

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 December 2010

Public Authority: Home Office
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant asked the Home Office (the “public authority”) to provide information concerning its contract to upgrade its application and enrolment system, forming part of the National Identity Scheme (the “NIS”). The public authority provided some information but refused to disclose the remainder citing the exemptions under sections 23(1) (Information supplied by or relating to bodies dealing with security matters), 24(1) (national security), 31(1) (law enforcement), section 40(2) (personal information) and 43(1) and 43(2) (commercial interests) of the Freedom of Information Act 2000 (the “Act”).

The Commissioner’s decision is that none of the exemptions at sections 23(1), 24(1), and 31(1) and 43(2) are not engaged. He finds that the exemption at 40(2) is engaged in respect of some of the information as its disclosure would breach the Data Protection Act (the “DPA”). The complaint is therefore substantially upheld.

The public authority’s handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

The Commissioner’s role

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.

Background

2. The request concerns a contract between the Identity and Passport Service (the "IPS") and CSC (the "Contractor") in relation to provision of the National Identity Scheme (NIS). According to the IPS website¹:

"To date IPS has awarded four contracts in direct support of the NIS ...

An Application & Enrolment contract was awarded to CSC in April 2009 for a total value of £385m. This is a ten year contract which will deliver new systems to support the processing of applications for passports and identity cards, as well as replacing other administrative and support capabilities used by IPS."

3. The public authority also produced a publication entitled "*The National Identity Service: Delivery Update 2009*"². This includes further general background information about the NIS.
4. The Contractor has several articles on its own website about its involvement^{3, 4, 5}. One of these articles confirms the following:

"News Release-- April 07, 2009

... CSC ... today announced that the UK Identity and Passport Service (IPS), an executive agency of the Home Office responsible for issuing UK passports and ID cards, has awarded the company a 10-year managed information technology (IT) services contract to upgrade the IPS application and enrollment system. The agreement has an estimated value of \$570 million (385 million pounds sterling).

Under the terms of the contract, CSC will assume responsibility

¹http://www.ips.gov.uk/cps/files/ips/live/assets/documents/PP_2.1_Public_Panel_further_briefing_December_2009.pdf

²http://www.ips.gov.uk/cps/files/ips/live/assets/documents/Doc_D_IPS_delivery_report_8.pdf

³ http://www.csc.com/uk/news/7494-identity_and_passport_service_appoints_five_suppliers_for_the_national_identity_scheme

⁴ http://www.csc.com/newsroom/press_releases/24942-csc_awarded_570_million_it_services_contract_by_uk_identity_and_passport_service

⁵ http://www.csc.com/smart_business/ds/33194/33622-transform_it_for_better_service_for_passport_applicants

for several existing legacy IT service contracts supporting the IPS. CSC will upgrade the existing application and enrollment system with new capabilities to process applications for passports and ID cards. The additions include the ability for customers to apply online; improved background checking; a new system for reporting lost and stolen passports and ID cards; customer support for updating personal data; and new IT and telephony systems.

Working in conjunction with the IPS and its other delivery partners for the National Identity Service, CSC will play a key role in enabling the agency to deliver the next generation of biometric passports and support the introduction of ID cards".

5. The complainant has made a request concerning a different contract concerning the IPS and the provision of the NIS. The Commissioner has issued a separate Decision Notice concerning this request – reference number FS50304115.

The request

6. On 12 May 2009 the complainant made the following information request⁶:

"Please supply a copy of the following documents, which form a part of the contract awarded 7th April 2009 to CSC to upgrade IPS' application and enrolment system:

- 1. The Service Agreement Schedules and annexes (in the order 1-x, or 2-x followed by 1 if Schedule/Annex 1 is entitled "Definitions", where x is the number of documents)*
- 2. The Service Agreement which contains conditions specific to a contract*
- 3. The Framework Agreement which sets out the core terms for contracts awarded, if different to the Framework Agreement with Thales*
- 4. Any and all other documents which form a part of this contract, in ascending order of the number of pages within the*

⁶http://www.whatdotheyknow.com/request/contract_with_csc_for_national_i#incoming-70601

document. For documents with the same number of pages, the documents should be considered in ascending alphabetical order of their titles.

Please supply as many pages as possible, starting with page 1 of the document appearing first in the ordering as specified above, and proceeding sequentially through the pages of this document followed by the remainder of the above listed documents, in order, to the extent that my request would not be subject to exemption under section 12 of the FOIA.

If you are considering applying the section 12 exemption to any extent in the face of clear Information Commissioner and Information Tribunal decisions to the contrary, please bear in mind that:

a) A refusal to answer my request in full will result in an appeal to the Information Commissioner, which will undoubtedly result in a decision consistent with his earlier decisions;

b) It is in the public interest that public money is spent on the substantive activities of releasing information under FOIA, rather than on an unnecessary appeal to the Information Commissioner”.

7. On 19 May 2009 the public authority acknowledged the request.
8. On 11 June 2009 the complainant chased a response to his request.
9. On 12 June 2009 the public authority advised the complainant that it wished to extend the time in which to provide as response by virtue of section 10(3) of the Act as it was considering the public interest in disclosure by virtue of the exemption at section 43 (commercial interests). It advised that it aimed to respond by 8 July 2009.
10. On 10 July 2009 the public authority advised the complainant as follows:

After careful consideration we have decided that the information you have requested is exempt from disclosure under Sections 12 and 22 (1) of the Freedom of Information Act 2000. In applying these exemptions IPS has had to balance the public interest in disclosing this information against the public interest of withholding it.

There is public interest in disclosure because we are committed to providing as much transparency on contracts for the National

Identity Scheme as we can. To that end we are pleased to advise you that an exercise has been commissioned within IPS to release further contractual information. This will allow us to publish summaries of the contracts for the Scheme, including those we will be awarding in the coming months. Our intention is that this document will provide as much information as we can, without prejudicing commercial, personal data or security interests. This will be made available on the IPS website and once this work has concluded, a copy will be sent to you.

The exemption within Section 12 applies to your request as a whole, not on an 'incremental' basis. The case against disclosure is that, in order for us to comply with the request without incurring such cost, a more refined request will be required to understand the exact information you require. Any public interest test can then be conducted in regard of any potential commercial, technical and security information within the documentation. However, we believe the summary contracts we intend to publish will provide the information you have sought where practical".

11. On 19 August 2009 the complainant asked for an internal review of his request of 28 November 2008. He explained why he didn't believe the exemptions at section 12 and 22 were applicable.
12. On 10 November 2009 the public authority advised the complainant that his internal review was nearing completion.
13. On 4 January 2010 the complainant chased a response. This was acknowledged by the public authority on the same day and he was advised that a reply should be with him by the end of the month.
14. On 4 February 2010 the public authority sent out its response. It found that the exemptions at sections 12 and 22 were not appropriate. It concluded that:

"IPS intend to publish summaries of the two contracts with Thales and CSA [sic] by the end of February 2010. They wil [sic] be available on the IPS website. I understand that the summaries which wil [sic] be published will, in terms of the information which they provide if not the exact format, be that which would be provided in response to an FoI request such as those which you have made. Where information is withheld, IPS wil [sic] explain the reason and refer to the relevant sections of the Act. IPS wil [sic] accordingly send to you later this month a revised response based on the summaries which wil [sic] be published,

together with the references to the sections of the FoI Act under which information is withheld. Since the information is too large to send electronically, they will require a postal address to which to send the information. I would be grateful if you could provide such an address."

15. On 26 February 2010 the public authority again wrote to the complainant. It advised him that:

" Contract summaries in relation to Thales and CSC have now been published and are available on the Identity and Passport Service (IPS) website at http://www.ips.gov.uk/cps/rde/xchg/ips_live/hs.xsl/282.htm Due to the sheer size of the documents in question, it is not possible to send them to you in electronic form, but you have indicated that you are content to access them from the website. Some of the information that was contained in the documents is exempt under the Freedom of Information Act 2000, and therefore has been withheld..."

It advised him that some of the information was being withheld under the exemptions at sections 23(1) (Information supplied by or relating to bodies dealing with security matters), 24(1) (national security), 31(1) (law enforcement), section 40(2) (personal information) and 43(2) (commercial interests).

16. On 18 March 2010 the complainant advised the public authority that he had now accessed the various published service agreements but that he was unable to locate any Framework Agreement/s as per part 3 of his original request.
17. On 13 April 2010 the public authority explained to the complainant that:

"In part 3 of your first request in respect of the contract with Thales you asked that we supply a copy of "The Framework Agreement which sets out the core terms for contracts awarded". In a later request which referred to the contract with CSC you asked for "The Framework Agreement which sets out the core terms for contracts awarded, if different to The Framework Agreement with Thales".

In response to your requests, the "core terms" you refer to in respect of these contracts are contained within the Service Agreement which we have already made available. The arrangements we hold with all suppliers that are delivering the

National Identity Service are standalone contracts that are individual to each supplier".

18. The complainant responded on 13 April 2010 saying:

"Part 3 of both requests was not intended to request the "core terms", it was clearly intended to request the "Framework Agreement". The phrasing "core terms" was intended to help you to identify the document I sought.

From reading the Service Agreements it is quite clear that the Framework Agreement(s) are a separate document with separate terms. For example, the definition of "Framework Dispute Resolution Procedure" in Schedule 1 to both Service Agreements refers to a Schedule 4 (Framework Dispute Resolution Procedure) of the Framework Agreement. I have found no such schedule in either Service Agreement. Both Service Agreements contain a Service Dispute Resolution Procedure, but why else would clause 46 of both Service Agreements make a distinction between them?"

"Furthermore, clause 94.1 of both Service Agreements begins "This Service Agreement together with (i) the Framework Agreement ..." clearly referring to the Service and Framework Agreements as separate documents".

19. No further response was made by the public authority. However, documents under the heading "Framework Agreement for the National Identity Scheme" were put on the public authority's website on 31 August 2010⁷.

The investigation

Scope of the case

20. On 26 March 2010 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:

⁷http://www.ips.gov.uk/cps/rde/xchg/ips_live/hs.xsl/1787.htm?advanced=&searchoperator=&searchmodifier=&verb=&search_date_from=&search_date_to=&stage=&search_event_subject=&search_category=&search_query=&search_scope=&search_group=&varChunk=

- Non-disclosure of any Framework Agreement/s
 - Excessive redaction of the Service Agreements / schedules
21. The complainant subsequently qualified that he was not complaining about schedule 16 of the Contract.
22. As the Framework Agreement documents had been made available on the public authority's website, albeit at a very late stage, the Commissioner asked the complainant to confirm that these met part 3 of his request. The complainant acknowledged this but, despite being asked on two further occasions, he did not provide a response. In the absence of such a response the Commissioner has proceeded as if the public authority's disclosure has met this part of the complainant's request and he has removed this element from the scope of his investigation.

Chronology

23. On 20 July 2010 the Commissioner commenced his investigation. He requested a complete, unredacted copy of the contract, annotated to show where each exemption was being applied. He also sought further explanations regarding the applicability of the exemptions. This was acknowledged on 21 July 2010.
24. Following an initial agreement to extend the time to respond to the Commissioner's queries, on 27 August 2010 the public authority sought further time to allow for further consultation. It asked for an extension until 28 September 2010.
25. On 7 September 2010 the Commissioner responded to this request. As an interim measure, he again asked for a full copy of the contract so he could start to consider its release - he further commented that he expected that this was already 'marked up' to identify where exemptions were applied as a result of the public authority citing the exemptions during its internal review. He advised that he did not need to see any information redacted by virtue of section 23 at this stage.
26. On 10 September 2010 the public authority sent the Commissioner a copy of the contract.
27. On 20 September 2010 the Commissioner provided the complainant with a brief update.
28. On 29 September 2010 the public authority telephoned the Commissioner. It advised him that it was hoping to soon be in a

position to release further content. The Commissioner agreed that he would allow 5 more days for work to be completed.

29. On 6 October 2010 the Commissioner requested an update. He specifically enquired as to whether any further information had now been released. The public authority provided a further response by return. This included details of concerns raised by the contractor, which are believed to have been provided on that same date. The contractor cited section 41 and stated that, if section 41 was found to not be applicable, that it wished to cite 43(1) instead. It also cited section 43(2). The public authority has made no reference to section 41 so the Commissioner has not considered it. However, it did, at this late point in the investigation, seek to rely on section 43(1) as well as section 43(2). It stated:

"We have considered their concerns and we have concluded that we are in agreement with CSC in regards to the information which they regard as currently commercially sensitive".

30. Unfortunately much of the identified information has been withheld stating multiple exemptions and it is not apparent which exemption is being applied to which piece of information. The Commissioner here notes that he requested a detailed breakdown of where exemptions were being applied when he first wrote to the public authority in July. This request had still not been complied with, rather the public authority appears to have relied totally on the documentation which has been provided by the contractor.
31. The public authority also included further details regarding the non-disclosure of staff names and identified where these were within the Contract. It again stated that it would release further information.
32. On 7 October 2010 the Commissioner again enquired regarding the proposed time for a further release of information to the complainant. On 11 October 2010 the public authority advised that it was doing some further work and that the releases would be made a maximum of 30 days later. These were not expected to be full releases of the information and exemptions were still expected to be applied in part.
33. Due to the lack of progress, and the likely requirement for him to make a decision in any case, the Commissioner advised the public authority on 13 October 2010 that he would be proceeding with his Decision Notice. This was reiterated on 28 October 2010.
34. On 7 December 2010 the public authority provided a further response to questions which were initially raised by the Commissioner on 20 July 2010. In this response it concluded that section 23 was not engaged

and that further information was suitable for release – although which parts of the contract fell into this latter category remained unclear.

35. The public authority provided a list of those pieces of information where it was now seeking to rely on section 24 and those pieces where section 24 was being disapplied. It also gave a breakdown of where it was applying the exemption at section 31(1), although it was not clear whether the identified parts were now the only parts of the contract where section 31 was being applied. There was still no breakdown to identify clearly where the exemptions at sections 43(1) and 43(2) were being applied. It was still unclear whether or not any more information had been disclosed or was to be made available.
36. Although reluctant to consider such a late response from the public authority, the Commissioner recognises the potential seriousness of disclosing information which could have an impact on national security. He has therefore decided to take this into account. However, he would stress his disappointment that the public authority would appear to have previously applied sections 23 and 24 without proper regard to the information being withheld. He has drawn this conclusion as a result of the public authority eventually dropping reliance on section 23 and removing reliance on section 24 in several instances.

Analysis

Exemptions

Section 24 – national security

37. The public authority has identified to the Commissioner, at a very late stage, where it believes this exemption applies. The Commissioner notes that in many cases information which was previously withheld under this exemption has now been identified as not properly falling under it. The Commissioner therefore presumes that the public authority has concluded that this information will now be suitable for disclosure, although that is not entirely clear from its latest response.
38. Section 24(1) provides an exemption from the duty to disclose information, imposed by section 1(1)(b), where this is *required* for the purpose of safeguarding national security. This exemption is also qualified by the public interest test. This means that the information should be disclosed if the public interest favours this despite the requirements of safeguarding national security.

39. The first step in considering whether this exemption is engaged is to understand the wording of the exemption and whether the arguments of the public authority are relevant to this exemption. The exemption will only be engaged where it is *required* for the purpose of safeguarding national security. The approach of the Commissioner is that *required* in this context means reasonably necessary. It is not sufficient for the information sought simply to relate to national security; there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged.
40. On the issue of the meaning of *national security*, the Commissioner has followed the approach taken by the Information Tribunal in the case *Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045). The Tribunal noted that it had been unable to find an exhaustive definition of national security, but referred to a House of Lords decision (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153), which made the following observations on this issue:
- “(i) national security’ means the ‘security of the United Kingdom and its people’ (para 50 per Lord Hoffman);*
 - (ii) the interests of national security are not limited to action by an individual which can be said to be ‘targeted at’ the UK, its system of government or its people (para 15 per Lord Slynn);*
 - (iii) the protection of democracy and the legal and constitutional systems of the state is part of national security as well as military defence (para 16 per Lord Slynn);*
 - (iv) ‘action against a foreign state may be capable indirectly of affecting the security of the United Kingdom’ (para 16-17 Lord Slynn): and*
 - (v) reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom’s national security’ (para 17 Lord Slynn).”*
41. The Commissioner has viewed the withheld information and considered the public authority’s arguments. The Commissioner’s view in this case is that insufficient evidence has been put forward to support a conclusion that withholding the information is *required* for the purposes of safeguarding national security. He further notes that some of the information to which this exemption has been applied in this case has been deemed suitable for disclosure in a different contract which the public authority has been considering at the same time as this one (see paragraph 5 above). This inconsistency again leads the Commissioner

to conclude that the exemption has been inappropriately relied on in this case.

42. The exemption provided by section 24(1) is not, therefore, engaged. In these circumstances it has not been necessary to go on to consider the balance of the public interest.

Section 31(1) – law enforcement

43. The public authority has cited section 31(1)(a); this has not been cited by the contractor. Section 31(1)(a) provides an exemption for information the disclosure of which would, or would be likely to, prejudice the prevention or detection of crime.
44. Consideration of this exemption is a two-stage process. Firstly, disclosure must be at least likely to result in the prejudice described in the exemption. Secondly, this exemption is subject to the public interest test. This means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information should be disclosed.
45. The public authority has not specified whether it believes the prejudice resulting through disclosure *would* or *would be likely* to occur. In such circumstances the Commissioner will consider the lower threshold of *would be likely*. The test that the Commissioner applies when considering whether prejudice *would be likely* is that the possibility of this must be real and significant and more than hypothetical or remote. This is in line with the approach taken by the Information Tribunal in *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005) in which it stated:

“Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there ‘may very well’ be prejudice to those interests, even if the risk falls short of being more probable than not.” (paragraph 15)

46. The first step in considering whether these exemptions are engaged is to address whether the arguments advanced by the public authority are relevant to these exemptions. The public authority has stated that:

“Some of the information ... falls within this exemption because it relates to measures taken to ensure that criminal activities, such as relating to terrorism, immigration offences, fraud and computer misuse, cannot be perpetrated, and/or can be detected, in relation to the information held and the services

delivered under the National Identity Service. Further, disclosure would also mean that the National identity Service's role in providing a reliable way of proving and verifying the identity of individuals, and therefore the prevention of identity related crime, would be undermined".

47. The Commissioner accepts that, if the effects of disclosure predicted by the public authority were to occur, this would be likely to result in prejudice to the prevention and detection of crime. The arguments advanced by the public authority are, therefore, relevant to this exemption.
48. However, turning to the likelihood of this prejudice occurring, the Commissioner does not accept that the content of the information in question reveals anything which would allow criminal activity to be perpetrated or have an impact on identity-related crime. The withheld information relates to the contractor's premises, which the Commissioner was largely able to find online, as well as diagrams and details of system processes and functionality, data storage, system interfaces and network design. It has also been cited to withhold details of some subcontractors. The Commissioner considers that some of this information is available elsewhere, and he is not persuaded that disclosure would facilitate criminal activity.
49. The Commissioner concludes that the exemption provided by section 31(1)(a) is not engaged. The reasoning for this conclusion is that the public authority has not demonstrated to the Commissioner that a real and significant likelihood of prejudice relevant to this exemption would be likely to result through disclosure of the information in question. He does not accept that, to any significant degree, it would allow crime to be perpetrated or undermine the reliability of the NIS. As this conclusion has been reached at this stage it has not been necessary to go on to consider the balance of the public interest.

Section 40(2) – personal information

50. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the "DPA"). This exemption has been cited in respect of parts of Schedules 14, 32 and 34 of the contract.

51. During his investigation the public authority advised the Commissioner that it was no longer applying this exemption to civil servants, rather it was being applied to information which identified particular members of staff of the suppliers and third parties by name. It confirmed that it believed disclosure of the names of those third parties involved with the contract would breach the first data protection principle.
52. The first principle of the DPA requires that the processing of personal data is fair and lawful and,
- at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

Is the requested information personal data?

53. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
54. The Commissioner considers that the withheld information can be separated into 2 different groups as follows.

Group 1

55. This group consists of the names of 24 members of staff who are representatives of third parties. All are mentioned once in either Schedule 14 or Schedule 32 of the contract. They are clearly identified by name, employer and position and the Commissioner therefore considers that these references are their '*personal data*'.

Group 2

56. This consists of lists of transferring employees in Schedule 34 of the contract. Although the individuals are not named, the list includes where they are transferring from, a unique identifier, a date of birth, job title, service dates, salary, whether they are a 'fair deal' employee and details of any pension scheme that they are in. Although the individuals are not actually 'named', the Commissioner considers that there is sufficient information available to allow them to be identified and he therefore considers that the lists contain their '*personal data*'.

57. For the section 40(2) exemption to apply the public authority would need to show that disclosure would contravene one of the data protection principles as set out in the Data Protection Act 1998. The first data protection principle has been cited in this case.

The first data protection principle

58. The public authority has advised the Commissioner that it believes disclosure would contravene the first data protection principle. The first data protection principle provides that:

“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.”

59. The Commissioner’s guidance on section 40, which can be accessed on his website via the following link:
http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf suggests a number of issues that should be considered when assessing whether disclosure of information would be fair.

- The individual’s reasonable expectations of what would happen to their personal data.
- The seniority of any staff.
- Whether the individuals specifically refused to consent to the disclosure of their personal data.
- Whether disclosure would cause any unnecessary or unjustified distress and damage to the individuals.
- The legitimate interests in the public knowing the requested information weighed against the effects of disclosure on the individuals.

60. Furthermore, the Commissioner’s guidance suggests that, when assessing fairness, it is also relevant to consider whether the information relates to the public or private lives of the third party. His guidance states:

“Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned”.

61. The Commissioner will consider each group of personnel separately below.

Group 1

62. Having reviewed the redacted names the Commissioner notes that there are four names withheld from Schedule 14 and twenty from Schedule 32. They can be grouped in two categories:

- (i) security controllers from four named subcontractors; and,
- (ii) key personnel of the supplier.

63. The public authority gave the Commissioner the following reasons for non-disclosure of staff names:

"It is considered that due to the controversial nature of the contract at the time of publication, there was a real risk of exposing the individuals to unsolicited lobbying or individual contact which would be both inappropriate and disruptive to their ability to carry out their roles.

Furthermore it is not considered that the release of the personal information would be necessary in light of the suppliers themselves being clearly identified and available for enquiries should a member of the public wish to make further enquiries.

Whilst it is acknowledged that the level of public interest in the named individuals in the contract is likely to be significantly lower in light of the changing circumstances, it is also considered that the public interest in such individuals having their personal information or names disclosed is significantly lower due to the same circumstances. It is not considered to be necessary to disclose the names of these individuals to further public understanding of the contracts and as such it is not considered to be fair to do so.

We do not consider that the disclosure of staff names in this case would be fair, in a general sense, given the expectations that these staff have about the disclosure of their identities and contact details. Therefore disclosure could not be made in compliance with the general "fairness" test within the first data protection principle, and it would therefore breach the DPA with the result that section 40(2) applies. In addition it is worth noting that even if disclosure could be regarded as being generally "fair" none of the more specific conditions enabling compliance with the

first data protection principle contained within Schedule 2 of the DPA would be met in this case”.

64. The Commissioner believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared with what information senior staff should expect to have disclosed. This is because the more senior a member of staff the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
65. With regard to the names of the staff in the redacted Schedules, the Commissioner considers that these people are relatively senior individuals within the organisations who were given high level responsibilities, as outlined in the public authority's arguments above. They are cited as either 'security controllers' for named organisations or 'key personnel' for the supplier. The Commissioner believes that it would therefore not be unreasonable for them to have an expectation that their involvement in a significant contract would be disclosed.
66. Furthermore, the Commissioner does not accept the public authority's argument that the staff may be at risk from 'lobbying' because of the controversial nature of the contract. As identified within the request, the contract has already been signed on 1 August 2008, some three months prior to the request.
67. The Commissioner therefore concludes that disclosure would not breach the first data protection principle.
68. As is outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is Condition 6. This states that:
“the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”
69. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas [EA/2007/0060]*. In that case the Tribunal established

the following three part test that must be satisfied before the sixth condition will be met:

- there must be legitimate interests in disclosing the information,
- the disclosure must be necessary for a legitimate interest of the public,
- even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.

70. No specific argument to support a legitimate interest for disclosure of the named parties has been given by the complainant. The Commissioner has however considered whether or not the disclosure of the parties would assist with transparency and accountability for managing such a contract and whether disclosure is necessary for the legitimate interests of the public.
71. Those staff in who are 'security controllers' have had their names, job titles and the company details all redacted. Those who are 'key personnel' have had their names, security clearance, and length of time in role redacted. In the Commissioner's view, all the staff are identified purely as nominated representatives for management of the contract.
72. The Commissioner has not identified any specific harm in releasing the information in this case, and he considers that the release of the redacted information would be fair. The Commissioner considers that – given the benefits of transparency and accountability - a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing and understanding the full details of the contract and who was responsible for important decisions involving significant sums of public money.
73. The Commissioner further finds that disclosure is necessary for the public to be able to be satisfied as to the seniority of those involved. He also finds, in this case, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the senior-level individuals concerned.

Group 2

74. The staff falling within this group are not identified by name. However, the Commissioner considers that the individual entry for each member of staff would provide sufficient detail for their identification. In the

vast majority of cases this includes their date of birth, job title, employer, basic salary and details of any pension scheme they are in.

75. The public authority did not provide any specific arguments for this 'group' of staff, providing only those arguments which are listed above. However, the Commissioner considers that the information held about these parties is different and therefore warrants different considerations.
76. The staff in group (1) all have direct involvement with the carrying out of the contract and the Commissioner believes that their expectations and seniority would be such that their details are suitable for disclosure, as he has determined above. However, the staff contained in this group have no such role. They are staff working in the commercial sector whose details would not ordinarily be subject to consideration under the Act and who have no direct or specific involvement with the contract itself.
77. The Commissioner believes that none of the staff listed would reasonably expect their details to be divulged to the public at large. They are not employed by the public authority itself, nor are they public sector employees, and they have no direct personal involvement with the contract itself. The Commissioner therefore concludes that disclosure of this information would be unfair and would therefore breach the first principle of the DPA. As the Commissioner is satisfied that providing the information would contravene the first data protection principle, he has not gone on to consider the other data protection principles.

Exemptions at section 43(1) and 43(2) (commercial interests).

78. The public authority has provided the Commissioner with a breakdown of the information which has been withheld under these two exemptions; this is a document which appears to have been prepared solely by the contractor. This breakdown only partially identifies where section 43(1) or 43(2) have been applied. The Commissioner is unable to draw any accurate conclusion based on this response. The contractor has withheld entire schedules and parts of schedules, often citing multiple exemptions. The Commissioner further notes that the public authority has stated that it is prepared to release further information but it is not yet clear what that consists of or whether disclosure has been made.
79. In order to have previously cited section 43(2), which was first relied on at internal review stage, the Commissioner would have expected the public authority to have scrutinised all the information and applied

the exemption where it thought it was engaged. Furthermore, based on the substantial amount of time that it took the public authority to comply with both the original request and the subsequent internal review, the Commissioner would again have assumed that it was considering the withheld information in some detail and documenting its reasons for non-disclosure. In fact, the public authority has been unable to provide the Commissioner with any such breakdown and it has relied solely on a response from the contractor which appears to have been provided at a late stage in the investigation.

80. The Commissioner understands that the contractor has gone to some lengths to put forward its views regarding the commercial sensitivity of parts of the contract. However, in many instances it has applied exemptions to information which the Commissioner would generally expect to be released in line with the OGC FOI (Civil Procurement) Policy and Guidance version 2.0 (“OGC Guidelines”)⁸. The public authority does not appear to have taken any account of this guidance which is generally relied on by both the Commissioner and the First-tier Tribunal (Information Rights) when considering complaints about requests for contract-related information. Nor does the public authority appear to have referred to Decisions which have already been made by the Commissioner, and the Information Tribunal (now the First-tier Tribunal (Information Rights)), regarding public sector contracts.
81. It is not the Commissioner’s role to identify which parts of a contract should or should not be released in line with OGC guidance or previous complaints he has dealt with. Therefore, in the absence of any detailed arguments or explanation from the public authority to identify the exemption applied to each piece of withheld information, the Commissioner is unable to accept that either section 43(1) or 43(2) are engaged.

Procedural requirements

Section 1(1) and 10(1)

82. 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

⁸ This document provides guidance to government departments as to what procurement and contract information should be disclosed under FOIA.

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

83. Section 10(1) provides that-

'... a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

84. The original information request in this case was made on 12 May 2009. The public authority failed to comply with section 1(1) until 10 July 2009, therefore taking 43 working days (and 324 working days to publish the information in respect of part 3 of the request). In failing to provide a response compliant with section 1(1), within 20 working days of receipt of the request, the public authority breached section 10(1).

85. As the Commissioner has decided that the public authority should have disclosed the requested information there were further breaches of sections 1(1)(b) and 10(1) for failing to provide this to the complainant within the statutory time limit.

Section 17(1)

86. Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies."*

87. In this case the public authority issued its refusal notice later than the twenty working day limit. Accordingly, the Commissioner finds a breach of section 17(1).

88. The public authority cited section 40(2) but failed to advise the complainant which data protection principle/s would be breached were it to disclose the requested information. In doing so it breached section 17(1)(a), (b) and (c).

The Decision

89. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
- In failing to provide a timely response it breached sections 10 and 17(1).
 - In failing to provide an adequate refusal notice it breached section 17(1)(a), (b) and (c).
 - In failing to provide the requested information, other than the personal information of those staff falling into group 2, it breached sections 1(1)(b) and 10(1).

Steps required

90. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- The information requested at parts (1) and (2) of the request should be provided to the complainant.
91. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

92. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

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

Internal review

94. 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 is concerned that in this case, it took over 100 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Engagement

95. During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance or inability to meet the timescales for response set out in his letters. This mirrors the experience of the complainant in the lengthy delay in getting a response to his requests.
96. Accordingly the Commissioner does not consider the public authority's approach in this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the public authority's future engagement with the ICO and would expect to see improvements in this regard.

Right of Appeal

97. 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.

Website: 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 20th day of December 2010

Signed

**Graham Smith
Deputy Commissioner and Director of Freedom of Information**

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

Legal annex

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 10(1) provides that -

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies".

Section 40(2) provides 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."

Section 40(3) provides that –

"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, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."