

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 January 2009

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Summary

The complainant requested a copy of a contract agreed by the public authority for the provision of a national broadband network under the NHS National Programme for IT with certain information removed. The public authority initially refused to disclose the contract under sections 12 (cost of compliance exceeds the appropriate limit) and 43(2) (prejudice to commercial interests) of the Act. It subsequently also sought to rely on sections 40(2) (personal information) and 41 (information provided in confidence). During the course of the investigation, the complainant accepted the public authority's application of section 40(2) to certain information in the contract.

The Commissioner determined that sections 12, 41 and 43(2) were not applicable and ordered that a redacted version of the contract be disclosed to the complainant. He also found that the public authority had not complied with section 1(1)(b), as it did not provide the requested information by the time of the completion of the internal review, and section 10(1), as it did not provide the requested information within 20 working days of the request. In addition, it breached section 17(1)(b) and (c), as it failed to state in its refusal notice that it believed that sections 40(2) and 41 were applicable to the information requested nor explain why they applied.

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.

The Request

2. On 5 April 2005 the public authority received a request from the complainant "... to quote me for the cost of sending me a copy of the contract with BT covering supply of the N3 broadband service, in particular the legal "terms and conditions" covering matters such as assignment and sub-contracting, limitation of liability, insurance, etc and the contractual compensation scheme covering failures to meet service targets.". He went on to say that "I appreciate that contract prices and charges may be commercially confidential, nor am I requesting detailed technical specifications or details of service delivery locations, etc which I imagine may run to many pages in a contract of this magnitude."
3. On 5 April 2005 the public authority replied to the complainant and informed him that his request had been refused. It explained that the information was exempt from disclosure under section 43 of the Act as it was commercially sensitive information. It believed that disclosure would prejudice the commercial interests of both the public authority and its suppliers. It went on to state that the public interest in ensuring that the Programme was able to continue to negotiate innovative and advantageous contracts for the NHS outweighed the public interest in transparency.
4. The public authority also informed the complainant that it had considered editing the contract so as to provide it in the form he had requested. However, given the scale and complexity of the material concerned, this task would involve a great deal of time and would result in it incurring costs well in excess of the £600 limit provided under Act.
5. On 16 May 2005 the complainant emailed the public authority to ask it to carry out an internal review of its decision.
6. On 19 December 2005 the public authority wrote to him to confirm the results of the internal review. It informed him that it believed that the contract was exempt from disclosure although it did not specifically state which exemption under the Act it believed applied. However it stated that, even in the redacted form requested, disclosure would be prejudicial to the commercial interests of the public authority, the contractor and its sub contractors. In relation to the public interest test it stated that the public interest in transparency and accountability was outweighed by the need to reassure contractors who entered into business partnerships with the public authority that commercially sensitive information would not be made public.
7. In addition, it stated that it had calculated that the time needed to find, sort and redact the material to create the version of the contract he had asked for would exceed the cost ceiling of £600 for the handling of FOI requests.

The Investigation

Scope of the case

8. On 13 September 2005 the complainant contacted the Commissioner to complain about the public authority's refusal to disclose the information that he had requested.

Chronology

9. There were a substantial number of communications between the Commissioner and the public authority. The most significant are outlined below.
10. On 1 November 2006 the Commissioner wrote to the public authority to request a copy of the withheld information, a copy of the response to the request for an internal review and further clarification as to why the information had been withheld.
11. On 27 November 2006 the public authority wrote to the Commissioner and indicated that it would send a detailed explanation of the rationale it had adopted in withholding the information requested by the complainant.
12. On 6 December 2006 the Commissioner emailed the public authority for confirmation as to when it expected to provide him with the additional information and, again, requested a copy of the contract.
13. On 7 December 2006 the public authority wrote to the Commissioner and provided him with a copy of the result of the internal review.
14. On 20 December 2006 the public authority wrote to the Commissioner offering, because of its size, to make the contract available for him to inspect at its offices. In relation to its justification for the application of section 43(2), it explained that it would need to consult the main contractor but believed that its submission would be completed by the end of January 2007.
15. On 4 January 2007 the Commissioner emailed the public authority to indicate that he would like to receive a copy of the contract as this would allow more detailed consideration of its provisions than an inspection would allow.
16. On 6 March 2007 the public authority wrote to the Commissioner enclosing a copy of the relevant contract.
17. On 2 April 2007 following a number of previous communications seeking the public authority's detailed submission on the application of section 43(2), the Commissioner emailed the public authority to inform it if he did not receive the submission by 10 April 2007 he would serve an Information Notice requiring its production.

18. On 10 April 2007 the public authority forwarded to the Commissioner a detailed submission regarding the application of section 43(2) to the withheld information. In addition, it argued in its submission that some of the withheld information was exempt from disclosure under section 41 as it constituted confidential information provided to the public authority by a third party. The submission also included a detailed letter from Fujitsu containing arguments as to why it believed the information should be exempt from disclosure under the Act. The arguments of the public authority and the contractor are considered in detail when analysing the application of the exemptions.
19. On 19 April 2007 the Commissioner, with the agreement of the public authority, forwarded to the complainant a copy of the contents pages of the contract in order for him to confirm which parts he wished to access.
20. On 19 April 2007 the complainant confirmed to the Commissioner which parts of the contract he considered to come within the scope of his request. This is detailed in the Analysis section of this notice when dealing with the application of section 12.
21. On 6 July 2007 the Commissioner wrote to the public authority setting out questions with regard to the application of sections 41 and 43 to the withheld information.
22. On 18 October 2007 the public authority provided the Commissioner with responses to the queries that he had raised, including information provided by the contractor about the prejudice it could suffer from the disclosure of the information contained in the contract. It also informed the Commissioner that it believed that the contract contained references to named individuals in relation to which it believed that section 40(2) was applicable.
23. On 19 October 2007 the Commissioner requested some additional documents related to changes made to the contract.
24. On 2 November 2007 the public authority provided the documents which had been requested.
25. On 12 May 2008, following correspondence with the public authority on a complaint closely linked to this one which raised similar issues, the Commissioner asked it to confirm:-
 - i. whether it still wished to rely on section 12 of the Act;
 - ii. which parts of the contract it believed section 41 applied to; and
 - iii. the date the contract was signed by the parties.
26. On 12 May 2008 the Commissioner sought confirmation from the complainant as to whether he was seeking to access information related to named individuals in the contract. The complainant confirmed that he was not.

27. On 12 May 2008 the Commissioner emailed the public authority to confirm that the complainant was not objecting to the application of s40(2) to named individuals in the contract.
28. On 21 May 2008 the Commissioner asked the public authority to confirm whether it believed that the disclosure of the information withheld under section 43(2) would have, or would have been likely to, prejudice the commercial interests of the public authority, the contractor and subcontractors.
29. On 8 July 2008, following a number of previous communications, the Commissioner emailed the public authority to confirm that if a response to his queries was not received by a specified date he would serve an Information Notice.
30. On 10 July 2008 the public authority provided the Commissioner with a response to his queries. It confirmed that it was arguing that disclosure of the withheld information "would" prejudice the commercial interests of the contractor and "would be likely to" prejudice the public authority's commercial interests under section 43(2). It also confirmed that it was still seeking to rely on section 12 of the Act.
31. On 14 July 2008 the Commissioner sought a more detailed explanation from the public authority as to how it has estimated that section 12 was applicable.
32. On 28 July 2008 the public authority provided the Commissioner with a detailed calculation under section 12 of the amount of time it had estimated that it would take to respond to the request.
33. On 27 August 2008 the Commissioner queried the public authority's interpretation of the scope of the request for the purposes of applying section 12.
34. On 18 September 2008 the public authority provided the Commissioner with further explanation as to how it had estimated that the appropriate limit would be exceeded under section 12.
35. On 22 September 2008 the Commissioner raised further queries in relation to the application of section 12.
36. On 29 September 2008 the Commissioner sought clarification from the public authority with regard to the prejudice that might have occurred to the contractor's subcontractors from the disclosure of the withheld information.
37. On 7 October 2008 the public authority provided the Commissioner with responses to his queries about the application of section 12 and the application of section 43(2) to information related to the subcontractors.
38. On 8 October 2008 the Commissioner sought further clarification regarding the application of section 43(2) to information related to the subcontractors.

39. On 16 October 2008 the public authority confirmed that it was not seeking to rely on arguments that disclosure of information contained in the contract would have prejudiced the commercial interests of the subcontractors under section 43(2).
40. It also informed the Commissioner that it did not believe that it was necessary for it to specify whether it was relying on arguments that disclosure “would” or “would be likely to” prejudice the commercial interests of the contractor or public authority under section 43(2).
41. On 20 October 2008 the Commissioner noted the public authority’s argument in relation to the application of section 43(2) but pointed out that this appeared to be inconsistent with the approach taken in its email of 9 July 2008, when it specified the levels of prejudice it believed would have been suffered by the contractor and itself. He asked for confirmation as to which approach it was adopting in this case.
42. On 30 October 2008 the public authority informed the Commissioner that although it had “...explored some of the issues that could theoretically apply were [the complainant] able to narrow his request further, we are nevertheless convinced that the request as it stands must be refused under Part 1 of the Act. We therefore see no obligation to proceed to consider the application of any exemption under Part II...”. It considered that the cost of complying with the request would have considerably exceeded the appropriate limit stipulated in the Act.
43. In order to clarify the issue raised by the Commissioner, the public authority stated that its comments in its email of 16 October 2008 concerning the issue of the levels of prejudice were made in relation to the probability of prejudice to the commercial interests of any subcontractors.
44. It went on to state that its email of 9 July only referred to the commercial interests of the contractor and the public authority. It had “...explained that, in principle, disclosure would prejudice the former, but only be likely to prejudice the latter. This was an expression of our firm belief as to the relative likelihood of prejudice to the respective parties in this particular instance. It was not, and was not intended as, a statement of irrefutable fact given on the basis that only the one or the other alternative could necessarily be true.”
45. The Department emphasised that it remained convinced that section 12 was engaged and that a narrowing of the request would be likely to lead to a section 43(2) refusal. Until it received a narrowed request, it was “unable to consider in detail the application of section 43(2) to the information in question.”
46. On 19 November the Commissioner contacted the public authority to ask it if it wished to make any further submissions in light of the Information Tribunal decision which had recently been issued which concerned the application of the Act to an IT contract that it held.

47. On 5 December 2008 the public authority confirmed that it did not wish to make any further submissions.

Analysis

48. The full text of the provisions of the Act which are referred to can be found in the Legal Annex at the end of this notice, however the relevant provisions are summarised below. The procedural matters are considered first and then matters relating to the application of the exemptions.

Background

49. The request was for a contract which formed part of the NHS National Programme for IT ("the Programme"). The Programme was designed to deliver a new, integrated information technology system and services to help modernise the NHS. Responsibility for the delivery of the Programme was allocated to Connecting for Health, an agency of the public authority.

50. The Programme was to be delivered through a series of local and national contracts. The local contracts covered five regional areas encompassing the whole of England. The contractors were to ensure that local systems met national standards and that they facilitated data flow between the local and national systems. In order to do this they were to upgrade or replace hardware and software as appropriate.

51. Under the Programme there were also contracts for a number of national services including:-

- an electronic prescription service to try to improve the efficiency of prescribing and dispensing;
- an email and directory service for all NHS staff;
- computer accessible x-rays and scans; and
- an electronic booking service for patients to arrange appointments.

52. In addition, the Programme included a contract for the provision of a national broadband network (N3) for all NHS sites and locations in England. This was intended to underpin and enable the delivery of the new IT systems and services under the Programme. It replaced the existing system which was viewed as inadequate to deliver what was planned. The contract in question was for the design, implementation and operation of a national network for the NHS to support communications within and between NHS organisations. This system was essential to the working of all the other initiatives within the Programme.

53. The intention was that the N3 contract would provide:-

- a fast and reliable network for NHS organisations, ensuring that existing and new systems ran smoothly and quickly;
- networking solutions tailored to the needs of individual NHS organisations, with the flexibility to cater for current and future needs;
- sufficient bandwidth to implement new approaches to healthcare such as the computer accessible x-rays and scans;
- opportunities for the NHS to take advantage of updates and improvements in networking technology.

54. The contractor was to be responsible not only for the provision and implementation of the network but also its management, including dealing with any faults or issues which arose. The contract had a value in excess of £530 million. It was signed by the parties on 19 February 2004 for a period of at least seven years and was approximately 1000 pages long.

The scope of the request and the complaint

55. During the course of Commissioner's investigation, the complainant confirmed that his request was intended to be for the version of the N3 contract that was agreed on 19 February 2004, rather than the version of the contract that was in force at the time of his request on 5 April 2005.

56. In addition, the complainant confirmed that he was not seeking to challenge the public authority's application of section 40(2) to the names of any individuals contained in the contract.

57. The Commissioner informed the public authority of these facts during the course of his investigation.

Procedural matters

Sections 1, 10 and 17 – Communication of information and refusal notice

58. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should in its refusal notice:-

- (a) state that fact,
- (b) specify the exemption in question,
- (c) state why the exemption applies.

59. In this case, the public authority failed, by the time of the completion of the internal review, to state that it was relying on sections 40(2) and 41, nor explain why they applied. It therefore breached section 17(1)(b) and (c).

60. In addition, by not providing the requested information to the complainant within 20 working days of the request, the public authority breached sections 10(1). By not providing it to the complainant by the time of the completion of the internal review, it breached section 1(1)(b).

Section 12 – Cost of compliance exceeds the appropriate limit

61. The public authority argued that that it did not have to comply with the complainant's request as section 12 of the Act applied. Section 12(1) provides that –

“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.”

62. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 prescribe the 'appropriate limit' as being £600 for central government, with staff costs calculated at a rate of £25 per hour. Consequently, in order to avoid exceeding the fees limit the public authority would need to be able to complete the location, retrieval and extraction of the requested information within 24 hours of staff time.

63. Regulation 4(3) requires a public authority, in determining whether the appropriate limit would be exceeded, to only take into account the following:-

- (a) determining whether it holds the information,
- (b) locating the information, or a document which may contain the information,
- (c) retrieving the information, or a document which may contain the information, and
- (d) extracting the information from a document containing it.

64. The public authority initially argued that the document concerned was an exceptionally long document. To carry out a line by line redaction of the contract would take a considerable period of time and it had estimated that such a task would very significantly exceed the appropriate limit of £600.

65. The Commissioner subsequently requested a more detail explanation of how the public authority had estimated that compliance with the request would have exceeded the appropriate limit.

66. The public authority informed the Commissioner that the original assessment of cost was based on an estimate which was not formally recorded in a detailed breakdown. However, it provided him with a further assessment of the applicability of section 12 which it believed confirmed the accuracy of its original estimate.

67. It anticipated that responding to the request would have required the following key activities:-

1. Retrieving a copy of the N3 Agreement.
 2. Reviewing each clause and schedule within the N3 Agreement to identify the terms and conditions related to assignment, subcontracting, limitation of liability, insurance and the compensation scheme covering failures to meet service targets in accordance with the complainant's request.
 3. Physically extracting the information set out in point 2 above.
 4. Reviewing each clause and schedule within the N3 Agreement to identify information regarding contract prices and charges which may be commercially confidential, detailed technical specifications and details of service delivery locations.
 5. Reviewing each clause and schedule within the N3 Agreement to identify commercially sensitive information to be redacted pursuant to relevant exemptions under the Act (e.g. s.41 (confidential information) and s.43 (commercially sensitive information)). The public authority stated that the time estimate for this task had not been taken into consideration in the total amount figure, and was not part of the assessment of whether the appropriate time limit had been exceeded.
 6. Physically redacting each clause and schedule extracted as per point 3 above to remove elements located in accordance with points 4 and 5 above.
 7. Retrieving a copy of each of the Change Control Notes ("CCN") entered between the public authority and the contractor prior to the date of complainant's request.
 8. Reviewing each CCN to confirm how these impact on the N3 Agreement as at the date of the complainant's request, where necessary incorporating the amendment into the appropriate section of the agreement and carrying out the process referred to in paragraphs 2, 3, 4, 5 and 6 above.
68. The public authority estimated that the time required to undertake this retrieval, review and redaction exercise would take approximately 61 hours, at an estimated cost of £1525 (61 x £25) which was significantly in excess of the £600 appropriate limit in Section 12. It provided a detailed breakdown as to how it had arrived at this figure.
69. The public authority also informed the Commissioner that the assessment was based on the assumption that the person performing the retrieval, review and redaction process was familiar with the N3 Agreement. If the exercise was undertaken by an individual who was less familiar with the agreement, then it anticipated that the estimated cost of compliance would be higher.

70. The Commissioner examined in turn the each of the activities which the public authority had specified would be necessary to comply with the request in order to determine the applicability of section 12.

Activity 1

71. The retrieval of a copy of the contract is not an activity which should take a significant period of time as it is a clearly defined, easily identifiable document.

Activities 2, 3 and 4

72. In relation to the activities 2 and 4, the Commissioner believes that the inclusion of these activities in the public authority's estimation of the time required to comply with the request is based on an incorrect interpretation of the scope of the complainant's request. It is clear from the complainant's request that its scope was not intended to be limited in the way that it has been construed by the public authority.

73. With regard to activity 2, the initial request was for a copy of the N3 contract "...in particular the legal "terms and conditions" covering matters such as assignment, and subcontracting, limitation of liability, insurance, etc and the contractual compensation scheme covering failures to meet service targets."

74. It seems apparent that the request was not intended to be limited to the topic areas specified. This can be seen from the use of words "such as" and "etc" and the fact that the complainant was seeking to obtain the legal "terms and conditions" which cover a broad spectrum of topics. It would seem that the topic areas mentioned were intended to be merely examples of the sort of areas covered by the legal "terms and conditions". In the Commissioner's view the topic areas stated in the request should not have been used to define the limits of the scope of the request.

75. Likewise, the second part of the request states that "I appreciate that contract prices and charges may be commercially confidential, nor am I requesting detailed technical specifications or details of service delivery locations, etc...". It is difficult to conclude, as was done in relation to activity 4, that the complainant intended this list of items to be conclusive because of the word "etc" at the end of the sentence.

76. The Commissioner's view is reinforced by confirmation from the complainant that he did not intend his request to be given the limited interpretation that was placed on it by the public authority when it sought to apply section 12. The complainant explained that when he referred in his request to matters such as assignment, subcontracting, etc these were merely intended to be examples of the terms and conditions that he was seeking. The items listed were not intended to limit the scope of his request. The request was intended to be for a much greater amount of information than would have been covered by the public authority's interpretation of it.

77. After examining the initial request, the Commissioner is of the view that in its original form it was not sufficiently clear to be able to identify which specific

information in the contract the complainant wished to obtain. He believes that it would have been appropriate for the public authority to contact the complainant to seek to clarify the scope of the request.

78. During the course of his investigation the Commissioner suggested to the public authority that the complainant be provided with a copy of the contents pages of the contract in order to be able to identify more accurately which parts he was interested in obtaining and which parts he was not. The public authority agreed to this.

79. As a consequence of being supplied with the contents pages, the complainant confirmed that he believed that the following parts of the contract were outside the scope of his request:-

- i. any pricing information in Schedule 9.1 (Pricing, service deductions and incentive payments);
- ii. Schedule 9.3 (Financial model);
- iii. Schedule 9.4 (Compensation on termination); and
- iv. Annex 2 (Financial model).

80. Following further discussions with the Commissioner, the complainant subsequently confirmed that he also did not wish to access the information contained in the following parts of the contract:-

- (a) Schedule 1.5 Appendix A (Specific insurance requirements);
- (b) Schedule 3.3 Part C (Estimated split of revenue); and
- (c) Schedule 9.1 Appendix C (Description of the core).

81. In the Commissioner's view it would take a relatively short period of time to remove the above information from the contract as it relates to clearly defined parts of the document. The only area where there would be a need for a review of the content of the contract in order to identify the information to be redacted would be in relation to (i), the pricing information in Schedule 9.1. However, as this schedule is only 31 pages long, it should not require a significant amount of time to complete this task.

82. The Commissioner does not therefore anticipate that, had the scope of the request been clearly identified, that it would have taken the public authority very long to carry out activities 2, 3 and 4.

Activity 5

83. The public authority has explained that the time taken to identify potentially exempt information in the contract was not included in its estimate of whether the appropriate limit under section would have been exceeded.

Activity 6

84. In relation to the activities detailed in activity 6, the Commissioner has indicated in relation to activity 4 that the clarification of the complainant's request should have resulted in the information he was seeking to exclude from its scope being easily identified. It would consequently not have taken very long to also redact this information from the contract.
85. Activity 6 also relates to the redaction of exempt information which was identified in the process explained in activity 5. The Commissioner is of the view that, not only can a public authority not take into account the time taken in identifying information which is exempt information under the Act in determining whether the appropriate limit has been exceeded, it also can not take into account the time taken to remove that exempt information from non exempt information. He finds support for this view in the decisions of the Information Tribunal in *Jenkins v The Information Commissioner and Defra (EA/2006/0067)* and *DBERR v The Information Commissioner and Friends of the Earth (EA/2007/0072)*. He therefore does not believe that this is time that can legitimately be included in the public authority's estimate for the purposes of applying section 12.

Activities 7 and 8

86. Activities 7 and 8 relate to the Change Control Notes which detail the changes which were made after the contract was initially agreed in February 2004. The complainant made it clear to the Commissioner that he was seeking to obtain a copy of the contract in its original form prior to any changes being made. The Commissioner informed the public authority of this. The public authority would not therefore need to include in its estimate the time taken to retrieve and review any subsequent changes that had been made to the contract after it was initially agreed.
87. In light of the above the Commissioner believes that it would not have taken the public authority a significant period of time to comply with the complainant's request. He would estimate that it could have completed within a period of 4-5 hours. The cost of complying with the request would therefore have been well within the appropriate limit of £600. The Commissioner is consequently not satisfied that section 12 was applicable to the request and went on to consider whether any of the information was exempt from disclosure.

Exemptions

Section 41 – Information provided in confidence

88. The public authority argued that some of the information in the contract was exempt from disclosure under section 41 as it was confidential information which had been provided to it by the contractor.
89. Section 41(1) provides that information is exemption from disclosure if:-

- (a) it was obtained by the public authority from another person and
 - (b) the disclosure of the information to the public by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
90. The Commissioner's view is that disclosure would constitute an actionable breach of confidence if:-
- i. the information has the necessary quality of confidence;
 - ii. the information was imparted in circumstances importing an obligation of confidence; and
 - iii. disclosure would be an unauthorised use of the information and, in the case of commercial information, would have a detrimental impact on the commercial interests of the confider.
91. If these parts of the test were satisfied, the Commissioner would then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.
92. The public authority argued that the following areas were covered by section 41:-
- (a) specific levels of limitation of liability (clauses 49.5, 49.6, 52.1.13, 52.14, 56 and 57)
 - (b) specific service levels and service charge deductions (schedule 1.2 in its entirety and paragraph 6 of Schedule 9.1)
 - (c) parent company guarantee (Schedule 8.3)
 - (d) specific insurance requirements (contained in the table in Schedule 1.5 Appendix A)
 - (e) estimated split of revenue in Part C of Schedule 3.3
93. During the course of the Commissioner's investigation the complainant confirmed that he did not wish to access the information referred to in (d) and (e) above. The Commissioner has not therefore considered the application of the exemptions to these parts of the contract.
94. The public authority initially claimed that the names of the subcontractors contained in the contract were confidential. However, in a response provided to the Commissioner, it was accepted that these names were not confidential as they were already in the public domain.
95. The Commissioner therefore considered whether (a) – (c) above were exempt from disclosure under section 41.

(a) Was the information obtained by the public authority from another person?

96. In the *Derry City Council v The Information Commissioner (EA/2006/0014)* case the Information Tribunal confirmed that a written agreement between a public authority and another party did not generally constitute information provided by that other party to the public authority and, therefore, did not fall within section 41(1)(a) of the Act. It proceeded to note that

“... contracts will sometimes record more than just the mutual obligations of the contracting parties. They will also include technical information, either in the body of the contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises, it may be that material of that nature could still be characterised as confidential information “obtained” by the public authority from the other party to the contract (or perhaps a “trade secret” under section 43(1) of the Act) in which event it may be reacted in any disclosed version.” (para 32(e))

97. This approach was also applied by a differently constituted Information Tribunal in *Department of Health v Information Commissioner (EA/2008/0018)*.

98. In relation to the parts of the contract referred to in (a) – (c) above, the Commissioner has examined these provisions of the contract and formed the view that they do not contain information which could be regarded as of a technical nature. These parts of the contract appear to contain information which would have been agreed between the parties rather than provided by the contractor to the public authority.

99. This view is reinforced by a statement by the public authority in its letter to the Commissioner of 18 October 2007 that the information in these parts of the contract related “... to terms and conditions of a particularly high degree of commercial sensitivity which were agreed between the parties following an exchange of information and on the basis that they would remain confidential”.

100. Given that the public authority acknowledges that these were provisions of the contract which were agreed between the parties, the Commissioner is not satisfied that they contained information which was obtained by the public authority from a third party as they resulted from negotiations between the parties. He is consequently of the view that section 41 was not applicable to this information.

101. The Commissioner went on to consider whether these provisions were exempt from disclosure under section 43(2).

Section 43(2) – Prejudice to commercial interests

102. The Commissioner considered whether the information that the complainant requested from the contract was exempt from disclosure under section 43(2).

103. The contract contained information falling into a range of different categories including:-

- commencement and duration;
- services to be provided;
- implementation plans and testing;
- monitoring of performance;
- contract management and dispute resolution;
- details of financial obligations of the parties under the contract;
- intellectual property and confidentiality;
- indemnities and liabilities;
- what would happen on the termination of the contract.

104. As was previously noted when discussing the possible applicability of section 12, the complainant informed the Commissioner that in his view the following parts of the contract were outside the scope of his request:-

- i. any pricing information in Schedule 9.1 (Pricing, service deductions and incentive payments);
- ii. Schedule 9.3 (Financial model);
- iii. Schedule 9.4 (Compensation on termination); and
- iv. Annex 2 (Financial model).

105. Following further discussions with the Commissioner, the complainant subsequently confirmed that he also did not wish to access the information contained in the following parts of the contract:-

- (a) Schedule 1.5 Appendix A (Specific insurance requirements);
- (b) Schedule 3.3 Part C (Estimated split of revenue); and
- (c) Schedule 9.1 Appendix C (Description of the core).

106. Section 43(2) provides an exemption from the disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

107. The Commissioner accepts that the information withheld related to the commercial activities of the public authority and the contractor and therefore fell within the scope of the exemption contained in section 43(2). He then went on to consider the likelihood that the release of the information would have prejudiced the commercial activities of either of the two parties to the contract.
108. The Commissioner is aware that the public authority consulted extensively with the contractor in preparing its arguments. He was provided with copies of two letters from the contractor in relation to the potential prejudice that it believed it would have suffered from the disclosure of the withheld information.
109. In an email of 9 July 2008 the public authority informed the Commissioner that it believed that disclosure of the withheld information would have prejudiced the commercial interests of the contractor. In the same communication, the public authority stated that it believed that disclosure would have been likely to prejudice, rather than would have prejudiced, its own commercial interests. It subsequently confirmed that this represented its firm belief as to the likelihood of prejudice to the respective parties.
110. In dealing with the issue of whether disclosure would be likely to prejudice commercial interests of the public authority, the Commissioner notes that, in the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
111. In dealing with the issue of whether disclosure would have caused prejudice to the commercial interests of the contractor, the Commissioner notes that, in the case of *Hogan v Oxford City Council and The Information Commissioner (EA/2005/0030)*, the Information Tribunal confirmed that, whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not. This limb of the test placed a much stronger evidential burden on the public authority than if it were relying on the other limb of the test, “would be likely to prejudice”.
112. He has also taken into account the views of the Tribunal in the same case that it accepted that “the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction.” (para 15). However, the Tribunal noted that certain factors should be considered in such cases, stating that whether or not prejudice was likely “would depend on the nature of the information and the degree of similarity between the two transactions.” (para 15).
113. The public authority was of the view that the provisions contained in the contract represented commercial positions it had negotiated with the contractor following a competitive procurement process. The nature, scope and value of these arrangements, the high degree of commercial competition involved in the award

of the contract and the very significant impact the services would have on improving health care to citizens in England, meant that there was a unique sensitivity to these commercial terms.

114. However, it acknowledged that there were certain terms in the contract to which section 43(2) may not have applied. These terms constituted standard drafted terms contained within commercial contracts which were unlikely to be unique to the public authority or to impact on key commercial interests underpinning the Programme.

115. The terms it identified as falling within this category were:

- i. Clause 1.2 – Interpretation
- ii. Clause 2 – Execution of documents
- iii. Clause 66 – Notices
- iv. Clause 67 – Variations
- v. Clause 68 – Waiver
- vi. Clause 69 – No Agency
- vii. Clause 70 – Entire Agreement
- viii. Clause 71 – Conflicts of Agreements
- ix. Clause 72 – Severability
- x. Clause 73 – Counterparts
- xi. Clause 74 – Costs and Expenses
- xii. Clause 76 – Further Assurance
- xiii. Clause 77 – Dispute Resolution Procedure
- xiv. Clause 78 – Governing Law

116. The Commissioner considered the potential prejudice to the contractor and the public authority in turn.

1. Prejudice to the commercial interests of the contractor

117. The public authority provided a number of arguments as to how it believed the contractor's commercial interest would have been prejudiced by the disclosure of the requested information. The Commissioner considered each of these in turn.

(i) Prejudice in relation to future tendering exercises

118. The public authority argued that disclosure of the contract would have been prejudicial to the commercial interests of the contractor because the companies involved in the Programme operated in a relatively small industry that was contract driven. If the contract had been released it would have identified commercial positions taken by the contractor. This would have given information to its competitors, subcontractors and potential customers that they could have used to their commercial advantage in future competition or commercial negotiations with the contractor. Even the slightest competitive advantage granted to another party in negotiating for a contract (at that time or in the future) would have been detrimental to the contractor by jeopardising its position

in ongoing projects, future negotiations and, consequently, its long term financial viability.

119. The public authority was of the view that large public and private sector information technology and communications services contracts were usually subject to competition. The contractor was continually bidding for such contracts. These contracts were often long term. Accordingly, knowledge of concessions made by the contractor in this contract would be of relevance to other contracts for many years to come.
120. Also, if its concluded position were to have been made public, the contractor's competitors and customers would have known what it has previously accepted in certain key areas whereas the contractor would not have had access to the same information about its competitors.
121. The Commissioner notes that the N3 contract was for the design, implementation and operation of a national broadband network for all NHS sites and locations in England. This contract was clearly distinct from the other national contracts under the Programme which included contracts for:-
- an electronic prescription service to try to improve the efficiency of prescribing and dispensing;
 - an email and directory service for all NHS staff;
 - computer accessible x-rays and scans; and
 - an electronic booking service for patients to arrange appointments.
122. The N3 contract was also distinct from the local contracts for the five regional areas in England. Under these contracts the contractors were to ensure that local systems met national standards and that they facilitated data flow between the local and national systems. This involved the upgrading or replacement of hardware and software. These contracts also required the provision of training and resources to local NHS organisations to help ensure that their NHS staff had the skills to use the new systems.
123. The public authority argued that disclosure of the contract could have prejudiced the contractor's commercial position in ongoing projects or future negotiations. It has not provided the Commissioner with any evidence of tenders that the contractor had submitted, or contracts it was negotiating, at the time of the request which were materially comparable to the N3 contract. Nor has it given any indication of any comparable contracts that the contractor was likely to be tendering for within a reasonable period after the request which would have been similar in nature to the N3 contract.
124. Even if there was evidence that the contractor was likely to be bidding for, or seeking to negotiate over, a contract which was similar in nature to the N3 contract, for a number of reasons the Commissioner is not convinced that the

disclosure of this contract would have allowed the contractor's competitors to draw conclusions about the positions it would take in relation to future contracts.

125. Firstly, the N3 contract was unique. It was designed to address the unique requirements of a very specific service that was required to be delivered. It would therefore have been significantly different from other contracts the contractor might seek to enter in future. As a consequence, it would have been very difficult to draw meaningful comparisons between the N3 contract and other contracts the contractor was seeking to obtain or negotiate over. It is particularly difficult to see how the information contained in this contract would have been transferable to other procurement situations because of its complexity due to the large number of variables and deliverables.
126. Secondly, by the time of the request, the contract was already nearly 14 months old. This is important given the rapidly changing and competitive nature of the field of information technology. It would seem very likely that any tenders submitted, or contracts negotiated, subsequent to the request would have been significantly different in terms of what was contained within them to the provisions contained in this contract.
127. Thirdly, by the time of the request, the public authority has confirmed that parts of the original contract had been renegotiated. In its submission dated 5 April 2007 it stated that each agreement under the Programme had been subject to significant negotiation and/or settlement discussions to the extent that the original agreements would no longer present a true picture of the current contractual obligations of any of the parties.
128. The contractor's competitors and potential customers would almost certainly have been aware that the N3 contract would have changed from its original form but would not have known in what ways it had changed. They would therefore not be sure to what extent any of the provisions in the original contract would reflect the commercial positions the contractor might adopt in relation to similar contracts at the time at the time of the request, some 14 months after the contract had come into operation.
129. Finally the Commissioner notes that complainant is not seeking to obtain all of the information in the contract. In particular he has sought to exclude from his request information which may be regarded as more likely to be of a sensitive nature such as pricing and financial information and certain technical information.
130. Given all of these factors, the Commissioner is not satisfied that the contractor would have suffered prejudice in relation to any future tendering exercises or commercial negotiations as a result of the disclosure of the information requested from the N3 contract in its original form.

(ii) Impact on share prices

131. The public authority argued that the contractor could have suffered prejudice to its commercial interests from disclosure of the contract because the contractor

was listed on the public exchanges. These markets were very sensitive to any information regarding the nature of companies' commercial arrangements and their status at any particular point in time. Given the very substantial value of the contract and its high profile in the IT sector, the release of this information could have had an impact on the value of the contractor's share price.

132. In addition the public authority pointed out that the contractor was bound by the rules of the stock markets in which it operated. This meant that any information regarding the nature of commercial arrangements, such as the contract in question, had to be managed with extreme care. Any disclosure would have to be very carefully managed in order not to cause a breach of these rules or adverse impact on the contractor's share values. Unless disclosure was through normal regulatory channels, this could have caused an uninformed and unwarranted market reaction jeopardising the financial stability of the contractor, have had a material impact on its shareholders and/or have been in breach of stock market rules.
133. The contractor subsequently confirmed in a letter which was provided to the Commissioner that it did not believe that disclosure of the contract in itself would have constituted a breach of the Financial Services Authority's disclosure rules. However, it believed that disclosure would have led to negative press coverage which would have then put pressure on its share price.
134. The Commissioner has already noted that the original version of the contract would have gone through a number of significant changes by the time of the request. It is likely that those people who were interested in obtaining this version of the contract would have been aware that it was of a dynamic nature and, consequently, that it would no longer represent the provisions which were current in the contractual relationship. It would therefore have been of very limited value in providing anyone with an indication of the contractor's current commercial arrangements and their status.
135. In addition, the Commissioner's general view is that the potential for the public to be misled or to misunderstand information, if it was to be released, is not a valid ground for withholding it. A public authority has the option to issue an explanatory statement with any disclosure which would provide an overall context to the information being released where it was felt that there was a danger of misunderstanding or misinformed comment. It would have been possible for the public authority to issue such a statement with the requested information.
136. The Commissioner is therefore not convinced that reliance would have been placed on this information to the detriment of the contractor's share price and market position.

(iii) Disclosure of contractor's know-how

137. The public authority argued that the disclosure of the contract would have placed in the public domain details of the contractor's and its suppliers' internally developed know-how. This would have seriously harmed the

contractor's competitive advantage in the marketplace which it had strived to build over time.

138. The Commissioner asked the public authority to identify which parts of the contract contained information related to the contractor's know-how. The public authority provided him with a letter from the contractor which gave as an example of this the information contained in Appendix C of Schedule 9.1.
139. The Commissioner notes that the complainant has confirmed that he did not wish to access the information contained in this specific part of the contract.
140. In the absence of any indication from the public authority as to other specific parts of the contract which might contain information related to the contractor's technical know-how, the Commissioner has been unable to identify any other provisions which would fall within this category.
141. After considering the arguments presented by the public authority, the Commissioner is not satisfied that the disclosure of the requested information contained in the contract would have prejudiced the commercial interests of the contractor.

2. Prejudice to the commercial interests of the public authority

142. The public authority provided a number of arguments as to how it believed its commercial interest would have been likely to have been prejudiced by the disclosure of the information. The Commissioner considered each of these in turn.

(i) Disclosure of the public authority's negotiated position

143. The public authority informed the Commissioner that the N3 contract was one of a number related to the Programme which it had negotiated with service providers. All the main contracts in the Programme adopted a similar set of terms and conditions and risk profile which were based on the same key commercial principles. However, each contract was individually negotiated and there were individual considerations for each contract. These reflected a specific allocation of legal and contract risk applicable to the requirements of what a service provider was offering and the public authority's bargaining power in relation to a given procurement.
144. The public authority believed that it was the minor differences of approach between contracts which were the source of greatest sensitivity as it was these differences which suppliers would latch onto in future negotiations. It stated that to date it had maintained a robust approach in negotiations with service providers and refused to allow them the opportunity to renegotiate terms which would have impacted on the underlying risk profile of the commercial relationship.
145. It was contended by the public authority that the disclosure of the N3 contract would have provided service providers with an advantage in active commercial

negotiations or discussions with it. This was because they would then have then been aware of potentially more favourable positions that it had taken in related commercial agreements or performance discussions with the contractor. They could then have “cherry picked” positions taken in the N3 contract to undermine the public authority’s commercial position in future negotiations.

146. It believed that it would have been difficult for it to maintain a “no negotiation” approach if the information requested was disclosed. Over time this would have led to a lowest common denominator effect whereby contract terms and conditions were renegotiated to the least favourable position for the public authority.
147. It was acknowledged by the public authority that, insofar as information related to contracts for the supply of commodity items of IT, it was likely to lose its sensitivity quite quickly because of the rapid developments in that area. However, it argued that the position in relation to the key supplier contracts under the Programme was different. These contracts related to the establishment of dynamic, long term, service relationships which were intended to continue and develop over a number of years. The commercial sensitivities in these arrangements diminished only once the relevant services were fully implemented and a period of stable live running had been fully achieved. This was likely to be achieved by 2010. The likelihood of reaching this target would be damaged if its commercial relationship with the contractor was put in jeopardy.
148. The public authority accepted that the risk of prejudice would reduce over time. However, it was of the view that as long as the key commercial contracts which underpinned the Programme, including the N3 contract, remained subject to substantive review and renegotiation, disclosure would be likely to cause substantial prejudice to those negotiations. By 2010 it believed that its commercial relationship with its service providers would have sufficiently matured to allow disclosure without the substantial risk of prejudice.
149. It also accepted that it was inappropriate to claim that disclosure of one commercial arrangement would cause prejudice to another unless there was a close nexus between the two arrangements. However, it believed there was a very close nexus between the key commercial relationships which constituted the Programme, of which this contract was just one part. At the heart of each of the relationships were contracts which established a consistent approach to collaborative working between the public authority and the relevant service providers.
150. The public authority informed the Commissioner that the key commercial contracts which underpinned the Programme, including the one under consideration, were of a very dynamic nature and were continually subject to substantive review and renegotiation. As the Commissioner has already noted, all the parties involved in the Programme would have been aware that the contracts would be going through regular and significant changes and that therefore a copy of the N3 contract in its original form would not necessarily be representative of the contractual positions which existed between the contractor

and the public authority some 14 months later. However, the other service providers would not be aware of the ways in which the original contract had changed, without having access to an updated copy of the contract.

151. In addition, again as has previously been noted, the Commissioner accepts that there were likely to be some similarities between the N3 contract and other contracts which were a constituent part of the Programme. However, he believes that, given its subject matter, it was clearly distinct from the other national and local contracts under the Programme such that it was sufficiently unique that direct comparisons could not realistically be drawn with those other contracts during any renegotiations which might take place.
152. As well as the differences in the subject matter of the contracts within the Programme, a wide range of criteria, financial and non financial, would have been taken into account in awarding the contracts because of their size and complexity. There would have been significant differences in how different criteria would have been weighed and applied to each service provider for each separate contract. This would presumably allow the public authority to explain and justify differences in any similar provisions between different contracts within the Programme.
153. Linked to the above argument, if service providers attempted to use details of similar provisions in the N3 contract as leverage to obtain parity in their own contracts, it would clearly be open to the public authority to argue that the N3 contract was agreed as a package of terms. Consequently, it was not appropriate to look in isolation at specific provisions and draw comparisons with other contracts in the Programme.
154. In light of the above arguments, the Commissioner is not satisfied that disclosure of this contract would have been likely to prejudice negotiations which the public authority may have been conducting with other service providers within the Programme, at the time of the request or at some point thereafter.

(ii) Adverse effect on the public authority's relationship with contractor

155. The public authority argued that the contract had established a commercial relationship between it and the contractor which would last for at least seven years. A major factor in achieving successful delivery of the contract came from establishing a relationship with the contractor which was built on core values of respect, trust and confidence. This was essential to securing delivery in a complex operational environment that is often politically charged and commercially dynamic.
156. It believed that the disclosure of the contract could have led to the contractor being less willing to approach the relationship in an open and frank manner. This would have made it much harder for the public authority to assert effective commercial control over the relationship in the way that it had previously done. If the contract were disclosed it anticipated that the contractor would have limited the level of commercially sensitive information which it would be

prepared to contribute to support ongoing contract management processes and its general preparedness to work together with the public authority to resolve issues in a spirit of openness and mutual cooperation. This would have been prejudicial to the public authority's commercial interests and operational objectives.

157. The public authority acknowledged that there was an argument that both parties should have anticipated the possibility of enhanced public scrutiny as a result of the Act. However it believed that disclosure would lead to a breakdown of their relationship and that this behavioural change would adversely impact on the public authority's commercial control and consequently be a source of prejudice to its commercial interests.
158. In relation to the N3 contract the public authority indicated that there had been some well documented early difficulties. It believed that it had been important to the success of the Programme that it had been able to hold discussions with the contractor to rectify these problems out of the public spotlight. It was of the view that disclosure of the contract would have been likely to prevent it being able to achieve this objective.
159. The Commissioner has acknowledged in previous Decision Notices that he has issued that the impact disclosure of information may have on a public authority's relationship with a contractor is a common concern for many public authorities. His general view is that those who wish to enter contracts with public sector organisations should now be aware and understand that, as a result of the Act, there will be a greater degree of scrutiny of these contracts than those in the private sector. Provided that the information is not commercially sensitive, its disclosure should not unduly affect the relationships between a contractor and a public authority, particularly as the contractor will be aware that the public authority is releasing information as part of its statutory duties to the public.

(iii) Disclosure of misleading information

160. The public authority acknowledged that, in principle, where an exemption did not wholly apply then the information should be made available in redacted form. However, the Programme had a very high public profile and relied heavily on retaining the trust and confidence of the public and a large number of internal stakeholders, such as doctors, nurses and administrative staff, to secure effective delivery. It was therefore critical that the Programme maintained a clear, consistent and accurate communication strategy with these individuals so as to garner support for the objects of the Programme.
161. The public authority believed that there was a substantial risk that disclosure of information about the Programme which was incomplete and/or out of date, without the right context, could undermine this strategy, leading to a misleading picture of the Programme. This could lead to comment in the media and adverse influence on the ability of the public authority to ensure effective management of the underlying commercial and contractual relationship with the contractor and other third party service providers. This would have been highly detrimental to its strategic objective.

162. The Commissioner acknowledges that the contract is a very extensive and complex document. However, as already noted, his view is that the potential for the public to be misled or to misunderstand information, if it were to be released, is not a valid ground for not disclosing information. A public authority has the option to issue explanatory information which would provide an overall context to the information being released where it is felt that there was a danger of misunderstanding or misinformed comment.

(iv) Withdrawal by the contractor from the contract

163. The public authority argued that disclosure of the contract would have been likely to adversely impact on the share price and competitive position of the contractor which would have had a significant adverse effect on the financial stability of the service provider and/or its willingness to commit appropriate resource to, or otherwise fulfil its very substantial obligations under, the contract. This ultimately could have led to a position, as with another service provider, where it no longer wished to perform services for the Programme and effectively ended the relationship with the public authority. The consequences of this would have been extremely harmful to the public authority.

164. The Commissioner explained when dealing with possible prejudice to the commercial interests of the contractor that he was not satisfied that disclosure of the contract would have a detrimental impact on the contractor's share price. His reasoning is explained in paragraphs 131 to 136 above. He did not believe that this would be a likely outcome given that there would have been an awareness, amongst those who would have had a particular interest in it, that the provisions in the original contract would no longer be representative of those which were current at the time of the request. As a consequence he is not convinced that disclosure might have resulted in the withdrawal by the contractor from the N3 agreement.

(v) Reduction in pool of bidders for future contracts

165. The public authority argued that disclosure could have resulted in contractors being dissuaded from bidding for projects on the basis that whatever concessions they made as part of a negotiation process (including contract changes during contract performance) would ultimately be revealed to competitors together with their commercially sensitive information. This could result in a reduction in the pool of potential contractors available to the public authority.

166. The provision of information technology services to the public sector is regarded by many as a lucrative market in which contracts are awarded for very significant amounts of public money. The overall value of this contract was in excess of £500 million. Organisations which are competing within this market will have made large investments in order to do so. They may stand to make very large profits. As a result, the Commissioner is not convinced that the disclosure of this information would have deterred them from bidding in future

for contracts of this type, particularly as he is not convinced that it would require the disclosure of commercially sensitive information.

Other relevant considerations

167. In addition to the arguments presented to him by the public authority, the Commissioner has also taken account of the comments of the Information Tribunal in the case of *Department of Health v The Information Commissioner (EA/2008/0018)*. The Tribunal made its comments in the context of considering the extent to which information in an IT contract between the public authority and a contractor should be disclosed under the Act.
168. The Tribunal stated in its decision in relation to the contract it was considering, which was approximately 200 pages long, that
- “If a party wishes to rely upon an exemption it is up to them to establish that it is valid. Bearing in mind the length of the Contract it is unacceptable to expect the Commissioner to review a Contract clause by clause applying very general principles.” (para 98)
169. In reaching its decision the Tribunal went on to place significant reliance on the guidance issued by the Office of Government Commerce on the application of the Act to various types of contractual information. It stated that the guidance, *OGC (Civil Procurement) Policy and Guidance version 1.1*, and the DCA working assumptions note accompanying it, was “...a useful approach to dealing with an information request and in broad terms reflects the approach that we have adopted in our consideration of this contract.” (para 80)
170. The Tribunal made reference to 12 areas within a contract which the guidance indicated should normally be disclosed by a public authority. These were:-
- i. Service level agreements
 - ii. Product/service verification procedures
 - iii. Performance measurement procedures
 - iv. Contract performance information
 - v. Incentive mechanisms
 - vi. Criteria for recovering sums
 - vii. Pricing mechanisms and invoicing arrangements
 - viii. Payment mechanisms
 - ix. Dispute resolution procedures
 - x. Contract management arrangements

- xi. Project management information
- xii. Exit strategies and break options

171. The Commissioner notes that these 12 areas cover a significant amount of information contained in the N3 contract.

172. The Tribunal went on to state that it "...would expect the DoH in any future cases of this type to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out." (para 87)

173. The Commissioner further notes that the public authority has not provided him with any specific arguments as to why the general principles contained in the guidelines should not apply in this case and therefore why information should be withheld.

174. Taking into account the Tribunal's observations and the arguments presented to him by the public authority, the Commissioner has not, in his view, been provided with sufficient evidence to support the application of section 43(2) to any of the information the complainant was seeking from the contract. He has therefore decided that the exemption was not engaged and the information should have been disclosed.

The Decision

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

- it incorrectly applied sections 12, 41(1) and 43(2) to the information that had been requested;
- it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review;
- it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request
- it breached section 17(1)(b) and (c) by not stating in its refusal notice that it was relying on sections 40(2) and 41(1), nor explaining why they applied

Steps Required

176. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- to disclose to the complainant a copy of the original N3 contract with the following information redacted:-
 - i. the names of any individuals contained in the contract;
 - ii. Schedule 1.5 Appendix A (Specific insurance requirements);
 - iii. Schedule 3.3 Part C (Estimated split of revenue);
 - iv. any pricing information in Schedule 9.1 (Pricing, service deductions and incentive payments);
 - v. Schedule 9.1 Appendix C (Description of the core);
 - vi. Schedule 9.3 (Financial model);
 - vii. Schedule 9.4 (Compensation on termination); and
 - viii. Annex 2 (Financial model).

177. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

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

179. On the 31 March 2008, the Commissioner issued the public authority with a practice recommendation. The recommendation listed various examples of the authority's failure to conform to the section 45 Code of Practice, and provided guidance on how the Department may improve future conformity in this respect.

180. In addition to documenting examples of non-conformity, the recommendation noted that the Commissioner had felt compelled to warn the public authority that an Information Notice would be issued on a number of occasions. The Commissioner wishes to record his disappointment that on the 8 July 2008, over three months after his practice recommendation was issued, he has found it necessary to repeat his warning in this respect.

Failure to comply

181. 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.

Right of Appeal

182. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 served.

Dated the 29th day of January 2009

Signed

**Anne Jones
Assistant Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

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

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

Time for Compliance

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.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“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.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Refusal of Request

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.”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

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.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and

- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”