

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 23 April 2007

Public Authority: Department for Environment Food & Rural Affairs
Address: Nobel House
17 Smith Square
London
SW1P 3JR

Summary

The complainant requested information about the tendering process for a research project including the successful submission. The Commissioner found that some of the information that the complainant believed should have been disclosed was not held at the time the request was made or had in fact had been released. Other information had been withheld under section 43. The Commissioner found that the refusal notices issued by the public authority failed to adequately explain the reasons why the exemption was engaged and why the public interest favoured maintaining the exemption. This constitutes breaches of section 17. The public authority also failed to provide any of the information which it considered was not exempt within the statutory time limit, this constitutes a breach of the section 10. In relation to the small amount of information that was withheld under section 43, the Commissioner found that the information, including that detailing the rates charged for specific elements of the project was not commercially sensitive and so should have been released. This constitutes a breach of section 1.

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 the 2 January 2005 the complainant wrote to the Department for Environment Food and Rural Affairs (Defra) and asked for information relating to a research project on the Economic Evaluation of Marketing Standards – Horticulture and Eggs. The complainant specifically requested the following;

- (i) “Documents relating to the drawing up of the terms of reference, including the changes made to the terms of reference and the reasons for these changes.”
 - (ii) “The tender submitted by the organisation that got the contract. This should include details and CVs of the proposed team members”
 - (iii) “All correspondence with the organisation that got the contract and members of the team, including correspondence after the report was submitted.”
 - (iv) “Evaluations of the draft report and any other submissions, including evaluations produced by outside peer reviewers”
 - (v) “Details of any investigation of the process that may have been carried out following the forwarding of a letter of mine by Alan Simpson MP to Margaret Beckett. This was dealt with by Lord Whitty”
3. On the 13 January 2005 Defra acknowledged receipt of the request and explained that it aimed to provide a response within 20 working days from the date that the request was received which was the 4 January 2005.
4. Defra wrote to the complainant again on the 1 February 2005 to advise him that the information he had requested was being considered under the exemption provided by section 43 which relates to information the disclosure of which would, or would be likely to, prejudice commercial interests. The full text of section 43 is contained in the legal annex that is attached to this notice. Defra explained that this exemption was subject to the public interest test and further time was required to determine whether the public interest lay in disclosing the information. Defra set itself a target of the 1 March 2005 to respond fully to the request.
5. The complainant responded by email on the 4 February 2005 arguing that the information he requested was not commercially sensitive. In support of his argument he attached a schedule of the conditions of the contract for the research project which stated at paragraph 19.7 that “The Ministry shall be free to disclose the terms of the Contract and the particulars of the Project as it thinks fit”. Section 20 of the contract placed the copyright of any reports or documents relating to the project with Defra.
6. The complainant wrote to the Commissioner on the 11 February 2005 and complained that Defra was in breach of its obligations under the Act. At this time he raised the following points;
 - Defra had not informed him whether the information he had requested was held.
 - Defra had not communicated the information to him.
 - Defra had failed to comply with the time limits laid down in the Act.
 - That in his opinion the conditions of the contract meant that anyone submitting a tender had committed themselves to

complete openness and that therefore the exemption provided by section 43 of the Act could not be applied.

7. The Commissioner advised the complainant that the Act did allow public authorities to extend the time limit for dealing with requests where this was necessary to fully consider the public interest in maintaining an exemption, however public authorities were still required to advise an applicant of the need to do so within 20 days of request being received. According to the Commissioner's calculations the twentieth working day from the 4 January 2005 was the 1 February 2005. The Commissioner's initial view was that Defra had not breached any of the time limits set by the Act and the complainant was advised that he should wait for a Defra to provide its full response, after which he should pursue the matter through Defra's own complaints procedure if he was not satisfied with its response.
8. On the 1 March 2005 Defra sent the complainant some of the information he had requested. The accompanying letter explained that there was no record of any changes to the terms of reference. (It follows therefore that no information in respect to this matter existed and therefore no information could not be provided). Defra also explained that although it had provided most of the successful tender document, which was submitted by a company called ADAS, it was not able to release certain information contained in relation to, what Defra described as, ADAS's costing mechanism, as this would allow ADAS's internal pricing structure to be deduced. This would prejudice the commercial interests of both ADAS and Defra. The information was therefore withheld under the exemption provided by section 43.
9. The remaining elements of the successful tender were provided, including an annex containing the CVs of 5 key members of the research team. The individuals concerned had consented to the disclosure of this information.
10. Finally the letter advised the complainant that copies of all the correspondence that there had been between ADAS and itself, both before and after the project report was submitted, including Defra's evaluation of the draft final report, together with all the other information that it held and which had been requested, was enclosed.
11. On the 10 May 2005 the Commissioner received another letter from the complainant. The letter was dated 11 February 2005 which is assumed to be an error. Enclosed with this letter was a copy of a letter that the complainant had sent to Defra dated 11 March 2005 which catalogues a number of concerns that the complainant had with the response he had received to his request. He alleged that:-
 - Defra had not adhered to the time limits set out in the Act.
 - Defra claimed there had not been any changes to the terms of reference for the research contract and so had not provided any information relating to such changes.
 - Defra had withheld information from the successful tender relating to the number of days worked by individuals from the research team. The

- complainant disputed the grounds on which this information had been withheld.
- The refusal notice issued by Defra did not comply with the requirements of the Act, particularly in respect of how it explained the application of the public interest test in maintaining the commercial interest exemption.
12. In his letter to Defra dated 11 March 2005 the complainant asked Defra to take steps to remedy the alleged failures. In his letter to the Commissioner he advised the Commissioner that Defra had not replied to this complaint. From the information provided, it was not unreasonable to assume that Defra had not provided an internal complaints procedure. The Commissioner therefore wrote to the complainant on the 12 May 2005 and asked for copies of the correspondence he had received from Defra on this matter with a view to investigating the complaint.
 13. The complainant provided the required information on the 6 June 2005. This included an email from Defra to the complainant dated 13 May 2005 which revealed that an internal review was in fact being undertaken and that Defra anticipated that this would be concluded by 9 June 2005.
 14. The Commissioner contacted Defra by phone on the 9 June 2005 to find out how the internal review was progressing and was advised that the final letter concluding the internal review would be sent to the complainant that day. In light of this the Commissioner wrote to the complainant and advised him he should await the outcome of the review, after which, if he had still had outstanding concerns, he should provide a copy of the internal review letter and specify what his concerns were.
 15. Defra sent a letter to complainant dated the 9 June 2005 advising him of the outcome of the internal review. The review letter explained that Defra had responded to his request in accordance with the time limits set out in the Act. Defra explained that it had responded to his request within 20 working days of it being received by informing him that additional time was required to consider his request. It explained that the Act allowed the 20 working days deadline to be extended where this is necessary to consider the public interest in maintaining a qualified exemption. In this particular case Defra stated that additional time was required because of the volume of the information received and the need to consider the application of qualified exemptions.
 16. The review letter went onto advise the complainant that Defra had provided him with all the information it held that fell within the scope of his request on the 2 March 2005 apart from two pages of information which was withheld under the exemption provided by section 43 – prejudice to commercial interests. Defra went on to explain that the remaining information had not been provided earlier because it had decided it made more sense to provide a single response which dealt with all parts of the request.
 17. In relation to information on changes to the terms of reference for the research project, Defra reiterated its position that as there had been no changes to the terms of reference no such information existed.

18. Once the internal review had been completed the complainant was free to raise any outstanding concerns with the Commissioner. However the complainant had also complained to the Commissioner about a subject access request he had made to Defra under the Data Protection Act 1998. Although the complainant's concerns in relation to this subject access request were addressed it was not initially recognised that the complainant had outstanding concerns in relation to his Freedom of Information request.
19. The complainant contacted the Commissioner by email on the 5th January 2006 for an update on how the investigation was proceeding. This prompted a review of the correspondence he had submitted and it became clear that on the 18 July 2005, in dealing with issues around his subject access request, the complainant had submitted a copy of Defra's review letter with annotations detailing the issues that he was still concerned with.
20. On the 11 January 2006 the Commissioner wrote to the complainant apologising for the confusion and sought to clarify the issues that were still outstanding following the internal review. These were, in the order raised by the complainant, as follows;
 - The time taken to complete the internal review.
 - The time taken to respond to the original request.
 - That no information had been provided on changes to the term of reference prior to these being issued to the tenderers.
 - The quality of the explanation as to why information was withheld.
 - The application of the exemption provided by section 43 in relation to commercial interests.
 - That specific information on how many days work were allocated to two named individuals.
21. The complainant was also asked whether the provision of information concerning a complaint he made about the tendering process (see point (v) of paragraph 2 above) was still an issue he wished to complain about as this was not referred to in the annotated version of the review letter that he had submitted.

The Investigation

Scope of the case

22. The complainant confirmed by email on the 30 January 2006 that the six issues listed in paragraph 20 above were the matters that he specifically wished to complain about. On the 24 February 2006 he clarified that he was still interested in accessing information concerning any investigation that was triggered by his complaint to Defra about the tendering process. It is these matters that the investigation is confined to.
23. One of the issues raised by the complainant is the length of time Defra took to conduct its internal review of how the request was handled. The Act does not set

any statutory time limit in respect to how long a public authority should take to conduct a review. The Commissioner's duty under section 50 of the Act is to make decisions on whether a request had been dealt with in accordance with Part I of the Act. However this matter is addressed in the 'Other Matters' section at the end of this notice.

24. The Commissioner also considered whether the information requested was environmental information and whether the complainant's right of access to the information should have been considered under the Environmental Information Regulations 2000 (the 'Regulations'). When the complainant initially made his complaint in January 2005 the Commissioner did contact Defra and amongst other issues broached the subject of whether the request should be considered under the Regulations. Defra had taken the view that the focus of the information was on the award of a contract. It was not information on the state of the elements of the environment, factors or measures affecting the environment or information falling within any of the other definitions contained in regulation 2 of the Regulations as to what constitutes environmental information.
25. The Commissioner has considered Defra's representations on this matter and has taken the view that no link has been established between the information on the tendering process and the state of the elements or factors, or measures affecting those elements. Furthermore, as the investigation proceeded it seemed unlikely that whether the request was considered under the Act or the Regulations would have a material effect on the complainant's right of access. It is also noted that neither the complainant nor the public authority raised this as a matter of concern.

Chronology

26. By the time Defra's internal review of the request had been concluded and it was appropriate for the Commissioner to investigate the complaint he had already been provided with copies of a number of documents relevant to the case. These included;
 - The original request dated 2 January 05.
 - Defra's initial response advising the complainant of its need to extend the deadline dated 1 February 2005. This was in effect the first refusal notice.
 - Defra's letter dated 1 March 2005, which accompanied the information sent to the complainant and served as a second refusal notice in respect of the information withheld under the exemption provided by section 43.
 - An email from the complainant to Defra dated 13 March 2005 expressing dissatisfaction with Defra's response and seeking an internal review.
 - An acknowledgement of that email dated 3 May 2005
 - A further email from Defra giving the 9 June 2005 as the target date for concluding the internal review.
 - Defra's review letter explaining the outcome of the internal review dated 9 June 2005.
 - An annotated version of that review letter detailing the complainant's outstanding concerns.

27. **11 January 2006.** The Commissioner wrote to Defra and asked it to provide a copy of the successful tender from ADAS, clearly marked to indicate the information that had been withheld.
28. **24 January 2006.** Defra provided the information requested. The information that had been redacted from the tender submission was one section entitled 'Resource Requirement and Budget' and consisted of one full page and the last paragraph from the preceding page. In broad terms the information included an explanation of the overall cost and staff days to be spent on the project. This was then broken down into a table detailing the tasks that comprised the research project, which staff would complete those tasks, their grade, the number of days spent on the task, the cost per day and total cost attributable to these separate tasks.
29. **13 February 2006.** The Commissioner wrote to the complainant. He noted that in the annotated version of the review letter the complainant had made reference to having evidence which supported his claim that there had been changes to the terms of reference. The Commissioner asked for this evidence.
30. **24 February 2006.** In response the complainant provided a chain of emails between Defra staff, which it is assumed he obtained through his separate subject access request. The emails are dated April 2002 and it can be deduced from them that the terms of reference were issued to bidders at the end of April 2002. The emails seem to relate to a draft version of the terms of reference (or the invitation to tenders as it is referred to in these emails) and a covering letter which are being circulated for comment prior to being issued. The final email dated the 26 April 2002 reveals that there was an intention to make some changes to the covering letter. There is nothing that explicitly states that changes were required to the invitation to tender itself, however the emails are rather ambiguous on this matter.
31. **8 March 2006.** The Commissioner wrote to Defra asking for comment on each of the issues still of concern to the complainant.
32. In relation to the time taken to respond to the initial request it was noted that the deadline could be extended where necessary to properly consider the public interest in maintaining a qualified exemption. However it seemed unlikely that all the information was initially considered exempt and so the non exempt information could have been released within the 20 working days. Furthermore in its letter to the complainant of the 9 June 2005 Defra explains that the deadline needed to be extended to consider exemptions, plural, and the volume of information requested (see paragraph 15). Therefore Defra was asked to clarify the extent to which the information requested was considered exempt when it extended the deadline for compliance on the 1 February 2005 and which exemptions were being considered.
33. In relation to information on any changes to the terms of reference the Commissioner provided Defra with a copy of the chain of emails supplied by the

complainant in support of his assertion that the changes had been made and that information on these changes existed.

34. The Commissioner also raised the issue of the quality of the explanation contained within the second refusal notice of 1 March 2005 as to why some information had been withheld. This is discussed in detail in paragraph 76.
35. In relation to the actual application of section 43, the commercial interest exemption, the Commissioner asked Defra to provide further details of what points were considered by it when determining whether the information was exempt including any representations made by the company concerned. Defra was also asked whether the overall cost of the contract, which was included in the exempt information, was still considered exempt.
36. Defra was advised that the complainant was particularly interested in information on the number of days worked by two named individuals. The Commissioner asked whether it was possible to provide headline figures for the days worked by these two people, disassociated from the rates charged for their work.
37. Finally Defra were asked to clarify what steps were taken in response to the complaint into the tendering process that the complainant had made.
38. **12 April 2006.** In relation to the time taken to deal with the original request Defra clarified that as at the 1 February 2005 it was not only considering the application of the section 43 – the commercial interest exemption, but section 35 – formulation of government policy and section 40 – personal information. Defra explained that to consider these exemptions properly it had needed to consult with ADAS and seek permission from various people whose CVs were included in the tender submission. This was complicated since some of those people were no longer employed by ADAS. Ultimately Defra did not rely on the exemptions provided by sections 35 or 40 to withhold the information.
39. Defra confirmed that they had checked again whether any changes were made to the terms of reference and said that although drafting changes were made to the covering letter that accompanied the terms of reference, no change to the actual term of reference themselves were made.
40. Regarding why the public interest favoured maintaining the commercial interest exemption Defra stated that it believed that the key public interest were identified in the second refusal notice dated 1 March 2005. However it went on to recognise that these could have been flagged up more clearly but commented that the situation was rectified at the internal review stage.
41. In relation to the application of section 43 Defra explained that ADAS considered the information on the number of days worked by individuals and the cost charged per day for that work, was commercially sensitive as it would allow competitors to analyse how it scoped and priced the projects it tendered for. Defra did not consider the overall cost of the project to be sensitive. This information was already in the public domain and explicit references to this total was included in the material that the complainant had already been provided with.

42. Defra also explained that the criteria for awarding the project included the tenderer's grasp of the issues involved, the capability and experience of the research team together with the cost of the project. This enabled Defra to determine which bid provided the best value for money.
43. In response to the suggestion that it might be possible to release information on the total number of days worked by the individuals named by the complainant, Defra said that it believed this information was exempt as the number of days worked, analysed with the overall cost of the project would allow competitors to calculate the daily rates charged in respect of these two individuals who were senior members of the proposed research team.
44. In relation to the complaint that the complainant had made to Defra via his MP regarding the tendering process Defra stated that the information requested had been provided to him on the 1 March 2005. Defra explained that because of the seriousness of the complainant's allegations the matter had been investigated by Defra's then Chief Economist and found to be wholly without foundation. A response to the allegations was sent to the complainant's MP on the 13 December 2004. A copy of this letter together with notes of the Chief Economist's investigation was included with the information sent to the complainant on the 1 March 2005.
45. **26 September 2006.** The Commissioner contacted Defra by phone and by two emails regarding a number of issues. The main purpose of the telephone call was to advise Defra that the Commissioner had attempted to analyse the overall cost of the project and the days allocated to the two named team members. It had not proved possible to produce any accurate estimate of the daily rate charged for them, this was despite making educated assumptions as to their rate relative to more junior members of the team. This point was also explained in an email sent to Defra the same day.
46. During the same telephone conversation the opportunity was also taken to ask Defra once more to confirm whether as at 1 February 2005 it was still considering the application of exemptions or purely the public interest in maintaining section 43. The official explained that he was not involved in the initial handling of the request but that it was his understanding that the deadline was extended purely to consider the public interest in maintaining the commercial interest exemption.
47. A second email sent that day from the Commissioner asked Defra for additional information on the public interest arguments it had considered in relation to maintaining the commercial interests exemption. The email also asked Defra whether it would be prepared to release a copy of the covering letter to the terms of reference showing the drafting changes that it held.
48. **10 October 2006.** Defra responded and explained that in relation to the number of days work assigned to two named team members it had consulted further with ADAS and was now content to release additional information. That additional information, which was released on the 18 October 2006 included the number of days work attributed to each constituent task of the research project and which

team members were assigned to carrying out those tasks. This meant that the whole of the tender submission by the winning tenderer, ADAS, had now been disclosed apart from information revealing the actual daily rates charged for the individual team members and their grades/positions.

49. Defra also provided some additional information on the public interest arguments it had considered in relation to the commercial interest exemption. This recognised a strong public interest in knowing how public money is spent as this generates confidence in the integrity of the procurement process. This argument had proved persuasive in Defra deciding to disclose the majority of the information requested. However it maintained that in relation to the information that had been withheld the public interest favoured maintaining the exemption.
50. In relation to the terms of reference Defra again asserted that no changes to the actual terms of reference had been made, only to the covering letter. It explained that there was no longer any record of these changes.
51. **18 October 2006.** In light of the fact that the complainant had now received the vast majority of the information that he had requested the Commissioner wrote to the complainant to ask whether he still wished to pursue his complaint.
52. **19 October 2006.** The complainant emailed the Commissioner in response to the additional information that had been forwarded by Defra(see para 41). He asserted that the information that had now been disclosed could in no way reveal ADAS's cost structure. He said that it did not identify which members of the research team are full time staff and which were freelance, nor did it provide any information on the opportunity cost of the full time staff.
53. **23 October 2006.** The Commissioner again emailed the complainant to clarify whether he still had concerns over the information into the complaint that he had made to Defra over the procurement process. The complainant responded the same day. Unfortunately he did not clarify whether this was a matter that still concerned him but simply stated that he wanted everything that he originally asked for.
54. **30 November 2006.** The Commissioner reviewed the evidence that the complainant had provided to support his argument that there had been changes made to the terms of reference prior to them being issued. The chain of emails begins with an attachment being circulated labelled 'ITT1' and the sender asks for any comments or amendments. The chain concludes with an email from one official stating that he proposes to make changes to the covering letter and saying that, "Suggested revisions are marked as tracked changes in the attached." The attached document apparently being the same ITT1. This gives rise to some ambiguity as it seems plausible that ITT1 refers to the actual invitation to tender or terms of reference rather than a covering letter. It was also noted that the attached document was a relatively small in size. The Commissioner emailed Defra and asked whether it could provide copies of the final versions of the covering letter and the terms of reference (which, as a party to the tendering process the complainant would have already received). It was hoped this might

reveal whether the attachment in question was just the covering letter or the terms of reference.

55. **8 December 2006.** Defra responded by email, providing a scanned hard copy of the terms of reference and the covering letter. Unfortunately it was not possible to determine from the size of these documents which of them the attachment contained. Defra explained that its interpretation of the emails was that the changes referred to were to the covering letter only. It also explained that although there were formal retention policies in relation to some documents these did not extend to draft documents and that the working practice was likely to be that once a final version had been agreed, draft documents would be destroyed.
56. **10 January 2007.** Defra emailed the Commissioner and advised that whilst searching a file relating to a separate business area they had in fact discovered a copy of the attachment in question, ITT1, which was forwarded to the Commissioner.
57. **16 January 2007.** Having studied the attachment in question it was apparent that there had been changes made to both the covering letter and the actual terms of reference, albeit only very minor ones. The Commissioner considered that there was nothing sensitive about this information and so emailed Defra inviting it to release this information to the complainant.
58. At the same time the Commissioner took the opportunity to review Defra's arguments over the sensitivity of the information from ADAS's submission that Defra still believed to be commercially sensitive, i.e. the daily rates for the various staff and their grades. It was put to Defra that information which revealed a contractor's profit margins was more likely to warrant protection than simply the prices charged for particular activities. Defra was also asked to provide further information on the extent to which ADAS was involved in bidding for similar contracts at the time of the request. The Commissioner also suggested to Defra that, in general terms, the daily rates charged for such staff would be known within the industry and asked Defra to comment on this assertion. Finally the Commissioner asked Defra whether it considered that the sensitivity of the information was likely to have declined during the period between the tender being submitted in May 2002 and the request being made in January 2005.
59. **8 February 2007** Defra advised that it was happy to release the attachment containing the changes to the invitation to tender and the covering letter to the complainant. Due to the need to clarify changes in the complainant's contact details the information was released on the 23 February 2007.
60. Defra did not directly address the question as to whether the withheld information revealed anything about ADAS's profit margins. It did however explain that ADAS had been bidding for research projects of this nature at the time the request was made and indeed was still involved in similar tendering exercises. Whilst it accepted that competitors may be able to estimate the daily rates charged by ADAS it considered that there was a real difference between an "educated estimate and a known fact". Defra went on to emphasise the competitive nature of the tendering process and explained that if competitors knew the information on

the daily rates it would enable those competitors to reduce their own tender bids to the disadvantage of ADAS.

Findings of fact

61. The successful tender was submitted by ADAS in May 2002.
62. The request was received by Defra on the 4 January 2005 and it provided an initial response (the first refusal notice) on the request 1 February 2005, which was the twentieth working day following the receipt of the request, extending the time limit for complying with the request on the basis that additional time was required to consider the public interest test in relation to the commercial interests exemption provided by section 43. Some information was disclosed on the 1 March 2005 together with a second refusal notice explaining that other information had been withheld under section 43. This was the fortieth day following the receipt of the request. The internal review was requested on the 11 March 2005 and was completed on the 1 June 2005, a period of 55 days inclusive.
63. During the course of the investigation additional information was disclosed including information on the number of days worked by individuals on different tasks on the 10 October 2006 and the information on the changes to the terms of reference and its covering letter on the 23 February 2007.

Analysis

Procedural matters

Section 1

64. Section 1 entitles a person making a request to be told whether the public authority holds the information requested, and if so to have that information communicated to him. The complainant was originally concerned that he was not provided with two of pieces of information he requested. This is apart from the information which Defra withheld under section 43 on the grounds that it was commercial sensitive. The two pieces of information in question relate to changes in the terms of reference and information relating to the investigation of a complaint about the tendering process which the complainant had made earlier.
65. In relation to information concerning the investigation into the tendering process following the complainant's complaint to Defra via his MP, the Commissioner is satisfied that the information in question was provided to him. Although this was an issue raised by the complainant in his original complaint to the Commissioner there was no reference to the issue in the complaint following the internal review which was made in the form of an annotated version of Defra's review letter (see paragraph 19). The Commissioner later asked the complainant whether the issue was still a matter of concern to which he responded that it was. In light of this the issue was raised by the Commissioner in his letter to Defra dated 8 March 2006.

In response Defra advised that a full response to this element of request was provided to the complainant on the 1 March 2005 (see paragraph 43). The Commissioner did attempt to clarify with the complainant whether this was still a matter of dispute on the 23 October 2006. Unfortunately the complainant did not directly address this issue in his response and therefore the Commissioner was not in a position to identify the outstanding issues in order to pursue the matter with Defra. In light of this the Commissioner concluded that Defra has provided the complainant with the information relating to this element of his request.

66. There was no breach of section 1 of the Act in respect of the information relating to information on the investigation into the complaint about the tendering process.
67. In relation to information on changes to terms of reference although Defra originally contended that no changes were made and so no information existed it later accepted that changes had been made to the covering letter and eventually did produce the information in question which revealed changes had been made to both the covering letter and the terms of reference. This information was subsequently provided to the complainant and therefore the issue is more concerned with the time of compliance.

Section 10

68. Section 10 of the Act provides that a public authority must provide the information requested within 20 working days. The information relating to the changes of the terms of reference was requested in the January 2005 and was not disclosed to the complainant until February 2007. In light of this Defra failed to comply with the provisions of section 10 in relation to this information.

Sections 10 & 17

69. Two of the issues raised by the complainant in his complaint to the Commissioner concerned the time taken to respond to his original request and the quality of the explanation he was provided with as to why the some of the information he requested had been withheld (see paragraph 20).
70. As already discussed, section 10 of the Act provides that a public authority must provide the information requested within 20 working days. However section 10(3)(b) provides that the period may be extended where a public authority requires additional time to consider the public interest in maintaining one of the qualified exemptions. Where such an extension is required a public authority is obliged to explain the situation to the applicant. Under section 17(1) the public authority must state which exemption has been engaged and, if it is not obvious, why that exemption applies. This must be done within 20 working days. Under section 17(2) the public authority also has to inform the applicant if additional time is required to consider the public interest test within the 20 working days. In other words the public authority must have already decided that the exemption is engaged within the 20 working days; the extension is only available for consideration of the public interest test. The public authority must also provide an estimate of how long it will take to conduct the public interest test under section 17(2).

71. Defra did advise the complainant that additional time was required to consider the public interest in relation to the commercial interests exemption and gave an estimate of the 1 March 2005 as the date such considerations would be completed. The letter was sent on 1 February 2005 which was within 20 working day time limit.
72. However in Defra's internal review letter of the 9 June 2005 there was a reference made to the need to extend the deadline in order to consider a number of exemptions, including but not exclusively, the commercial interest exemption. It was also stated that another reason for the need to extend the deadline was the volume of information requested. In light of this Defra was asked to clarify whether, as at the 1 February 2005, it considered all the information in ADAS's tender submission to be exempt and if so under what exemptions (see paragraph 32). Defra responded that it had **not** concluded that all the information in the tender submission was exempt by 1 February 2005 (see paragraph 38) and referred to other exemptions being considered, namely section 35 – formulation of government policy, and section 40 - personal information. It should be noted that the exemption in relation to personal information is not subject to the public interest test and therefore the Act does not allow any grounds for extending the deadline in relation to this exemption. During a later telephone conversation (see paragraph 46) a Defra official was asked whether he could confirm that the time limit had only been extended to consider the public interest test rather than whether exemptions were engaged. The official had not been party to the initial request handling and so was unable to provide a categorical assurance that the extension was only required in relation to the public interest. However it was his understanding that this was the case.
73. Based on the information contained in the internal review letter and Defra's letter to the Commissioner of the 12 April 2006 and in the absence of a categorical confirmation to the contrary, it appears that the need to extend the 20 working day deadline was not solely for consideration of the public interest test in relation to section 43. Rather, Defra was still determining whether other exemptions applied i.e. section 35- formulation of government policy, and section 40 – personal information, partly, perhaps, because of the amount of information falling within the scope of the request. The Act requires a public authority to determine whether any information is covered by an exemption within 20 working days regardless of the volume of information to be considered. As Defra had not determined whether these exemptions applied, it failed to refer to them in its refusal notice of the 1 February 2005. This is a breach of section 17(1).
74. It is also noted that Defra's letter of the 1 February 2005 only referred to the fact that, "the information requested must be considered under the exemption under section 43 of the Act covering commercial interests". This is a very general statement and does not identify which elements of the tender were considered commercially exempt. It would therefore be difficult to see how it would be apparent to the recipient of such a notice why the exemption was engaged. Therefore the public authority would be required under section 17(1)(c) to explain why the exemption applied. No such explanation was included in the notice.

75. In its letter to the Commissioner dated 12 April 2006 Defra explained that it had decided not release non exempt information (i.e. the information that it had already concluded was not covered by an exemption) within the 20 working day deadline because it considered that it would be more useful to provide the complainant with a fuller response once the public interest test in relation to the exempt information had been considered, rather than provide the information on a piece meal basis. However the Act only provides for an extension in relation to those pieces of information which the public authority has already decided is exempt and simply needs more time to consider the public interest. In other words the non exempt information still needs to be provided within the 20 working days. The Commissioner is aware that there may be situations where a public authority believes it makes more sense to respond to a request by providing one coherent body of information once all deliberations have been concluded. Where a public authority proposes to follow this course of action it should liaise with the applicant and confirm that this approach is acceptable. There is no evidence that this was done in this case. Since Defra failed to provide the non exempt information within 20 working days following receipt of the request it breached section 10(1) of the Act.
76. Where, after extending the deadline for consideration of the public interest test, the public authority finds that the public interest favours maintaining the exemption it is required under section 17(3) to issue the applicant with a further refusal notice explaining the public interest arguments it has taken into account when making this decision. Defra's letter of the 1 March 2005 explains in greater detail why the information that has been withheld is exempt. The Commissioner considers it was reasonable for Defra to have assumed that the complainant, who has commercial experience of such projects, would have understood an explanation that ADAS's "costing mechanism" was commercially sensitive. However this notice does not address the public interest arguments that were weighed in deciding the public interest favoured maintaining the exemption. This constitutes a breach of section 17(3). The Commissioner considers that since Defra had extended the time limit to consider the public interest, it was all the more important to discuss such arguments. However the Commissioner notes that in its internal review letter of the 9 June 2005 there was an explanation of the public interest arguments.

Exemption

Section 43 – commercial interests

77. In broad terms section 43 provides that information is exempt if its disclosure would, or would be likely to, harm the commercial interests of some one. This can include the commercial interests of the public authority itself or the interests of another party for example a contractor carrying out work for the public authority.
78. The complainant was concerned with two issues relating to the application of section 43. He raised concern about the overall application of the exemption and specifically highlighted the fact that information on the number of days worked by

two named individuals had been withheld under the exemption (see paragraph 20). However during the course of the investigation Defra did disclose some additional information including the information on the two named individuals.

79. The information that Defra originally withheld was just over one page from the successful tenderer's submission. As described in paragraph 28 this comprised of summary of the costs of the project, including the overall cost, followed by a breakdown of these costs detailing the individual tasks, who those tasks would be carried out by, the number of days required for each task and the daily rate charged for those tasks.
80. Defra had explained to the complainant that it was unable to release this information without revealing ADAS's 'costing mechanism', and in its internal review letter went onto explain that the information was a breakdown of costings for the bid which would allow a competitor to deduce ADAS's internal pricing structure. The complainant countered (in his annotated version of the internal review letter which was received on the 18 July 2005) that this would not be the case and that the document would not reveal information that would determine an internal pricing structure such as;
- Marketing cost
 - Percentage of the year in which consultants are working on fee earning projects
 - Salary of consultants
 - Amount paid to freelance consultants
 - Overheads
81. Once the complainant had had the opportunity to review the additional information that Defra released in October 2006 he further argued in an email to the Commissioner dated 19 October 2006 that this type of information would not disclose ADAS's cost structure. It did not identify who were permanent staff and who were freelance. Nor did the information indicate the opportunity costs of permanent staff, suggesting that, "they cost nothing if they have no other paid work to do".
82. The Commissioner accepts that the information that was withheld would not reveal the costs to ADAS of carrying out this work. It does not reveal what ADAS's profit margins would be for this project. Nevertheless an actual breakdown of costs, revealing the current price ADAS charged for undertaking each of the different elements of the research could still be useful to its competitors if they were looking to undercut ADAS in future tendering exercises. What it would not do however is reveal the lowest price that ADAS could afford to bid whilst still making a profit in future tendering exercises. That is not to say that if disclosing this information resulted in ADAS having to submit a bid that yielded a lower profit this would not prejudice its commercial interests. It has not been shown however that ADAS could not still submit a winning bid, albeit one yielding a lower profit.
83. The Commissioner also notes that although the price charged is a significant factor is not the sole criteria on which projects such as this are awarded, for example the experience and reputation of the research teams are also important

- factors. The Commissioner acknowledges that although the prestige of researchers is more likely to be already known within the industry than daily rates, the very existence of these other factors diminishes the commercial sensitivity of the daily rates.
84. The Commissioner has considered the degree to which the daily rates would represent industry norms; how easily competitors may already be able to estimate the rates charged. The submissions made by Defra on this issue were not conclusive. However they did accept that educated estimates could be made whilst maintaining that this was rather different than knowing the actual rates.
85. If it would have been possible for competitors to approximate the daily rates as at May 2002 then it begs the question as to whether this information would have any commercial sensitivity some 2 ½ years later when the request was received. Although Defra has informed the Commissioner that ADAS was still actively bidding for similar contracts at the time of the request this does not mean that the rates charged in the tender submission were still current. Indeed it is more probable that the rates had changed and in the absence of any evidence to the contrary then the Commissioner is of the view the sensitivity of these rates would have diminished over time.
86. For the Commissioner to find that the exemption is engaged he must be satisfied the disclosure would or would be likely to prejudice the commercial interests of ADAS. The test of whether a disclosure is likely to prejudice the interests protected by an exemption is that established in the Lord case [R (on the application of Lord) v Secretary of State for the Home Office [2003]]. In that case which related a prejudiced based exemption under the Data Protection Act 1998, the view was expressed that, "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."
87. Having considered the representations made by Defra the Commissioner is not satisfied that there is a very significant risk that the disclosure of the daily rates would prejudice the commercial interests of ADAS. In light of this the Commissioner's decision is that section 43 is not engaged.

The Decision

88. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

Section 1

89. In respect of the information relating to an investigation into a complaint made about the tendering process, the Commissioner's decision is that the information was provided. In relation to this information, there was no breach of 1(1)(b).

90. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Section 10

91. Some of the information within the tender submission was not considered exempt by Defra. This was not released within 20 working days following the receipt of the request. This is a breach of section 10(1) of the Act.
92. Information about the number of days work allocated to individual members of the research team for particular elements of the project, including the two specific individuals identified by the complainant was originally withheld under section 43. Defra ultimately accepted the Commissioner's view that such information did not engage the exemption. Therefore this information was released during the course of the investigation. However since this disclosure was well outside the time limit provided by the Act this constitutes a breach of section 10(1).

Section 17

93. By the time it issued its original refusal notice of the 1 February 2005 Defra had not concluded its consideration of other exemptions. It therefore failed to include details of these exemptions in that refusal notice. This constitutes a breach of section 17(1).
94. In its original notice of the 1 February 2005 Defra did advise the complainant that some information was exempt under section 43 and that it required additional time to consider the public interest test. However it failed to provide an adequate explanation of why the exemption was engaged. This is a breach of section 17(1)(c)
95. In its second notice of the 1 March 2005 Defra did not explain why in all the circumstances of the case the public interest favoured maintaining the exemption provided by section 43. This is a breach of 17(3)(b).

Section 43

96. In relation to the remaining information that is still being withheld under section 43, i.e. the summary that commences the section titled 'Resource Requirement and Budget' together with the information on the daily rates and grades applicable to the different team members, the Commissioner's decision is that at the time the request was made disclosure would not, and would not be likely to, prejudice the commercial interests of ADAS. It is therefore not exempt information. Section 43 is not engaged and since this information has not yet been released, this therefore constitutes a breach of section 1(1)(b)

Steps Required

97. In light of the circumstances set out paragraph 100 above, the Commissioner requires the public authority to take the following steps to ensure compliance with the Act;

Release the remaining information which is currently being withheld from the tender submission. This information should be sent to the complainant at his new address.

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

Other matters

99. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern:
100. In relation to the time taken to complete the internal review the Commissioner acknowledges that there is no statutory deadline for conducting internal reviews and notes that the complainant had raised 37 points which he wished the internal review to consider.
101. Defra accepted that the internal review had taken 60 days and recognised that it should have been completed sooner. It explained that this was due in part to a heavy caseload at the time and in part because Defra was still developing its experience of dealing with requests under the Act. Defra had apologised to the complainant over the time taken.
102. The Commissioner is disappointed with the length of time taken by Defra to conduct its internal review and refers it to the Commissioner's recently published guidance on this subject, 'Freedom of Information Good Practice Guidance No 5 – Time limits on carrying out internal reviews following requests under the Freedom of Information Act 2000', which advocates that as a rule public authorities carry out such reviews within 20 working days.
103. In relation to the information on changes to the terms of reference which Defra initially claimed it held no record of only to later discover a copy of the documents in question, the Commissioner notes the following;
104. Defra explained that the information was discovered in a file on matters not directly related to the subject of the complainant's request. Nor does it seem that Defra intended to, or had a business need to, retain a copy of these changes. This being so it is understandable that having searched what it considered to be the relevant files, Defra concluded that the information was not held. Undertaking a more extensive search which would have captured the particular file containing this information, may have raised issues of costs and whether the appropriate limit (the cost ceiling for locating and retrieving information) would be exceeded.

Failure to comply

105. 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

106. 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@dca.gsi.gov.uk

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 23rd day of April 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annexe

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.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

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.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

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).”

Section 43(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).”