

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2012

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DQ

Decision

1. The complainant has requested a range of information relating to commercial training provided by Hertfordshire Fire and Rescue Service. Hertfordshire County Council (the "council") provided some of the requested information, confirmed some information was not held and withheld some information because it considered that disclosure would be likely to result in prejudice to its commercial interests.
2. The Commissioner's decision is that the council has correctly confirmed that information relating to gross profits derived from commercial training is not held. In relation to its decision to withhold details of customers in receipt of training, the Commissioner has decided that the council has wrongly applied the commercial interests exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - 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 FOIA and may be dealt with as a contempt of court.

Background

5. Under the Fire and Rescue Services Act 2004, the council is the Fire and Rescue Authority for Hertfordshire. Hertfordshire Fire and Rescue Service (HFRS) sits within the Community Protection Department of the council.
6. The relevant section of the council website explains that commercial training was "...established in response to the growing demand for information regarding workplace fire safety and the management of workplace health and safety."¹ Training is designed to facilitate organisations' compliance with the requirements of The Regulatory Reform (Fire Safety) Order 2005.
7. According to the council's website, commercial training has been operating for 10 years and some 800 businesses have been in receipt of this service.

Request and response

8. On 13 January 2012, the complainant wrote to the council and requested information in the following terms:

"1. What revenue has been derived from the provision of Commercial Training and associated services by the Hertfordshire Fire and Rescue Service in 2011, 2010 and 2009?"

2. What gross profit has been derived from the provision of Commercial Training and associated services by the Hertfordshire Fire and Rescue Service in 2011, 2010 and 2009?"

3. How does Hertfordshire Fire and Rescue Service calculate its cost of providing Commercial Training and associated services and has this procedure varied in 2011, 2010 or 2009?"

4. What has been Hertfordshire Fire and Rescue Service's cost of the provision of Commercial Training in 2011, 2010 and 2009? How many people on average has Hertfordshire Fire and Rescue Service employed in the provision of Commercial Training in 2011, 2010 and 2009?"

¹ See, for example:

<http://www.hertsdirect.org/services/commsafe/commprotect/fire/commercial/>

5. Please provide a list of customers that have received Commercial Training from Hertfordshire Fire and Rescue Service in 2011, 2010 and 2009?"

9. The council responded on 10 February 2012 and provided the information specified in requests 1, 3 and 4. In relation to 2, the council confirmed that the information was not held. In relation to 5, the council confirmed that the information was being withheld under the commercial interests exemption (section 43(2) of the FOIA).
10. Following an internal review the council wrote to the complainant on 14 March 2012. In relation to request 2, the council maintained its position that the information was not held. In relation to 5, the council upheld its decision to withhold the information but, at the prompting of the complainant, disclosed details of training courses provided, broken down by industry sector.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The Commissioner has agreed with the complainant that his investigation will be confined to a consideration of the council's handling of requests 2 and 5.

Reasons for decision

Section 1 - is the information held?

"2. What gross profit has been derived from the provision of Commercial Training and associated services by the Hertfordshire Fire and Rescue Service in 2011, 2010 and 2009"

13. The complainant has alleged that the council has wrongly confirmed that the requested information is not held.
14. The Commissioner considers that the normal standard of proof to apply in determining whether a public authority holds any requested information is the civil standard of the balance of probabilities.
15. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the

information is not held. This may include arguments that there is no business reason to hold or retain the information. The Commissioner will also consider any arguments or evidence that information is held put forward by the complaint. He will also consider any reason why it is inherently likely or unlikely that information is not held.

16. In its initial response to the complainant, the council explained that specific costs relating to the provision of each individual training course are not calculated so it was unable to determine a profit figure.
17. The Commissioner asked the council whether there was any accounting or audit purpose for recording details of profits. The Commissioner also asked the council to confirm whether such details were required for its annual report or other statutory purposes.
18. The council confirmed that it does not record a gross profit figure in recording income from its commercial training courses. It confirmed that there is no requirement for it to do so and no business purpose. In explaining why this is so, the council clarified that individual course costs are calculated to ensure that no course will be run unless it covers its own costs. This calculation is based on factors such as instructor numbers, venue (internal or external) and consumables.
19. The Commissioner understands that the practical focus when devising courses and monitoring expenditure is ensuring that the council "covers its costs". Having considered the available evidence, including the council's confirmation that there is no business purpose to hold the information, the Commissioner is satisfied that the requested information is not at any time recorded by the council and was not held at the time of the request.

Section 43(2) – Prejudice to Commercial Interests

- "5. Please provide a list of customers that have received Commercial Training from Hertfordshire Fire and Rescue Service in 2011, 2010 and 2009."*
20. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption and is, therefore, subject to the public interest test.
 21. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."*²

22. In this instance the requested information is a list of customers to which the council has, on payment of a fee, provided training. The council has confirmed that a number of other commercial organisations and fire services offer training of this type.
23. In determining whether the provision of training constitutes a commercial activity and whether the information falls within the scope of the exemption, the Commissioner has considered whether training constitutes a core function of the council and referred to previous Tribunal decisions.
24. He notes that, whilst promoting fire safety is linked to the core purpose of the fire service, the council has not argued or provided evidence that the educational aspect is a core function.
25. Although commercial interests have been accepted by the Tribunal in relation to not for profit organisations, the Commissioner considers that there are substantial differences in this case.
26. In *University of Central Lancashire v ICO (EA/2009/0034)* – "UCLAN", the Tribunal recognised that the University depended upon student fees for survival and ploughed any money it made back into developing the courses and assets that attracted students³. This was all linked to its core purpose.
27. The Commissioner considers that, according to the scenario provided by the council, training doesn't seem to be a core function. Whilst it may be that the council needs the revenue from courses to ensure that it can continue to provide the service, if this ceased it could simply stop offering training and it would appear that its 'commercial competitors' would continue to meet the demand.

2

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

3

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i357/UCLAN_v_IC_&Colquhoun_\(EA-2009-0034\)_Decision_08-12-09_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i357/UCLAN_v_IC_&Colquhoun_(EA-2009-0034)_Decision_08-12-09_(w).pdf)

28. Moreover, though the training function may depend on fees for survival the fire service does not depend on the training as an income stream to contribute towards its core function. The fire service as a whole is publicly funded; this is in contrast to the situation described in UCLAN which does depend on student fees (domestic and international). In fact the council seeks to make no excess (even for reinvestment into course materials). Its confirmation, discussed in this notice in the section 1 analysis above, that there is no business need to retain information relating to profits reinforces a view that the withheld information does not relate to what is commonly recognised as a commercial activity.
29. The Commissioner accepts that the council provides training within a commercially competitive environment. He also recognises that the category of withheld information may, in a different context, relate to an organisation's commercial activity. However, on the basis that the training in question operates on a costs recovery basis, that the provision of training is not a core function of the council and that it is not dependent upon training revenue for its continued existence, he has concluded that the interests identified are financial rather than commercial and therefore not inherent within the section 43 exemption.
30. As he has found that the withheld information does not fall within the scope of the exemption the Commissioner has concluded that the exemption is not engaged. He, therefore, requires the council to disclose the information to the complainant.

Right of appeal

31. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. 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

Jo Pedder
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF