

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 August 2010

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

Summary

The complainant requested the contract plus any appendices and indexes for the IDENT1 system¹, following an earlier Decision Notice promulgated by the Commissioner. This was subsequently clarified to mean one schedule of that contract, which had not been in the scope of the Commissioner's Notice.

The public authority released some of the information but withheld the remainder citing sections 41(1) and 43(2) of the Freedom of Information Act 2000 (the "Act").

The Commissioner's decision is that the exemptions at section 41(1) and 43(2) are not engaged. The complaint is therefore upheld and he requires the information to be released.

The public authority's handling of the request also resulted in procedural breaches of sections 1(1)(b) and 10(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

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>

requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The National Policing Improvement Agency (NPIA), established by the Police and Justice Act 2006, replaced both the Police Information Technology Organisation (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>.
3. Responsibility for the provision of the IDENT1 service was taken on by the NPIA, having previously lain with PITO. 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.”

4. The IDENT1 contact was secured by Northrop Grumman (the “Contractor”). 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.”

5. The following are also extracts from a news release made on behalf of the Contractor 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."

6. The Commissioner has already promulgated a Decision Notice in relation to this contract which can be found on his website².
7. In his earlier Decision Notice the Commissioner found that the public authority should have disclosed the withheld information; this was done. However, the earlier Decision Notice did not cover schedule E of the contract as it had been removed from the scope of the request. This Notice therefore only refers to that remaining Schedule.

The request

8. On 7 July 2009, the complainant made the following information request:

"I request a copy of the contract plus any appendices and indexes for the IDENT1 system, as referred to in the Information Commissioner's recent decision notice FS50125350".

9. On 23 July 2009 the public authority provided its response. On the same date, the complainant queried that its response had only included part of the contract, i.e. schedules M to W.
10. On 24 July 2009 the public authority apologised for the oversight and forwarded some further information.
11. On the same date the complainant again queried the response. He stated:

"... I note that Schedule E is still missing; if it's your intention to withhold this please could you provide a proper refusal notice stating the exemption(s) and public interest arguments as appropriate?"

² http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50125350%20.pdf

12. In its response of 27 July 2009 the public authority stated:

"...Our interpretation of your request was for those Schedules referred to in the Information Commissioners Decision Notice (Case Ref: FS50125350). Schedule E was considered exempt information, a point conceded and not pursued by the original applicant, and therefore it was not considered by the Information Commissioner as part of his decision.

I have logged this request for Schedule E, as a new request ...".

13. On the same day the complainant replied:

"I'm sorry you misinterpreted my request, as I thought it was clear and unambiguous. If I had wanted just the information already released or ordered to be released, I'd have said so. I only mentioned the decision notice at all to be precise about which document I was referring to.

In any case, please consider releasing this schedule (and if not the whole thing then as much as possible) as there is a clear public interest in knowing how much the government is spending on a major IT procurement exercise such as this one and since the contract is such a bespoke one it is very unlikely to prejudice future pricing negotiations for either party".

14. On 17 August 2009 the public authority sent out its response. It provided some information but withheld the remainder under the exemptions in sections 41(1) (information provided in confidence) and 43(2) (commercial interests).
15. On 16 September 2009 the complainant sought an internal review. This was acknowledged on 30 September 2009 when the public authority apologised for the delay and advised that it hoped to be able to respond by 23 October 2009.
16. On 21 October 2009 the public authority sent its internal review. It maintained its earlier position.

The investigation

Scope of the case

17. On 15 November 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled (this was not received until the complainant re-sent it on 29 November 2009). The complainant specifically asked the Commissioner to consider the following points:
- the public authority's interpretation of his original request;
 - the citing of section 41 to withhold information, which he believes contravenes the Commissioner's guidance;
 - the 'over enthusiastic' application of section 43; and
 - the brevity of the internal review.
18. On 2 December 2009 the Commissioner acknowledged receipt of the complaint and also advised the public authority accordingly.

Chronology

19. On 3 March 2010 the Commissioner advised the complainant that he was about to start his investigation. On 10 March 2010 he wrote to the public authority and raised some queries.
20. On 24 March 2010 the public authority sent the Commissioner its response.

Analysis

Exemptions

21. The public authority has applied both exemptions cited to the same pieces of withheld information within schedule E of the contract. It has confirmed to the Commissioner that it: *"intended to rely on both exemptions for all of the information ... redacted"*, adding that this withheld information:

"... was essentially the cost of service expressed in a number of different ways or as the basis of calculations to present a given outcome. As a result all of the redactions refer to the same

information each time is [sic] was repeated within the document”.

Section 41 – information provided in confidence

22. Section 41(1) provides that information is exempt 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.
23. 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 in that case 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 were 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?
24. If these parts of the test were satisfied, the Commissioner would then consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

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

25. 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. It proceeded to note that

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

26. This approach was also applied by a differently constituted Information Tribunal in *Department of Health v Information Commissioner* [EA/2008/0018].

27. The Contract itself was worked on by both the public authority and the Contractor together, as the Commissioner had ascertained in his earlier investigation. He had also found that there was no breakdown to identify which party had provided each piece of information. Bearing this in mind, the Commissioner enquired as to the source of the pricing information. He was advised that:

"... all of the pricing information in the Ident1 contract was supplied by Northrop Grumman alone".

28. However, the Commissioner has examined these parts of the contract and formed the view that they do not contain information which could be regarded as being solely supplied by the Contractor. In the Commissioner's view, the withheld information is not of a 'technical nature' and appears to be information which would have been agreed between the parties rather than provided by the Contractor to the public authority. Although the public authority has stated above that the information was supplied solely by the contractor, the Commissioner does not accept this point because, ultimately, the contract and the pricing details were agreed by both parties prior to the final document being signed.

29. Accordingly, the Commissioner is not satisfied that the withheld pricing information was obtained by the public authority from a third party, as it resulted from negotiations between the parties. He therefore does not agree that the information was 'obtained' from the Contractor; rather, it was 'agreed' by both parties and, consequently, he is of the view that section 41 is not engaged.

Section 43(2) – prejudice to commercial interests

30. The Commissioner has also considered whether the withheld information contained within the contract was exempt under section 43(2); this exemption has been applied by the public authority to the same information which it also withheld under section 41(1).
31. 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).
32. The Commissioner accepts that the withheld information relates to the commercial activities of the public authority and the Contractor and therefore falls within the scope of the exemption contained in section 43(2). He will therefore go on to consider whether the release of the information would, or would have been likely to, prejudice the commercial activities of either of the two parties to the contract.
33. The public authority advised the complainant that:

“The information contained within this document is very sensitive commercially, as it relates directly to the price and pricing methodology employed by the IDENT1 supplier.

The supplier is active within the highly competitive market of providing services to the public sector and would be seriously disadvantaged if this information were to be made public to a competitor in any current bid processes.

The disclosure of this information would also allow competitors to use this commercially sensitive information to inform their decision on whether to participate in future tenders operated by the Agency or on any pricing position they take within a tender, which could lead to an impaired competitive environment for the NPIA or even possible price fixing”.

The public authority provided no further arguments to the Commissioner.

34. 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.

35. 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).
36. 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.
37. The public authority has argued that disclosure of the contract could prejudice the Contractor's commercial position in ongoing or future negotiations within the public sector. Whilst it provided no evidence to support this to the complainant, it did refer to a recent bid in which both the Contractor and itself had been involved, advising the Commissioner (under its arguments in support of section 41(1)), that disclosure would affect the Contractor's ability to bid for similar installations within the UK and beyond. It stated that the recent procurement that the Contractor had bid for relied heavily on the current contract as: *"... a reference point and example of a successfully delivered biometrics system and a contracting model that works"*. However, the Commissioner notes that this recent bid was not for a further IDENT1 system, but for a different bespoke system and he does not therefore find that this argument carries much weight. Furthermore, as both parties had already worked together, the Commissioner would expect that a previous successful contract between the parties would be a likely starting point for any new proposals. He further notes that the previous disclosure ordered in his

earlier Decision Notice did not therefore appear to have discouraged the Contractor from dealing with the public authority.

38. The Contractor made the following submissions to the public authority on 7 November 2005, when it was contacted regarding the previous information request for the Contract:

"The fact that the contract has been awarded does not negate the potential for harm to the commercial interests of the contractor and its teaming partners, if disclosure of bid information is made publicly available. There are future bidding opportunities to consider (e.g., follow on procurements, re-compete efforts, new procurements, etc.), and it would significantly damage the commercial interests of the contractor in such future bids if the contract terms and conditions and pricing structures agreed in this contract were to be made publicly available. Further, when balancing the prejudice that would be done to the contractor against the public interest in disclosure, it should be noted that such disclosures would also act against the public interest by providing advantages to the contractor's competitors in relation to future competitions that could easily undermine fair competition and the ability of the Authority to obtain best value for money".

39. Unfortunately however, no further arguments or evidence were provided by the public authority to support the Contractor's position. Therefore, although the Commissioner acknowledges the Contractor's position, he notes that the public authority has not relied on it to any extent. He finds this disappointing in light of his previous Decision Notice about this Contract, especially as he afforded the public authority a second opportunity to put further arguments forward and even suggested that it considered his earlier Decision Notice before providing any further response.

40. In his earlier Notice, the Commissioner drew some of the following conclusions in relation to this exemption.

- *Even if [the public authority] 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.

- *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 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.*
 - *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.*
41. The Commissioner believes these earlier conclusions are again pertinent to this current request and he has not been provided with any further argument by the public authority which would suggest he should take a different view.
42. 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 the Contractor in this case in advance of the contract being awarded. The Contractor was therefore 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 relationship between the public authority and the Contractor.

43. The Commissioner does not believe that disclosure of the remaining information would or would be likely to deter this Contractor, or other contractors, from bidding for future contracts. He notes that the Contractor has bid for a further contract with the public authority. The Commissioner 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.
44. 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 the remaining information. Although the public authority made reference to on-going negotiations in respect of a different tender, it provided no detail as to how releasing the pricing detail in this requested Contract would, or would be likely to, affect the current bid, and he doubts that any other system could be sufficiently comparable to this one to be affected. He has therefore concluded that the exemption is not engaged and the information should have been disclosed. There is therefore no requirement to consider the public interest.

Procedural Requirements

Section 1 – general right of access

45. 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”.*

Complainant's first request

46. The complainant has expressed dissatisfaction with the way his initial request was handled and believes that the public authority did not interpret it correctly.
47. The complainant's original request sought a copy of the IDENT1 contract (plus appendices and indexes) *"as referred to in the Information Commissioner's recent decision notice FS50125350"*.
48. The public authority's interpretation of this request was to send him a copy of the information that was disclosed following the serving of this Notice – albeit that this took two attempts. As a result, appendix E was not considered by the public authority as this was not included within the scope of the Commissioner's earlier Notice.
49. The complainant was unhappy with this response, as is shown in paragraphs 11 to 13 above. He believed that his request was unambiguous and that if he had only wanted a copy of what had already been released then he would have asked for this. However, the Commissioner here notes the public authority's explanation to the complainant, which states that its interpretation was that he required the information that was released as a result of the earlier Notice as this is what he had actually asked for, and that this does not therefore include schedule E.
50. The Commissioner accepts the public authority's stance on this point and considers it has given a reasonable response. It has interpreted the request literally and then dealt with the subsequent request for schedule E when it became clear that this is what the complainant actually wanted.
51. Therefore, the Commissioner does not find any breach of the Act in this respect.

Complainant's second request

52. The Commissioner considers that the information which has been 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

53. 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.”
54. 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 exemptions at sections 41 and 43. He therefore finds that it breached section 10(1) in relation to its obligation under section 1(1)(b) of the Act.

The Decision

55. 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:
- it correctly interpreted the complainant’s original request.
56. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- the public authority breached section 1(1)(b) of the Act by failing to provide the information to the complainant in response to his second request;
 - by incorrectly applying the exemptions at sections 41 and 43 the public authority breached section 10(1) in relation to its obligation under section 1(1)(b).

Steps required

57. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- it should disclose the withheld information.
58. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Other matters

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

Concerns raised by third party

61. The Commissioner has been provided with a copy of some concerns which the third party Contractor raised subsequent to his earlier decision. He notes the Contractor's concerns that the Commissioner did not take into account some of its arguments and areas of concern, particularly in respect of future dealings with public authorities. However, the Commissioner would here note that his decisions are based on the arguments provided by the public authority, and by the complainant where appropriate, and it is therefore the responsibility of the public authority to put forward any arguments to support its position that information should be withheld.

Internal review

62. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his 'Good Practice Guidance No 5', published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner notes that in this case the internal review took 26 days. Whilst this would fall within his 'exceptional' limit, he does not consider that the response warranted any additional time as it merely refers to the earlier refusal notice and offers no further argument or explanation for

withholding the information. He is therefore concerned that it has taken so long to provide a response which affords no more information.

Right of Appeal

63. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 31st day of August 2010

Signed

**Graham Smith
Deputy Commissioner**

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