

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 21 January 2008

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

Summary

The complainant sought disclosure of a contract agreed by the Department of Health for the provision of an electronic recruitment service for the NHS. The public authority initially refused to disclose the contract on the basis of the exemptions contained in sections 41 (confidential information) and 43(2) (prejudice to commercial interests) of the Act. It subsequently also sought to rely on sections 43(1) (trade secrets) and 44 (prohibitions on disclosure). The Commissioner determined that none of the exemptions were applicable to the contract and ordered that it be disclosed to the complainant. He also found that the public authority had not complied with section 1 of the Act as, at the time of the request, it probably did not hold all of the contract and did not inform the complainant of this fact. In addition, it breached section 17(1)(b) and (c), as it failed to state in its refusal notice that sections 43(1) and 44 were applicable to the information requested nor explain why they applied.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 7 January 2005, the complainant emailed the Department of Health ("the Department") to request a copy of the contract between the public authority and Methods Consulting Ltd ("the contractor"), signed on 11 August 2003, for the provision of an electronic recruitment service for the NHS.

3. On 9 February 2005, the complainant emailed the Department seeking a response to his earlier email.
4. On 9 February 2005, the Department contacted the complainant to inform him that it could find no record of his original communication but would proceed to deal with his request.
5. On 21 March 2005, the Department informed the complainant that it believed that the contract was exempt from disclosure under sections 41 (confidential information) and 43(2) (prejudice to commercial interests) of the Act. The Department argued that section 41 was applicable because there was a confidentiality clause in the contract and that disclosure would harm the Department's working relationship with the contractor and thus the effectiveness of the contract. It also believed that disclosure of the contract would prejudice the commercial interests of the Department and the contractor and that the public interest did not favour release of the information.
6. On 4 April 2005, the complainant wrote to the Department requesting that it carry out an internal review of its decision to refuse to disclose the information.
7. On 21 June 2005, the Department informed the complainant that the result of the internal review was to uphold the original decision.

The Investigation

Scope of the case

8. On 11 July 2005, the complainant wrote to the Commissioner to complain about the way his request for information had been handled and the refusal of the Department to provide him with the information he had requested. The complainant subsequently informed the Commissioner that he did not wish to pursue a complaint in relation to the Department's failure to respond to his original request or the time taken to provide a refusal notice. He did however want the Commissioner to rule on the Department's decision to withhold the contract.

Chronology

9. There were a large number of communications between the Commissioner and the Department, the most significant are outlined below.
10. On 27 September 2006, the Commissioner wrote to the Department to request a copy of the contract. He also sought a more detailed explanation as to why it believed sections 41 and 43 were applicable to the information that had been withheld.
11. On 25 October 2006, the Department requested further time to provide a response to the queries the Commissioner had raised.

12. On 1 December 2006, the Department wrote to the Commissioner to confirm that it still held a copy of the contract in its records but that two of the schedules to the contract appeared to be missing. It indicated that it wished to review its original decision to withhold the contract but that it needed to seek the views of the contractor in accordance with the Code of Practice issued under section 45 of the Act.
13. On 18 January 2007, the Department wrote to the Commissioner enclosing a copy of the contract, with the exception of Schedules 6 and 14, which it stated that it could not locate. It also informed him that, following consultations with the contractor, the Department was still of the view that the contract was exempt from disclosure under sections 41 and 43 and provided some additional arguments with regard to the application of the exemptions.
14. On 30 January 2007, the Commissioner wrote to the Department seeking further clarification as to why it believed that the release of the information would cause prejudice to the commercial interests of the Department and the contractor. In addition, he pointed out that the Information Tribunal had recently ruled that it was unlikely that most of the information contained in a contract would be exempt under section 41. He asked it to identify specific provisions of the contract which might meet the requirements for section 41 to apply.
15. On 28 February 2007, the Commissioner agreed to allow the Department additional time so that it could consult further with the contractor over the issues raised in his most recent letter.
16. On 16 April 2007, the Department wrote to the Commissioner to confirm that it expected to be able to provide him with the contractor's views shortly.
17. On 2 May 2007, the Department informed the Commissioner that it had held a meeting with the contractor, at which the contractor had raised some very detailed objections as to why the contract should not be released. It had asked the contractor to put its concerns in writing and expected a response shortly.
18. On 31 May 2007, the Commissioner wrote to the Department querying why he had not received details of the contractor's concerns regarding the disclosure of the contract.
19. On 4 June 2007, the Department telephoned the Commissioner to explain that the response from the contractor had been delayed by its need to consult with third parties to whom some of the commercially sensitive information in the contract belonged.
20. On 10 June 2007, the Commissioner asked for an explanation as to why the Department could not locate the missing two schedules.
21. On 9 July 2007, the Commissioner telephoned the Department and was told that a full response to his queries had been drafted but this was being checked by the Department's lawyers and might need to be reviewed by the Department for Constitutional Affairs before it was sent.

22. On 16 July 2007, the Department indicated to the Commissioner that he should receive a response to his queries shortly. The Commissioner requested, if it was not already in the Department's draft response, that it provide him with details of any negotiations being undertaken by the Department or the contractor at the time of the request which were similar in nature to the contract. In addition, the Department indicated that it had searched for the two missing schedules but had been unable to locate them. It intended to contact the contractor who might be able to provide the missing schedules
23. On 14 August 2007, the Department wrote to the Commissioner to provide him, following discussions with the contractor, with detailed arguments as to why it believed the contract was exempt from disclosure under section 41, 43 and 44. These arguments are considered in the "Analysis" section of this notice.
24. On 17 August 2007, the Commissioner telephoned the Department to ascertain whether it had obtained copies of the missing schedules. The Department informed him that it was still pursuing this.
25. On 30 August 2007, the Commissioner wrote to the Department asking for confirmation as to which parts of the contract it believed were exempt from disclosure under section 44 of the Act.
26. On 15 September 2007, the Department wrote to the Commissioner to inform him that it had asked the contractor if it would supply the Department with a copy of the two missing schedules. However, the contractor was not prepared to do so as it regarded the schedules as confidential.
27. On 17 October 2007, the Commissioner requested from the Department details of the searches which had been undertaken to try to locate the missing schedules in order to satisfy himself that appropriate efforts had been made to trace them.
28. On 5 November 2007, the Commissioner was informed by the Department that it was carrying out further searches in order to be satisfied that it no longer held the missing schedules.
29. On 21 November 2007, the Department indicated to the Commissioner that it had nearly completed all the searches that it believed might reasonably result in the missing schedules being located.
30. On 5 December 2007, the Department provided the Commissioner with a response detailing the searches which had been undertaken for the two missing schedules. The Department informed him that it had carried out searches of the files it held, both electronic and paper, which it believed could contain the missing schedules but had been unable to locate either of them. It went on to explain that it could not locate files which it had stored between August 2003 and September 2004. As the contract in question had been signed in August 2003, it seemed likely that it had either been destroyed in error or lost, along with the other files for this period.

31. On 6 December 2007, the Commissioner sought clarification from the Department as to why it had an incomplete version of the contract which relates to the same period as the complete version, whether a complete version was held, and considered, at the time the request was made and details as to which work areas the lost files from 2003 to 2004 related.
32. On 7 December 2007, the Department confirmed that the incomplete version of the contract which had been supplied to the Commissioner had been located in a shared drive in its computer system but that the complete version, with the missing schedules, was not located in the same place. It was unable to confirm whether it held a complete version of the contract at the time the request was made. The Department explained that the missing files for the period from between August 2003 and September 2004 were files related to the area of e-recruitment.

Analysis

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

Procedural matters

Section 1 – information held or not held

34. Under section 1 of the Act, a public authority is under a duty to inform a person who requests information whether it holds the requested information. Where a request is made, as in this case, for a copy of a particular document, a public authority should inform the person who made the request if it only holds part of the document. Failure to do so would constitute a breach of section 1.
35. When the Department provided a copy of the contract to the Commissioner for the purposes of his investigation, Schedules 6 and 14 were missing. The Department has provided the Commissioner with details of the efforts it has made to locate these schedules. The Commissioner is satisfied that the Department has carried out extensive searches of its electronic and paper records and that, on the balance of probabilities, it no longer holds these parts of the contract.
36. However, the Commissioner also needs to consider the position at the time that the Department issued its refusal notice in March 2005. In its refusal notice the Department confirmed that it held the requested contract and gave no indication that any part of it was missing. Had it been aware, at that time, that any of the schedules were not held it should have informed the complainant of this fact.
37. The Department has informed the Commissioner that it has been unable to locate its files related to e-recruitment stored between August 2003 and September 2004. As the contract was signed in August 2003, this raises doubts as to whether the

Department actually held the complete contract when it issued its refusal notice. The Department has been unable to provide the Commissioner with any indication as to what information it held at that time. In the circumstances, with no evidence to suggest what information was actually held at the time of the request, the Commissioner is forced to conclude that the Department may not have held a complete copy of the contract when it refused the complainant's request. He is therefore not satisfied that the Department correctly informed the complainant of what information it held when it issued its refusal notice and, therefore, finds that it breached section 1 of the Act.

Section 17(1)(b) and (c) – Refusal notice

38. Section 17(1)(b) and (c) 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 state in its refusal notice which exemptions are applicable and explain why the exemption applies. In this case, the public authority failed to state in the refusal notice that it was relying on sections 43(1) and 44, nor explain why they applied, and, therefore, breached section 17(1)(b) and (c).

Exemptions

Section 41 – Confidential information

39. The Department argued that the contract was exempt from disclosure under section 41 of the Act as it was subject to an express confidentiality clause contained within it.

40. 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.

41. 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. 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 the contract obtained by the Department from a third party?

42. In the *Derry City Council* case the Information Tribunal confirmed that a written agreement between a public authority and another party did not generally constitute information provided by that other party to the public authority and, therefore, did not fall within section 41(1)(a) of the Act.

43. However, the Department pointed out that the Tribunal had gone on to state in that case 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...on the particular circumstances in which the point arises, it may be material of that nature could still be characterised as confidential information “obtained” by the public authority from the other party to the contract.” (pg 22 para 32(e))

44. The Department explained that the contractor’s view was that it had brought its own unique know how and intellectual property to the creation of the contract, the project and the ongoing delivery of the services. The contract therefore contained methodologies and ways of working which were unique to the contractor and which were reflected in how the project was defined, structured and managed, how the deliverables were defined and how the project and ongoing services were run. The contract also contained a significant amount of information about the technical materials, the hardware and software infrastructure design, which was used for the delivery of the service. It was argued that all of this was information supplied by the contractor to the Department and, therefore, fell within section 41(1)(a). The Department’s view was that its refusal to disclose the contract on the basis of the exemption contained in section 41 was still valid.

45. The contract itself is approximately one hundred pages long and contains provisions on a wide range of areas including service levels and targets, prices, intellectual property rights, legal liability, security, insurance, dispute resolution and rights on termination. 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 Department, including how the project was set up and managed, he is still of the view that the contract contains terms which were agreed between the parties and which set out their mutual obligations. The Department has argued that the whole of the contract should be exempt from disclosure under section 41. The Commissioner does not accept that the whole contract could be regarded as information provided by the contractor falling within section 41(1)(a). He is concerned that the Department has continued to argue that all of the contract exempt under section 41 and not seek to identify specific provisions to which the section might more realistically apply.

46. In the absence of any indication from the Department as to specific parts of the contract which it might reasonably be argued fall within the category of information provided by the contractor, the Commissioner has carried out a review of the contents of the contract to see if he could ascertain whether there were any provisions which it is readily apparent contain information about the contractor's methodologies, ways of working and technical material. Whilst there is a significant amount of information in the contract which relates to matters such as the contract delivery and service levels, he was unable to identify any information which could clearly be regarded as related to the contractor's methodologies, ways of working and technical material and which appeared to have been provided solely by the contractor.
47. As a consequence, the Commissioner is not persuaded that the information contained within the contract has been provided by the contractor to the Department and does not believe that it comes within section 41(1)(a). He is, therefore, not satisfied that section 41 is applicable to the requested information. He has gone on to consider whether it may be exempt from disclosure under section 43(1), 43(2) or 44.

Section 43(1) – Trade secret

48. The Department argued that the requested information was exempt from disclosure under section 43(1) which provides that information can be withheld by a public authority if it constitutes a trade secret. It quoted from a letter from the Contractor to the Department which stated that the contractor believed that the information in the contract related to the methodologies and ways of working which were unique to the contractor and should be treated as a trade secret. This was reflected in how the project was defined, structured and managed, with the majority of the contract being written by the contractor. The contractor argued that these techniques and methodologies had been built up from its own innovations over many years of experience and had been used on many projects. They had remained confidential during this time and were a means by which it could differentiate itself from its competitors.
49. The Commissioner's own guidance on section 43(1) (Awareness Guidance No. 5) points out that what is meant by the term "trade secret" is not defined by the Act. However, it advises that there are certain questions that should be considered in determining whether something is a trade secret. These are:-

- i. Is the information used for the purpose of trade?
- ii. Would the release of the information cause harm?
- iii. Is the information already known?
- iv. How easy would it be for competitors to discover or reproduce the information for themselves?

(i) Is the information used for the purpose of trade?

50. The Commissioner's guidance indicates that information may be commercially sensitive without being the sort of secret which gives a company a "competitive edge" over its rivals, and therefore constituting a trade secret. In relation to the information contained in the contract, the Commissioner would not regard its contents as being the sort of information which would give the company concerned a competitive edge. It contains a range of information including details of the parties' mutual obligations, what the project covers and how the project will be managed. None of this appears to be particularly unique so as to constitute what might be regarded as a trade secret.

(ii) Would the release of the information cause harm?

51. It is not readily apparent from the information contained in the contract that its release would cause the contractor harm. There is a confidentiality clause in the contract which states that all information obtained from the other party under or in connection with the contract should be treated as confidential. However, as discussed in relation to section 41, it is not apparent that information contained in the contract itself, such as information relating to the structure and management of the project, should be regarded as information obtained from the contractor as it would appear to be something that has been agreed between the parties. In addition there is nothing in the contract which specifically refers to how the project is structured and managed being a trade secret or being of a confidential nature.

(iii) Is the information already known?

52. The Department has stated that it has been informed by the contractor that the techniques it believed were a trade secret had been used on many projects prior to the one to which this contract related. If this is the case, then it seems likely that such techniques would be known beyond a narrow circle of people. This may not prevent such information constituting a trade secret, particularly if the contractor had sought in the past to protect the information by confidentiality provisions in the contracts it entered. However, it may tend to suggest that it is less likely to be regarded as a trade secret.

(iv) How easy would it be for competitors to discover or reproduce the information for themselves?

53. If the techniques which are claimed to be trade secrets have been used on many projects it may not be difficult for a competitor to find out about these techniques.
54. Having considered all the factors above the Commissioner is not satisfied that the information contained within the contract related to the structuring and management of the project constituted a trade secret and therefore does not accept that section 43(1) is engaged. He went on to consider whether the information was exempt under section 43(2) or 44.

Section 43(2) – Prejudice to commercial interests

55. The Commissioner has 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).
56. In this case, the Department 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 to 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.
57. The Commissioner then went on to consider the likelihood that the release of the information would have prejudiced the commercial activities of either of the parties.
58. The Department stated that it believed that if the prices that were agreed to be paid under the contract were released it would be likely to prejudice its own position as a buyer of information technology services such as websites, databases and interactive software applications. This would hinder its ability to obtain value for money from service providers in future contracts.
59. The Department also believed that the contract contained information which would be of commercial value to competitors of the contractor as it provided information about the contractor's way of doing things which could be made use of by its competitors. It was argued that disclosure of the contract would put the contractor at a disadvantage in tendering for a new contract when the current contract expired as it would disclose its previous pricing, and other terms it had agreed, to its competitors.
60. It was also argued that disclosure of the contract would give competitors of the contractor access to its methodologies and know how which would give those competitors an advantage in tendering for a wide range of contracts in which they might be in competition with the contractor. This could potentially have caused the contractor significant financial losses.
61. The Department was further of the view that disclosure might also have harmed its relationship with the contractor, and by extension future suppliers, which might lead

to them no longer wishing to do business with the Department. This would have been extremely detrimental to the Department as a purchaser of information technology services.

62. 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*, the Information Tribunal confirmed that “the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.” (para 15). He has viewed this as meaning that the risk of prejudice need not be more likely than not, but must be substantially more than remote.
63. He has also taken into account the views of the Tribunal in the same case that it accepted that “the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction.” (para 15) However, the Tribunal noted that certain factors should be considered in such cases, stating that whether or not prejudice was likely “would depend on the nature of the information and the degree of similarity between the two transactions.” (para 15)
64. 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 that the request was made.
65. The contract was for the provision and maintenance of a website for the recruitment of NHS staff covering the whole of England. The Department, despite being requested to do so, did not provide details of any negotiations which it, or the contractor, were undertaking at the time that the request was made which were similar in nature to the requested contract and which might therefore have been prejudiced by its disclosure.
66. Even if it could be argued that there were negotiations ongoing at the time of the request which were in a similar area to this contract, 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 have been seeking to enter at the time of the request. Therefore, terms such as those relating to service requirements, standards, the key performance indicators and prices were likely to be different in this particular contract to others that might have been under negotiation. The Department and the contractor could point to economies of scale, and a range of other variables, when negotiating other contracts to counter any strategy which sought to use the provisions in this contract as a basis for determining the provisions in any other contract either was negotiating.
67. In addition, at the time the request was made, the contract had been in operation for approximately 18 months and related to the rapidly changing and very competitive area of information technology. It would seem very likely that any tenders submitted or contracts negotiated 18 months after this contract came into operation would be significantly different in terms of what was contained within them to the provisions contained in this contract. This is particularly case in relation to areas such as the prices agreed in relation to different elements of the contract.

68. The contract does not appear to contain information which would have allowed the contractor's competitors to identify the pricing mechanisms it was using in bidding for contracts and, as a consequence, predict the prices it might submit in bidding for future contracts. Nor, as discussed in relation to section 41 and 43(1), has the Commissioner been convinced that it contains information detailing the contractor's technical know how which might be of value to its competitors. It would, therefore, appear difficult to see how other commercial organisations would have gained any competitive advantage in relation to the Department or the contractor from the disclosure of this contract.
69. As regards the Department'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. 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. He, therefore, does not believe that disclosure of the information in question would have unduly affected the relationships between the Department and the contractor.
70. The Commissioner is also not persuaded by the Department'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.
71. Once again the Commissioner has concerns over the Department's apparent contention that the whole of the contract is exempt from disclosure under section 43(2), as opposed to raising more realistic arguments related to specific, identified provisions within it.
72. Having reviewed the content of the contract, the Commissioner is not satisfied that, at the time the request was made, the disclosure of the terms of the contract would have been likely to prejudice the commercial interests of the Department or the contractor. He went on to consider whether the information was exempt under section 44.

Section 44 – Prohibitions on disclosure

73. The Department argued that some provisions of the contract were exempt from disclosure under section 44 of the Act as disclosure was prohibited by regulation 43 of the Public Contract Regulations 2006. Regulation 43 provides that

"(1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders."

74. It informed the Commissioner that the contractor's successful tender proposals and its subcontracting arrangements came within regulation 43 as they contained technical or trade secrets or confidential information.

75. The Commissioner's view is that in order for information to fall within regulation 43 it must be:

- i. forwarded to the public authority by the tendering party and
- ii. reasonably designated by the tendering party as being confidential.

76. In relation to the information that the Department had indicated that it believed fell within this regulation, the Commissioner pointed out to the Department that the complainant had not requested a copy of the contractor's tender proposals and that he had not been able to identify which part of the contract provided details of the contractor's subcontracting arrangements. Despite a request to do so, the Department did not identify the parts of the contract to which it believed regulation 43 was applicable.

77. The Commissioner could not identify any information in the contract which would appear to have been forwarded to the Department by the contractor which related to its tender proposals or its subcontracting arrangements. He is not therefore persuaded that there is information in the contract which comes within regulation 43 of the Public Contract Regulations 2006 and, therefore, which is exempt from disclosure under section 44 of the Act.

The Decision

78. The Commissioner has decided that the Department did not deal with the following elements of the request in accordance with the Act:

- it did not inform the complainant that it did not hold all of the information that had been requested and therefore breached section 1;
- it failed to state in its refusal notice that section 43(1) and 44 were applicable to the information that had been requested and explain why the exemptions applied and therefore breached section 17(1)(b) and (c);
- it incorrectly applied sections 41, 43(1), 43(2) and 44 to the information that had been requested.

Steps Required

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

- to disclose to the complainant a copy of the contract that he requested.

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

Other matters

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

82. During the Commissioner's investigation, the Department undertook to ascertain the views of a third party contractor on the release of the requested information. Whilst Part IV of the Code of Practice issued under section 45 of the Act '*Consultation with Third Parties*' encourages such an approach, the Commissioner is disappointed that a more thorough consultation did not take place at the time of the initial request and with the length of time taken to ascertain the views of the third party.

83. In addition, the Commissioner is concerned that the Department sought to argue that the whole of the contract was exempt from disclosure and so appeared to apply exemptions on a general principle, rather than considering the request on its own merits. As a matter of law and good practice, requests and any subsequent reviews should be considered on a case by case basis.

84. Despite extensive searches, the Department was unable to provide the Commissioner with two schedules pertinent to the complainant's request. By failing to provide this information or satisfactorily account for its destruction, it is likely that the Department has failed to conform to recommendations of Part 8 (active records management) and Part 9 (disposal arrangements) of the Code of Practice issued under section 46 of the Act.

85. Of further and more serious concern is the admission that the two schedules may be amongst paper files stored between August 2003 and September 2004, which the Department cannot account for. The Department's inability to confirm the whereabouts of these files suggests that there has been further, more extensive non-conformity with the section 46 Code. Therefore the Commissioner has informed The National Archives (TNA) of his concerns, in relation to its role in providing advice and assistance on matters of records management.

86. The Commissioner is also concerned that the files which are apparently missing may contain or have contained personal information relating to living individuals, in which case there may have been a breach of the data protection principles.

87. The Commissioner will now consider whether further intervention may be appropriate in relation to the matter of the missing paper files.

Failure to comply

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

Right of Appeal

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

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 21st day of January 2008

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

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

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

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

Refusal of Request

Section 17(1) provides that -

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

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

Information provided in confidence.

Section 41(1) provides that –

“Information is exempt information if-

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

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

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Commercial interests.

Section 43(1) provides that –

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

Section 43(2) provides that –

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

Section 43(3) provides that –

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

Prohibitions on disclosure.

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”