

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2019

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant asked Birmingham City Council for information relating to a payment it made to the GMB Union. The Council provided the information held in respect of parts 1 and 4 of his request and provided a not held response in respect of part 3. The Council initially refused to provide information in respect of part 2 of the complainant's request in reliance on section 40(2) of the FOIA. Following the Commissioner's intervention, the Council subsequently provided the information relevant to part 2 of the request.
2. The Commissioner's decision is that Birmingham City Council has complied with section 1 of the FOIA by providing the complainant with information it holds in respect of part 2 of the complainant's request. The Commissioner has also decided that the Council breached section 10 of the FOIA by failing to provide the complainant with the information he asked for in respect of all parts of his request and particularly in respect of part 2.
3. No further action is required in this matter.

Request and response

4. On 8 January 2019, the complainant submitted a request for information Birmingham City Council. The complainant advised the Council that his request relates to, "what has now become known as the "Secret Payments to the GMB" for a failure to consult". The information which the complainant seeks is:

1. "Was the decision to make this payment made by officers, councillors or a committee of councillors?"
2. If officers made the decision, which officer(s) were responsible?
3. If councillor(s) made the decision please advise who they were, and if they were part of any formally constituted committee.
4. Please advise on the total amount payed out as a result of these "secret payments".
5. Please advise on where in the council's accounts these payments will be shown."
6. The Council acknowledged its receipt of the complainant's request on 6 February 2019, advising him that the Council has been unable to meet the 20 day deadline for responding to his request. The Council said, "This is due to the information requested taking longer to collate than was initially expected".
7. On 14 February 2019, the Council sent the complainant its response to his request. The Council informed the complainant that, in answer to his question 1, "a combination of senior management as well as officers from the service, finance, HR and legal made the decision".
8. The Council refused to name the officers who made the decision to make a payment to the GMB union. The Council advised the complainant that to do so would contravene the first data protection principle and therefore the information necessary to answer the complainant's question 2 was withheld in reliance on section 40(2) of the FOIA.
9. The Council's response to the complainant's question 3 was "N/A" and in answer to his question 4, the Council said, "There were no secret payments made. £68,465 in total was paid". The Council's response to the complainant's question 5 was to inform him that the payments will be reflected in the Waste Management budget.
10. On 14 February 2019, the complainant wrote to the Council and asked it to review its handling of his request. The complainant's email focussed to two matters: The failure of the Council to meet the 20 working day deadline for responding to his request; and the Council's reliance on section 40(2) of the FOIA to withhold the names of the officers who made the decision to make the payments to the GMB union. The complainant made the following assertion with regard to the Council's refusal to disclose the officers' names:

"Whilst I accept that some more junior officers ought to enjoy the protection of anonymity, it is reasonable, and within the public interest

to know the names of the senior officers involved in the decision as they are senior public facing public servants who are used to having their names attached to Council decisions and documents. For instance Chief Officers and other senior officers have their names on Cabinet and other Committee reports. Presumably these decisions were made under some form of delegated authority so there will have been named officers responsible for the decision. Accordingly, I believe it is in the public interest and not in conflict with data protection principles for the Council to provide the names of any Chief Officer, Assistant Chief Officer or other senior officer who was part of this decision making."

11. The Council wrote to the complainant on 7 March 2019, having completed its review. The Council determined that it had appropriately relied on section 40(2) of the FOIA to withhold the names of the officers who made the decision regarding the payments to the GMB union. The Council said:

"...the Council considers that disclosure of this information at this time, would not be fair or lawful, as the individual/s concerned would not expect or have consented to their personal information to be disclosed in the circumstances as this matter is still ongoing and could make them a focus in this dispute".

Scope of the case

12. The complainant contacted the Commissioner on 1 April 2019 to complain about the way his request for information had been handled.
13. The complainant asserted that the payments made to the GMB union are a huge issue of public concern as they have created a major industrial dispute that has had a major negative impact for the people of Birmingham. The complainant argued that withhold these names is unacceptable.
14. The complainant accepted that more junior officers ought to enjoy the protection of anonymity but that it is reasonable, and within the public interest, to know the names of the senior officers involved in the decision.
15. Making the presumption that the decisions were made under some form of delegated authority, the complainant asserts that there will have been named officers responsible for the decision.
16. The Council's response to the complainant's question 3 made clear that no politicians were involved in agreeing these payments. Therefore, according to the Council's constitution, these payments must have been agreed by an officer under "delegated authority". To substantiate his

assertion, the complainant referred the Commissioner to section 13 of the Council's constitution – at page 114, where the names post holders who have delegated authority are listed. The complainant therefore argued that it therefore follows that payments can only lawfully and constitutionally have been made under delegated authority then a named post holder must have been responsible for agreeing it.

17. The complainant says, "Given the controversy around this matter and the massive public disruption of the refuse workers' industrial action, it is in the public interest for the information to be known. It is not unreasonable for the names of Chief Officers and Assistant Chief Officers to be made public as they regularly appear in public Cabinet reports". The complainant therefore argues that the alternative to the Council disclosing this information is for the Council to acknowledge that the payments were not lawfully and constitutionally made.
18. In response to the Council's comments that the officers had not consented to their personal information to be disclosed as this matter is still ongoing and could make them a focus in this dispute, the complainant informed the Commissioner that the dispute is now settled and this reason would now not be a relevant consideration.
19. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the Council is entitled to withhold information in reliance on section 40(2) of the FOIA. Additionally, the Commissioner advised the complainant she would also determine whether the Council has breached section 10 of the FOIA by failing to respond to his request within 20 working days.

Reasons for decision

20. Section 1 of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

21. Section 10 of the FOIA states that:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

21. The Council revisited the complainant's request and reviewed its position in respect of its response to part 2 of the complainant's request,
22. Subsequently, on 4 October 2018, the Council wrote to the complainant and provided him with the following information in answer to his request to be told which officer or officers were responsible for the Council's payment to GMB:

"As a collective of decision makers and as per our delegations, the roles that Chief Executive, Chief Finance Officer (Section 151 Officer), Corporate Director of Place, Director of HR and City Solicitor."
23. Before making its disclosure, the Commissioner spoke with the Council to discuss whether the information (above) met the terms of part 2 of the complainant's request. The Council assured the Commissioner that the information it intended to disclose reflected the recorded information it holds and, on the grounds that the complainant had not initially asked for the names of the officers, the Council considered that it did meet the terms of part 2 of the complainant's request. The Council pointed out that the names of the persons holding the positions listed in its intended response are available on its website.
24. On 7 October 2019, the Commissioner wrote to the complainant to advise him that she was closing his complaint case. In the Commissioner's opinion, the Council's disclosure of 4 October appeared to satisfy the terms of his question 2 and therefore the Council had satisfied section 1 of the FOIA. The Commissioner also advised the complainant that she would record a breach of section 10 of the FOIA against Birmingham City Council on the basis that the Council's disclosure was well in excess of the twenty working day compliance period required by section 10.
25. The complainant responded to the Commissioner's email later that day. Whilst not disputing that the Council had now complied with part 2 of his request, the complainant requested a decision notice, and asking the Commissioner to provide a remedy for each of the following elements of his complaint:
 - ...for the Commissioner to acknowledge the Council did not meet the provisions of the FOI act by answering in the 20 day time limit;
 - ...for the Commissioner to acknowledge the Council's email of 6 February was incorrect and was not in accordance with the FOI act;
 - ...for the Commissioner to confirm with the Council that it has changed its procedures so that no such wrong information as per the email of 6 February is sent out again; and,

- ...for the Commissioner to ask the Council to apologise to UNISON for not meeting its obligations under the FOI act.

The Commissioner's decision

26. The Commissioner has decided that Birmingham City Council has complied with section 1 of the FOIA. The Commissioner acknowledges that the Council has provided the complainant with a response to each part of his request which meets the terms specified by the complainant.
27. The Council failed to respond to all of the parts of the complainant's request within the twenty working day compliance period required by section 10 of the FOIA. This is especially the case of the Council's disclosure of information to the complainant on 4 October 2019 in respect of part two of his request. The Commissioner therefore finds that the Council breached section 10 of the Act.
28. The Council's email to the complainant of 6 February 2019, is not compliant with the FOIA. There is no provision which permits a public authority to extend the compliance period because the information which has been requested is "...taking longer to collate than was initially expected".
29. The Council's excuse does not equate to the justified extension of the compliance period allowed by section 1(3)(a) - where a public authority reasonably requires further information from a requester in order to identify and locate information; by section 10(3) - which allows the compliance period to be extended to consider the public interest; or by section 9 - where an authority is waiting for a fee to be paid following a notice served under that section.

Other matters

30. The Commissioner notes the remedies which the complainant has asked her to consider. The Commissioner considers that her decision (above) satisfies the first two of the complainant's 'remedies'.
31. The Commissioner acknowledges that the Council's procedures for dealing with information requests is a matter for itself. That said, the Commissioner expects the Council to be mindful of this notice and to consider her decision in terms of its on-going compliance with the Act.
32. The Commissioner has a statutory duty to promote good practice in respect compliance with the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.

33. The Commissioner's duty extends to ensuring public authorities follow and maintain the standards of good practice described in the Code of Practice¹ issued under section 45 of the FOIA. In addition to the Code of Practice, the Commissioner publishes guidance for public authorities which also details best practice.
34. Where a public authority fails to meet best practice in these matters, the Commissioner can issue practice recommendations. The Commissioner may also refer to non-compliance with the Code of Practice in her decision and enforcement notices.
35. It is not open to the Commissioner to order a public authority to apologise to a requester for a breach of the FOIA

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

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

37. 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.

38. 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
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SK9 5AF