

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2019

Public Authority: The Pensions Ombudsman
Address: 10 South Colonnade
Canary Wharf
E14 4PU

Decision (including any steps ordered)

1. The complainant has requested information about the AEA Technology pension scheme ("AEAT Scheme") and the transfer of public sector benefits into that scheme. The Pensions Ombudsman (TPO) refused to comply with the request citing section 12, section 40(2) and section 21 of the FOIA as its reasons for withholding the requested information. Whilst still relying on these exemptions, the TPO later cited section 14, section 41 and section 31(1)(c).
2. The Commissioner's decision is that TPO correctly applied section 40(2) and section 31(1)(c) to the requested information. However, she is not persuaded that TPO cited section 14 appropriately. The Commissioner does not accept that section 12 applies to part three of the request or that section 21 was correctly applied.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose any information TPO holds within the scope of parts one, two and three of the request that has been withheld under section 21. For the avoidance of doubt, this means non-personal information concerning the AEAT Scheme and the transfer of public sector benefits, particularly those from UKAEA, that are referred to as "general documents" by the public authority (such as leaflets, booklets, deeds of amendment etc).
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

5. On 23 March 2018, the complainant wrote to TPO and requested information in the following terms:

"Under the Freedom of Information Act (2000), I am requesting copies of the documents and notes

- 1) **concerning the AEA Technology (AEAT) Pension Scheme and***
- 2) **the transfer of Public Sector benefits, particularly those from UKAEA, into this Scheme.***
- 3) **In addition, please include copies of complaints submitted to the Pensions Ombudsman Service, and the POS responses concerning these matters.***

I understand that you may need to redact some of these to preserve anonymity under the Data Protection Act (1998). There is no need to resend the information [named individual] dispatched to me on date 17/8/2016 under a previous FoI request, as this simply comprised my own information..."

6. On 8 May 2018, TPO responded, separating out the request into its constituent parts:

- Part one - TPO stated that it was withholding information that it considered to be the personal data of third parties. Other information was withheld as reasonably accessible to the complainant and exempt under Section 21 of the FOIA. TPO explained that any information from the complainant's own file had already been provided under the DPA 1998.
- Part two - TPO stated that it was withholding information that it considered to be the personal data of third parties. Other information it withheld as reasonably accessible to the complainant and hence exempt under Section 21 of the FOIA.
- Part three - TPO stated that it was withholding information that it considered to be the personal data of third parties and other information was withheld as reasonably accessible to the complainant and exempt under Section 21 of the FOIA. Any remaining information that fell within the scope of this part of the request TPO stated would be too costly to extract and would exceed the Section 12 cost limit.

7. Following an internal review, TPO wrote to the complainant on 22 June 2018 upholding its original response.

8. After the Commissioner wrote to TPO it stated that the request was a repeat request and a grossly disproportionate burden. TPO additionally

cited section 41 (information provided in confidence) and section 31 (law enforcement) for withholding the information.

Background

9. TPO impartially investigates complaints from members of occupational and personal pension schemes or their beneficiaries, employers or trustees about pension administration, amongst other matters. TPO is a tribunal and a non-departmental public body, sponsored and funded by the Department for Work and Pensions.
10. The privatisation of part of the United Kingdom Atomic Energy Authority (UKAEA) in 1996 led to AEAT being created and a pension scheme being drawn up which, the Commissioner understands, had to be at least as good as the UKAEA Scheme from which employees were transferring. Employees were able to choose to freeze the pension they had built up prior to privatisation (with UKAEA) or for existing employees to transfer to a specific AEAT Scheme. The AEAT Scheme entered administration in 2012 and was assessed by the Pension Protection Fund and subsequently transferred over in 2016.
11. When a complaint was brought to the TPO by the complainant, it had reached the conclusion that his complaint was outside its jurisdiction and could not be investigated.

Scope of the case

12. The complainant contacted the Commissioner on 24 September 2018 to complain about the way his request for information had been handled.
13. The Commissioner considers that the scope of this case concerns TPO's application of section 14. If section 14 is not applicable, she will consider section 12 and, as appropriate, the exemptions cited in paragraph one.

Reasons for decision

Section 14(2) – repeated requests

14. TPO did not cite which limb of section 14 it was applying but it did state that the request was a repeat request. Consequently the Commissioner intends to look at section 14(2) first. Section 14(2) of FOIA states that:

"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply

with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request."

15. TPO's view is that initially the complainant's first FOIA request which ended in the ICO's decision notice being appealed to the First-Tier Tribunal appears different to his second request. TPO explained that the complainant's first request was for information concerning his own complaint and the second request concerns other parties' complaint files. However, TPO then stressed that this was in fact a repeat request by quoting comments made by the complainant in order to support its view that the decision not to investigate his complaint lay behind both complaints. TPO's view is that the request is an attempt to resurrect matters when both the ICO in its decision notice FS50645807 and the Tribunal had already made their determinations.
16. The complainant, however, argues that his second request is significantly different. The first request was restricted to a search of his own case number and name and did not examine the broader issue of all AEAT pensioners and the justification for the decision by TPO not to investigate their complaints.
17. By its own admission TPO states that the complainant's latest request under the FOIA is set out as a much broader request seeking all documents and notes held by TPO relating to the AEAT Scheme; the transfer of Public Sector benefits (particularly from the UKAEA Scheme to the AEAT Scheme); all complaints received by TPO, and TPO's responses to complaints about these transfers.
18. The Commissioner's guidance is as follows –

"Under Section 14(2) of the Act, a public authority does not have to comply with a request which is identical, or substantially similar to a previous request submitted by the same individual, unless a reasonable period has elapsed between those requests..."

A public authority may only apply Section 14(2) where it has either;

- *previously provided the same requester with the information in response to an earlier FOIA request; **or***
- *previously confirmed the information is not held in response to an earlier FOIA request from the same requester.*

If neither of these conditions applies then the public authority must deal with the request in the normal manner."

19. A request is only considered to be identical if its scope and wording precisely matches that of a previous request or is substantially similar.

20. The Commissioner's decision is that TPO incorrectly applied section 14(2) to the information as it is neither identical nor substantially similar to his first request.

Section 14(1) – vexatious requests

21. TPO argued that responding to the complainant's request would impose a grossly disproportionate burden. An authority cannot claim section 12 (cost of compliance exceeds the appropriate limit) for the cost and effort associated with considering exemptions or redacting exempt information, however these can be claimed under section 14(1).
22. Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.
23. TPO explained that it is a small office with limited resources. TPO argued that in order to consider such a wide request (effectively all the information held on the AEAT Scheme) it would need to spend time considering the applicable exemptions and redacting personal information from numerous third-party complaint files. Its conclusion was that this would cause a disproportionate and unjustified level of disruption.
24. One of the indicators that the Commissioner sets out in her guidance¹ is the burden on the authority. The burden is defined as the effort required to meet the request being so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester.
25. TPO clearly states that this is the complainant's second information request. It supports its position that the request is vexatious by stressing the time it would take to redact and apply exemptions to the requested information. A public authority is able to apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.
26. The Commissioner considers though that there is a high threshold for refusing a request on such grounds. Her guidance sets out the following criteria as viable -

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

- *The requester has asked for a substantial volume of information*
AND
- *The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO* **AND**
- *Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.*

27. The Commissioner does not accept that TPO has provided enough evidence to be able to support its characterisation of the request as a grossly disproportionate burden and therefore the request is not 'vexatious'.

Section 12

Part three of the request

28. Section 12(1) of the FOIA states that:

'(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

29. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of TPO. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

30. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers

that any estimate must be 'sensible, realistic and supported by cogent evidence'.²

The complainant's view

31. The complainant argued that the contents of 23 complaint files could hardly be described as excessive, particularly if in electronic form.

TPO's view

32. TPO stressed to the Commissioner the breadth of the complainant's request. Complaints made to TPO are normally stored in paper files whilst the 'Navigo' system is used to store electronic documents such as emails and Word documents. It is not possible to scan the Navigo electronic files to extract specific information or data. Both the hard copy file and the associated Navigo file for each identified complaint would need to be manually checked. TPO explained that this would involve physically looking at each document in the paper file and manually opening each document/entry in the Navigo file to assess whether it falls within the scope of the complainant's request.
33. TPO conducted an electronic search for all files relating to the AEAT Scheme and/or the transfer of benefits from the UKAEA Pension Scheme. It identified 42 separate complaint files that could potentially contain information falling within the scope of the request, of which 23 were very likely to be in scope because the electronic record indicates that they relate to the transfer of benefits. The 42 files relate to 27 individual complainants to TPO (including the complainant on this case). Some complainants register multiple complaints.
34. In response to the Commissioner's questions, TPO estimated that checking all the complaint files that it had identified as having the potential to fall within the scope of the complainant's request would take more than 18 hours to complete. TPO, by way of example, cited the 200 plus pages that comprised the complainant's file which it estimated would take at least two hours to review. However, each complaint file is a different size. Identifying (presumably determining and locating) what information falls within scope) all the information that concerns the transfer of Public Sector benefits (the broadest scope of the complainant's request) would, in TPO's view, take weeks.

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> – (paragraph 12)

35. TPO did not carry out a specific sampling exercise, providing the reason that the breadth of the complaint, at its lowest possible level, involves around 23 separate complaint files and at its highest 42 files. However, each complaint file, both paper and Navigo versions would need to be reviewed within 47 minutes before the applicable limit was reached, which it did not consider could be realistically achieved. TPO confirmed that this estimate is based on the quickest method as there is no alternative to physically checking each document contained within the paper and Navigo files separately.
36. TPO argued that the complainant had already been provided with information relating to his own complaints to TPO. As the remaining information being sought relates to information held on third party complaint files, there is no advice or assistance that the TPO could offer the complainant in refining his request.

The Commissioner's view

37. Section 12 could have been applied to the whole request. However, TPO only applied section 12 to the third part of the request. The Commissioner can therefore only consider it in relation to part three.
38. The Commissioner considers that a sampling exercise should have been conducted on an average sized file. TPO told the Commissioner that the complainant's file is 200 pages plus and, setting aside the fact that its contents have already been provided (leaving 22 files), it is not clear if his file is larger than average or not but the calculation seems to have been reached by dividing 18 hours by 23. TPO has not told the Commissioner what size an average file is, it is impossible therefore to calculate how long a small file would take, or, for that matter, what proportion of the 22 or 23 files are small, medium or large.
39. The Commissioner does not accept that TPO has established that part three of the request alone would exceed the fees limit and therefore section 12 is not engaged.
40. However, both section 40(2) and, subsequently, section 31(1)(c) and section 41 have also been applied to the information in part three and she needs to consider the applicability of these exemptions before reaching a decision.

Section 31 – law enforcement

41. The Commissioner has had sight of an example of the complaint files to which the TPO has applied section 31 where section 21 or section 40(2) are not applicable.

42. The relevant parts of section 31 are set out below -

*"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
...(c) the administration of justice"*

43. The Commissioner's guidance on section 31 includes the following analysis:

"As well as preventing any prejudice to particular cases, section 31(1)(c) can protect a wide range of judicial bodies, such as courts, coroner's courts and tribunals from disclosures that would in any way interfere with their efficiency and effectiveness, or their ability to conduct proceedings fairly. This will include prejudice to the administrative arrangements for these bodies and the appointment of magistrates and judges, or arrangements for the care of witnesses. It would also cover any disclosures that would interfere with the execution of process and orders in civil cases." ³ (paragraph 26)

44. Section 31 is a prejudice based exemption and is subject to the public interest test. In this case disclosing the information would have to prejudice the administration of justice and, before the information can be withheld, the public interest in preventing that prejudice must outweigh the public interest in disclosure.

45. Section 31 is engaged only if certain criteria are met -

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would or would be likely' to result in prejudice.
46. TPO has explained that it was set up by Parliament to resolve pension disputes. It is a tribunal, with users having a right of appeal to the High Court (Chancery Division). The public authority believes that the general expectation of the parties involved in a dispute which is referred to TPO do so on the understanding that information will be shared on a limited basis for the purposes of the resolution and/or determination of the complaint or dispute. They do not expect the details of the dispute, how the investigation is conducted, or process details, to be disclosed to the world at large. TPO contends that AEAT Scheme members that come to TPO do not expect their information to be shared with third parties unless they are other Ombudsmen or Regulators. If they wanted to share this information, they could go directly to the Campaign Group.
47. The complainant's view is that this issue could be resolved by writing to all the individuals involved to ask if they would be willing to share their information under the proviso that names and contact details would be redacted.
48. The Commissioner is satisfied that the prejudice alleged by TPO is real and of substance, and that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect. She must now establish whether disclosure would be likely to result in the prejudice alleged (ie the third criterion).

Level of prejudice

49. In order for this exemption to be engaged it is necessary to prove that disclosure would involve a level of harm. The harm in this case means that disclosure would or would be likely to prejudice the proper administration of justice.
50. The Tribunal analysed the two levels of prejudice in *Hogan and Oxford City Council v the Information Commissioner [EA/2005/0026 and 0030]* where it said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."(paragraph 33)

51. TPO is relying on the lower level of prejudice. TPO argues that disclosure of information contained within its complaint files would be likely to prejudice its ability to resolve cases effectively. It underpins this by saying that members of the public might think better of bringing their complaints to TPO if they considered that their personal, private information might be more widely circulated.
52. TPO asserts that if disclosure was ordered, individuals involved in disputes may be less cooperative and more guarded about the information that they share with it. They might be less willing to participate in free and frank discussions about a dispute, which would significantly prejudice its ability to resolve disputes efficiently.
53. The Commissioner agrees that the lower level of prejudice is engaged and that there is a real and significant risk of the prejudice occurring should the contents of complaint files in their entirety be subject to disclosure.

Public interest test

Arguments in favour of disclosing the information

54. TPO acknowledges that there is a public interest in openness, transparency and accountability, but that this is achieved by the alternative means of the publication of the Ombudsman's Determinations (in an anonymised format) on its website - <https://www.pensions-ombudsman.org.uk/our-decisions/>.
55. The complainant's opinion is that this would be an argument if TPO had made a determination but his complaint was never investigated, therefore no determination appeared on the website. TPO's view is that there is a clear public interest in it being able to operate on the basis of confidentiality between the parties.
56. TPO does not consider that the disclosure of information relating to a dispute is justified on public interest grounds because the consequences of doing so are likely to prejudice its ability to carry out its statutory function to administer justice.

Balance of the public interest

57. The Commissioner understands the complainant's point of view. However, she considers that, if individuals thought that their information would be disclosed if they brought a complaint to TPO it might deter them from doing so, or being candid if they did. She agrees that it would undermine TPO's authority and its ability to administer justice within its specified remit which is not in the public interest.

Section 40(2) – Personal information

58. The Commissioner does not intend to look at the complainant's own complaint file (section 40(1)) as it was excluded from the scope of the request and it has, in any case, already been provided to him.
59. The complainant asked for information concerning the AEAT Scheme and the transfer of Public Sector benefits, particularly those of UKAEA, into this Scheme. He specifically asked for copies of complaints submitted to TPO and its responses to the complainants.
60. At the time of compliance with the request, the relevant legislation in respect of personal data was the Data Protection Act 1998 ("the DPA 1998"). The determination in this case must therefore have regard to the DPA 1998, and the terms of the FOIA that were applicable at that time.
61. Section 40(2) states that:
- "Any information to which a request for information relates is also exempt information if–
- (a) it constitutes personal data which do not fall within subsection (1), and (b) either the first or the second condition below is satisfied."
62. Section 40(3) of the FOIA explains the following –
- "The first condition is–*
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–*
- (i) any of the data protection principles..."*

Is the withheld information personal data?

63. For this exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA 1998 as:

"...data which relate to a living individual who can be identified–

(a) from those data, or

(b) from those data and other information which is in the possession

of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."

64. TPO stated that it is very likely that most, if not all, of the documents contained within its complaint files will contain personal data of some sort relating to the respective complainants. These complaint files are also likely to contain personal data about other individuals connected to the complaint. Individuals can be identified by personal details such as their name, address and email addresses. They may also be identifiable from other information contained within the complaint files.
65. The Commissioner has had sight of a sample file of the withheld information. She accepts that the complaint files contain the names of individuals, their age, contact details, workplace details, biographical details, scheme/financial details and correspondence. Other third party individuals will also be identifiable from the contents of these files. Therefore the contents of the complaint files clearly contain personal data.

Does the information contain any sensitive personal data?

66. Sensitive personal data is defined in section 2 of the DPA. It is personal information which falls into one of the eight categories set out in section 2 of the DPA.
67. TPO explained that it is common for its complaint files to contain sensitive personal data, most commonly racial or ethnic origin and physical or mental health or condition. It was not possible for TPO to say how much is 'sensitive personal data' without actually extracting the information from the files.
68. The Commissioner is satisfied that some of the withheld information will be sensitive personal data within the categories listed in the DPA 1998.

Would disclosure breach the data protection principles?

69. Schedule 1 of the DPA 1998 sets out the data protection principles. The first data protection principle says personal data should only be disclosed if it is fair and lawful to do so. The conditions for releasing personal data are set out in schedule 2.
70. The Commissioner has identified the first data protection principle as relevant to this request. The principle requires the following –

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

*(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

71. In considering whether it would be fair to release this information the Commissioner needs to balance the reasonable expectations of the data subject/s and the potential consequences of disclosure set against the legitimate public interest there may be in disclosing this information.
72. TPO does not consider that schedule 2 would allow the information to be disclosed, including under the sixth condition. Disclosure of the information to the complainant would, in its opinion, be unwarranted given that the data subjects provided the information in confidence and on the basis that the information would be used only for the purposes for which it was provided to TPO, that is, to determine the complaint or dispute.

Reasonable expectations

73. The complainant's view is that TPO has provided redacted information from complaint files in the past, removing personal data and leaving the important non-personal arguments. Therefore he is not questioning that it applies but that it could be redacted to anonymise it. The consideration here though is not whether it could be redacted to anonymise it but whether it was withheld correctly under the exemption for third party personal data.
74. TPO's view is that all the complaints covered by the complainant's request relate to the TPO complainants' employment and their associated occupational pension schemes. TPO argues that it handles personal data on the basis of its statutory power to determine complaints under Part X of the Pension Schemes Act 1993. No specific consent has been obtained to use these third parties' data for any other purpose than their complaint or dispute.
75. Parties provide TPO with their personal data on the basis that it will be used solely to consider their complaint or dispute. Consent has not been obtained for data to be used for any other purpose. TPO does explain to complainants that it has the power to share information about a complaint with a small number of designated persons, including other ombudsman schemes, regulators and so on in line with the Pension Schemes Act 1993 if TPO thinks it necessary in helping them carry out their own functions. However, there is no provision for data to be disclosed to persons unconnected to the dispute.

Consequences of disclosure

76. TPO argues that disclosure of the information to the complainant would be unwarranted, given that the data subjects provided the information in confidence and on the basis that the information would be used only for the purposes for which it was provided. To disclose personal information provided within the context of a complaint or dispute to the

Ombudsman service would be distressing and undermine their faith in the confidentiality of the service.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

77. As outlined earlier, TPO does not consider that schedule 2 would allow the information to be disclosed, including under the sixth condition. Set against this is the fact that TPO publishes its decisions/determinations on its website in some cases with the names of the individual attached and this is acknowledged on the website.
78. However, there is a difference between publishing a decision and publishing the contents of a complaint file, part of which is inevitably personal data. What appears on the website is essentially a summary of the determination and data protection has presumably been considered prior to publication.
79. The Commissioner accepts that the release of the personal data contained in the complaint files of third parties would be outside the reasonable expectations of the data subjects concerned who had provided it in order that TPO could determine a complaint or dispute. She also acknowledges that some of the individuals concerned might be content to have their information shared because they may themselves share the complainant's position regarding the pension transfer. However, it seems unlikely that those individuals would be unaware of a pressure group and be unable to provide some of their information should they wish to do so.
80. To release the contents of complaint files containing personal data into the public domain sets a precedent and the Commissioner's view is that it would be unfair and cause distress to those concerned, in breach of the first data protection principle.
81. For the reasons given above, the Commissioner concludes that the disclosure of the third party personal data requested would be unfair and is therefore exempt under section 40(2) of the FOIA by virtue of section 40(3)(a)(i).
82. The Commissioner has found that it would be in breach of the data protection principles to release personal data from the requested complaint files, she has therefore not gone on to consider section 41 and whether the information was provided to the TPO in confidence.

Section 21 – information accessible by other means

83. TPO has applied section 21 to all three parts of the request.
84. Section 21 of the FOIA states that:

"(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) 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."

85. The purpose of the exemption is to ensure that there is no right of access to information via the FOIA if it is available to the applicant by another route. It is an absolute exemption which means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.

TPO's view

86. TPO's view is that the complainant is a member of a campaign group. TPO provided other evidence that we cannot set out here for personal data considerations. Information available to the Campaign Group and its members would therefore be reasonably accessible to him. It argues that general documents concerning the AEAT Scheme such as Trust Deeds and Rules, Deeds of Amendment, member booklets, and so on can be obtained by the complainant from the Trustee or his former employer. TPO speculates that, as a member of the Scheme, he would have been sent a number of communications directly. The Scheme has also been the subject of a Parliamentary Debate where information provided to members of the Scheme has been discussed, and of which the complainant is aware.
87. TPO stated that it was confident that any information that falls outside the scope of the alternative exemptions it was relying on is likely to be reasonably accessible to the complainant and it provided two URLs to where this information can apparently be accessed.
88. On 20 March 2019 TPO responded to further questions from the Commissioner by explaining that it had not compared the information available in its complaint files with that which the complainant was likely to be able to access himself. It did consider that there was likely to be duplication across the files and overlap between what the complainant could obtain from the sources he had been referred to. Specifically in relation to part three of the request, TPO accepted that not all of the information it holds will be available to the complainant but that what he could not access was being withheld under alternative exemptions.

The complainant's view

89. The complainant argues that he is unable to obtain all of the information he needs from other sources.

The Commissioner's view

90. A public authority must know that it holds the information in order to be able to apply the section 21 exemption. When a public authority receives a request for information it has a duty to establish whether it holds that specific information because under section 1(1)(a), the requester is entitled to be told whether the authority holds the information. In this case, TPO has a duty to confirm or deny whether it holds the requested information. The Commissioner's guidance explicitly states that a public authority cannot claim the section 21 exemption on the basis that it probably holds the information or information of the same type.⁴ TPO needed to know whether it held the information specified in the request at the time it received it. It is clear that it does not. Consequently, the exemption is not engaged.

Section 10 – time for compliance

91. Section 1(1) of the FOIA states 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."

92. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
93. The Commissioner finds that TPO did not respond to the request for information within the appropriate time frame and therefore breached section 10(1).

⁴ <https://ico.org.uk/media/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

Right of appeal

94. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

95. 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.
96. 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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