

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 October 2012

**Public Authority:** Tyne and Wear Fire and Rescue Service  
**Address:** Service Headquarters  
Nissan Way  
Sunderland  
Tyne and Wear  
SR5 3QY

#### Decision (including any steps ordered)

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1. The complainant has requested a range of information relating to fire training provided by Tyne and Wear Fire and Rescue Service. The public authority provided some of the requested information, confirmed some information was not held and withheld some information under the exemption where disclosure would be likely to prejudice its commercial interests.
2. The Commissioner's decision is that the public authority has correctly confirmed that information relating to gross profits derived from the provision of fire training is not held. In relation to the list of customers in receipt of fire training, the Commissioner has decided that the public authority has incorrectly 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
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 20 February 2012 the complainant made the following request:

"The Fire Industry Association has the following questions of Tyne and Wear Fire and Rescue Authority under the Freedom of Information Act 2000 and would like to be provided with information that provides a response to these questions: -

1. What revenue has been derived from the provision of Fire Training by the Tyne and Wear Fire and Rescue Service in 2011, 2010 and 2009?
2. What gross profit has been derived from the provision of Fire Training by the Tyne and Wear Fire and Rescue Service in 2011, 2010 and 2009?
3. How does Tyne and Wear Fire and Rescue Service calculate its cost of providing Fire Training and has this procedure varied in 2011, 2010 or 2009?
4. What has been Tyne and Wear Fire and Rescue's cost of the provision of Fire Training in 2011, 2010 and 2009? How many people on average has Tyne and Wear Fire and Rescue Service employed in the provision of Fire Training in 2011, 2010 and 2009?
5. Please provide a list of customers that have received Fire Training Tyne and Wear Fire and Rescue in 2011, 2010 and 2009?

Note: Fire Training in the above questions refers to the services offered as detailed on the webpage

<http://www.twfire.org/commercial/trainingcentre/training-courses/#.TOIhaPWHjIU>"

6. The public authority responded on 16 March 2012 and provided some information within the scope of the request but stated that no gross profit has been derived by the provision of fire training and refused to provide the information at point 5 citing the exemption at section 43(2) of the FOIA as its basis for doing so.
7. An internal review was requested on 26 March 2012 in relation to points 2, 4 and 5. The public authority provided an internal review on 21 May 2012 in which provided some information in relation to point 4 and maintained its original position in relation to points 2 and 5.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled in relation to points 2 and 5.
9. The Commissioner has therefore considered whether information is held in relation to point 2 and whether the commercial interests exemption at section 43(2) applies to the information requested at point 5.

## Reasons for decision

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### Section 1 - is the information held?

10. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
11. 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.
12. 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 legal or business reason to hold or retain the information. He will also consider any reason why it is inherently likely or unlikely that information is not held as well as any arguments or evidence that information is held put forward by the complaint.
13. The complainant has stated that the public authorities initial response, that no gross profit has been derived by the provision of fire training, is inadequate as even if no profit has been generated, information that it does hold that deals with the overall costs/revenue ratio and, where applicable, any losses, should be disclosed.
14. During the investigation, the public authority stated that training services are provided on a 'not-for-profit' basis in accordance with local government regulation. It explained that the table set out in the response to point 1 of the original request indicates the revenue derived from such training activity and, in response to point 4, the public

authority had set out the approximate cost, to the nearest thousand, of providing such activities and services. Its view is that when set against the average revenue for the three year period requested this indicates a negligible loss. The public authority are of the opinion that it factually replied stating it did not derive any profit from such activities which, indeed, could be easily seen from the information provided in the answers to points 1 and 4. The Commissioner considers that the provision of the information in relation to points 1 and 4 also fulfils the obligation to provide advice and assistance in relation to point 2.

15. The Commissioner is aware, from dealing with complaints relating to the same requests for information made to other Fire and Rescue Services by the same complainant, that Fire and Rescue Services have a statutory power to charge for the provision of training but such charges are limited to cost recovery rather than extending to profit making activities (FS50446509). He is also aware that there is no requirement or business purpose for Fire and Rescue Services to record a gross profit figure in recording income from its commercial training courses (FS50444733).
16. In the circumstances, the Commissioner does not consider that there is any evidence in that would justify refusing to accept the public authorities position that it does not hold the precise information requested at point 2 in this case. The Commissioner is therefore satisfied that on the balance of probabilities, the information requested is not held by the public authority. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

### **Section 43(2) – Prejudice to Commercial Interests**

17. 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.
18. 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."<sup>1</sup>

19. In this instance the requested information is a list of customers who have paid for fire training provided by the public authority.
20. 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 public authority and referred to previous Tribunal decisions.
21. The Commissioner is aware that a number of other commercial organisations and fire services offer training of this type but notes that, whilst reducing risk is part of Tyne and Wear Fire and Rescue Service's mission, and promoting fire safety is linked to the core purpose of the fire service, the public authority has not argued or provided evidence that the educational aspect is a core function.
22. Although the guidance referred to above states that the underlying motive for a commercial activity does not necessarily have to be profit, and commercial interests have been accepted by the Tribunal in relation to not for profit organisations, and the Commissioner considers that there are substantial differences in this case.
23. 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 students<sup>2</sup>. This was all linked to its core purpose.
24. The Commissioner considers that, according to the scenario provided by the public authority, commercial training doesn't appear to be a core

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<sup>1</sup>[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.aspx](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.aspx)

<sup>2</sup>

[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)

function. Whilst it may be that the public authority needs the revenue from courses to support the service in the current financial climate, in that it is able to achieve economies of scale through maintaining a critical mass in training capacity, if the revenue from commercial training provision ceased it could simply stop offering training and it would appear that its 'commercial competitors' would continue to meet the demand.

25. 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 publically funded; this is in contrast to the situation described in UCLAN which does depend on student fees (domestic and international). In fact the public authority seeks to make no excess. Its argument that proposals are being developed to operate as a trading company in the future, and that any disclosure would potentially damage this venture going forward, reinforces the view that the withheld information does not relate to what is commonly recognised as a commercial activity. The fact that it may be a commercial activity in the future is not relevant to the decision as to whether the commercial interests exemption applies to this request as the Commissioner must consider the circumstances at the time of the request.
26. The Commissioner accepts that the public authority 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 public authority 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.
27. 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 public authority to disclose the information to the complainant.

## Right of appeal

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28. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

29. 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.
30. 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**