Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **7 October 2019**

Public Authority: **Parliamentary and Health Service Ombudsman**
Address: **Millbank Tower**
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested information relating to the AEA Technology Pension Scheme (AEAT).

2. The Commissioner's decision is that Parliamentary and Health Service Ombudsman (PHSO) has correctly applied section 44(1) of the FOIA to the withheld information.

3. The Commissioner does not require PHSO to take any steps as a result of this decision notice.

Request and response

4. On 6 March 2018, the complainant wrote to PHSO and requested information in the following terms:

   "I, therefore, would like to submit a formal request under the FOI Act to see the contents of these complaints (acknowledging that the names of the complainants will be withheld under the Data Protection Act). As a public body, the PHSO is accountable and must provide this information on request."

5. PHSO responded on 11 April 2018 and refused to provide the requested information citing section 40(2) of the FOIA by virtue of section 40(3)(a)(i).

6. Following further correspondence, PHSO advised the complainant that the majority of the complaint files relating to the AEA Technology Pension Scheme had been destroyed. However, it later provided a table to the complainant showing 15 complaints that had been dealt with and the outcome of those complaints.

7. On 24 April 2018 the complainant then made the following request:

   "I ask you now to release the statistics on the complaints regarding AEAT. It appears that there may have been a significant number of these complaints, and I ask you to provide me with the actual number of complaints that have been raised regarding AEAT and the number upheld and declared out of remit. If you do not hold a log of or statistics about complaints made against the PHSO's handling of complaint cases about AEAT you need to state that fact in writing. I see no reason why you are unable to release these statistics you must have collected whilst perusing the case files involved."

8. PHSO replied on 15 May 2018 and provided a new reference number. It stated that during the period 2014/15 to 2016/17 there were a total of 15 complaints received relating to the AEA Technology Pension Scheme. It also attached a table providing breakdown to show the outcome of each complaint.

9. On 21 May 2018 the complainant made a further request for an explanation of the terminology used in the table of complaints and PHSO provided this on 7 June 2018.

10. The complainant also made a new request on the same day *"to release the content of these cases after 'redacting' (censoring) the names of claimants.."*

11. On 12 September 2018 PHSO further responded to the request made on 7 June 2018 and stated that the content of the files was being withheld under section 44(1)(a) of the FOIA. It is unclear from the correspondence provided when an internal review was carried out.

Background

12. In 2015 the complainant made a complaint to PHSO via his MP in relation to the actions of the Pensions Regulator, regarding AEAT. The complaint was not upheld by PHSO. Since then, the complainant has made a number of information requests to PHSO relating to complaints made about AEAT.

13. The Commissioner has taken the following information from https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7740

14. AEA Technology (AEAT) pension scheme is a defined benefit final salary scheme set up with AEA Technology (previously the commercial arm of the UK AEA was floated on the stock exchange in September 1996. AEA Technology has become a Government owned company that April, although staff remained members of the UK AEA pension scheme until flotation (HC Deb 18 March 2015 c284WH).

15. The Atomic Energy Authority Act 1995 detailed the conditions for privatisation of AEAT and included specific provision for the pension arrangements of transferring staff. This included a "statutory duty and statutory reassurance" to provide a pension scheme that was "no less favourable" than the UK AEA scheme" (Schedule 4, para 6 and 7).

16. In November 1996, the Government Actuary's Department (GAD) issued a note outlining the choices available to members of the UK AEA scheme. These were to:

- Leave their preserved benefits in the UK AEA scheme (a public service scheme);
- Transfer them to the AEAT scheme; or
- Purchase a personal pension.

17. The note said that it was "unlikely that the Scheme would fail or, that the benefit promise made by either the UK AEA scheme or the AEAT scheme would ever be broken" (Pensions Ombudsman determination-4816, January 2015).

18. The AEAT Scheme entered a Pension Protection Fund (PPF) assessment period in 2012 and transferred to the PPF in July 2016. It is estimated that 3,000 people have been affected as a result and are now covered by PPF compensation arrangements (PQ 6580, 7 September 2017).

19. The PPF was set up under the Pensions Act 2004 to provide compensation to members of defined benefit pension schemes that wind up underfunded on the insolvency of the employer. It provides two levels of compensation (for most of those below pension age at the start of the assessment period, 90% subject to a cap). See PPF website and Library Briefing Paper SN-03917.

20. An AEAT pensions campaign was set up with the aim of achieving the "reinstatement of pension rights as promised by the government at the time of privatisation." It argued that the GAD document "encouraged employees to transfer to the new scheme" and that scheme members "were only told of the risk to their scheme in August 2012, when the negotiations were all but complete".

21. The issue was the subject of a Westminster Hall debate in March 2015 (HC Deb 18 March 2015 c284-93WH). Opening a further Westminster Hall debate in October 2016, Sir Oliver Letwin said that the information given to scheme members at privatisation by GAD had not brought out the difference in risk between the two schemes:

    "What is clear is that nowhere in the rest of the document does the Government Actuary's Department say what was also patently true — that the risk of the pensioners losing a large part of the value of their pensions if they remained with their accrued rights in the UKAEA scheme was zero, or as near to zero as human beings get. A triple A-rated guarantee from HM Government attended that scheme. No such security was available under the AEA Technology scheme. Commercially-backed schemes do not have a triple A-rated Government-backed guarantee that pensioners will get their money as promised. That is a material difference between the two schemes, and the Government Actuary's Department, in offering advice to pensioners, had a clear duty to bring out that difference in risk. It did not, and that is the starting point for the compelling argument I will make. (HC Deb 26 October 2016 c163WH)"

22. He suggested the PHSO should be able to rule on whether there had been maladministration:

    "It is well established in the case law surrounding the ombudsman that if a Government Department misleads people, that is a form of maladministration, and if it causes them loss, that is a form of maladministration that the ombudsman can rule requires remedy. That

is a perfectly well established chain of thought. We might think, therefore, that the Parliamentary and Health Service Ombudsman would be able to rule on whether I am right in asserting that the Government Actuary's Department misled these pensioners and therefore engaged in an act of maladministration."

23. The then Pensions Minister Richard Harrington did not accept that it had a responsibility to compensate scheme members beyond what would be provided through the Pension Protection Fund:

"The Government do not believe that we should compensate members of the AEA Technology pension scheme above what is being provided by the Pension Protection Fund. That is very clear. I would rather not be grey about it; that is the Government's position. We do not accept that the loss of the pensions was the Government's fault."

24. He said the note provided by GAD was not advice:

"Whatever it may or may not be, the note clearly states at the beginning that it was a note by the Government Actuary's Department on the options available in respect of accrued benefits. It states that clearly. I do not wish to be pompous about the word "advice", which means different things in the financial services world than in the general context of conversation between people and in guidance, but it was not designed to be advice. It provides three options and outlines the main factors that people should take into account when reaching their decision on which option to accept."

25. A complaint regarding information provided to employees about their pension rights woud fall within the remit of the Pensions Ombudsman (PO) rather than the Parliamentary and Health Service Ombudsman (PHSO). Decisions of the PO could be challenged in the courts by judicial review or appeal.

26. On 14 September 2018, the then Business, Energy and Industrial Strategy (BEIS) Minister Sam Gyimah said that the Secretary of State had *"no plans to make a statement on this matter."*

27. The AEAT Pension Campaign[1] was set up with the aim of achieving "the reinstatement of pension rights as promised by the government at the time of privatisation." It explains:

[1] http://aeat.pensioncampaign.info/story/

- Why does AEAT pension campaign believe members should feel aggrieved?

There are several reasons including the following.

AEA Technology was allowed to enter a pre-pack administration and default on its pension liabilities, despite it being an apparently profitable company and actively recruiting. The transfer of service at the time of privatisation was said to be secure and the government does not intend to honour this promise.

The AEAT pension scheme was set up to be at least equivalent to the UKAEA one, but the government is not intending to fulfil this statutory requirement.

- What does the AEAT pension campaign hope to achieve?

The reinstatement of pension rights as promised by the government at the time of privatisation. A thorough investigation into the pre-pack insolvency of AEA Technology, including the roles of various interested parties, including the pensions regulator, the PPF and the trustees.

Scope of the case

28. The complainant initially contacted the Commissioner with the support of his MP on 17 May 2018 to complain about the way his request for information dated 6 March 2018 had been handled.

29. Following further correspondence the complainant submitted his grounds for complaint on 10 December 2018, and included copies of correspondence with PHSO.

30. On 28 June 2019 the Commissioner wrote to the complainant with her preliminary view that PHSO had correctly cited section 44(1)(a). The complainant responded and stated:

"In undertaking your investigation, you need to understand that I did not request information gathered during any PHSO investigations, which would make the material exempt from the Act, but rather the conclusions and topic matter of the relevant investigations.

It is the exemption under section 44(1)(a) that I am challenging. The material I am requesting was not and could not have been acquired during an investigation."

31. The Commissioner wrote to PHSO on 15 July 2019 asking it to clarify why the conclusions were considered exempt and explain how the legislation demonstrated this.

32. PHSO did not respond and consequently the Commissioner wrote again on 6 September 2019 requesting a response by 13 September 2019. She also advised that if she did not receive any response by that date, it may influence the outcome of her decision. The Commissioner sent a final reminder on 24 September 2019 and PHSO finally responded on 26 September 2019.

33. The Commissioner therefore considers the scope of this case to be to determine if PHSO has correctly applied section 44(1)(a) of the FOIA to the withheld information requested on 21 May 2019, that is:

"to release the content of these cases after 'redacting' (censoring) the names of claimants.."

Reasons for decision

Section 44 – statutory prohibitions on disclosure

34. Section 44 is an absolute exemption, which means that if information is covered by any of the subsections of section 44 it is exempt from disclosure. It is not subject to a public interest test.

35. Section 44 of the FOIA states that:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

36. The PHSO has sought to rely on the section 44 exemption under the FOIA to withhold information obtained for the purposes of investigations.

The PHSO stated that the relevant legislation from which it draws its powers is the Parliamentary Commissioners Act 1967 (PCA)[2]. Section

[2] http://www.legislation.gov.uk/ukpga/1967/13/section/11

11(2) of the PCA, also sets out the circumstances under which information obtained by the PHSO for the purposes of an investigation can be disclosed. '

(2) Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation under this Act shall not be disclosed except-

> *(a) for the purposes of the investigation and of any report to be made thereon under this Act;*
>
> *(aa) for the purposes of which is being investigated by the Health Service Commissioner for England or a Local Commissioner (or both);*
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> *(b) for the purposes of any proceedings for an offence under [the Official Secrets Acts 1911 to 1989] alleged to have been committed in respect of information obtained by the Commissioner or any of his officers by virtue of this Act or for an offence of perjury alleged to have been committed in the course of an investigation under this Act or for the purposes of an inquiry with a view to the taking of such proceedings; or*
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> *(c) for the purposes of any proceedings under section 9 of this Act;*

and the Commissioner and his officers shall not be called upon to give evidence in any proceedings (other than such proceedings as aforesaid) of matters coming to his or their knowledge in the course of an investigation under this Act.

37. The Commissioner recognises that this legislation prohibits disclosure of information obtained during an investigation. The Commissioner also notes the provision of privacy at section 7(2) of the PCA 'Every investigation under this Act shall be conducted in private'. (http://www.legislation.gov.uk/ukpga/1967/13)

38. PHSO explained that the provision relates to 'Information obtained by the Commissioner or his officers in the course of or for the purposes of an investigation'. This information is assessed and analysed and if material to the investigation forms the building blocks of its final reports.

39. PHSO further explained reports are written for the complainant (and if parliamentary in nature, for the relevant Member of Parliament) and the body under jurisdiction. Therefore they are saturated with material evidence i.e. information obtained during the course of an investigation. To produce a final report without disclosing this information is not an

easy task and whilst there may be times when the Ombudsman decides to dis-apply that provision, it is at PHSO's discretion to do so.

40. PHSO responded to the complainant with a detailed breakdown of why the PCA applied in its internal review response. However for brevity the Commissioner has not repeated it here.

41. The PHSO makes reference to exemptions outlined in section 11(2) of the PCA that it can use to dis-apply the prohibition or the gateways available to it should it decide to disclose information in a given context.

42. There is no means of challenging this under the FOIA. The FOIA itself cannot provide an exemption from a statutory prohibition. Gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world at large.To dis-apply the prohibition remains at PHSO's discretion. As the Information Commissioner has previously remarked[3]:

"The Commissioner's view is that it is to the discretion of the PHSO in a given case whether it uses an exemption to dis-apply the prohibition and therefore use this gateway. ***It is not within the Commissioner's remit*** *to question the use, or not, of the exemption or gateway in a particular case. This is a decision for the PHSO alone. Therefore for these reasons, if the PHSO decides not to use an exemption or gateway to dis-apply the prohibition in a particular case, the prohibition from disclosure under section 44(1)(a) must continue to apply.*

There is no means of challenging this under the FOIA. The FOIA itself cannot provide an exemption from a statutory prohibition. Gateways allow disclosure for specific purposes but FOIA is about general disclosure to the world at large."

43. The Commissioner asked PHSO to specifically address the complainant's argument that the conclusion and topic matter was not material gathered during an investigation.

44. PHSO explained that as above, (paragraph 38), PHSO final reports are derived and inseparable from information obtained in the course of or for the purposes of an investigation.

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[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614951/fs50778473.pdf

45. For example, on 5 August 2018 PHSO wrote to the complainant advising him of the outcomes of the cases in question. It provided him with a table showing each case and the outcome 'upheld', 'out of remit' or 'not upheld'. At the internal review PHSO also explained the terminology and added further information about each case.

46. PHSO stated that it would not provide anything more detailed due to the fact investigations are conducted in private as per Section 7(2) of the PCA 1967 '*Every investigation under this Act shall be conducted in private'* and as described above, disaggregating that information obtained in the course of an investigation from the final report of that investigation is difficult and near impossible.

47. Finally, PHSO explained that it has already disclosed to the complainant as much information as it could without invoking s44(1)(a). Any further information would be detailed complaint case information gathered in the course of or for the purpose of an investigation. This includes the final decision being recorded in a 'final report'.

48. Following the Commissioner's own guidance[4] and the binding decision of the Upper Tribunal in 2011 (Ofcom v Gerry Morrissey and the IC, 2011 UKUT 116 AAC), she will not question or examine the reasonableness of the authority's decision. The Commissioner will only verify that the authority has made that decision, and not consider whether its decision was reasonable.

49. Section 44 is an absolute exemption and so it is not necessary to set out public interest test considerations here.

50. The Commissioner has viewed all the documentation provided by both the complainant and the PHSO and has considered and reviewed the historical background surrounding the complaint, in particular the on-going campaign for the reinstatement of the rights of the former pension scheme. Although she has not seen the withheld information, the Commissioner is satisfied by PHSO's explanation that all of the information requested is exempt information under FOIA as its disclosure is prohibited by section 11 of the PCA (provision for the secrecy of information).

[4] https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf

51. In conclusion, the Commissioner's decision is that PHSO has correctly applied section 44(1)(a) to withhold all the requested information in this case.

Right of appeal

52. 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

53. 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.

54. 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 .....

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