

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 October 2012

**Public Authority:** West Sussex County Council  
**Address:** Council Hall  
Chichester  
PO19 1RQ

### Decision (including any steps ordered)

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1. The complainant has requested a range of information relating to services such as the servicing of fire protection systems and training provided by West Sussex 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 is not held but that the council have incorrectly applied the exemption where disclosure would be likely to prejudice its commercial interests to the amended request for the overall costs / revenue ratio. The Commissioner has also decided that the public authority has incorrectly applied the commercial interests exemption to the list of customers in receipt of services such as the servicing of fire protection systems and training.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information held from which the pricing structure is derived in relation to the overall costs / revenue ratio requested at point 2.
  - Disclose the information requested at point 5.
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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6. On 2 March 2012 the complainant made the following request:

"The Fire Industry Association has the following questions of West Sussex County Council 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 services such as the servicing of fire protection systems and training by the West Sussex Fire and Rescue Service in 2011, 2010 and 2009?
2. What gross profit has been derived from the provision of services such as the servicing of fire protection systems and training by the West Sussex Fire and Rescue Service in 2011, 2010 and 2009?
3. How does West Sussex Fire and Rescue Service calculate its cost of providing services such as the servicing of fire protection systems and training and has this procedure varied in 2011, 2010 or 2009?
4. What has been West Sussex Fire and Rescue's cost of the provision of providing services such as the servicing of fire protection systems and training in 2011, 2010 and 2009? How many people on average has West Sussex Fire and Rescue Service employed in the provision of the servicing of fire protection systems and training in 2011, 2010 and 2009?
5. Please provide a list of customers that have received services such as the servicing of fire protection systems and training from West Sussex Fire and Rescue in 2011, 2010 and 2009?

7. The council responded on 29 March 2012 and provided some information within the scope of the request but refused to provide the information at point 5 citing the exemptions at section 43(1) and section 40(2) of the FOIA as its basis for doing so. In relation to point 2 it stated that it is not engaged in trading so there is no profit and in relation to point 4 it referred to the answer provided for point 1 stating that charges are based on cost recovery.

8. An internal review was requested on 12 April 2012 in relation to points 2 and 5. The complainant stated that the response to point 2 is inadequate as it does not go far enough to disclose the information requested. He has stated that even if no profit is generated, information that deals with the overall costs / revenue ratio should be disclosed.

9. The council responded on 14 June 2012 stating that it believed it had answered the question which specifically related to the making of a profit. However, it stated that it holds data from which the pricing structure is derived and that this information comes within the request

for the overall cost / revenue ratio. It applied the exemption at section 21 in relation to the 'revenue' part of the amended request, and the exemptions at section 43(1) and section 43(2) to the data from which the pricing structure is derived. It maintained its reliance on the exemption at section 43(1) to point 5.

## **Scope of the case**

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled in relation to points 2 and 5.
11. The Commissioner has not considered the application of the personal information exemption at section 40(2) of the FOIA as the council withdrew its reliance on this in its internal review response.
12. The Commissioner has also not considered the application of the exemption at section 21 in relation to the 'revenue' part of the amended request as he considers that the requested information was provided by the council in its initial response. He does not deem it necessary to consider an exemption for information which has been provided.
13. The Commissioner has therefore considered whether information is held in relation to gross profits at point 2 and whether the commercial interests exemption at section 43(1) or 43(2) applies to the amended request for the overall costs / revenue ratio.
14. In relation to the information requested at point 5, the Commissioner has considered whether the commercial interests exemption at section 43(1) applies. He has also considered whether the commercial interests exemption at section 43(2) is engaged as the council applied this during the Commissioner's investigation.

## **Reasons for decision**

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### **Section 1 - is the information held?**

15. 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.
16. 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.

17. 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.
18. The council explained that charges for services provided are based on cost recovery only. It stated that West Sussex Fire and Rescue Service is not engaged in trading and so there is no profit. It further explained that the statutory provision for charging for such services on a cost recovery basis is permitted by virtue of section 18A of the Fire and Rescue Services Act 2004.
19. 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).
20. In the circumstances, the Commissioner does not consider that there is any evidence in that would justify refusing to accept the council's position that it does not hold the precise information originally requested at point 2 in this case. The Commissioner is therefore satisfied that on the balance of probabilities, information on gross profits is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

### **Section 43 Commercial Interests**

21. The council have primarily applied section 43(1) to both the data from which the pricing structure is derived and the list of customers, applying section 43(2) in the alternative. However, the Commissioner has deemed it appropriate to consider section 43(2) first.

#### **Section 43(2) Prejudice to the commercial interests of any person**

22. 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.

23. 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>

24. In this instance the requested information is data from which the pricing structure is derived and a list of customers who have paid for services such as the servicing of fire protection systems and training provided by West Sussex Fire and Rescue Service.
25. In determining whether the servicing of fire protection systems and the provision of training constitute commercial activities and therefore whether the information falls within the scope of the exemption, the Commissioner has considered whether such activities constitute core functions of the West Sussex Fire and Rescue Service and referred to previous Tribunal decisions.
26. The Commissioner is aware that a number of other commercial organisations and fire services offer such services but notes that, whilst such activities are part of the authorities strategic aim of 'Keeping West Sussex Safe', and promoting fire safety is linked to the core purpose of the fire service, the council has not argued or provided evidence that the provision of such services is a core function.
27. 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.
28. 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

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[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)

courses and assets that attracted students<sup>2</sup>. This was all linked to its core purpose.

29. The Commissioner considers that, according to the scenario provided by the council, the servicing of fire protection systems and the provision of training don't appear to be core functions. Whilst it may be that West Sussex Fire and Rescue Service needs the revenue from such activities to ensure that it can continue to provide those services, if this ceased it could simply stop offering the services and it would appear that its 'commercial competitors' would continue to meet the demand.
30. Moreover, though the servicing of fire protection systems and the provision of training may depend on fees for survival the fire service does not depend on the fees generated as an income stream to contribute towards its core function. The council have confirmed that the services are not subsidised and need to be self-financing. 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 authority seeks to make no excess. Its confirmation, referred to in this notice in the section 1 analysis above, that the statutory provision for charging for such services on a cost recovery basis only, reinforces the view that the withheld information does not relate to what is commonly recognised as a commercial activity.
31. The Commissioner accepts that the public authority provides the servicing of fire protection systems and the provision of 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 services in question operate on a costs recovery basis, that they are not core functions of the authority and that it is not dependent upon the 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.
32. As he has found that the withheld information does not fall within the scope of the exemption the Commissioner has concluded that the

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[http://www.informationtribunal.gov.uk/DBFiles/Decision/i357/UCLAN\\_v\\_IC\\_&\\_Colquhoun\\_\(E\\_A-2009-0034\)\\_Decision\\_08-12-09\\_\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i357/UCLAN_v_IC_&_Colquhoun_(E_A-2009-0034)_Decision_08-12-09_(w).pdf)

exemption at section 43(2) is not engaged and has therefore gone on to consider the exemption at section 43(1).

### **Section 43(1) Trade secrets**

33. Section 43(1) of the FOIA provides an exemption for information which constitutes a trade secret. This is a qualified exemption and is therefore subject to the public interest test.
34. As the Commissioner has found that the provision of services such as the servicing of fire protection systems and training are not commercial activities it follows that data from which the pricing structure is derived and the list of customers cannot be trade secrets. This view is reinforced by the fact that the council have clearly stated it is not engaged in trading and the Commissioner's aforementioned guidance on the commercial interests exemption which states that in attempting to decide whether information is in fact a trade secret, it may be helpful to ask a number of questions one of which is 'Is the information used for the purpose of a trade'?
35. As he has found that the withheld information does not fall within the scope of the exemption the Commissioner has concluded that the exemption at section 43(1) is not engaged. He, therefore, requires the public authority to disclose the information to the complainant.



## Right of appeal

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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: 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)

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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**