstanding eg eg May 2012 = 5 June 2012 = 4*
 - 3. How many claims were settled in 2014/2015 by month and value... eg april 2014... 250 £1m*
 - 4. Age and gender of claimants by 5 year bands by gender... important as females close to retirement are very likely to be in financial hardship until claim is settled*
 - 5. How much money is budgeted for payment by year eg 2016... £4m/2017 £3m*
 - 6. By monthly of 2016 what money is budgeted for payment and the number of claims expected to be settled.*
 - 7. How many claims are budgeted for carry over into 2017 and how much does this represent*
 - 8. By when are all claims due to have been settled*
 - 9. By what date must all claims be registered."*
6. The council responded on 2 February 2016. It provided some information in respect of part 6 of the request (although it withheld other information under section 36(2)(c), and withheld the information in response to the remaining requests, again under section 36(2)(c).
 7. Following an internal review the council wrote to the complainant on 25 February 2016. It maintained its original decision.

Scope of the case

8. The complainant contacted the Commissioner on 29 February 2016 to complain about the way his request for information had been handled. He believes that the information he requested cannot affect individual claims as he has only asked for total values over years. He therefore considers that the council's response is incorrect.

9. The Commissioner considers that the complaint is that the council was not correct to apply section 36(2)(c) to the information and therefore that it should have been disclosed to him in response to his request.

Reasons for decision

10. Section 36(2)(c) provides that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to prejudice the effective conduct of public affairs.
11. In determining whether exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.

The qualified person

12. In deciding whether the Council has correctly engaged the exemption, the Commissioner has first considered who, within the Council, is the 'qualified person' for the purposes of the exemption. The relevant qualified person for the purposes of this exemption is defined by section 36(5).
13. The ability of the qualified person to determine whether information is exempt cannot be delegated to another person. The reason for asking who gave the opinion is to ensure that the decision was taken by the correct person. If the person who gives the opinion is not the qualified person, then the information cannot be exempt.
14. In this case, the Council confirmed that the qualified person for the purposes of the exemption is the Monitoring Officer. The Commissioner accepts that the Council has identified the appropriate person for the purpose of providing a reasonable opinion, and has continued to consider whether the qualified person has provided an opinion and when the opinion was provided.

Did the qualified person give an opinion and when was it given?

15. The Council has provided evidence to the Commissioner that the qualified person's opinion was sought and obtained on 2 February 2016, and that the information was described to the qualified person. The Commissioner is therefore satisfied that the qualified person gave an opinion, and has continued to consider whether the opinion given was reasonable in the terms of the exemption.

Was the opinion reasonable?

16. The Commissioner has issued guidance on the application of section 36 (available at https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf). With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

17. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner must consider whether the inhibition or prejudice claimed relates to the specific subsection of section 36(2) that the Council is relying upon.
18. The council's argument is that the information relates to ongoing equal pay claims which are in the process of being resolved through settlements and employment tribunals. It argues that disclosing the information at this stage would provide information to claimants and their representatives which would put it at a disadvantage when conducting settlement negotiations. It said that this could lead to claims being amended or further claims being received at the expense of the taxpayer.
19. It further claims that a disclosure of the information would assist current and prospective claimants with their claims and hinder and distract officers from their task of dealing with the claims as they arise on their own merits.
20. It also argues that a disclosure would negatively impact upon the safe space which officers need to discuss cases. It argues that it should be able to plan and conduct litigation and discuss live issues and reach decisions away from external distraction and without fear that this could

have a negative impact upon the plans if the information is disclosed prior to the cases being completed. It argues that when dealing with litigation or potential future claims, it is important that those dealing with the issue should be able to do so without concerns of disclosure and a consequent amendment of equal pay claims by claimants.

21. The council has also taken into account the provided further arguments which the Commissioner has taken into account in her decision however she is not able to elaborate on these points further within this decision notice.
22. Having considered the arguments considered by the qualified person the Commissioner is satisfied that the opinion is reasonable. There are ongoing live cases which the council is currently working on, and there is a potential of future cases being made against the council. A disclosure of the information at this point would be likely to affect the current process of resolving the cases, particularly if claimants with ongoing claims decide to amend their claims following the disclosure of the information as the council has argued.
23. Having considered the arguments, the Commissioner is satisfied that the qualified person's opinion is reasonable. She must therefore consider the application of the public interest test required by section 2(2)(b). The test is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest

24. In considering the competing public interest arguments in this case, the Commissioner has drawn upon the Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and British Broadcasting Corporation* (EA/2006/0011 and EA/2006/0013). The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
25. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.

26. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would be likely to prejudice the effective conduct of public affairs.

Public interest arguments in favour of disclosure

27. There is a general presumption of openness running through the Act and the Commissioner considers that there is a strong inherent weight to the public interest in general openness and transparency with regard to decisions made by public authorities. The Council accepts that there is public interest in ensuring that the public have access to information which allows them to understand decisions taken by public authorities.
28. In historical terms there is a strong argument towards the disclosure of this information. The council has a large amount of equal pay claims waiting to be resolved, and this has led the complainant to make his request on the basis that he considers it is delaying resolving these at the expense of those who have money owed to them. The complainant argues that the council should be transparent about the issues he has raised as the delays are resulting in some individuals waiting years before their claims are resolved. He notes that many of these individuals are past retirement age and he has raised the issue of people dying whilst still waiting for their claim to be settled. He argues that for many individuals, the money which they have claimed may be desperately needed, particularly as they get older.
29. The BBC has reported in a number of articles that the council has thousands of equal pay claims still unsettled years after workers won an equal pay ruling in 2010. The court ruling found that workers were entitled to back pay for years when they earned less than their male counterparts due to female employees missing out on bonuses which were paid to their male counterparts. The BBC reports that the council's bill in respect of these cases was likely to be in the order of £757 million.
30. Initially the council indicated that it would not be able to afford the payments and said that they would need to seek aid from central government to pay or loan money for some of the figure. The government subsequently provided further funds however this was not enough to cover the shortfall which the council considered was necessary in order to pay all of the claims. In 2012 the then council leader, Sir Albert Bore stated that that the ruling had left the council in a "horrendous position financially" (<http://www.bbc.co.uk/news/uk-england-birmingham-20294633>)

31. In 2013 the council and joint trade unions reached an agreement to settle claims in order to avoid 'lengthy and costly hearings'. However in 2015 the BBC reported that many of the claims were still waiting to be resolved (<http://www.bbc.co.uk/news/uk-england-birmingham-34069437>). It reported that around 12 000 had already been settled but a Unison employee considered that 4-5000 may still remain unresolved. The issue therefore still affects many thousands of individuals.
32. The issues with the councils previous pay systems have been deliberated on by a court, which found that payments were due to some individuals under equal pay legislation. This opened the doors for many others to make claims along similar lines. The consequent delays in settlements being reached could be considered unfair and inequitable under the circumstances and the public could see this as a further extension of the discrimination which the court found to have occurred in the first instance.
33. The Commissioner recognises that the council would argue that it needs to ascertain whether any money is owed to each person on a fair and reasoned basis, and reach an agreement with them as to the final sum to be paid, and that this is time consuming given the number of individuals involved. It has agreed with the unions to settle all claims rather than require costly litigation (to both parties) wherever possible. However it would argue that it is not in tax payer's interests for the council to settle claims without fully considering each individuals case as money paid out is effectively funds taken away from the councils other resources (and taxpayers).
34. However the fact remains that many claims are yet to be settled, and in the interim people may be suffering hardship as a result of the delays. The Commissioner therefore recognises a strong public interest in this information being disclosed. It will provide detailed evidence on the completed and ongoing claims, and on the remaining claims which the council is aware of. It will also provide individuals who have made claims with information on the overall payments which the council has made, together with its budget to meet future claims.
35. Further to this, a disclosure of the information would highlight to the electorate the potential impact which resolving the remaining cases will have on the council's finances in the near future.

The public interest in the exemption being maintained

36. As stated above, in the case of the application of section 36, some weight must be accorded to the public interest in the exemption being maintained purely on the basis that the qualified person's opinion is reasonable. The Commissioner has therefore taken into account that

the qualified persons arguments are reasonable and that the exemption is engaged when balancing the public interest arguments.

37. The Commissioner notes that the council has been relatively clear to the public about the extent of the issue and how it would affect public funds. It has been clear since the court decision in 2010 that the number of claimants meant that a significant amount of money was required to pay money owed to employees and former employees following the decision. It has therefore been transparent over the issue to the extent that taxpayers and the general public are aware of the issues and the substantial financial payments it has, and will need to make.
38. The council argues that beyond this, the disclosure of the information would result in claimants amending their claims, further work being required and further uncertainty being introduced into the process of settling the disputes. It also argued that a disclosure could result in further claims being made, including potentially 'de minimis' claims and invalid claims.
39. As regards this potential for de minimis claims, the council recognised that equality claims are already well known about. They have been widely reported on in the media. The Commissioner considers that this weakens the argument that disclosing this information would be likely to increase the amount of claims which the council receives. She considers that if it does do so it is likely to be to a limited degree only. The Commissioner has also borne in mind that even in cases where there is a minor claim, if money is owed to an individual due to inequality in their past role then the individual has a right to make the claim, and the council is obligated to deal with that.
40. The council argues that a result of disclosing the information would ultimately be that the process would cost the council (and therefore the taxpayer) more. If that is the case then other council services could be negatively impacted by the loss of financial and personnel resources. It said that in the current economic climate it is in the public interest for it to limit its liability in respect of equal pay claims and the legal cost of those claims insofar as possible. It said that doing so will benefit local tax payers as it will result in funds being available for other necessary areas of public spending.
41. It considers also that there is a public interest in allowing it to resolve the disputes free from the public eye in order to facilitate reaching settlements and avoiding further costly litigation over the issue of money owed.
42. If individuals consider that they are owed more they may or refuse to settle the claim and ultimately this may end up being taken to Tribunal

or to the courts for settlement – this adds cost to the process for taxpayers as the council would need to spend time and resources defending the claim.

43. The Commissioner has also taken into account the council's further arguments.

Balance of the public interest

44. The Commissioner considers that the arguments relied upon by the council for applying section 36 do not clearly explain the likelihood, frequency or severity of the impact which a disclosure might have. They are primarily based upon speculation regarding claimants' actions if the information were to be disclosed but do not specify exactly why that would occur.

45. Equal pay claims require the claimant to demonstrate a comparator, (another employee of the council doing work of equal value), demonstrating that they carried out work of equal value and the differences in pay between the role they were employed in and the comparator's role. This requirement to demonstrate the level, and extent of the inequality reduces any real opportunities to claim excessive amounts with any real prospects of success as the claims need to be evidence based, (although it would obviously not prevent such claims being made entirely and this in itself would cost the council in time and resources).

(a) The council has predicted the amount of future claims it could receive and the time it predicts it will take to complete the outstanding claims. This information forms part of the withheld information but there is a public interest in taxpayers being able to view this information in order to be informed on how the council considers that settlements may affect its ongoing budget.

(b) The council relies on the argument that, if the information is disclosed, claimants will use the information to calculate their own estimated figures and refuse to settle at lower figures, whether their figures are correct or not. Cases may therefore end up being referred to the employment tribunal or the courts at greater extent to the public purse. However there is a relatively clear formulaic approach used to demonstrate the losses for individuals – the difference between the payments made to the individual and that made to a suitable comparator for the relevant periods of time. The Commissioner therefore considers that this argument is to an extent speculation and fails to take into account the necessary requirements for successful claims such as details of comparators as described above.

- (c) The Commissioner notes that employment tribunals can order retrospective payments on equal pay claims for a limited period of 6 years. This reduces the opportunity to make excessive claims for payment through the tribunal service.
 - (d) The information is purely totals of previous claims together with estimates for the ongoing claims. The information does not include details of the grades of individuals, the length of time they had worked for the council and their overall pay compared to their comparator. A disclosure of the information would not therefore provide details which would allow former employees to calculate a figure likely in their own claim. For this reason, a disclosure of this information would not particularly affect negotiations as figures for individuals would not be disclosed, and they would provide no indication of the circumstances of each complainant where previous settlements had taken place.
46. The Commissioner notes that a disclosure of the information would not in fact provide individuals with a basis upon which to accurately calculate their claims. The figures which were requested are totals rather than individual payments, and it is not the case that simply averaging the total figure out against the total claims made would provide an accurate, or even a 'ball park' figure which complainants might consider may be due to them. This appears to be part of the basis for the council's claim that disclosing the figures would result in amended claims being made to it. Each and every settlement is however dependent upon the circumstances of each claimant, such as the length of time worked, their salary over that period when compared to payments made to a comparator over that same period, and any bonuses etc. which were not available to them compared to the comparator. Each case will therefore have a different result, with some potentially finding they are owed far less than others. Further to this, claims may have been settled at additional or lesser payments due to the circumstances argued by both sides during the negotiations. The figures for past settlement totals would not therefore give any real indication of the likely sums which employees might consider should be due to them as individuals.
47. The test in this case balances in guarding the rights of the council to protect its, and therefore taxpayers interests by providing a means to allow negotiations and settlements outside of the public eye, versus the rights of individuals to understand the council reaction to the courts findings and historical inequality.
48. The information would provide rough figures on the numbers of people who are affected by the issues and how long they have been waiting to settle their claim. It would also provide tax payers with information on

figures the council has reserved to deal with the remaining claims by year. This is important as it will highlight to tax payers an indication of the funds which the council may need to account for in future payments over this issue, and an estimated time during which the council's finances will continue to be affected.

49. The Commissioner understands the council's argument revolves around placing itself in the best position to deal with the settlement claims in an informal position and at the least cost to the taxpayer. Certainly as regards avoiding expensive litigation and tribunal cases there is a strong public interest in allowing informal resolutions as much as possible. The complainant however considers that as the council is taking so long to settle claims there is a stronger public interest in the information being disclosed in order to demonstrate whether the council has addressed the claims process fairly, appropriately and whether it is taking too long to assess and settle claims at the expense of individuals who may already have been treated unfairly.
50. The Commissioner considers that the complainant's arguments are persuasive. Whilst he acknowledges the qualified person's argument that a disclosure of the information may be detrimental to the council's ability to negotiate claims as claimants may use the information to reassess (correctly or incorrectly) the amounts due to them, he also notes that the council said that it is for claimants to demonstrate the inequality they have faced, provide evidence to that effect and to quantify their losses as a result.
51. The complainant argues that the council's has delayed payments beyond the length of time it should have taken to resolve them. The Commissioner understands that many of these claims will be legitimate and that money will be owed to them from previous unequal pay. The courts have already judged that there was inequality in the council's previous pay systems in some respects - this has not been disputed by the council. The Commissioner understands the complainant's argument, that it would be inequitable for the council to delay payments for longer than it takes to validate the claim, quantise the loss and negotiate a payment to settle the issue.
52. The only way the public and affected employees would be able to reassure themselves that the council is not deliberately delaying settlements because it is failing to ensure that the claims are processed in a timely and efficient manner is for the council to be transparent about the figures it holds on past claims and ongoing settlements. Providing the public and claimants with access to this information would enable them to hold the council to account for any delays in settling all of the claims. The delays are already known about, however this information would give more precise details as to the number of cases

remaining and provide a degree of detail as to the money reserved by the council to respond to the ongoing claims.

53. Disclosing the information would also demonstrate to the public the depth and scope of the potential liabilities which the council faces, which would allow a greater degree of clarity over its future financial decisions as regards the other public services it provides.
54. The Commissioner has failed to be persuaded by the council that the public interest arguments in favour of withholding the information in this case outweigh the public interest in the information being disclosed.
55. Given this a balance the Commissioner considers that in this instance the public interest rests in the disclosure of the information.

Right of appeal

56. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.
58. 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

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