

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

### **Decision notice**

**Date:** 25 March 2019

**Public Authority:** Birmingham City Council

**Address:** Council House  
Victoria Square  
Birmingham  
B1 1BB

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

---

1. The complainant has requested various information about job evaluations (request 1), and then subsequently, the internal communications relating to the handling of request 1 (request 2). In respect of request 1, the Council refused to comply under section 12(1), and in respect of request 2, the Council disclosed some held information but withheld the remainder under section 42(1).
2. The Commissioner's decision is that, in respect of request 1, the Council has failed to demonstrate that section 12(1) is engaged, and has also breached section 17(1). In respect of request 2, the Council is entitled to withhold specific information under section 42(1), but has breached section 10(1) and section 17(1).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to request 1 that does not rely upon section 12(1).
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

---

### Request 1 (Council reference 1269039)

5. On 21 May 2018, the complainant wrote to the Council and requested information in the following terms:
1. *Please advise of the Job Evaluation scores for the specific posts below at the Library of Birmingham with a breakdown of points scored for each criterion including the date of the evaluation:-*
  2. *Site Services Manager GR5 (Library of Birmingham deleted post 2015)*
  3. *Building Services Manager (Central Library 2007-2012)*
  4. *Venues Manager GR5 (Library of Birmingham - deleted post 2015)*
  5. *Please advise the Job title of the Manager signing off and submitting the Job Evaluation Forms relating to the above and their grade.*
  6. *Please supply a copy of the Job Evaluation Forms for each of the above posts.*
  7. *Please advise the date of those evaluations.*
  8. *Did those evaluations have any input from a Job Holder?*
  9. *If not why not?*
  10. *Were the above conducted as 'desktop exercises' only?*
  11. *What is the employee appeals process for Job Evaluations?*
  12. *Has the 'appeals process' changed since 2007?*
  13. *If so how many times has the process changed and what were the reasons prompting that change?*
  14. *Please supply copies of those appeals process procedures.*
  15. *Between what Salary Scale Point ranges was the Building Operations Senior Manager paid between 2007 and when the post was deleted in 2015?*
  16. *Please provide a table of the Scale Point Range and Salary*
  17. *What do those scale points equate to in terms of actual Grade if not indicated in the table above?*
  18. *Please supply a structure chart(s) for the old Central Library ' Facilities/Building Operations Department for 2007 to 2012*
  19. *How are managers trained in the completion if of Job Evaluation forms?*
  20. *Have all managers submitting Equal Pay JEQs been trained in their completion?*
  21. *How many people are involved in the evaluation of a JEQ form once submitted?*
  22. *What are the roles of the people involved in that evaluation and how do they differ?*

23. *Are Job Evaluations subject to a moderation process after submission?*
  24. *Please give details of the moderation process?*
  25. *What quality checks by the Job Evaluation Person/Panel are made to ensure JEQ forms submitted by Managers are accurate?*
  26. *What training do JEQ assessors received and who from?*
  27. *Have all JEQ assessors received this training?*
  28. *Are Benchmark Jobs used in the Council as part of the JEQ scheme?*
  29. *What are the benchmark GR6 jobs used in JEQ assessment which other potential GR6 posts are assessed against?*
  30. *What is the process for assessing new Jobs against benchmark posts in general within the Council?*
  31. *What checks if any are made by the JEQ assessors to ensure Job Descriptions submitted by managers are reliable?*
  32. *When were the Council Guidance notes supporting JEQ evaluations last updated?*
  33. *What types of updates have been made to the notes since their inception?*
  34. *How many pay audits have been undertaken across the Council to ensure the continued validity of the scheme since its introduction?*
6. The Council responded on 19 June 2018. It stated that it would not be able to provide a response within 20 working days, on the basis that it was still collating the requested information.
  7. The Council responded further on 9 July 2018 and 18 July 2018. It stated that it was extending the time for compliance under the provision of section 10(3), on the basis that it needed to consider the public interest test for the exemption provided by section 36.
  8. The Council provided a substantive response on 10 August 2018. It stated that it was refusing to comply with the request under section 12(1).
  9. On 10 August 2018, the complainant asked the Council to undertake an internal review.
  10. The Council provided the internal review outcome on 17 October 2018. It maintained the application of section 12(1).

Request 2 (Council reference 2123495)

11. On 15 August 2018, the complainant wrote to the Council and requested information in the following terms:

*Please supply all recorded information regarding Freedom of Information request 1269039 from its original receipt to 14th August including that relating to decision making and handling of that request. To include email communications, written notes, policy documents referred to database entries and similar.*

12. The Council responded on 18 September 2018. It stated that it was extending the time for compliance under the provision of section 10(3), on the basis that it needed to consider the public interest test for the exemption provided by section 43(2).
13. The Council provided a substantive response on 2 October 2018. It disclosed held information.
14. On 7 October 2018, the complainant asked the Council to undertake an internal review, on the basis that further recorded information was held.
15. The Council provided the internal review outcome on 6 November 2018. In this the Council advised that further information had been identified and that this was being reviewed to determine whether it could be disclosed. The Council provided a further internal review outcome on 3 December 2018. In this it disclosed further held information, but withheld some under section 42(1).

## **Scope of the case**

---

16. The complainant contacted the Commissioner to complain about the way his requests for information had been handled.
17. The Commissioner considers the scope of this case to be the determination of whether the Council is entitled to apply section 12(1) in respect of request 1, and entitled to withhold information under section 42(1) in respect of request 2. The Commissioner will also consider the Council's procedural handling of the requests.

## **Reasons for decision**

---

### **Section 12(1) – Cost of compliance**

18. Section 12(1) of the FOIA states:

*Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*

19. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004<sup>1</sup> ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
20. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
  - determining whether the information is held;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.

Is section 12(1) engaged?

*The Council's position*

21. The request seeks information relating to specific roles over an 11 year period. To respond to the request, officers would need to refer to a report that lists all Job Evaluations (of which there are approximately 8000). This task would take approximately 20 minutes per evaluation. Once a match had been found, it would then need to be queried with a different spreadsheet to view the relevant Job Evaluation codes to enable retrieval of information stored on the Job Evaluation system. This would take approximately 20 minutes per evaluation. In addition to this, the Job Evaluation team would need to manually review its old electronic files, and potentially seek input from the recruitment team, who may hold job description and person specification information. This would take approximately 20 minutes per evaluation. In addition, if no electronic information is found, retrieval of the hardcopy information would be required from the Council's records management facility (which would incur additional storage retrieval costs). The structure charts would also need to be checked in this way, and if not found within the Job Evaluation team's historical storage, and the Recruitment team's

---

<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

storage, a further manual search with the HR Operations and Business Partner teams would be necessary; this would in itself take 14 hours as a minimum.

22. Once the information has been identified and retrieved, the information required would need to be interrogated for the points requested; the job title of the manager responsible for the Job Evaluation Questionnaire, with a further cross reference of each point to the HR/Payroll database to obtain grades. This would take approximately 1 hour minimum for each evaluation.
23. To check the SCP (spinal column point) ranges between posts in the time period, would require approximately 30 minutes. To obtain historical pay scales would need approximately 30 minutes. To review all files since that time and identify pay audits would take approximately 3.5 hours.

#### The Commissioner's view

24. The Commissioner has reviewed the Council's arguments under section 12. It is pertinent for the Commissioner to note that the Council has chosen to submit the contents of its original internal review outcome, rather than take the opportunity to provide a full account of its position and address the specific questions that the Commissioner has asked.
25. Notwithstanding this, the Commissioner has carefully reviewed the content of the Council's response of 10 August 2018, and the internal review outcome of 17 October 2018.
26. The Commissioner understands that the estimate provided by the Council is 27 hours (as stated by the Council in its response).
27. An apparent explanation of how this total estimate was reached was provided in the internal review response, which has been closely paraphrased in paragraphs 22-24. The Commissioner has considered this explanation, and understands that the request relates to three specific Job Titles (cited in parts 2-4 of the request), and seeks the relevant Job Evaluations and a range of information connected to these.
28. The Council has provided a variety of figures about how long it would take to retrieve this information from various teams and resources. However, the Council has not confirmed whether the various figures it has provided are based on a sampling exercise by an officer, nor has it provided any clear technical evidence (or an explanation of its systems) to support the figures it has given. Consequently, the Commissioner has little evidence to understand the basis for the figures that the Council has stated. For example, the Commissioner cannot comprehend how the

retrieval of a single identifier from a list would take 20 minutes, or how the location of 'structure charts' would potentially take 14 hours

29. In the absence of any clear explanation, there are no means by which the Commissioner can make an informed decision about the various figures stated by the Council, some of which do not immediately appear (to an independent person) to be realistic. The Commissioner notes that, if the Council has not taken appropriate actions to confirm whether the appropriate limit would be exceeded, it is not reasonable for the Council to simply assert that certain actions would take specific amounts of time.
30. As the Council has failed to provide sufficient evidence to demonstrate that compliance would the request would exceed the appropriate limit, the Commissioner does not find that section 12(1) is engaged.

### **Section 42(1) – Legal professional privilege**

31. Section 42(1) of the FOIA states that:

*Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

32. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the First-tier Tribunal ("the Tribunal") in the case of *Bellamy v The Information Commissioner and the DTA* (EA/2005/0023) as:

*...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.*

33. There are two types of privilege; 'litigation privilege' and 'legal advice privilege'. Litigation privilege will be available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. Communications made between

adviser and client in a relevant legal context will therefore attract privilege.

34. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
35. In this case the Council has confirmed that it considers the withheld information to be subject to legal advice privilege.

#### Legal advice privilege

36. The Commissioner has reviewed the withheld information, which comprises email communications between a Council officer and a solicitor internal to the Council.
37. The Commissioner understands that these emails relate to the Council's consideration of a previous information request that the complainant had submitted to the Council.
38. Having reviewed the information, the Commissioner is satisfied that it represents legal advice. The Commissioner is further satisfied that there is no available evidence to suggest that the information has lost its confidentiality by entering the public domain. Consequently, the Commissioner accepts that the information attracts legal professional privilege on the grounds of legal advice privilege, and that on this basis section 42(1) is engaged.

#### The public interest test

39. As a qualified exemption, section 42(1) is subject to a public interest test. The information must therefore be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exemption.

#### *Public interest arguments in favour of disclosure*

40. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.
41. The complainant has indicated that he disagrees with the Council's need to have sought legal advice in relation to his previous request, and contests that this was done in order to unnecessarily prolong the handling of the request.



*Public interest arguments against disclosure*

42. The Council has confirmed that the legal advice was sought in relation to the complainant's previous request, and specifically about the procedural requirements of the FOIA and the availability of specific exemptions. As such, the legal advice related to a live and ongoing matter at the time that the request was made.
43. The Council further argues that there is an inherently strong public interest in maintaining the concept of legal professional privilege, and in preserving the confidentiality of client-lawyer communications.

*Balance of the public interest test*

44. The Commissioner has considered the arguments put forward by the complainant, in addition to the stated position of the Council and the prior findings of the Commissioner and the Tribunal in relation to legal professional privilege.
45. The Commissioner appreciates that in general there is a public interest in public authorities being as accountable as possible in relation to their actions and decisions.
46. However, there is also a strong opposing public interest in maintaining the Council's right to communicate with its legal advisors in confidence. To outweigh that public interest, the Commissioner would expect there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
47. In the circumstances of this case the Commissioner understands that the legal advice has been sought by the Council whilst complying with its statutory duties under the FOIA, and it is noted by the Commissioner that in handling the previous request, the Council applied the specific provisions of section 10(3), and further, indicated that it may need to apply the exemption provided by section 36.
48. Whilst it is recognised that the complainant disputes the Council's need to have sought the legal advice in relation to his request, the Commissioner is aware that public authorities frequently need to consult their legal advisors in respect of their statutory duties, and in light of the scope and apparent complexity of request 1, the Commissioner does not find it particularly unusual that the Council took this action, and does not consider that this provides a strong and overriding public interest in

the disclosure of the information. As such, the Commissioner is satisfied that the exemption has been correctly maintained.

### **Section 17 – Refusal of request**

49. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
50. In respect of request 1 and request 2, the Council did not seek to rely upon section 12(1) and section 42(2) (respectively) until outside of 20 working days. As such, the Council breached section 17(1).

### **Section 10(1) – Time for compliance with request**

51. Section 10(1) specifies that, subject to the terms of the FOIA, the requested information must be communicated no later than 20 working days after the date on which the request was received.
52. In respect of request 2, the Council identified and disclosed held information outside the time compliance. As such, the Council breached section 10(1).

### **Other matters**

---

53. The Commissioner considers that the Council has demonstrated a confused handling of the requests; and has seemingly applied section 10(3) to both requests in respect of exemptions that it has not subsequently sought to rely upon (although this position does not appear to have been relayed to the complainant in any subsequent communications).
54. The Commissioner reminds the Council that section 12 (and, depending on context, section 14(1)) provide for a public authority to refuse a request where it would exceed the appropriate limit (or, otherwise represent a significant burden). However, the Commissioner expects a public authority to provide cogent evidence in support of its position; in cases where a public authority fails to do this, it is not appropriate for the Commissioner to apply arguments on the public authority's behalf.

## Right of appeal

---

55. 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)

56. 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.
57. 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**