

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 28 October 2010

**Public Authority:** NHS Business Services Authority  
**Address:** Bridge House  
152 Pilgrim Street  
Newcastle upon Tyne  
NE1 6SN

### Summary

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The complainant requested details of projected pensions based on a number of employment scenarios. The public authority refused the request on the basis of the exemption provided at section 21 of the Act, that the information is reasonably available to him by other means. It directed him to an online pensions calculator on the NHS Pensions website where it explained that he would be able to obtain the answers to his request. The Commissioner finds that the public authority does not hold the requested information and has breached section 1(1)(a) by not communicating this to the complainant.

### The Commissioner's Role

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1. 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. On 28 September 2009 the complainant submitted the request for information, below, to the NHS Business Services Authority:

*"I would be grateful if you would provide me with projected pension details for the 5 following cases:*

1. *Entering the NHS Pension Scheme January 2008, retiring on Consultant grade aged 65 on 22/04/2027*
2. *Entering the NHS Pension Scheme August 2010, retiring on Consultant grade aged 65 on 22/04/2027*
3. *Entering the NHS Pension Scheme August 2011, retiring on Consultant grade aged 65 on 22/04/2027*
4. *Entering the NHS Pension Scheme August 2012, retiring on Consultant grade aged 65 on 22/04/2027*
5. *Entering the NHS Pension Scheme August 2013, retiring on Consultant grade aged 65 on 22/04/2027*

*Thank you for your assistance"*

3. The public authority replied on 19 October 2009, refusing the request on the basis of section 21 of the Act, that the information is reasonably accessible to him by other means. The complainant was directed to a calculator on the NHS Pensions website<sup>1</sup> which it explained could provide the information he requested.
4. The complainant requested an internal review of this response on 4 November 2009 and the public authority replied on 17 December with the outcome of that review. The review upheld the previous decision to withhold the information on the basis of section 21 of the Act.
5. There were also several other exchanges of emails between the complainant and the public authority, during which the public authority also explained that consultants' salaries are negotiated at a local level and therefore it was unable to provide the information requested without a salary figure to work from. The public authority also offered to discuss this with the complainant over the telephone.

## **The Investigation**

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### **Scope of the case**

6. On 17 December 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

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<sup>1</sup> Available online at <http://www.nhsbsa.nhs.uk/Pensions/calculators.aspx>

- The online pensions calculator does not provide access to the information requested.

The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

## Chronology

7. On 25 February 2010 the Commissioner contacted the public authority to discuss the complaint. The public authority explained that the NHS pension scheme is a 'final salary' scheme, therefore the level of pension depends only on the level of salary at retirement and the years of pensionable service. The online pensions calculator permits the user to input these parameters and receive an immediate figure for the pension benefits applicable. It further explained that as the 'Consultant grade' salary level is negotiated at a local level, it would be unable to provide the requested information without knowing what specific salary level applied in the circumstances.
8. On 25 February 2010 the Commissioner wrote to the complainant to advise him of this and indicated his preliminary view that this suggested the public authority's refusal under section 21 of the Act may be correct. He observed that it was not clear that the nature of the pension scheme had been fully explained to the complainant by the public authority and therefore, armed with the knowledge of the 'final salary' status and the length of service stipulated in his request, he might wish to revisit the online calculator inputting a range of likely final salary figures, and hence obtain the information. He also noted the public authority's offer to discuss his complaint by telephone.
9. The complainant responded on 27 February 2010. He made the following points:
  - The public authority had disclosed information to the Commissioner not known to him (the Commissioner understands this to be a reference to the status of the pension scheme as a 'final salary' scheme);
  - The public authority had stated that 'NHS Pensions' are capable of providing the information;
  - The public authority has all the information to hand, including final salary information which the complainant does not have;
  - The complainant has assisted the public authority by providing it with details of the exact information he requires;
  - He is not an NHS employee, the online calculator is for NHS employees;
  - The online calculator does not provide an official pension statement;

- His request requires a response in a specific format, namely *"in the form of an official written statement from the NHS Pensions on NHS Pensions headed paper"*; and
  - The complainant has not telephoned the public authority as this will not provide him with the information in the format requested.
10. On 1 March 2010 the Commissioner wrote to the complainant to establish the exact form of his request for information. The complainant subsequently explained that his request had been submitted online, hence he had been unable to provide a copy for the Commissioner's investigation. The Commissioner took a quotation of the request from the public authority's internal review response, noting it was very similar to a version quoted in later correspondence from the complainant to the public authority. He forwarded this to the complainant, asking if this was an accurate transcription of his request and whether it omitted or misquoted any important element of the request.
11. On 2 March 2010 the complainant replied, agreeing that the quotation was correct (subject to one minor alteration of a typographical error). This was therefore agreed as the basis of the complaint and is the text reproduced in the 'The Request' section, above.
12. On 3 March 2010 the Commissioner wrote to the complainant explaining that he had been unable to locate anything in the complainant's correspondence which required the public authority to provide the information in the form stipulated by the complainant, namely 'an official written statement from the NHS Pensions on NHS Pensions headed paper'. The complainant has not provided anything which would support his assertion. Consequently, this element of the complaint has not been considered further.
13. The complainant has indicated to the Commissioner that he considers his request to be a request for an official, written [pension] statement. He has explained to the Commissioner the circumstances which lie behind his request and, while the Act is applicant- and motive-blind, the complainant's explanation serves to clarify that what he intends to obtain is a formal pension forecast for the various circumstances described in his request.
14. The Commissioner observes that the request does not make mention of any requirement for an official statement, nor has the complainant provided any evidence that any request was made in such terms. Correspondence between the complainant and the public authority, subsequent to the internal review, suggests that this could have been the complainant's intention, but an objective reading of the

complainant's request for 'projected pension details' suggests that the provision of calculated pension benefits, based on the parameters provided, would satisfy the request.

15. The complainant has indicated his view that the public authority has all the information to hand, including final salary information which he does not have, and that NHS pensions officials are capable of providing this information. The correspondence he has provided to the Commissioner does not support that view, in that the correspondence from the public authority explains that it does not hold a generic salary figure, and does not confirm that it is capable of providing the information.
16. The Commissioner has directed the complainant to an area on the NHS website<sup>2</sup> which provided details of the possible range of a consultant's salary, commenting that the wide range shows that a consultant's salary may vary greatly and therefore this document shows that there is no definitive figure which might be taken to be a 'Consultant grade'. He also confirmed that the online pensions calculator is a publicly-available facility whose use is not restricted to NHS employees.

## **Findings of Fact**

17. The Commissioner notes, from publicly-available information he found on the NHS website, that the salary range for a consultant may vary from £74,504 to £176,242 and that therefore there is no definitive value which may be said to meet the description of 'Consultant grade' as specified in the complainant's request.

## **Analysis**

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### **Substantive procedural matters**

#### **Section 1 - Does the public authority hold the requested information?**

18. The public authority has explained that its role in administering NHS pensions is to determine the value of the pension benefits to be paid in each individual case, and arrange payment of the benefits to the pensioner. As the NHS pension is a 'final salary' scheme, the information it requires in order to do this is essentially confined to that described at paragraph 7, above.

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<sup>2</sup> Available online at <http://www.nhscareers.nhs.uk/details/Default.aspx?Id=553>

19. Even if the public authority were considered to hold the information described at paragraph 16, above, that does not contain information on the range of consultant grade salaries for 2027.
20. To the extent, therefore, that it holds information about NHS pensions, the information it holds is retrospective, relates to pensions already being paid out and is specific to each individual pensioner. The Commissioner therefore considers that, irrespective of any arguments in relation to section 21 of the Act, the public authority does not hold the requested information for the following reasons:
- The requested information is hypothetical and depends on factors which cannot be known at the time of the request: namely, the value of a consultant's salary in 2027.
  - The information held by the public authority is historical (and current) information about pensions being paid by it.
  - To the extent that it can provide an individual pensions estimate, this will be an estimate based on a calculation using parameters necessarily supplied by the applicant, not taken from its own records.
  - The production of an estimate implies something more than just the disclosure of information held. It suggests a process of analysis and calculation, which is not required by the Act. A public authority is only obliged to provide information which it holds, not to generate new information in response to a request.
  - There is no evidence to suggest that the public authority holds information which it could extract in order to provide an estimate in response to the complainant's request, because it cannot hold information on the level of a consultant's salary in 2027.
21. The Commissioner considers that an objective reading of the complainant's request would require the public authority to hold information on the salary of a 'Consultant grade' post on 22 April 2027. As has been established, the current range of a consultant's salary is considerable, the difference between the upper- and lower-limit is over £100,000.
22. The public authority has also explained that, to the extent that it has a business need to hold information on salaries, that information is specific to the individual pensioner and any information held will therefore be historic, not projected forwards. The public authority does not produce pension forecasts.

23. Subsequent to its internal review, the public authority continued to engage with the complainant. In an email dated 17 December 2009, the public authority asked the complainant:

*"Can I ask that you specify exactly why the calculators do not give you the information you are seeking and I'll then see if there is anything else we can do to resolve this for you."*

24. The complainant responded on 18 December, reminding the public authority that his correspondence of 4 November 2009 explained that the information he requested was not accessible via the public authority's online system. He also referred the public authority to other correspondence, sent to a different individual at the public authority on 3 October 2009, which also stated the same.

25. The Commissioner has obtained a copy of the complainant's letter of 3 October 2009. The letter contains the following clarification from the complainant:

*"To clarify, I have not requested the information as an employee enquiry.*

*The request is made as a general enquiry for projected NHS pension information; with reference to the entry years and retirement age details provided in my email enquiry (a copy of which I note also accompanied your letter).*

*If it assists you to provide the projected NHS pension information requested, please process this request under the provisions of the **Freedom of Information Act (2000)**."*

26. The Commissioner is therefore satisfied that the complainant's correspondence does not provide the public authority with any explanation why the online calculator will be unsatisfactory for the complainant's purposes, and which would have assisted it in amending its response.

27. The Commissioner has therefore determined that the public authority does not hold information on the salary scale for a consultant grade post, for 22 April 2027 and consequently does not hold the requested information.



## Exemptions

### Section 21

28. The public authority did not refuse the request under section 1 of the Act, that it did not hold the requested information, but rather under section 21 of the Act, that the requested information was reasonably accessible to the applicant by other means. The Commissioner notes that information cannot be refused under any exemption provided in section 11 of the Act if it is not held by the public authority.
29. The Commissioner's view is that the meaning of the request is clear. It requests (speculative) information on a hypothetical level of pension achievable in a range of different scenarios. The public authority's response appears to suggest that its interpretation of the request was, essentially, similar to this because it did not ask the complainant for any clarification of his request.
30. The Commissioner considers the objective reading of the request in paragraph 29 to be a reasonable one and, therefore, the public authority lacked sufficient information to permit it to rely on the exemption provided at section 21 of the Act. Had the public authority requested examples of the final salary figure envisaged by the complainant under section 1(3) of the Act and the complainant had then provided examples, it might then have been entitled to refuse the request under section 21 and refer him to the online pensions calculator.
31. He concludes that the refusal of the request on the basis of the exemption provided at section 21 of the Act was incorrect as the requested information is 'not-held' and therefore cannot be 'refused'. The public authority should, instead, have provided the complainant with a denial that the requested information was held by it. It could reasonably then have provided the complainant with details of its online pensions calculator, under the duty to provide advice and assistance under section 16 of the Act.

## The Decision

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32. The Commissioner's decision is that the public authority did not deal with the request in accordance with the requirements of the Act.



- The requested information is not held by the public authority. In failing to confirm or deny that information was held, the public authority breached section 1(1)(a) of the Act.
- The information was incorrectly refused under the exemption provided at section 21 of the Act.

## Steps Required

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33. The Commissioner requires no steps to be taken.

## Other matters

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34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

35. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner notes that in this case it took 31 working days for an internal review to be completed. The level and complexity of that review does not appear to be such that it would have been reasonable for it to have taken longer than 20 working days.

## 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

**Dated the 28<sup>th</sup> day of October 2010**

**Signed .....**

**Pamela Clements  
Group Manager, Complaints Resolution**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## Legal Annex

### **S.1 General right of access**

**Section 1(1)** provides that -

*'Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.'*

**Section 1(2)** provides that -

*'Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'*

**Section 1(3)** provides that –

*'Where a public authority –*

*(a) reasonably requires further information in order to identify and locate the information requested, and*

*(b) has informed the applicant of that requirement,*

*the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'*

**Section 1(4)** provides that –

*'The information –*

*(a) in respect of which the applicant is to be informed under subsection (1)(a), or*

*(b) which is to be communicated under subsection (1)(b),*

*is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.'*

**Section 1(5)** provides that –

*'A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).'*

**Section 1(6)** provides that –

*'In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'.'*

## **S.21 Information Accessible by other Means**

**Section 21(1)** provides that –

*'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'*

**Section 21(2)** provides that –

*'For the purposes of subsection (1)-*

*(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and*

*(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.'*

**Section 21(3)** provides that –

*'For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.'*