

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2020

Public Authority: Staffordshire Fire and Rescue Service
Headquarters

Address: Pirehill
Stone
Staffordshire
ST15 0BS

Decision (including any steps ordered)

1. The complainant requested pensions-related information from Staffordshire Fire and Rescue Service ('SFRS'). SFRS advised the complainant that it did not hold the requested information.
2. The Commissioner's decision is that, on the civil standard of the balance of probabilities, SFRS does not hold the information.
3. The Commissioner does not require any steps to be taken as a result of this notice.

Request and response

4. On 18 December 2019, the complainant wrote to SFRS and requested information in the following terms:

"My request relates to the firefighters pension scheme 1992, and specifically to the Day Crewing system that operated in Staffordshire until 2012.

Could you please supply me with the dates and documented outcomes of all reviews into the pensionability of the Firefighters 1992 Pension scheme with regard to elements of pay, emoluments and allowances received working the Day crewing system and to include the retained type duties element.

Request information from March 1992 up to the present that may be ongoing."

5. SFRS responded on 15 January 2020, stating:

"The Service has not undertaken any reviews into the elements of pay emoluments and allowances, received whilst working the retained type duties element of the Day Crewing System, being made pensionable within the 1992 Firefighters' Pension Scheme, so documentation is not available. The retained elements of the Day Crewing System were made pensionable by the Service as part of the 2006 Firefighters' Pension Scheme."

6. The complainant requested an internal review on 7 July 2020, highlighting four documents in which SFRS had stated reviews had been completed. SFRS provided the outcome of its internal review on 27 July 2020. It upheld its original position, provided further details and advised:

"...you received the correct response that no reviews were undertaken into the Firefighters Pension Scheme 1992 in relation to day crewing payments and allowances".

7. Post internal review, there followed further email exchanges between the complainant and SFRS, with SFRS' final position being sent on 14 August 2020 as follows:

- "1. We are not able to pinpoint an exact date when the implications of the Norman v Cheshire case¹ were reviewed, the initial considerations were obviously around the 2006 pension scheme whereas your request related to the 1992 scheme and particularly to day crewing elements which the Service knew had been covered under the 2006 scheme until day crewing ceased in 2011.*
- 2. You are correct in pointing out that the legal advice relating to the 1992 scheme was received in March 2020 and this was after the date of your Freedom of Information request, however I included this information in my response in order to provide you with a complete picture of the Service's review of this matter. The original response was correct in that no reviews relating to day crewing and the 1992 scheme had been undertaken for the reasons stated in response to point 1 above, namely that day*

¹ <http://www.fpsregs.org/images/Legal/Caselaw/NormanvCheshire.pdf>

crewing ceased in 2011 and had been covered under the 2006 scheme which was the subject of the Norman v Cheshire case."

8. The complainant expressed dissatisfaction with this response and notified SFRS of his intention to complain to the ICO.

Scope of the case

9. The complainant contacted the Commissioner on 21 August 2020 to complain about the way his request for information had been handled.

10. He submitted the following grounds of complaint:

*"I requested information into when Staffordshire fire and rescue service undertook a review into the pensionable elements of the Firefighters 1992 pension scheme in regards to day crewing firefighters. At the time i [sic] was also in the process of a stage two pension dispute with the organisation in regard to this issue. High court guidance was issued in 2011 Norman v Cheshire and in 2019 Nathan Booth and Simon Jones V Mid West wales . Guidance has also been issued by the Local government Association and also Englands [sic] National pension Board with regard to this issue in 2019. All stating the Firefighters 1992 scheme Day crewing elements of pay are pensionable . i [sic] requested in FOI 127/19 [ie request under consideration here] information when Staffordshire Fire looked at this issue, at the time i [sic] had the following documents **1** Staffordshire Fire and Rescue Pension Board meeting minuets [sic] 02/11/2016 **2** Email from [name redacted] to [complainant] 18:11 12/09/2019 **3** Staffordshire Fire and Rescue Board meeting minuets [sic] 28 /10/19 **4** i [sic] News important stuff section - Pensions pensionable pay update. 06/12/19 all above saying SFRS had looked into, assessed , reviewed or had been advise [sic] in regard to the issue. Official first response says SFRS never undertook any review at any time SFRS later review response then contradicts its self [sic] by saying 'Following the Norman vs Cheshire case, Staffordshire Fire and Rescue Service considered whether there may be any implications for the Service' then also in a later reply state 'We are not able to pinpoint an exact date when the implications of the Norman v Cheshire case were reviewed'; I believe SFRS have completed multiple reviews in regard to the Fire fighters 1992 scheme and its pensionable elements, they state it in multiple documents they have or are completing a review, they then say they have never completed any reviews in the FOI response and again in the requested review (even when they contradict themselves in the same email.)"*

11. Having received SFRS' investigation response on 21 October 2020, the Commissioner secured its consent to relay the content to the complainant. She then asked the complainant to confirm whether the additional explanation provided by SFRS addressed his complaint to her.
12. On 2 November 2020, the complainant advised the Commissioner of his remaining concerns as follows:

"In regard to the reply from SFRS

SFRS State [sic] that; -

1. 'There is some evidence in the Strategy and Resources Committee minutes that advice had been taken from Staffordshire County Council and legal advisers to confirm this position but there is no documented evidence of this advice'.

This statement appears to contradict itself, how could there be some evidence but no documented evidence.

2. '[Name redacted] advised that with regard to this case, in Cheshire there had been no differentiation between the payment for lighting, heating, etc. which was why the case had been won. In Staffordshire the payments were clearly separate. They did look at this in detail when the case arose.'

*'that they looked at this **in detail** when it arose'.*"

13. It was agreed with the complainant that the above concerns would be relayed to SFRS for its consideration.
14. On 4 November 2020, SFRS replied as follows:

"In response to point one, as we have previously explained, there is some evidence that discussions took place with Staffordshire County Council but we cannot locate any written record of the content of these discussions.

For point two, the checks that were undertaken at the time involved ensuring the pay elements for the Day Crewing scheme were pensionable at the time, this was a simple check of the payroll detail. Again, there is no evidence of any documentation containing further details about these checks."

15. Having informed the complainant of the above, he told the Commissioner that he would like a decision notice to be issued in respect of his complaint because:

"SFRS have when required been able to locate pension documents dating back 2006 and 2007 in support of its

arguments. SFRS have stated that they had discussions with the County council, county councillors, legal advice and internal discussions on the subject but yet they have no documented outcomes with regard to this issue."

16. On 9 November 2020, the Commissioner informed SFRS of the complainant's view and asked it carry out a further thorough search before she proceeded to her decision notice. Details of its response are as set out in paragraph 28 below.
17. The Commissioner has considered whether, on the balance of probabilities, SFRS holds the requested information in relation to all parts of the request.
18. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The FOIA is concerned with transparency of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. The FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.

Reasons for decision

Section 1 – general access to information

19. Section 1 of the FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and, if so, to have that information communicated to them.
20. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
21. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not

expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

22. Therefore, the Commissioner has sought to determine whether, on the balance of probabilities, SFRS holds any recorded information within the scope of the request. Accordingly, she asked SFRS to explain what enquiries it had made in order to reach the view that it did not hold the information.
23. For the benefit of any potential appeals hearing arising from this decision notice, the Commissioner has included below SFRS' search related responses to the request as a whole (which, as explained above, were relayed to the complainant during the Commissioner's investigation).
24. SFRS told the Commissioner that:

‘[The complainant] asked for dates and documented outcomes into all reviews into the pensionability of the Firefighters 1992 Pension scheme with regards to pay, emoluments and allowances received working the Day crewing system and to include the retained type duties element. The request was passed to the Service's Human Resources department who in turn forwarded it to the Authority's Section 151 Officer, [name redacted]. [Officer's name redacted] has been with the Service for many years and was fully aware of the Norman v Cheshire case and any pensions issues surrounding this. [Officer's name redacted] issued the response that no reviews had been undertaken so documentation was not available. He also stated that the retained elements of the Day Crewing system were made pensionable under the 2006 Firefighters' Pension Scheme.

When searching for information relating to this request, the Section 151 Officer checked paper files containing historic pension board minutes and his own emails but was not able to find any documented outcome of any reviews into these issues. Some years have elapsed since the Norman v Cheshire case and there has obviously been some staff turnover during this time, the Section 151 Officer is the only current member of staff who would be likely to possess any correspondence around this issue.

The Service [SFRS] is satisfied that there is no documentation containing a formal documented review into the Norman v Cheshire case, any correspondence that did take place was probably through e-mail or telephone conversations. E-mails would have either been deleted due to the passage of time or

may have been sent to employees who have now left the organisation."

25. In addition, SFRS said:

"In the pension board meeting of 28 October 2019 the outcome of a further case concerning the Firefighters' Pension Scheme 1992 (Booth v Mid and West Wales) was discussed and following that it was decided that the Service would need to seek legal advice on the issues and conduct a review. At the time [the complainant] submitted his request there was no documented outcome from this review as it had not been completed.

The Service keeps minutes of meetings for 10 years under its retention schedule. The Service was not required to instigate a Pension's Board until April 2015 and the first meeting of this Board was in September 2015. The Service is satisfied that there have never been any documented outcomes of reviews contained within these minutes as no formal reviews had taken place."

26. SFRS explained that:

"An electronic search was conducted on the Strategy and Resources Committee and Audit Committee meetings held by the Staffordshire Fire and Rescue Authority before this position was held by the Office of the Police and Crime Commissioner for Staffordshire. The Strategy and Resources Committee was the scheme manager for the Firefighters' Pension Scheme until the Authority set up its pension board as required by law in April 2015. The pension board minutes since 2015 were also searched for information relating to reviews."

27. It said that it had searched using the terms below:

"Due to the small number of documents, the term 'pension' was used to search the Strategy and Resources Committee and Audit Committee minutes. Each document matched was then searched again for the term 'pension' and manually reviewed.

The Section 151 Officer searched his emails using the terms 'pension' and 'day crewing' but failed to find any evidence of a documented review."

28. In response to the Commissioner's request to carry out a further search before she proceeded to her decision notice (see paragraph 16 above), SFRS advised the Commissioner that:

"In response to [the complainant's] comments about the pension paperwork from 2006 that was located, this was a form he

signed to opt out of joining the 2006 Firefighters Pension Scheme. Pension paperwork obviously has to be retained for some time, even after an employee has left the Service, and our administrator had to access the archives to locate this document.

We are satisfied that we have searched all the locations where we would expect to find a documented review if one had ever been carried out. We have reviewed the minutes of the Strategy and Resources Committee going back to 2011 but have not found any evidence of a formal documented review being completed. As we have previously stated, any review of the implications of the case appears to have been conducted through an informal process involving verbal discussions and examination of payroll records. This obviously did not raise any serious concerns at the time which probably accounts for the lack of any formal documentation. Even if e-mails had been sent at the time, our e-mail archives only go back to 2017 so they would not contain any information relating to that period."

29. SFRS explained that if a formal review had been completed, then it would be held as an electronic record with the Strategy and Resources committee minutes or the Pension Board minutes. It said it is possible there may have been historic e-mails and that some of these may have been deleted due to: *"normal mailbox management or deletion following an employee leaving the Service"*.

30. In response to the Commissioner's question as to whether recorded information was ever held but no longer held, and when SFRS ceased to retain this information, SFRS said:

"We cannot be sure any information was ever held as this was likely to have been in the form of e-mails. There is no evidence of a formal documented review ever being completed."

31. In relation to its formal records management policy for records of this type, SFRS explained that:

"SFRS' document retention policy requires all minutes of corporate meetings to be retained for 10 years. If a documented review had been completed after 2011 then this would still be retained with these minutes."

32. It also said:

"SFRS has all the electronic copies of the Strategy and Resources Committee and Pensions Board for the relevant period and there is no reason to believe any information has been deleted. If any e-mails had been circulated surrounding this matter then the

Section 151 Officer's mailbox would be the most likely location to find copies of this information."

33. SFRS told the Commissioner there are no statutory requirements on it to have carried out a formal review. In relation to whether there is any business purpose for the requested information to be held, SFRS said:

"If a review had been completed then it would have been held with the Strategy and Resources Committee or Pension Board minutes as a record of the information provided to the meeting."

34. In relation to the Norman v Cheshire case, SFRS told the Commissioner that:

"In the minutes of the Strategy and Resources Committee dated 4 March 2015 the following information is recorded:

'For risk 6, which related to the "failure to plan for the potential financial liability of paying retrospective pension payments for RDS staff (for years 2000 to 2006) in addition to the potential financial liability regarding non-guaranteed overtime being incorporated into holiday pay claim' it was considered appropriate that the net risk impact score be lowered slightly. It was felt that although the case had been appealed and would come into immediate effect; a hearing was still required to establish how the pay would be calculated and following discussions with legal advisors at Eversheds, the Service was not expected to be affected by this ruling."

35. The Commissioner asked SFRS to confirm the dates of all the reviews falling within the period March 1992 to the date of the complainant's request. In reply, SFRS stated:

"There were no formal documented reviews into the Norman v Cheshire judgement from March 1992 to the date of [the complainant's] request. It appears that any consideration of the ramifications of the case were conducted verbally or by e-mail and there was never a formalised review."

36. SFRS added:

"Although these minutes refer to 'discussions' and 'advice' there is no evidence of any formal documented review being completed."

37. In response to the Commissioner's questions to aid her understanding of the context and background to the request, SFRS also provided some additional information about the Pension Scheme, all of which has been

relayed to the complainant. As these do not form part of her consideration as to whether the requested information is held but do provide useful context, the Commissioner has set out the key parts of this in the 'Other matters' section at the end of this notice.

Conclusion

38. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out earlier, the Commissioner is required to make a finding on the balance of probabilities.
39. Based on the explanations provided by SFRS, the Commissioner is satisfied, on the balance of probabilities, that no recorded information within the scope of the request is held.
40. The Commissioner is therefore satisfied that, on the civil standard of the balance of probabilities, that SFRS does not hold the requested information.

Other matters

41. The Commissioner finds it useful to include the following context to the request.
42. Details of Rule G1 of the 1992 Firefighters' Pension Scheme can be found here².
43. The Commissioner asked:

Did the Norman vs Cheshire have no bearing whatsoever on the 1992 Firefighters' Pension Scheme? If not, why not when it appears to have considered Rule G1 of the 1992 Scheme?

44. SFRS replied:

"The Norman v Cheshire case considered whether certain sums should be treated as pensionable pay under Rule G1, in this particular case these sums were the "retaining fee", "disturbance fee" and "public holiday pay" (referred to as 'the consolidated

² <https://www.legislation.gov.uk/ukxi/1992/129/schedule/2/made> stated

elements'). Cheshire Fire and Rescue Service had consolidated these payments with the basic pay into a lump sum. In Staffordshire Fire and Rescue Service's case, extra payments for day crewing firefighters such as their heat and light were separated from their basic pay and not consolidated as in Cheshire. The Service was aware of the case but was confident the issue did not apply as the payments had not been consolidated, therefore no review was necessary. There is some evidence in the Strategy and Resources Committee minutes that advice had been taken from Staffordshire County Council and legal advisers to confirm this position but there is no documented evidence of this advice."

45. The Commissioner asked SFRS:

"Can you provide evidence to support your statement that Day Crewing System retained elements were covered under the 2006 scheme?"

46. In response, SFRS said:

"Part 11 Chapter 1 (1) of The Firefighters' Pension Scheme (England) Order 2006 states that:

'Subject to paragraph (3) and rule 3(3), the pensionable pay of a firefighter member is the aggregate of—

(a) his pay in relation to the performance of the duties of his role, other than any allowance or emoluments that are paid to him on a temporary basis, and

(b) his permanent emoluments (including, in the case of a retained firefighter, any retaining allowance).'

In addition, Firefighters' Pension Scheme Circular FPSC 02/2007 issued by the Department for Communities and Local Government on 15 February 2007 stated:

'In discussing the definition of pensionable pay in the Firefighters' Pension Committee it was made clear that it was intended that the definition would allow the following payments to be treated as part of pensionable pay:

- Flexible duty allowance which may be paid to station managers and above. It was accepted that: (i) this represented 20% of the member's pay and should be reflected in any pension aware; and (ii) if the member moved*

at any time to a post which did not carry the allowance, the matter would be covered by the provisions of rule 7 of Part 3 (entitlement to two pensions) so that there would be no loss of any element of pension for which contributions had been made;

- *Temporary promotions. It is usual in public service pension schemes for pay on temporary promotion to be pensionable since any person who is temporarily promoted would normally be expected to have demonstrated the competencies of the higher post and either to be appointed to the post or another post on substantive promotion without reverting to the previous post.*

Acting up would not be pensionable as this should be short-term, dictated by the exigencies of the service, and the person may not need to have demonstrated all the competencies of the higher role.'

Staffordshire Fire and Rescue Service allocated day crewing staff two payroll numbers in order to allow the retained elements to be pensionable."

Right of appeal

47. 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

48. 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.
49. 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

Carolyn Howes
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