

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

### **Decision notice**

**Date:** 8 October 2018

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

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

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1. The complainant has requested information relating to various council job roles relating to refuse collection within the council. The council refused the information on the basis that section 36(2) of the Act applied.
2. The Commissioner's decision is that the council was not correct to withhold the information under section the exemption in section 36(2)(c).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the withheld 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

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5. On 27 July 2017 the complainant wrote to the council and requested information in the following terms:

*"In relation the post of Refuse and Recycling Collection Driver*

*Please state for each financial year from 2011/2012 to date:*

- 1. What grade this post was graded at*
- 2. The number of postholders at each spinal column point on that grade*
- 3. The basic number of contractual hours set out in contracts of employment and the number of days that these were spread over*
- 4. Whether staff were able to work on a task and finish basis*
- 5. What steps were taken to monitor the actual number of hours worked by post holders*
- 6. Whether staff were routinely offered additional shifts and if so, the basis upon which staff were paid for these shifts*
- 7. If staff were routinely offered additional shifts, the number of shifts offered and the percentage of staff that agreed to work them*

*In relation to the post of Refuse and Recycling Collection Officer*

*Please state for each financial year from 2011/2012 to date:*

- 1. What grade this post was graded at*
- 2. The number of postholders at each spinal column point on that grade*
- 3. The basic number of contractual hours set out in contracts of employment and the number of days that these were spread over*
- 4. Whether staff were able to work on a task and finish basis*
- 5. What steps were taken to monitor the actual number of hours worked by post holders*
- 6. Whether staff were routinely offered additional shifts and if so, the basis upon which staff were paid for these shifts*
- 7. If staff were routinely offered additional shifts, the number of shifts offered and the percentage of staff that agreed to work them*

*In relation to the post of Refuse and Recycling Collection Team Leader Driver*

*Please state for each financial year from 2011/2012 to date:*

- 1. What grade this post was graded at*
  - 2. The number of postholders at each spinal column point on that grade*
  - 3. The basic number of contractual hours set out in contracts of employment and the number of days that these were spread over*
  - 4. Whether staff were able to work on a task and finish basis*
  - 5. What steps were taken to monitor the actual number of hours worked by post holders*
  - 6. Whether staff were routinely offered additional shifts and if so, the basis upon which staff were paid for these shifts*
  - 7. If staff were routinely offered additional shifts, the number of shifts offered and the percentage of staff that agreed to work them"*
6. The complainant provided further information clarifying his request to the council on 16 August 2017.
  7. The council responded on 22 November 2017. It refused the request on the basis that section 36(2) of the Act applied, (prejudice to the effective conduct of public affairs).
  8. The complainant wrote again to the council asking it to carry out an internal review of its decision on 22 November 2017. The council responded to this request for review on 8 May 2018. It maintained its initial decision.

**Scope of the case**

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9. The complainant contacted the Commissioner on 24 January 2018 to complain about the way his request for information had been handled. They consider that the council should have disclosed the information to them.
10. The Commissioner considers the complaint to be that the council was not correct to apply section 36(2) to withhold the information.

**Reasons for decision**

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11. 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.
12. In determining whether the 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

13. 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).
14. 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.
15. In this case, the Council confirmed that the qualified person for the purposes of the exemption is the City Solicitor and 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?

16. The Council has provided evidence to the Commissioner that the qualified person's opinion was sought on 4 September 2017 and obtained from the qualified person on 20 November 2017. A copy of the request, the withheld information, a recommendation to withhold the information and a draft response was provided to the qualified person

for her consideration. Contrary arguments were also supplied for her consideration.

17. 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?

18. 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](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."*

19. 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.
20. The council argues that the 21 requests relate to information about grading and spinal column points relating to various waste management posts, their grading, their contractual hours and actual hours worked. It said that it believes that the main purpose of these requests is to obtain information to assist in ongoing (at that time) proceedings relating to equal pay, and that the disclosure would have been before the time which the employment tribunal or a court would ordinarily order such a disclosure of this sort of information. It said that *"So far as relevant to the proceedings the tribunal or court would no doubt order such information and documentation to be disclosed as appropriate"*.
21. The council's argument is therefore that the information relates to ongoing equal pay claims which are in the process of being resolved through legal negotiations and the potential via the employment tribunals or the courts. It said that a disclosure of the information could have made ongoing settlement discussions more difficult to conclude and could have potentially increased the value of the outstanding claims. It could also have led to more equal pay claims being brought against the Council, thus prolonging the equal pay litigation in which it is

embroiled and requiring further cost-saving measures to those which it has already implemented.

22. It argues that the complainant was seeking the information in order to particularise the claims for those he is representing. Whilst the Commissioner cannot take this latter argument into account as FOI requests are considered to be applicant blind, nevertheless, even when disregarding the identity of the requestor, it is clear that information of the sort requested could be used by relevant individual's representatives for the purposes which the council has claimed.
23. 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.
24. It also argues that disclosing the information at the time that the request was received could also have caused issues with negotiations between a union and the council at that time regarding the changes which the council was seeking to implement within the department. A long running dispute regarding these changes had occurred which had led to industrial action. This left waste uncollected and piling up on the city streets. The council argued that a disclosure of this information at that time could have misled the union into believing that the council had disclosed the information in order to put added pressure onto the striking workers to accept the changes they were seeking to implement. It said that this was because it would have disclosed information on the current business model in the department, which the union action was seeking to protect at that time.
25. It also argues that a disclosure would negatively impact upon the safe space which officers need to discuss cases and the industrial action. It also argues that some claims are 'de minimis' and the likelihood would be that further claims of this nature would be received as a result of the disclosure of this information.
26. Overall, the qualified person considered that a disclosure of the information would be likely to cause further disruption to the settlement of claims, and therefore section 36(2)(c) is engaged.
27. Having considered the arguments considered by the qualified person the Commissioner is satisfied that the opinion is reasonable. At the time of the request there was an ongoing dispute which ACAS was involved with. 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 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.

28. Having accepted that the qualified person's opinion is reasonable the Commissioner 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

29. 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 her assessment of the balance of the public interest.
30. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner will need to form her own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.
31. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and she 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

32. 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.
33. 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 the 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.

34. 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 BBC reported the council leader at the time, Sir Albert Bore, as stating that that the ruling had left the council in a "horrendous position financially" (<http://www.bbc.co.uk/news/uk-england-birmingham-20294633>)
35. 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.
36. The issues with the council's 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 Commissioner recognises that many claims are yet to be settled, or potentially even brought against the council.
37. The Commissioner recognises a strong public interest in this information being disclosed as it would aid in providing a degree of comparative information to staff and former staff which might assist them in identifying and particularising their own claims against the council.
38. There is a public interest in allowing justice to be done, and in those who have been unfairly, and potentially unlawfully treated by council pay practices in the past having the information necessary for them to be able to identify and make claims.



The public interest arguments in favour of the exemption being maintained

39. The council's arguments in favour of the exemption being maintained include:
- There would have been a significant disruption in settling equal pay cases and a weakening of the Council's bargaining position in settlement negotiations. Equal pay claimants principally rely upon comparators from the waste management department, and in particular, refuse collection officers, drivers and managers.
  - There would have been a disruption to Council officers in the timely and orderly investigation of claims.
  - Further and meritless claims may well have been made.
  - The impact of the increase in claims, both in terms of numbers of claims and their value, would have reduced monies available for funding Council services, and Council services would have been further severely disrupted or in some or many cases curtailed.
  - Disclosure of the information could have served to disrupt ACAS talks with trade unions underway that the time that the request was received. The impact of further industrial action would have had serious consequences for Birmingham residents and businesses, not least the public health implications of uncollected rubbish being left on the streets.
40. The council argues that some of these claims would be *de minimis*<sup>1</sup> claims, however, solicitors may take these upon a 'no win no fee' basis. Thus the number of claims which would be received by the council would be increased and the time and costs of resolving such claims would be likely to increase the pressure on council services further.
41. It further argued that the timing of the request would be likely to bring into light factors which may have led to disruption to the efforts of ACAS to resolve the industrial action which was ongoing at that time. The dispute with the refuse collectors was finally announced as resolved on 25 November 2017. The council argues that the information could have increased pressure on both the council and the union as a disclosure would have provided information on the council's business model

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<sup>1</sup> A legal doctrine by which a court refuses to consider trifling matters

relating to the refuse collection department and it was this which the union were seeking to protect in the dispute. It said that it was the councils intended changes to this business model which gave rise to the dispute in the first instance. It argued that *"The timing of this could have been construed by trade unions and their members as an underhand tactic by Council and could have led to further industrial action and further disruption to the Council's waste collection services"*.

### Conclusions

42. In its full response to the Commissioner the council also argued that as some or all of the information was already in the public domain there appeared to it to be minimal public interest in releasing the information again. It added that *"facilitating the provision of information that could be used to increase the amount of money paid to no-win, no-fee solicitors and their clients was held to be outweighed by the public interest of maintaining and avoiding disruption to Council services"*. The qualified person's opinion stated however that the information was not currently publicly available. The Commissioner therefore questioned this further with the council in a telephone call on 19 September 2018.
43. The council clarified that it does not consider that the information, as a whole package, would have been disclosed previously. However it considered that some parts of it might have been disclosed previously in response to FOI requests made by staff and former staff seeking information on comparators for equal pay claims. It said that whilst the council would have refused a request for all of this information had it been made previously it may have disclosed sections of it in this way. It said however that without significant work being carried out checking each request and response individually it would not be able to identify what information from this had been disclosed previously.
44. It also sought to argue that in any event, a disclosure of information to individuals in this form would not be disclosing information into the public domain as such as an individual seeking to obtain that information currently could not access information provided to individuals if they had never published it further.
45. The Commissioner notes however that FOI disclosures are considered to be to the whole world, and therefore where information has been disclosed previously it should be generally be considered to be within the public domain.
46. The Commissioner considers that some of 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 third parties actions if

the information were to be disclosed, but do not specify exactly why that would occur.

47. The Commissioner considers this to be the case because the council indicated that at least some of the requested information has been disclosed previously and was considered to be in the public domain, but it then failed to examine why a disclosure of the same information again would have the significant effects which it is claiming on its ability to provide its services when the previous disclosure of the information did not do so.
48. The council argues that if a disclosure of the information were to lead to additional claims this would lead to the council paying out further money, and further cases for it to consider, thereby prejudicing the provision of its other services. The Commissioner does not consider that this argument is particularly strong. Where claims are brought (and are successful) it is because those claims had merit. Where this occurs it is because the claimants are victims of the unlawful pay arrangements which the courts found that the council had operated for many years. Individuals will have brought those claims to establish their statutory right to fair and equal pay, and to be paid money which they were legally entitled to. If money is owed to individuals due to the council's previous unfair pay practices there is a strong public interest in those claims being satisfied and the individuals receiving money which they should rightly and lawfully have been paid previously.
49. As regards the council's argument regarding the potential for disclosure to increase the number of de minimis claims it receives, it is already well publicised that equality claims are ongoing. 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 to any great extent. She considers that if it does do so it is likely to be to a limited degree only.
50. Whilst further, de minimis claims may be made as a result of the disclosure of information which might raise the prospect that individuals have previously been paid unlawfully, in successful claims this would still be money which the council rightly owes to the individuals. Where the claims are unsuccessful, there would be clarification for the individuals concerned that their own pay was lawful. 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 unlawful pay practices then the individual has a right to make a claim and the council is legally obliged to deal with that. There is a set process within equal pay legislation which ensures that those claiming must provide evidence that their claims have substance. This negates the opportunity for false claims to be made to a

large degree. The administrative burden dealing with such claims is not a matter which the Commissioner considers to be wholly relevant as to the question of whether this information should be disclosed or not. Where equal pay claims are being made, regardless of the worth of those claims, it is for the council and the courts to decide whether the claims are de minimis or claims of substance and value.

51. There is a public interest in allowing individuals who may have legal claims being able to clarify their position and the disclosure of this information may inform and help to establish this, potentially therefore leading to some complaints not being made in the first instance where the claims they may believe they have are proved to be incorrect.
52. The Commissioner recognises that there may be legal avenues and protocols for the disclosure of such information during the tribunal and court process. The council felt that providing the information ahead of this judicial timings and management of this would prejudice its position within the proceedings in addition to prejudicing its position in settlement discussions.
53. There are however set processes within the equality laws which allow individuals to request information which would aid them in identifying whether discrimination has taken place against them prior to taking action against an employer.
54. The Commissioner recognises that whilst the right to submit discrimination questionnaires under section 138 of the Equalities Act 2010 has now been repealed, by virtue of section 66(2) of The Enterprise and Regulatory Reform Act 2013 they may still be used "*for the purposes of proceedings that relate to a contravention occurring before this section comes into force*".
55. Additionally ACAS have produced guidance on requesting information relating to potential discrimination claims from employers, available at <http://www.acas.org.uk/media/pdf/m/p/Asking-and-responding-to-questions-of-discrimination-in-the-workplace.pdf>. Whilst this guidance is not based on statutory based rights, an employer's failure to respond to the questions submitted following this guidance can be taken into account by the courts and Tribunals when reaching a decision as to whether discrimination has taken place.
56. The council also said that it considered the request to be a 'fishing expedition'. It argues that although there are set ways of obtaining information relevant to an individual's claim during litigation through the courts and tribunals system, it considers that this request was seeking to obtain information with which to be able to potentially identify further complainants or to better identify amounts which might be owed to their

clients. It is not however unlawful for companies to do this and the information which the complainant gains may help to identify claimants who had not recognised that they were potentially paid unfairly in the past.

57. The fact that legal firms may make requests for information in order to help them represent clients as a group may in itself be in the public interest. Companies representing larger numbers of clients will have the legal wherewithal to identify where unfair practices have taken place, and where they haven't, and the fact that they may represent a number of clients at once may in fact be beneficial to the resolution of claims for the claimants and council. The alternative is that many individuals would seek to request the same or similar information without being sure of their legal rights or the legal processes supporting them, thereby potentially increasing the overall administrative pressure on the council to respond to these individually. Alternatively these individuals may end up failing to make claims for money which they could rightly have claimed for.
58. The Commissioner has not taken into account the council arguments in respect of the specific applicant for the information. Other than in specific circumstances, requests should be treated as applicant blind and therefore the council's arguments are misplaced.
59. Withholding information such as this which might then lead individuals to identify that they have money owed to them because of unfair pay practices in the past is itself potentially against the public interest. This is the case even when recognising that the council also has a legal right to defend claims made against it, and acknowledging its argument that it is required to try to minimise the overall effect which the totality of such claims might have on its ability to provide public services as a whole.
60. Whilst the Commissioner notes the council's argument that it is under a duty to protect public finances, and that a rash of new claims made against it at once may cause it further financial difficulties over this, this is not a matter for the Commissioner to place any great reliance upon. Parliament and the courts have previously set the laws on equality, and where unfair pay practices have been identified the individuals are legally entitled to recompense. Whilst the council may argue that handling the claims and in due cases, recompensing these individuals, will affect its ability to provide ongoing public services that is a matter for it, for tax payers, and for the council to address with central government if this proves necessary.
61. The Commissioner therefore considers that the council's argument is weakened in this respect. If there are potential claimants these will be

because of unlawful practices by the council in the past. There is public interest in allowing individuals to have access to information which might help them determine whether that is the case. Additionally the potential to identify that current clients may in fact be owed further money than they have previously identified is in the public interest given the nature of the claims in question.

62. The Commissioner notes the council's argument that the timing of the request was such that the union may have wrongly considered that any disclosure was an attempt to undermine its position during its negotiations over the intended changes to the workforce's contracts. She considers that this was the strongest argument which the council put forward in favour of the exemption being maintained. The Commissioner recognises the contentious nature of the relationship between the parties and given the circumstances, she accepts that the parties may have been at virtual loggerheads when the request was received. She therefore recognises that there was a strong public interest in the council resolving the issues surrounding the industrial action as quickly as possible given the circumstances arising from the dispute.
63. Whilst she recognises that the situation was extremely sensitive at the time of the request it was open to the council to discuss the request with the union beforehand and clarify why the information needed to be disclosed. From the union's point of view, a disclosure of the information may also aid staff to formulate and particularise claims and so it would also have been beneficial to its members. Had the union provided strong reservations that the information should not be disclosed at that time this would have provided it with a much stronger argument that the circumstances surrounding the request did not merit a disclosure of the information. The Commissioner does however recognise that the situation was delicate and that careful handling of the situation would have been required.
64. The council's argument that the industrial action and the disruption which might be created by the further disclosure of the requested information is additionally weakened by its own statement that at least some of the withheld information has previously been disclosed. It could not clarify what information was previously disclosed, and in its response it also suggested that all of the information may have been disclosed previously. It has not clarified why these previous disclosures did not lead to the effects it is now predicting, nor why the disclosure at this particular time might have different effects to that which occurred previously.

65. Having considered the above arguments the Commissioner has decided that the public interest rests in the disclosure of the requested information.

## Right of appeal

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66. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

67. 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.
68. 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**  
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