

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 June 2009

Public Authority: National Police Improvement Agency
Address: NPIA Headquarters
4th Floor
10-18 Victoria Street
SW1H 0NN

Summary

The complainant requested the contract plus any appendices and indexes for the IDENT¹ system along with a list of all bidders and their bid submissions.

The public authority released some of the information but withheld the remainder citing sections 23, 31, 40(2), 41, 43(1) and 43(2) of the Act. The complainant did not pursue her request in relation to any information which was withheld under section 23 or which was contained in one withheld schedule of the contract. The public authority withdrew its reliance on section 43(1) during the investigation.

The Commissioner's decision is that the exemptions at section 31(1), 40(2), 41(1) and 43(2) are not engaged. The complaint is therefore upheld.

The Commissioner further finds that the public authority breached sections 1(1)(b), 10(1), 10(3), 17(1)(b) and (c) and 17(3).

The Commissioner's role

1. The Commissioner's role 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.

¹ IDENT1 integrates and enhances the National Automated Fingerprint Identification System used in England and Wales with the existing electronic fingerprint identification system used by the Scottish police forces, and provides the strategic platform for the integration of palm print searching. The platform also provides for the integration of future biometric capabilities such as facial imaging. <http://www.northropgrumman.co.uk/utills/downloads/IDENT1.pdf>

The request

2. On 11 October 2005 the complainant requested the following information:
 - *The contract plus any appendices and indexes for the IDENT1 system*
 - *A list of all bidders and their bid submissions*
3. This was acknowledged on 14 October 2005 and the complainant was advised that her request would receive a formal response within 20 working days.
4. The public authority wrote to the complainant on 25 October 2005. It provided a list of bidders and advised that, in relation to the other information, it was considering the public interest in respect of the exemptions under section 43(1) and (2) and section 31. It advised that it should hopefully be in a position to respond by 2 December 2005.
5. On 2 December 2005 the public authority advised the complainant that it was still not in a position to respond but would hopefully be able to do so by 9 December 2005.
6. On 13 December 2005 the public authority made its response. It confirmed that the requested information existed but that some of it was considered to be exempt from disclosure. In order to simplify its response the public authority provided a table which listed each schedule of the contract, which were lettered from A through to W. Schedules A, C, J, L, M, N, O, P and U were disclosed; schedules G, I and K were disclosed in part; the remaining schedules were withheld in full.
7. The exemptions cited were 23, 31, 40(2), 41, 43(1) and 43(2). No detail was given regarding the citing of section 23 and very limited information was provided to support citing section 40(2) or 41. Public interest arguments were provided for the other exemptions.
8. On 20 March 2006 the complainant requested an internal review. She specifically referred to schedules D, F, H, I, Q, R, S, T, V and W and said that she was happy to forego disclosure of schedule E which related to pricing.
9. On 24 April 2006 the public authority responded to the complainant and made a further limited disclosure of some previously withheld information. It also provided the result of the internal review which upheld its original refusal. It advised the complainant that it believed that its assessment of the balance of public interest was correct in relation to the “*wide and open-ended scope*” of her original request. The public authority also made

reference to what it termed the complainant's "*supplementary focussed request*", i.e. her specification of the ten schedules she wished to have re-considered as a result of the partial disclosure that had already been provided.

10. In respect of what it termed the "*supplementary focused request*" it said that it had further considered "*whether each one of those schedules contains any information which falls within the Subject-matter Request*". It had decided that the majority of the contract schedules, i.e. seven of the ten specified by the complainant, were outside the scope of the request. With its response it included a table of each of the schedules and also commented that:

"Where a referenced schedule does not contain information which falls within or relates to the Subject-matter Request, we have so confirmed in the table below. Our belief is that each schedule remains exempt from disclosure on the basis previously described."

The investigation

Scope of the request

11. On 31 May 2006 the complainant submitted a complaint to the Commissioner. She specified that she wished the Commissioner to consider whether there should be disclosure of the ten named schedules, as itemised in paragraph 8 above.
12. Although she had no requirement to do so she stated that the purpose of her request was to seek: "*A fuller account of how public money is being spent to build this database and a list of the protections in place to ensure the substantial amount of personal information held in this database is protected from misuse*".
13. On 25 March 2008 the Commissioner confirmed that he was considering disclosure of the following schedules - D, F, H, I, Q, R, S, T, V and W. As this did not include schedule K, relating to security, this resulted in reliance on section 23 being removed from the scope of the investigation as this was the only schedule where this exemption had been cited.
14. During the course of his investigation further disclosures were made to the complainant which included complete disclosure of schedule H. In light of this the Commissioner has removed this schedule from the scope of his investigation.

15. On 20 January 2009 the public authority withdrew its reliance on section 43(1) of the Act.
16. In correspondence dated 23 January 2009 the public authority identified further information from within schedule F which it believed could now be disclosed. (It also sought to extend its reliance on section 31 in respect of schedule F which will be considered later in this Notice). On 28 May 2009 the Commissioner asked the public authority to confirm whether or not it had actually released this additional information to the complainant at that time. On 1 June 2009 he was advised that this had not been done but that it would be done shortly. On 3 June 2009 the disclosure was made; this part of schedule F is therefore no longer within the scope of the Commissioner's investigation.
17. In its correspondence of 23 January 2009, the public authority also apprised the Commissioner of some issues which the contractor had asked to be brought to his attention in respect of schedule F. One such issue was the applicability of section 44(1) and 44(2) in respect of the public authority's obligation of confidentiality both generally in law and pursuant to Regulation 30 of the Public Services Regulations 1993 (SI 1993/3228). However, the public authority also stated that, regardless of the contractor's view, its own views had been provided. As the public authority did not itself raise any arguments regarding the applicability, or otherwise, of this exemption the Commissioner does not consider it to be relevant.

Chronology

18. On 5 March 2008 the Commissioner wrote to the complainant to advise that her case had been allocated for investigation. He invited her to clarify which schedules were within the scope of her complaint.
19. On 5 March 2008 he also wrote to the public authority to advise that he was clarifying the extent of his investigation with the complainant and would advise it of this as soon as possible.
20. Having had no response from the complainant the Commissioner emailed her again on 17 March 2008. The complainant telephoned and also emailed the Commissioner to confirm her requirements.
21. On 17 March 2008 the Commissioner advised the public authority regarding the scope of his investigation. He asked for a copy of the withheld information and also asked if it would consider releasing any more of the information at this stage. This was acknowledged by return.

22. On 18 March 2008 the Commissioner asked the public authority for a copy of the complainant's original request for an internal review of 20 March 2006 which had not previously been provided. A copy was sent and, at this point, the Commissioner became aware that the complainant had specifically dropped schedule E (containing pricing information) from the request. On 25 March 2008 the Commissioner wrote to the complainant to advise that he would not be pursuing disclosure of schedule E.
23. On 15 April 2008 the Commissioner wrote to the public authority chasing a response to his earlier letter of 17 March 2008. This letter was acknowledged by the public authority on 16 April 2008.
24. On 30 April 2008 the Commissioner again chased a response. He further advised that unless he received a reply within a specified deadline he would issue an Information Notice.
25. The Commissioner was advised, on the same day, that the contract was being burned onto a CD and would be posted imminently. The public authority also advised the Commissioner that: *"We have sought the views of the IDENT1 business leads in this area and they have confirmed that the rationale behind the application of original exemptions and the prejudice has not changed with the passage of time and still applies"*. It supplied a table which showed the exemptions it was relying on in respect of each of the withheld schedules. The CD was received on 1 May 2008.
26. On 14 May 2008 the Commissioner raised more detailed queries with the public authority in respect of the exemptions claimed. He specifically sought an explanation regarding the public authority's internal review and how it had decided that many of the schedules fell outside the scope of the request. He also made reference to his own guidance regarding what constituted a 'trade secret' and specified what information he required. This was acknowledged on 16 May 2008.
27. On 20 May 2008 the public authority sought additional time in which to provide a response to the Commissioner. He agreed to a date of 12 June 2008.
28. On 12 June 2008 a partial response was received from the public authority. This included correspondence which it had received from the contractor in respect of the requested information.
29. On 20 June 2008 the public authority advised the Commissioner that it expected to provide its outstanding responses by 23 June 2008. The Commissioner chased this on 25 June 2008 and was advised that the contractor had provided a comprehensive response to its queries and that this was currently being looked at. It requested until 27 June 2008 to

- provide a response. An update was received on 28 June 2008 which advised that some further information would be disclosed to the complainant. It also advised that there were still some parts of the contract where there were unresolved concerns about disclosure between themselves and the contractor, the contractor believing that grounds for non-disclosure applied and the public authority therefore requiring further clarification from the contractor to explain its position. A detailed list showing those parts of the contract under dispute was supplied.
30. On 30 June 2008 the Commissioner contacted the complainant to provide a further update. He advised that the public authority was involved in discussions with its contractor with a view to the disclosure of further information. He further advised that he expected this to take place shortly.
 31. On 10 July 2008 the Commissioner asked the public authority whether or not it had made a further disclosure, and, if so, what had been included. This was acknowledged and the Commissioner was advised that further information would be released on 14 July 2008. This information was emailed to the complainant on 15 July 2008.
 32. On 16 July 2008 the Commissioner wrote to the complainant to ask whether the additional disclosures had satisfied her request or whether she wished to make any further comments.
 33. On 24 July 2008 the complainant responded that her position had not changed. No further comments were added.
 34. On 18 December 2008 the Commissioner wrote to the public authority and requested information which had been previously sought but remained outstanding; this included its feedback as to which parts of the contract were considered to be 'trade secrets'. On 22 December 2008 a reply was sent but some issues remained outstanding.
 35. On 20 January 2009 the public authority advised the Commissioner that it had considered the Commissioner's comments regarding 'trade secrets' and had decided that this did not apply to any of the withheld information. It further clarified that it had sought clarification from the contractor but none had been given. It therefore confirmed that it was no longer relying on the exemption at section 43(1).
 36. On 23 January 2009 the public authority submitted a further version of schedule F to the Commissioner which included parts it now considered suitable for disclosure.

Background information

37. This request was originally made to the Police Information Technology Organisation (PITO) which is no longer in existence. The National Policing Improvement Agency (NPIA), established by the Police and Justice Act 2006, replaced both PITO and the Central Police Training and Development Authority (Centrex). It also took over some Home Office activities, and a number of national projects working directly to the Association of Chief Police Officers (ACPO). The Agency began its work in April 2007 - further information can be found on its website at <http://www.npia.police.uk> .

38. Responsibility for the provision of the IDENT1 service was taken on by the NPIA and this investigation has therefore been directed to this public authority.

39. The following information regarding IDENT1 can be found on the NPIA website:

“Being able to identify one person from many is vital to policing. NPIA-inspired technology now lets the authorities do this faster and more accurately than ever before. IDENT1, which supersedes the National Automated Fingerprint Identification Service (NAFIS), adds increasingly sophisticated identification techniques to the existing platform, while ensuring business continuity of the current service to police. IDENT1 is part of a wider drive towards formulating codes of best practice for government use of biometrics, such as facial imaging, fingerprint and iris technology.”

“The purpose of IDENT1 is to ensure the continuation of the mission-critical National Automated Fingerprint Identification System and to develop additional identification services. IDENT1 will provide the strategic platform for future identification services and capabilities, which includes palm searching, integration of Scottish records, a strategic platform and improved searching.”

“IDENT1 is now being used in England, Scotland and Wales. 440 Livescan fingerprint capture units and 100 Lantern mobile fingerprint capture units are linked to the system.”

“Users include:

- *45 fingerprint bureaux in England and Wales, including British Transport Police, the Serious Organised Crime Agency (SOCA) and HM Revenue and Customs*

- *Four Scottish fingerprint bureaux and custody suites in eight Scottish forces*
- *Hundreds of police personnel with direct access to the fingerprint system, and additional personnel using the system for management information*
- *The Home Office Immigration and Nationality Directorate*
- *Members of the public who are required to submit finger and palm prints if arrested or who provide their prints for elimination purposes”.*

“No two individuals' fingerprints are exactly the same, which makes this field of work crucial to police forces in their fight against crime.”

“The system processes 100,000 records of arrests every month and an increasing number of identifications. The average monthly number of identifications for the 12 months from July 2006 to June 2007 was 6,543 per month, compared with a monthly average of 5,804 for the previous 12 month period.”

40. PITO produced a High Level Operational Requirement document for potential bidders for the IDENT1 contract. This was provided to the complainant. Within this document is reference to the legislative ‘constraints’ of, amongst other pieces of legislation, the Freedom of Information Act. Bidders are advised that the IDENT1 service shall be delivered within such constraints.
41. The IDENT1 contact was secured by Northrop Grumman Information Technology Inc. According to its website <http://www.it.northropgrumman.com> :

“Northrop Grumman Information Technology, headquartered in Herndon, Va., is a trusted IT leader and premier provider of advanced IT solutions, engineering and business services for government and commercial clients. The company’s technological leadership spans such areas as public safety and homeland security solutions, secure wireless, cyber and physical assurance, IT and network infrastructure, managed services, knowledge management, modeling and simulation, and geospatial intelligence solutions.”

42. The following are also extracts from a news release made on behalf of Northrop Grumman which can be found online at: http://www.irconnect.com/noc/press/pages/news_releases.html?d=69428

“Northrop Grumman Corporation ... has been awarded a contract to provide advance biometric identification technology as part of an integrated computer system that links more than 50 police forces and agencies in the United Kingdom. This upgraded system, called IDENT1,

will for the first time, allow the routine identification of individuals throughout the United Kingdom mainland, following Scotland's decision to join with England and Wales in establishing a unified collection of finger and palm prints.”

“The IDENT1 contract is expected to be valued at approximately \$244 million (122 million Pounds) over eight years with up to three additional option years.”

Analysis

43. The full text of the relevant sections of the Act cited below can be found in the legal annex at the end of this notice.

Procedural

Section 1

44. Section 1(1) of the Act 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”.*

45. The Commissioner has considered whether the public authority has complied with section 1(1)(a) and (b) of the Act.
46. The public authority provided the complainant with a response within 20 working days which confirmed that it held the requested information, although it believed it to be exempt. At internal review stage this was varied and some information was released, the remainder again being withheld.
47. The Commissioner does not therefore consider that the public authority breached section 1(1)(a) of the Act as it provided timely response to the complainant confirming that the information was held. However, for the reasons which will be explained below, the Commissioner considers that some of the information withheld from the complainant should be released to him. Therefore the public authority has breached section 1(1)(b) of the Act by failing to communicate this information to the complainant in response to his request.

Section 10

48. Section 10(1) of the Act 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.”

49. The Commissioner has considered whether or not the public authority complied with section 10(1) of the Act.

50. As the public authority complied with section 1(1)(a) within 20 working days the Commissioner does not consider that it breached section 10(1) in relation to its compliance with section 1(1)(a).

51. However, for reasons which will be explained below, the Commissioner finds that the public authority did not provide the requested information to the complainant within the statutory time for compliance because it incorrectly applied the exemption at sections 31, 41 and 43. He considers that it breached section 10(1) in respect of sections 40 and 41, and section 10(3) in respect of sections 31 and 43, in relation to its obligation under section 1(1)(b) of the Act.

Section 17

52. 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.

53. The public authority extended the 20 working day deadline for dealing with this request by stating that it was considering the public interest in respect of the exemptions at sections 31 and 43(1) and (2). The Commissioner accepts that this is permissible under the Act. However, the subsequent refusal notice cited not only those exemptions for which the deadline was extended but also the exemptions at sections 23, 40(2) and 41. Therefore, by failing to issue a timely refusal notice in respect of these exemptions the public authority breached section 17(1).

54. If the final decision is to withhold the requested information, a second notice must then be issued providing the reasons for the decision on the public interest. Under the terms of section 17(3) of the Act, this second notice need not be issued *‘until such time as is reasonable in the*

- circumstances*'. As the Commissioner has explained in his '*Good Practice Guidance 4*', public authorities should aim to conduct the public interest test within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken should in no case exceed 40 working days.
55. In this case, the complainant made her request on 11 October 2005. The public authority confirmed on 25 October 2005 that it held the requested information, but stated that it required an extension until 2 December 2005 in order to consider the public interest test. On 2 December 2005 it extended this until 9 December 2005. It eventually responded on 13 December 2005. The Commissioner recognises that this case was dealt with prior to the issuing of his '*Good Practice Guidance No 4*' in February 2007. However, he considers that the 45 working days which the public authority took to deal with the matter was not a reasonable timescale, which constitutes a breach of section 17(3) of the Act.
56. In this case, the public authority stated that it was relying on section 31 but failed, by the time of the completion of the internal review, to specify which sub-section it was relying on. It therefore breached section 17(1)(b).
57. The public authority also stated in its refusal notice that it was relying on section 40(2). The Commissioner has decided that some information was correctly withheld by reference to this exemption. However, the Commissioner does not consider that the public authority provided an adequate explanation in accordance with its obligations under section 17(1)(c), in part because it did not explain which data protection principle/s would have been breached were this information disclosed in line with section 40(3)(a)(i). By failing to do so the public authority therefore breached section 17(1)(c).

Exemptions

58. The public authority has cited different exemptions in respect of the schedules at various times during this investigation. The Commissioner has therefore considered its most recent position which was given when it last wrote to the complainant on 15 July 2008, subsequently amended by its dropping of section 43(1). For clarity, the Commissioner has appended a table at the end of this Notice listing the Contract Schedules he has considered along with the exemption/s cited in each instance.
59. The Commissioner has considered the schedules separately, where applicable, under each exemption cited below.

Section 40(2) – personal information

60. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3) or section 40(4) is satisfied. One of the conditions, listed in section 40(3)(a)(i), is where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act (the “DPA”). This exemption has only been cited in respect of Schedule I of the contract.
61. During his investigation the public authority advised the Commissioner that it believed disclosure of the names of those involved with the contract would breach the first data protection principle.
62. The first principle of the DPA requires that the processing of personal data is fair and lawful and,
- at least one of the conditions in schedule 2 is met, and
 - in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

Is the requested information personal data?

63. Section 1 of the DPA defines personal data as data which relates to a living individual who can be identified:
- from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
64. The information which the public authority has redacted on the basis of section 40(2) consists of the names of four members of staff who are the nominated technical and commercial representatives for contract management; all are only mentioned in Schedule I of the contract. Two are employed by the public authority and two by the contractor. It clearly identifies third parties by name and the Commissioner therefore considers that these references are their personal data. However for the section 40(2) exemption to apply the public authority would need to show that disclosure would contravene one of the data protection principles as set out in the Data Protection Act 1998.

The first data protection principle

65. The public authority has said that it believes that disclosure would contravene the first data protection principle. The first data protection principle provides that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”

The Commissioner agrees that it is the first data protection principle that is relevant in this case.

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

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

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

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

68. Having reviewed the redacted names the Commissioner believes that the four members of staff can be grouped in two categories:

- (i) nominated technical and commercial representatives for contract management from the public authority; and,
- (ii) nominated technical and commercial representatives for contract management from the contractor.

69. The public authority gave the complainant the following reason for non-disclosure of staff names in its refusal notice:

"... the names of the nominated representatives were provided in confidence and the individuals' expectations were that such information was provided only for the purposes of this contract and not for wider dissemination".

70. It gave the following additional argument to the Commissioner during his investigation:

"IDENT1 is a security sensitive service upon the integrity of which the legally verified identity of persons of interest throughout policing and criminal justice is predicated. The names in Schedule 1 relate to roles which have full visibility of not only commercial details and trade secrets pertaining to the contract but also to operational details concerning people, assets, information, locations and events in performance of the contract. The publication of these names (or those of their successors in these roles), and their association with commercial and operational decisions relating to policing and criminal justice could expose these persons to compromise (through coercion by a number of possible means) which could result in compromise of policing operations or of the criminal justice process, with the consequence that the health and safety of a much larger number of people could be put in jeopardy. This is evidenced by the requirement to vet these individuals concerned to at least SC level (according to HMG security policy) prior to their appointment to these roles."

71. The Commissioner was also provided with a copy of a response which the contractor had given to the public authority after the public authority had made it aware of the information request and raised various queries. The Commissioner notes that the contractor made no reference to any concerns regarding the release of information about its staff. He does not therefore consider that any of the arguments raised refer specifically to the contractor's staff.
72. The Commissioner believes that a distinction can be drawn between the levels of information which junior staff should expect to have disclosed about them compared with what information senior staff should expect to have disclosed. This is because the more senior a member of staff the more likely it is that they will be responsible for making influential policy decisions and/or decisions related to the expenditure of significant amounts of public funds.
73. With regard to the names of the staff in the redacted documents, the Commissioner considers that these people were relatively senior

- individuals within the organisations who were given high level responsibilities, as outlined in the public authority's arguments above. The Commissioner believes that they should therefore have an expectation that their involvement in a significant contract would be disclosed. He does not accept the public authority's argument that its staff gave their names 'in confidence' and with the expectation that they would not be disclosed. He further notes that the public authority was already aware of its duties under the Act at the time of preparing the contract and its staff should therefore have already been aware of the possibility of disclosure.
74. As is outlined above, for third party personal data to be disclosed under the Act, disclosure not only has to be fair and lawful but also has to meet one of the conditions for processing in schedule 2 of the DPA. In this case the Commissioner considers that the most relevant condition is Condition 6. This states that:
- "the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*
75. In deciding whether condition 6 would be met in this case the Commissioner has considered the decision of the Information Tribunal in *House of Commons v Information Commissioner & Leapman, Brooke, Thomas* [EA/2007/0060]. In that case the Tribunal established the following three part test that must be satisfied before the sixth condition will be met:
- there must be legitimate interests in disclosing the information,
 - the disclosure must be necessary for a legitimate interest of the public,
 - even where disclosure is necessary it nevertheless must not cause unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the data subject.
76. The Commissioner notes that no specific argument to support a legitimate interest for disclosure of the named parties has been given by the complainant. He has however considered whether or not the disclosure of the names would assist with transparency and accountability for managing such a contract and whether disclosure is necessary for the legitimate interests of the public.
77. The Commissioner notes that it is only the name that has been withheld. There is no job title and no further explanation regarding the seniority of

- the named staff. The staff are identified purely as nominated representatives for management of the contract.
78. He does not identify any specific harm in releasing the information in this case, and he considers that the release of the names would be fair. The Commissioner considers that – given the benefits of transparency and accountability - a legitimate interest arises from the disclosure on request of information by public bodies. More specifically, there is legitimate interest in the public knowing and understanding the full details of the contract and who was responsible for important decisions involving significant sums of public money.
79. The Commissioner further finds that disclosure is necessary for the public to be able to establish the seniority of those involved. He also finds, in this case, that there would be no unwarranted interference or prejudice to the rights, freedoms and legitimate interests of the senior-level individuals concerned.
80. The Commissioner finally notes that staff are named in schedule Q, part A, Page 2, paragraph 2.2.2. and schedule R, page 28, paragraph 36.2.2. and that the public authority did not cite section 40(2) in respect of these individuals.

Section 31(1)(a), (b) and (c) - law enforcement

81. Section 31(1)(a), (b) and (c) states that information is exempt if its disclosure would, or would be likely to, prejudice:
- (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;
 - (c) the administration of justice.
82. The public authority has cited this exemption in relation to Schedules D, I, Q, R, S, T and V. At a late stage of the Commissioner's investigation it also sought to introduce this exemption in relation to schedule F which relates to service level requirements.
83. In considering whether to accept this late application the Commissioner has been mindful of the Information Tribunal's position on the late application of exemptions, as expressed in the case of *DBERR v Information Commissioner and Friends of the Earth* [EA/2007/0072]. In this hearing the Tribunal considered whether a new exemption can be claimed for the first time before the Commissioner. The Tribunal stated, at paragraph 42 of its decision, that:

“it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations”.

84. The Commissioner has adopted a discretionary approach to the late application of exemptions, based on a case by case basis and in consideration of the particular circumstances of each case, which he believes is in line with the Tribunal’s position on this issue.
85. When assessing the circumstances of the case and the late application of an exemption the Commissioner must carefully consider his obligations as a public authority under the Human Rights Act 1998 (the “HRA”), which prevent him acting incompatibly with rights protected by the HRA. It will therefore be difficult for the Commissioner to refuse to consider any exemptions that relate to rights under the convention.
86. Additionally, factors which the Tribunal has accepted as being reasonable justifications for the application of an exemption before the Commissioner and/or the Tribunal for the first time include:
- where some of the disputed information is discovered for the first time during the Commissioner’s investigation, and therefore the public authority has not considered whether it is exempt from disclosure;
 - where the authority has correctly identified the harm likely to arise from disclosure but applies these facts and reasoning to the wrong exemption;
 - where the public authority had previously failed to identify that a statutory bar prohibited disclosure of the requested information, and therefore ordering disclosure would put the public authority at risk of criminal prosecution; and
 - where the refusal notice was issued at an early stage of the implementation of the Act when experience was limited, although this factor is likely to become far less relevant in the future.
87. The Commissioner considers that the withheld information does not raise any issues under the HRA. Furthermore, in relation to the bullet points in the paragraph above, the Commissioner does not believe that the late application of section 31 in respect of schedule F is covered under any of the criteria. The public authority has cited section 31 in relation to other schedules so was clearly already considering its applicability yet at no point has it previously referred to any prejudice to law enforcement in respect of this particular schedule. In light of these considerations, and in all the circumstances of the case, the Commissioner has decided not to take section 31 into account when reaching a view on schedule F. The

- Commissioner also notes that section 43(2) has been applied to the same information by the public authority and he will therefore consider whether that exemption is applicable later in this Notice.
88. In respect of the remaining schedules where this exemption has been cited, for the Commissioner to agree that this exemption is engaged the authority must demonstrate that disclosure of the requested information would, or would be likely to, prejudice any one of the subsections cited. As the public authority has failed to specify the level of prejudice in this case, the Commissioner has, in line with the case of *McIntyre v The Information Commissioner and the Ministry of Defence* (EA/2007/0068), applied the lower threshold of “likely to prejudice” as there is no clear evidence that it should be the higher level.
89. The Information Tribunal case *John Connor Press Associates Ltd v Information Commissioner* [EA/2005/0005] outlined its interpretation of “likely to prejudice”. It confirmed, at paragraph 15, that: *“the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk”*. In other words, the risk of prejudice need not be more likely than not, but it must be substantially more than remote. As this is a qualified exemption, in addition to demonstrating the likelihood of prejudice, the authority must apply the public interest test, to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
90. In its refusal notice the public authority advised the complainant that schedules D, Q, R & V were exempt from disclosure under section 31; this was later varied to schedules D, I, Q, R, S, T and V. The reasons given were that:
- “Specifically, we believe that the detailed operational requirement of IDENT1, the actual information it contains, the capability of the system and how it is used operationally as a law enforcement tool should not become available to the wider public and needs to be safeguarded so that it continues to fulfil its vital function in the public security service arena. Not only would the functions of law enforcement agencies be potentially compromised, to the detriment of the community, but the means of prevention and detection of crime, if released, could pose a threat to public safety and the maintenance of public order if these were revealed.”*
91. To ascertain whether or not the exemption is engaged the Commissioner has considered its application to each schedule in turn. With the exception of schedules I, S and V where only a limited amount of information has been withheld, the other schedules have been withheld in their entirety. In respect of these schedules, there is no explanation from the public authority as to which specific parts, if disclosed, could reasonably cause

prejudice to the prevention or detection of crime, the apprehension or prosecution of offenders or the administration of justice. The Commissioner has therefore carried out a review of the contents to ascertain whether in his opinion there appear to be any parts in respect of which such prejudice may occur. His views are set out below.

Schedule D – Detailed Operational Requirement

92. This is the largest schedule of the contract having several sub-sections and being over 300 pages long. The entire schedule has been exempted under this exemption alone.
93. The schedule contains an introduction and glossary which have both been exempted and there is also a significant amount of information in the schedule which relates to matters such as the capacity and functions of the IDENT1 system and the system business rules. However, the Commissioner considers that these areas constitute an 'overview' of the system. He was unable to identify any information which could clearly be regarded as relating to detailed technical capabilities or functionalities where disclosure could result in compromise of the system resulting in the type of prejudicial effects cited by the public authority.

Schedule I – Contract Management

94. This schedule has been disclosed in full with the exception of the names of nominated representatives. Disclosure of the named parties has already been considered under section 40(2) of this Notice and disclosure has not been ordered. In view of this the Commissioner has not considered the application of section 31 to this schedule.

Schedule Q – Contractor's Solution

95. This schedule consists of three parts and totals over 70 pages. It has all been withheld under this exemption (and also under section 43(2)).
96. The first part of the schedule refers to areas such as project management, service delivery, training and development. The second part of the schedule contains a system description and depicts its architecture. The third part of the schedule contains a glossary of terms.
97. The Commissioner does not consider that the contents of this schedule contains information to a degree of detail whereby the release could have any of the prejudicial effects claimed by the public authority.

Schedule R – Livescan and EIU's

98. This schedule totals over 90 pages and consists of an introduction along with appendices and annexes. It has been fully withheld under this exemption (and also under section 43(2)).
99. It consists of contract terms and conditions, information about Livescan functionality, an overview of the Livescan system and a glossary of terms. Similarly to his views on schedule D above, the Commissioner considers that these areas constitute an 'overview' of the system. He is unable to identify any information which could clearly be regarded as relating to detailed technical capabilities or functionalities where disclosure could result in compromise of the system resulting in the type of prejudicial effects cited by the public authority.

Schedule S – Software, IPR and third party contract

100. This schedule is 14 pages long and has been partially released. The remaining withheld information has been exempted under this section as well as section 43(2).
101. The withheld information consists of lists of third party software and material. It does not identify any technical data, how the software packages interact or how anything is accessed. The Commissioner also notes that the redacted information appears to list products which would be readily available to any potential purchaser. He is of the view that the chance of this type of information having the prejudicial effect claimed by the Public authority would be no more than remote.

Schedule T - Assets

102. This 6 page schedule has been fully withheld under this exemption only. The withheld information identifies the treatment of assets within the contract. It is a very generic view of the treatment and responsibilities of the parties. The Commissioner can find no evidence to suggest that disclosure of this type of information would have a prejudicial effect that would be anything more than remote.

Schedule V – Authority's responsibilities

103. This 10 page schedule has been partially withheld under this exemption only.
104. The small amount of withheld information relates to site locations at which particular operations are undertaken, some of which the Commissioner has been able to ascertain from internet searches. He is of the view that

the chance of this type of information having the prejudicial effect claimed by the Public authority would be no more than remote.

Conclusion

105. In the case of the *Department of Health v the Information Commissioner* [EA/2008/0018] the Information Tribunal stated at paragraph 98 of its decision:

“The Tribunal also wishes to record its concern at the lack of detail provided to the Commissioner during his investigation. If a party wishes to rely upon an exemption it is up to them to establish that this 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 which contain no detail.”

106. The Commissioner notes that, in respect of those schedules which have been fully withheld in this case, this approach seems to have been taken by the public authority. He further notes that it concerns a contract which is considerably longer than the one which the Tribunal considered in the above mentioned case.
107. The Commissioner has reviewed the information withheld under this exemption, and, in the absence of any detailed arguments by the public authority, he has not identified any information which he believes would have the prejudicial effects stated were it to be disclosed. He does not find that section 31 is engaged in respect of any of the schedules.

Section 41(1) – information provided in confidence

108. The public authority originally argued that schedules D, E, F, G, H, Q, R, S, T and W were exempt under section 41 as: *“The information supplied was imparted in circumstances that impose an obligation of confidence and the information still remains confidential”*. However, in correspondence with the complainant on 15 July 2008 this exemption was only applied in respect of schedule F which is therefore the only schedule which the Commissioner is considering in relation to section 41(1). Furthermore, in correspondence dated 23 January 2009, the public authority reduced the amount of information withheld to a small amount within the ‘Service Level Criteria’ and ‘Shadow Metric’ sections of part 2 of schedule F.
109. 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.
110. In order to determine whether section 41(1) applied to the contract, the Commissioner took into account the guidance on the application of the section provided by the Information Tribunal in *Derry City Council v The Information Commissioner* [EA/2006/0014] at paragraph 30 of its decision. The issues he considered were:
- (a) was any of the information contained in the contract obtained by the public authority from a third party?; and if so
 - (b) would the disclosure of any of the information in the contract constitute an actionable breach of confidence, that is
 - i. did any of the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so
 - ii. was any of the information communicated in circumstances that created such an obligation?; and, if so
 - iii. would disclosure of any of the information be a breach of that obligation?;and, if this part of the test was satisfied;
 - (c) would the public authority nevertheless have had a defence to a claim for breach of confidence based on the public interest in disclosure of any of the information?

Was any of the information contained in schedule F obtained by the public authority from a third party?

111. In the *Derry City Council* case referred to above 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.
112. This approach was also applied by a differently constituted Information Tribunal in *Department of Health v Information Commissioner* [EA/2008/0018].
113. The public authority advised the Commissioner that all of the contractor's tender documents included the following statement:

"This tender includes data that shall not be disclosed outside the Authority and shall not be duplicated, used or disclosed - in whole or in part - for any purpose other than to evaluate this tender. If, however, a contract is awarded to this tenderer as a result of - or in connection with - the

submission of this data, the Authority shall have the right to duplicate, use or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Authority's right to use information contained in this data if it is obtained from another source without restrictions."

114. The contractor has further advised the public authority that:

"While the original documents supplied by the Authority (including the invitation to tender, invitation to submit a BAFO [best and final offer] etc.) are Authority documents, our position with respect to our submissions and responses to the Authority, including responses set out within documents originally provided by the Authority, is that these submissions and responses were provided to and subsequently negotiated with the Authority in confidence, placing a duty upon the Authority to treat and to continue to treat that information as confidential and to protect it accordingly. We therefore submit that this information should not be disclosed as any such disclosure would constitute a breach of confidence actionable by us against you falling within the exemption from FOIA disclosure under the absolute exemption provided by Section 41 and Section 2(3). Further, the very basis for this exemption, your duty of confidentiality, prevents you from electing to disclose that information in response to the subject request for information."

115. The contractor also stated to the public authority that:

"We reserve the right to take action with respect to any confidential information disclosed in breach of the Authority's duty of confidentiality and we would be grateful if you could continue to keep us informed with respect to the information you do finally disclose. We would further request that you keep us informed of any appeals against your disclosure decision by the person making the information request both under your internal complaints provisions and any subsequent appeal to the Information Commissioner. We would also request that the Authority appeal any decision notice made by the Information Commissioner that specifies that the Authority must disclose any of the information provided in confidence as outlined herein."

116. The Commissioner raised queries with the public authority in an attempt to establish which information within the contract was supplied by the public authority and which was supplied by the contractor. In its response the public authority advised that *"It is typical with complex procurements of this nature that the contract documentation is jointly negotiated and populated by both parties ..."* and that in this particular instance *"... both PITO and Northrop Grumman jointly worked on the contract documentation including all of the schedules"*.

117. The public authority further advised that: *“... the Schedules were jointly negotiated and populated by both parties over a lengthy contract negotiation phase lasting many weeks and months. Given the changes in resources, the merger of PITO and Centrex to form the NPIA, and the passage of time, it would be impossible to re-create precisely who provided which part of each Schedule and a very time-consuming exercise.”*
118. In correspondence with the Commissioner dated 14 January 2009 the public authority confirmed that it considered any undisclosed parts of schedule F, which is itself in three sub-sections, to be exempt under section 41 (and also section 43(2)). There are a total of 118 pages in the three parts of this schedule, the majority of which have been disclosed to the complainant during this investigation. However, this statement was further modified in subsequent correspondence of 23 January 2009 where it was cited only in relation to the second sub-section of schedule F.
119. The withheld information has been described by the public authority in the following terms:
- *“NPIA took into account NG’s strongly-held views that information about certain subjects should be withheld because the contract wording was taken directly from NG’s proprietary and confidential proposals.”*
 - *“NG provided to NPIA the concept of ‘shadow metrics’ as a means of adding service levels to the IDENT1 contract. This information reveals NG’s innovative mechanisms for enhancing the service level regime.”*
 - *“NG provided to NPIA innovative proposals for a weighted service level regime.”*
 - *“NG provided to NPIA innovative proposals for continuous service improvement. The amount by which NG was able to increase the Target Service Levels and the frequency of such increases indicates NG’s level of confidence in its ability to provide service improvements.”*
 - *“These ... reveal what the NG system is capable of delivering – a factor relevant to NG and its competitor systems. These items are [a] key factor in a long term contract of this nature and are something that can only be offered after careful analysis of risks and likely technology improvements over time. NPIA agreed with NG that its offerings in these areas are distinctive and market-competitive.”*
120. Schedule F contains details of a wide range of service level requirements. This includes terms and conditions and separate service level

requirements for both IDENT1 and Livescan. Whilst the Commissioner accepts that the contractor will have had a significant influence and input in relation to the provisions which were eventually included in the contract with the public authority, he is still of the view that the contract contains terms which were agreed between the parties and which set out their mutual obligations. As mentioned above, the public authority itself has stated that the contract was “*jointly negotiated and populated by both parties*” and that both parties “*jointly worked on the contract documentation including all of the schedules*”.

121. In his previous decision FS50083381 (link: http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fs_50083381.pdf) the Commissioner concluded that the contract in question was not ‘*obtained from*’ the contractor but was ‘*mutually agreed*’ (see paragraphs 33-35 of the decision), a view which was upheld by the Information Tribunal in *Department of Health v Information Commissioner* (EA/2008/0018). As a consequence, the Commissioner is not persuaded that the information contained within the contract in this case has been provided by the contractor to the public authority and consequently he does not believe that it comes within section 41(1)(a). He is, therefore, not satisfied that section 41 is engaged by the requested information.
122. The Commissioner notes that section 43(2) has also been applied to the majority of the information withheld under section 41. He has therefore gone on to consider whether this may be exempt from disclosure under that exemption.

Section 43(1) – trade secret

123. The public authority originally sought to rely on this exemption in respect of some of the information. However, the Commissioner notes that this reliance was withdrawn by the public authority when it advised him on 20 January 2009 that:

“... NPIA's view is that, in fact, none of the information over which exemption is claimed is covered by the bounds of the Trade Secrets exemption. We have given NG the opportunity to identify any Trade Secrets that it considers to exist, but NG has not taken us up on this opportunity. NPIA therefore withdraws its reliance on that exemption.”

124. The Commissioner has not therefore considered the applicability of this exemption.

Section 43(2) – prejudice to commercial interests

125. The Commissioner has also considered whether the information contained within the contract was exempt under section 43(2). Section 43(2)

- provides an exemption in relation to the disclosure of information where it would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This exemption has been applied by the public authority to schedules Q, R and W in full, and schedules F and S in part.
126. In this case, the public authority argued that disclosure would be likely to prejudice its commercial interests and those of the contractor. The Commissioner accepts that the information, as it concerns the provision of information technology services following a procurement exercise, relates to the commercial activities of both organisations and therefore falls within the scope of this exemption.
127. The Commissioner then went on to consider the likelihood that the release of the information would prejudice the commercial interests of either of the parties.
128. In its refusal notice the public authority stated that:
- “there is a likelihood that the disclosure of the relevant information contained within the contract would weaken [the contractor]’s position in a competitive environment by revealing information of potential value to its competitors”.*
129. The public authority also believed that full release of the withheld schedules was *“likely to unfairly prejudice the business interests of [the contractor] by making commercially sensitive information and the terms of business with [the public authority] available”* and that there was *“every likelihood that such information would be of commercial benefit to the company’s competitors”.*
130. It was also argued that disclosure of the schedules would significantly damage the commercial interests of the contractor in future bids for work. This was said to include, but not be limited to, bids for similar types of systems throughout the world as well as bids for related biometric type business within the UK and Europe. It did not however specify an actual example of such a contract or negotiation which was ongoing at the time of the request or was likely to arise in the near future.
131. The public authority was further of the view that releasing the information contained within the contract would be likely to have a detrimental effect on its own commercial interests by damaging an existing commercial relationship with a key public sector supplier and by deterring other private sector contractors from entering into future contracts with itself or other government departments. It said that government contractors have a legitimate expectation that commercially sensitive information will not be disclosed and that releasing the information at the time of the request

- would have been likely to undermine confidence in the integrity of its procurement activities, undermine trust and confidence in an ongoing business relationship and deter contractors from participating in future procurement processes. It believed that this would weaken its ability to secure contracts on best terms in the future.
132. In dealing with the issue of the likelihood of prejudice, 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”* (paragraph 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.
133. He has also taken into account the view of the Tribunal in the same case 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”* (paragraph 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”* (paragraph 15).
134. In addition to the above factors, the Commissioner also took into account, in considering the likelihood of prejudice, the time that had elapsed between the date of the contract and the date on which the request was made. The contract was for the design, development, testing, implementation, integration and deployment of the IDENT1 service. According to the contractor's own website at http://www.northropgrumman.co.uk/IT/what_we_offer/IDENT1.asp, it *“was awarded the IDENT1 contract by the Police Information Technology Organisation (PITO) in November 2004 after a competitive procurement process”*. However, the Commissioner notes that the commencement date within the contract itself states that it runs from 1 April 2005 for a period of eight years, followed by optional yearly continuance thereafter.
135. The public authority has argued that disclosure of the contract could have prejudiced the contractor's commercial position in ongoing or future negotiations. However, no evidence was provided of any tenders that the contractor had submitted, or contracts it was negotiating, at the time of the request which were comparable to this contract. Nor did it provide any indication of any comparable contracts which it was likely to have been considering in the near future.

136. Even if it had been able to evidence that there were other ongoing negotiations, or were likely to be some in the near future, the Commissioner believes that the subject matter of this contract was of a unique nature which would make it significantly different from other contracts which either party might seek to enter. As a consequence, it would have been very difficult to draw meaningful comparisons between this contract and any others which the contractor was seeking to obtain or negotiate over. 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 future contracts. It is particularly difficult to see how the information in this contract would be transferable to other procurements, owing to the large number of variables and deliverables and the unique setup of the fingerprint services within the UK.
137. The Commissioner also considers it of note that the contract was negotiated on an eight year term with optional yearly extensions following on from this. As such, it is extremely unlikely that negotiations would be considered for a replacement or alternative solution any time in the near future within the UK. Any negotiations for a comparable system within another country would be necessarily different as it is extremely unlikely that another country could have exactly the same requirements.
138. In addition, at the time the request was made, the contract had been agreed for approximately a year and effective for over six months. It would therefore seem very likely that any tenders submitted or contracts negotiated after this contract came into operation would be significantly different in terms of what was contained within them when compared to the provisions contained in this contract.
139. As regards the public authority's argument that disclosure would harm its working relationship with the contractor and, consequently, the effectiveness of the project, the Commissioner acknowledges that there is a common concern amongst public authorities about the impact that the disclosure of information may have on their relationships with contractors. However, he believes that commercial organisations which wish to enter contracts with the public sector should now be aware and understand that, as a result of the Act, there will be a greater degree of public scrutiny of these contracts than those in the private sector – which was in fact pointed out to all potential bidders in this case in advance of the contract being awarded. They will be aware of the greater presumptions in favour of the disclosure of information provided for by the Act whilst, at the same time, recognising that the Act contains provisions which will allow public authorities to withhold information which is likely to cause harm to the commercial interests of contractors, if the public interest lies in maintaining the exemption. In light of these factors, the Commissioner does not

believe that disclosure of the information in question would have unduly affected the relationships between the public authority and the contractor.

140. The Commissioner is also not persuaded by the public authority's argument that disclosure of this contract might deter this contractor, and other contractors, from bidding for future contracts. He considers that contracts of this nature are highly lucrative to the successful party and it is unlikely that they would willingly exclude themselves from tendering for contracts in the public sector because of the provisions of the Act.

Schedule F

141. In correspondence with the Commissioner dated 23 January 2009, relating specifically to schedule F, the public authority advised that it was now prepared to release more information which it had previously withheld and that this had been agreed with the contractor. In its reasons for continuing to withhold some of the information it stated that disclosure would reveal:

"... what the ... system is capable of delivering and the levels of confidence that Northrop Grumman had in predicting the capability at the go-live date."

"The amount which NG was prepared to increase the Target Service Levels and the frequency of such increases indicates NG's level of confidence in its ability to provide service improvements. This is a key factor in a long term contract of this nature and is something that can only be offered after careful analysis of risks and likely technology improvements over time. The information (willingness of NG to agree to these levels of service improvement) was provided in confidence. Disclosure would prejudice the commercial interests of NG by revealing to competitors how NG might bid in current and future government tenders in the UK and abroad and would be against the public interest by thereby distorting such competitions."

"... detailed information in relation to shadow metrics and planned and unplanned downtime. This is sensitive from a commercial perspective as it indicates what NG would be prepared to agree to for downtime relative to the price which it charges to NPIA, but it also references the downtime figures which are information from the DOR [Schedule D - Detailed Operational Requirement] which NPIA would not wish to disclose for national security reasons in reliance upon section 31 of the Act."

"... proposals ... for an improved service. They reveal what the Northrop Grumman system is capable of delivering and the levels of confidence that Northrop Grumman had in predicting the capability at FOC and FOC+3. It would be prejudicial to Northrop Grumman's commercial interests for

competitors to be able to see this information as it would give them an idea of the manner in which Northrop Grumman would respond to similar current and future bids. The information (willingness of Northrop Grumman to agree to these levels of service improvement) was provided in confidence and NG considers that disclosure would be an actionable breach of confidence.”

“... proposals ... for a weighted service level regime. They reveal what the Northrop Grumman system is capable of delivering and the levels of confidence that Northrop Grumman had in predicting the capability of the system and its understanding of the relative importance of parts of the system. It would be prejudicial to Northrop Grumman's commercial interests for competitors to be able to see this information as it would give them an idea of the manner in which Northrop Grumman would respond to similar current and future bids. The information (willingness of Northrop Grumman to agree to these levels of service improvement) was provided in confidence and NG considers that disclosure would be an actionable breach of confidence.”

142. Specifically in relation to schedule F the public authority also advised the Commissioner that the contractor had asked it to bring the following issues to his attention.
- (a) Information about Shadow Metrics should not have been disclosed in the manner that it was and that it had only consented to further disclosure on the basis that some information was now already (against its wishes and without its consent) in the public domain.
 - (b) The further and more detailed information that the contractor had petitioned the public authority to withhold was provided to it in confidence and, in the contractor's view, the public authority therefore had an obligation of confidentiality both generally in law and pursuant to Regulation 30 of the Public Services Regulations 1993 (SI 1993/3228). The contractor asserted that disclosure would be an actionable breach of confidence and in breach of the duty to honour its reasonable requests for confidentiality pursuant to the aforementioned Regulation 30.
 - (c) On the basis of the reasons given in (b) above, the contractor maintained the position that, in addition to the qualified exemptions under sections 43(2) and section 41(1), that sections 44(1) and 44(2) of the Act also applied.
143. In relation to the public authority's arguments regarding the application of section 43(2) to schedule F, the Commissioner has considered guidance produced by the Office of Government Commerce (OGC) regarding

procurement² which was cited by the Information Tribunal in its case of *Department of Health v Information Commissioner* [EA/2008/0018]. In this case the tribunal said, at paragraph 87, that it would expect:

“the [public authority] in any future case 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”.

144. The Commissioner notes that the public authority in the current case issued its refusal notice and internal review in 2005 and 2006 which was before the Tribunal decision cited above. Nevertheless, he considers that the guidelines still have value in setting out standards of good practice and he has used them to assist with his decision.
145. The Tribunal made reference to 12 areas within a contract which the guidance indicated should normally be disclosed by a public authority. The Commissioner notes that these 12 areas cover a significant amount of the withheld information contained in the contract in this case. 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
146. The OGC guidance clearly encourages the general release of service level agreements, performance measurement procedures, incentive mechanisms and pricing mechanisms, along with other information. It additionally encourages the release of product / service verification procedures unless the details are so detailed as to be considered a ‘trade secret’. The Commissioner notes that the public authority has withdrawn its reliance on section 43(1), the exemption applicable to information which constitutes a ‘trade secret’.

² The current OGC guidance was issued in November 2008 and is available online at http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf. The earlier version of this guidance, which existed both at the time of request and the Tribunal decision referred to, is also available online at <http://www.ogc.gov.uk/documents/FOI.pdf>.

147. 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.
148. Taking into account the OGC guidance and the Tribunal's observations the Commissioner is of the opinion that the withheld information within schedule F all falls within those areas of a contract which should normally be considered as suitable for release unless they contain 'trade secrets'. The public authority has itself concluded that it contains no such secrets.
149. Whilst he understands that a lot of time and money has been invested in drawing-up the contract he does not believe that disclosure of the information within this schedule would have been likely to prejudice either party's commercial interests. He again notes that both parties were aware of their duties under the Act at the tendering stage of the contract and that there should have been a reasonable expectation that the public would want to be shown that it was receiving a 'value for money' system which would remain competitive, be reliable and continue to improve throughout its duration.

Schedules Q, R and W

150. The Commissioner has concerns over the public authority's apparent contention that schedules Q, R and W are wholly exempt from disclosure as opposed to it raising more realistic arguments related to specific, identified areas within each one. As already mentioned above, the schedules were *"jointly negotiated and populated by both parties"* and the parties *"jointly worked on the contract documentation including all of the schedules"*. As such, the source of specific pieces of information in schedules Q, R and W has not been further broken down and, having read them, the Commissioner has not readily identified any potential harm to either party's commercial interests in their release.

Schedule S

151. The withheld information within schedule S is a list of third party software and material which appears to be generally available 'off the shelf' products. The Commissioner has not been offered any specific arguments in respect of retention of this information and he has been unable to identify any specific harm in disclosing lists of what appear to be commercially available products.

Conclusions

152. The Commissioner has not, in his view, been provided with sufficient evidence to support the application of section 43(2) to the information which has been withheld. He is not generally convinced that the information is of such detail that its release would reveal the contractor's technical 'know how' to a level which might be of value to its competitors and he therefore finds it difficult to see how other commercial organisations could gain any competitive advantage in relation to the public authority or the contractor from the disclosure of these schedules. He was not offered evidence of any actual on-going negotiations or any specific proposed new systems which would result in the contractor's market position being compromised and he doubts that any other system could be sufficiently comparable to this one to be affected. He has therefore decided that the exemption was not engaged and the information should have been disclosed.

The Decision

153. 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:
- By failing to issue a timely refusal notice in relation to the exemptions at sections at 23, 40(2) and 41 the public authority breached section 17(1).
 - By failing to provide its assessment of the public interest test within in respect of maintaining sections 31 and 43 within a reasonable timescale the public authority breached section 17(3).
 - By failing to state which sub-section of section 31 it was relying on by the time of the completion of the internal review it breached section 17(1)(b).
 - By failing to give an adequate explanation of its reliance on section 40(2) the public authority breached section 17(1)(c).
 - The public authority breached section 1(1)(b) of the Act by failing to provide the information to the complainant in response to her request.
 - By incorrectly applying the exemption at sections 40 and 41 the public authority breached section 10(1) in relation to its obligation under section 1(1)(b). By incorrectly applying the exemptions at section 31

and 43 it also breached section 10(3) in relation to its obligation under section 1(1)(b).

Steps required

154. The Commissioner requires the public authority to disclose to the complainant a copy of the contract as requested.
155. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

156. Although they do not form part of this Decision Notice, the Commissioner wishes to highlight the following matters of concern:
157. The Commissioner would like to clarify that he does not consider that the complainant's request for an internal review either contained or actually was a "supplementary focused request" as claimed by the public authority. The original request was not "wide and open-ended" and clearly included the whole contract. As the contract was only partially disclosed the complainant requested an internal review and clearly itemised those parts of the withheld information that she still required. If the public authority did indeed believe this to have been a supplementary request then the Commissioner fails to understand why it also responded to it as a request for an internal review.
158. The Commissioner would advise the public authority that any correspondence relating to the authority's response to a previous request should be treated as a request for internal review of the original decision, in line with paragraph 38 of the section 45 code of practice:

"Any written reply from the applicant (including one transmitted by electronic means) expressing dissatisfaction with an authority's response to a request for information should be treated as a complaint... These communications should be handled in accordance with the authority's complaints procedure, even if, in the case of a request for information under the general rights of access, the applicant does not expressly state his or her desire for the authority to review its decision or its handling of the application."

Right of appeal

159. 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

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 16th day of June 2009

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
 Wycliffe House
 Water Lane
 Wilmslow
 Cheshire
 SK9 5AF
 Non-confidential annex**

Schedules considered and the exemptions cited in each instance

Schedule	Exemption	Status
D	31	Fully withheld
F	41 & 43(2)	Partially withheld
I	40(2) & 31	Partially withheld
Q	31 & 43(2)	Fully withheld
R	31 & 43(2)	Fully withheld

S	31 & 43(2)	Partially withheld
T	31	Fully withheld
V	31	Partially withheld
W	43 (2)	Fully withheld

Legal annex

The Freedom of Information Act 2000

Section 1(1) provides that –

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

Section 10 provides that –

(1) 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.

(3) 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)(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 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(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.

Section 31(1) provides that –

Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,

(b) the apprehension or prosecution of offenders,

(c) the administration of justice,

(d) the assessment or collection of any tax or duty or of any imposition of a similar nature,

(e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

Section 40(2) provides that –

Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

Section 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.

Section 43 provides that –

- (1) Information is exempt information if it constitutes a trade secret.
- (2) 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).

The Data Protection Act 1998

Schedule 1 Part 1

The first principle

- 1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

**Schedule 2 - Conditions relevant for purposes of the first principle:
processing of any personal data**

- 1 The data subject has given his consent to the processing.
- 2 The processing is necessary—
 - (a) for the performance of a contract to which the data subject is a party, or
 - (b) for the taking of steps at the request of the data subject with a view to entering into a contract.
- 3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.
- 4 The processing is necessary in order to protect the vital interests of the data subject.
- 5 The processing is necessary—
 - (a) for the administration of justice,
 - (b) for the exercise of any functions conferred on any person by or under any enactment,
 - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
 - (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.
- 6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.