

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2017

Public Authority: Lancashire Fire and Rescue Service

Address: Garstang Road
Fullwood
Preston
PR2 3LH

Decision (including any steps ordered)

1. The complainant has requested information about whether Lancashire Fire and Rescue Service ("LFRS") had made changes to pay and conditions in the wake of a court judgment against a different fire and rescue service. LFRS confirmed that it held information falling within scope of the request, but that it was exempt from disclosure under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that LFRS did not apply the section 43(2) exemption correctly.
3. The Commissioner requires LFRS to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant, either disclosing the information previously withheld under section 43(2) or providing a further refusal notice which is compliant with section 17 of the FOIA and does not rely on section 43(2).
4. LFRS 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

6. On 18 March 2016, the complainant wrote to LFRS and requested information in the following terms:

"I would like some information under the freedom of information Act 2000.

'Norman v Cheshire FRS' which surrounded the issue of pensionable pay and the interpretation of Rule G1 of the 1992 Firefighters' Pension Scheme. This case was heard on 18 & 19 October 2011 by Mr Justice Andrew SMITH.

Please can you tell me if you 'LFRS' have complied with the above court ruling relating to additional payments paid to Firefighters e.g.

Day Crewing, Training Allowances, additional payment etc now being classed as pensionable pay?

1. If yes, when did you comply with this ruling?

2. If no, why haven't you complied with this ruling?"

7. LFRS responded on 20 April 2016, and confirmed that it held information which fell within the scope of the request, but said it was exempt from disclosure by virtue of section 43(2) of the FOIA.
8. LFRS stated that the judgment cited by the complainant "...has no direct application or binding legal authority on our current arrangements." It referred the complainant to the decision by the Pension Ombudsman in *Smith v South Wales Fire and Rescue Service*, which found that the ruling in *Norman v Cheshire Fire and Rescue Service* did not apply to South West Fire and Rescue Service because the particular circumstances specific to *Norman v Cheshire Fire and Rescue Service* were not shared by South Wales Fire and Rescue Service.
9. The complainant requested an internal review of LFRS's decision on 29 April 2016, but, despite the Commissioner's intervention, none was provided.

Scope of the case

10. The complainant contacted the Commissioner on 1 June 2016, to complain that he had not received an internal review.

11. The Commissioner asked LFRS to conduct an internal review, which it agreed to do. However, it subsequently became evident that no review was being conducted and so the Commissioner has exercised her discretion to accept the complaint as being about LFRS's application of section 43 of the FOIA to withhold the requested information.
12. The Commissioner has viewed the withheld information when reaching her decision on this matter, although it was necessary to issue an information notice to obtain a copy and she notes that LFRS exceeded the timescale for compliance with that notice.
13. The question of whether, as a matter of fact, LFRS is bound by the judgment in *Norman v Cheshire Fire and Rescue Service* is not a matter for the Commissioner to consider as it falls outside her jurisdiction.

Reasons for decision

Section 43 (Commercial interests)

14. Section 43(2) states:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

Information in scope

15. LFRS forwarded to the Commissioner a bundle of information which it considered fell within the scope of the request and which it believed to be exempt from disclosure under section 43(2) of the FOIA.
16. The Commissioner noted that several documents in the bundle were created after 18 March 2016, the date on which the request for information was received. The Commissioner is tasked with investigating whether a public authority has handled a request for information in accordance with its obligations under the FOIA and in doing so will consider the circumstances at the time a request is received. Consequently, it is her assessment that these documents fell outside of the scope of the request, by virtue of not being held by LFRS at the point the request was received. She has therefore not considered LFRS's application of section 43(2) of the FOIA to those documents.
17. Of the remaining withheld information, the Commissioner conducted internet searches and has determined that six documents which LFRS had sought to exempt from disclosure can be found online, and are therefore in the public domain. For LFRS's information, the name of each

document, and a link to its location online, is included in the confidential annex to this decision notice. The annex is being provided only to LFRS.

18. The Commissioner was unable to locate a further five documents online and has concluded that there is no evidence that they are publicly available. These documents are also listed in the confidential annex to this decision notice.
19. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43¹ of the FOIA explains 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. The Commissioner understands "commercial" to have its common dictionary meaning: "*related to buying and selling things*"²; "*concerned with or engaged in commerce*"; and, "*making or intended to make a profit*"³.
20. The Commissioner's guidance on section 43 describes the types of information which have the potential to cause prejudice to commercial interests. It describes a range of activities which a public authority might engage in, in which it might generate or otherwise come to hold such information. The guidance makes it clear that the underlying aim of a commercial interest will be to make a profit, or otherwise impact on the person's ability to participate competitively in a commercial activity. The guidance does not refer to remuneration arrangements between public authorities and their employees when describing the types of information which might be covered by the exemption.
21. In order for the exemption at section 43 to be engaged it is necessary to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
22. LFRS explained to the Commissioner that the withheld information relates to the remuneration provisions extended to its firefighters and their unions. It said the parties whose commercial interests would be

¹ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

² <http://dictionary.cambridge.org/dictionary/english/commercial>

³ <https://en.oxforddictionaries.com/definition/commercial>

prejudiced were "...every single employed whole-time and retained firefighter employed by LFRS and the relevant trade unions".

23. Taking into account the definitions set out in paragraph 19, the Commissioner does not consider that the payment of salaries and pensions by LFRS to its employees can be described as being a commercial transaction between them. It does not involve the necessary elements of commerce, competition and profit-seeking which section 43 seems designed to protect.
24. Similarly, the trade unions, in representing the interests of the firefighters, are not operating in a capacity which constitutes a commercial transaction, with related commercial interests which require protection.
25. The Commissioner's guidance states that there is a distinction to be drawn between "commercial interests" and "financial interests", as the two are not interchangeable. The term "financial interests" refers to anything of monetary value, covers payments for services and includes salary and pension payments. While it is possible that prejudice to a person's financial interests may also affect their commercial interests, this will not be the case where there is no concomitant commercial interest. In this case, the salary and pension payments LFRS' firefighters receive may be considered to relate to their financial interests. However, they do not represent a commercial activity between them and LFRS, and as such there is no concomitant commercial interest to protect. LFRS provides a public service and it has a contractual obligation to remunerate its firefighters. While it must do so within a framework of obtaining best value for money, its remuneration arrangements with its firefighters clearly do not fall within the definitions set out in paragraph 19.
26. LFRS has specifically argued that the prejudice which would occur would be to the firefighters' and to the unions' commercial interests. The arguments it has provided to the Commissioner relate specifically to the prejudice to the firefighters' financial interests, which it says would occur if the information was to be disclosed.
27. That being the case, the Commissioner considers that LFRS has not demonstrated that section 43 is engaged, in that it has not shown that disclosure would result in prejudice to the firefighters' and the unions' commercial interests. It follows that LFRS was not entitled to rely on section 43 to refuse the request.

Other matters

Section 45 - internal review

28. There is no obligation under the FOIA for a public authority to provide an internal review. However, it is good practice to do so, and where an authority chooses to offer one the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
29. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
30. When the complainant first contacted the Commissioner about LFRS's failure to conduct an internal review, the Commissioner sought to deal with the matter informally. On 1 June 2016 her representative spoke by telephone with LFRS's Clerk & Monitoring Officer, informing him of the complainant's request for an internal review. The Clerk was unaware that a request for an internal review had been submitted, but agreed to conduct one. The Commissioner forwarded a copy of the internal review request to LFRS and telephoned it again to check how the review was proceeding. Despite this, and a further email from the Commissioner to LFRS asking it to deal with the review, no internal review was ever completed. The Commissioner has asked LFRS to explain why it did not conduct an internal review, but LFRS failed to address this point in its response.
31. The Commissioner considers that by agreeing to conduct an internal review and then failing to do so, LFRS did not act in accordance with the section 45 code.

Right of appeal

32. 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

33. 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.
34. 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

Samantha Bracegirdle
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