

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 November 2008**

**Public Authority:** The Department for International Development (DFID)  
**Address:** Abercrombie House  
Eaglesham Rd  
East Kilbride  
G75 8EA

### Summary

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The complainant requested a copy of the winning tender proposal for a particular consultancy post along with details of the scores awarded to all of the tenders which the Department for International Development ('DFID') received. While DFID provided the complainant with the overall score awarded to the winning tender and the average score awarded to his tender (the complainant's tender was unsuccessful), DFID refused to disclose the winning tender proposal on the basis of sections 40(2) (personal data) and 43(2) (commercial interests) of the Act and also refused to disclose a detailed breakdown of the scores awarded to the tenders on the basis of section 43(2).

The Commissioner has concluded that the winning tender is not exempt on the basis of section 43(2) of the Act and although some of the information contained in the winning tender is exempt on the basis of section 40(2) of the Act, a significant proportion of this information is not. The Commissioner has therefore ordered DFID to disclose this information to the complainant.

With regard to the detailed score sheets for each tender, the Commissioner has concluded that the score sheets are the personal data of each individual who submitted a tender. Therefore, the Commissioner has decided that the score sheets held by DFID in relation to the complainant's tender are exempt on the basis of section 40(1). The Commissioner has also concluded that disclosure of the winning tenderer's score cards would be unfair is therefore exempt from disclosure on the basis of section 40(2).

### The Commissioner's Role

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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

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2. On 21 April 2005 the complainant submitted the following request to the Department for International Development ('DFID') with reference to the tender process entitled 'Competition Policy Consultant (CNTR 04 6051)':

'I am writing to request, under the Freedom of Information Act 2000, that you provide me with a copy of the tender which DFID accepted for the above contract.

Secondly, please provide a copy of the score sheets showing the points awarded to each tender received, under each of the evaluation criteria set out in the invitation to tender.

Thirdly, please confirm that I was the only tenderer to be formally interviewed during the evaluation process'.

3. DFID responded to this request on 24 May 2005. DFID explained that it was withholding copies of the winning tender and copies of the assessors score sheets for all of the proposals submitted on the basis of section 41 and 43 of the Act. DFID did however, provide the complainant with a copy of a score sheet showing the average score awarded to his tender and also confirmed that one other person (in addition to the complainant) had been invited for interview.
4. On 13 June 2005 the complainant asked DFID to conduct an internal review of its decision to refuse to disclose some of the information he had requested. In this correspondence the complainant identified a number of reasons why he believed that the exemptions contained at sections 41 and 43 of the Act were not applicable to the first two pieces of information that he requested (i.e. a copy of the successful tender and score sheets awarded to each tender). The complainant also noted that the third limb of his request asked for confirmation that he was the only candidate to be formally interviewed, however DFID's response of 24 May 2005 simply noted that 'one other person was invited for interview' and that this response did not answer his request. The complainant repeated his request for confirmation as to whether any other candidates were 'formally' interviewed. The complainant also asked to be provided with the date of the candidate's interview and the name of the candidate.
5. DFID informed the complainant of the outcome of its internal review on 12 August 2005. In this response DFID explained that it no longer considered section 41 to apply to any of the information that had been withheld, however, it remained of the view that all of the information withheld was exempt from disclosure on the basis of section 43. Moreover, DFID now explained that the CV of the candidate who won the tender formed part of the tender documents and DFID considered this to be exempt from disclosure on the basis of section 40(2) of the Act.
6. DFID did however provide the complainant with the name of the candidate who was awarded the contract along with the date on which he was interviewed. DFID

also informed the complainant that as of 1 August 2005 DFID will, in accordance with the European Court of Justice ruling on the Alcatel Case, be providing the following information when issuing notification of an award decision:

- The award criteria;
  - Where appropriate, the score the tenderer obtained against those award criteria;
  - The name of the winning tenderer.
7. On 21 August 2005 the complainant contacted DFID and, with reference to the Alcatel judgement, asked to be provided with the score of the winning tenderer.
8. DFID provided the complainant with the overall score of the winning tender on 29 August 2005.

## The Investigation

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### Scope of the case

9. The complainant contacted the Commissioner on 5 September 2005 and outlined a number of reasons why he believed that DFID's reliance on sections 40 and 43 to refuse to disclose the information he had requested (i.e. a copy of the winning tender and the score sheets for all tenders) was incorrect.

### Chronology

10. The Commissioner contacted DFID on 10 May 2007 and asked to be provided with a copy of the information that had not disclosed to the complainant along with an explanation as to why it believed this information to be exempt from disclosure.
11. On 29 May 2007 DFID provided the Commissioner with copies of the information withheld from the complainant. DFID explained that it did not have anything to add to the details contained in its refusal notice and internal review outcome with regard to why it believed this information to be exempt. However, DFID did provide the Commissioner with a number of pieces of internal DFID correspondence which related to its consideration of the request.
12. The Commissioner contacted DFID again on 6 June 2008 and asked to be provided with a copy of the 'Invitation to Tender' instructions in relation to this contract and confirmation as to which principles of the Data Protection Act 1998 (DPA) it believed would be breached if the requested information was disclosed.
13. DFID responded to the Commissioner on 9 June 2008 and provided him with a copy of the ITT instructions and a more detailed explanation as to why it believed section 40(2) to apply.

### Findings of fact

14. In late 2004 DFID invited tenders for a contract entitled 'Competition Policy Consultant'.
15. The ITT documents explained that the tender for this contract should be split into three parts:

Part A – Executive summary which should comprise a brief overview of the tender covering how the tenderer intended to achieve the outputs and an assessment of the resources the tenderer would require.

Part B – General and Technical which should be structured into the following 6 sections:

- Section 1 – Any Qualifications to Terms of Reference
- Section 2 – Technical response (including method of implementation)
- Section 3 – Names and CV's of personnel to work on this project
- Section 4 – Personnel Inputs – include person days without reference to fees
- Section 5 – Previous experience
- Section 6 – Matters not appropriate in any other appendix – e.g. Joint Venture, Disclosures, Conflict of Interest

Part C – Commercial Tender which should include all prices for the duration of the contract. The Commercial Tender should be tendered into the following 4 sections:

- Section 1 – Confirmation of the acceptance of DFID's Conditions of Contract
- Section 2 – Pricing
- Section 3 – A list of the names and designation of all nominated personnel proposed to work on this project.
- Section 4 – Matters not appropriate in any other appendix, e.g. Commercial Aspects of Joint Venture, Parent Company Guarantees

16. The Commissioner understands that DFID received two tenders and both of the tenderers in question (one of whom was the complainant) were subsequently interviewed by DFID.
17. In May 2005 DFID awarded the contract to a Mr John Preston for a value of £69,750.<sup>1</sup> Although DFID has published this figure, it has not confirmed whether this figure includes both the expenses incurred by Mr Preston (e.g. travel costs) and fee elements of Mr Preston's tender, and if so, what proportion of the £69,750 comprises expenses, and what proportion comprises Mr Preston's fee. Therefore, although DFID has published this figure and confirmed the number of

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<sup>1</sup> This information is available on DFID's website as it publishes the names of winning tenderers and the amount awarded for undertaking each contract.  
<http://www.dfid.gov.uk/procurement/contracts2005may.asp>

working days which this contract was awarded for, it is not possible using this information alone to calculate Mr Preston's daily fee rate.

18. The information that has been withheld consists of Mr Preston's tender which follows the format of that described above. DFID has argued that this is exempt on the basis of section 43(2) with the complainant's CV, which forms part of the tender, also being withheld on the basis of section 40(2).
19. With regard to the complainant's request for 'a copy of the score sheets showing the points awarded to each tender received' the Commissioner understands that upon receipt of each tender, DFID awarded each proposal a score out of 100, broken down by reference to each of the criteria for the tender. Each tender was therefore awarded a score based solely on the paper documents submitted to DFID. During the interview process, each of the three panel members recorded a score for each tenderer using the same scoring system used to review the paper proposals. DFID then used the scores awarded by each of the interviewers, along with the score awarded to the paper proposal, to create an average score for each tender in order to determine which tenderer should be awarded the contract.
20. Consequently, in addition to the overall average score for the winning tender which has been disclosed to the complainant, DFID holds four breakdowns of the scores awarded to the winning tender. DFID has argued that this scoring information is exempt from disclosure on the basis of section 43. Similarly, DFID also holds four breakdowns of the scores awarded to the complainant's own tender. (As noted in paragraph 3, the complaint has been provided with the average score awarded to his tender broken down by criteria. However, he has not been provided with the individual breakdowns).
21. The European Court of Justice Alcatel judgement (C-81/98) against Austria in 1998 found that EU national courts must, in all cases, be able to review and set aside award decisions on all public procurement contracts which are fully subject to the EU Procurement Directives. In May 2004, the European Commission issued a reasoned opinion against the UK requiring the UK to comply with the Alcatel judgement by introducing a mandatory standstill period between communication of award decision and contract conclusion. Consequently, from 1 August 2005, DFID, began to disclose the information listed in paragraph 6 when issuing notification of an award decision.

## Analysis

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### Exemptions

22. In order to consider the applicability of the exemptions DFID has relied upon, the Commissioner has considered separately the different types of information falling within the scope of the complainant's requests, i.e. firstly the tender documents and secondly the score cards.

### The tender documents

23. DFID has argued that the tender documents submitted by the winning tenderer are exempt on the basis of section 43 of the Act, with the tenderer's CV also being exempt on the basis of section 40(2).

#### *Section 40*

24. Section 40(2) of the Act provides an exemption for information which is the personal data of any third party where disclosure would breach any of the data protection principles contained in the DPA.
25. In order to rely on the exemption provided by section 40(2), the information being requested must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

*'...data which relate to a living individual who can be identified*  
*a) from those data, or*  
*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'*

26. DFID has argued that Mr Preston's CV constitutes his personal data and disclosure of this information would breach the first data protection principle contained in the DPA.
27. The first data protection principle states that
1. Personal data must be processed fairly and lawfully and
  2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
28. The Commissioner notes that DFID only considers Mr Preston's CV to be his personal data; however, in the Commissioner's opinion the remainder of the other documents comprising the tender proposal are **also** Mr Preston's personal data (and therefore may be exempt from disclosure on the basis of section 40(2) of the Act). In broad summary these additional documents can be classified into two categories: firstly, information about Mr Preston's background and experience (including his CV); and secondly, the pricing for which Mr Preston tendered he would carry out the contract for.
29. With regard to the first category of information, the Commissioner believes that this is Mr Preston's personal data because it contains detailed biographical information about his background and experience and therefore he can be identified from this data.
30. With regard to the second category of information, the Commissioner followed an example contained in his guidance document: 'Data Protection 1998: What are

personal data?'<sup>2</sup> This document includes an example which argues that when a salary for a job is included in an advertisement for a particular role, the data will not be personal data. However, where the same salary details are linked to a name (e.g. when the vacancy has been filled and there is a single named individual in post) the salary information will be personal data 'relating to' the employee in post. Following the principles set out in this example, in the Commissioner's opinion, the breakdown of the costs that Mr Preston submitted to DFID which detail the amount he was prepared to undertake the contract for, are also his personal data as he was successful in winning the tender and therefore received these costs from DFID.

31. Therefore, the Commissioner has considered below whether disclosure of any parts of the tender documents are exempt on the basis of section 40(2) and not just Mr Preston's CV which forms part of the tender documents.
32. The Commissioner's guidance on section 40 of the Act suggests that a number of issues should be considered when assessing whether disclosure of information would be fair, namely:
  - Would the third party expect that his or her information might be disclosed to others?
  - Had the person been led to believe that his or her information would be kept secret?
  - Has the third party expressly refused consent to disclosure of the information?
33. The Commissioner's guidance also notes that in thinking about fairness, it is likely to be helpful to ask whether the information relates to the private or public lives of the third party. 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.
34. With regard Mr Preston's expectations as to what would happen to his CV (and by implication the remainder of documentation included in his tender), DFID has argued that anyone submitting CVs to DFID as part of this tender process would have had a legitimate expectation that this information would remain confidential. This is because Mr Preston would have expected that DFID would only use such information for the purposes of determining whether he was a suitable person to carry out the consultancy work for which he was bidding. Although he would have expected the team assessing the bids to see his CV, he would not have expected that his CV would be disclosed to a member of the public.
35. In his submissions to the Commissioner, the complainant noted that the ITT documentation for this tender process explicitly stated that 'all information

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf)

submitted to DFID may need to be disclosed in response to a request under the [FOI] Act'. Therefore, the complainant has argued that all of those submitting tenders should have had an expectation that information they submitted may later be disclosed in response to an information request.

36. The Commissioner has reviewed the relevant sections of the ITT documentation in detail and has re-produced them below:

*'19.2 Freedom of information*

*DFID is committed to open government and to meeting their responsibilities under the Freedom of Information Act 2000. Accordingly, all information submitted to DFID may be disclosed in response to a request under the Act. We may also decide to include certain information in the publication scheme which we maintain under the Act.*

*Tender Obligations*

*If you consider that any of the information included in your tender would prejudice your legitimate commercial interests, please identify and explain (in broad terms together with a time period after which the information could be disclosed) what harm may result from disclosure if a requests is received. Tenderers must justify why they prefer any information to be withheld (Please see Section 41 of the Act – Information Provided in Confidence).*

*DFID Obligations*

*Tenderers should be aware that, even where it is indicated in the tender that information is prejudicial to tenderers commercial interests, DFID may be required to disclose it under the Act if a request is received. DFID recognises the legitimate commercial concerns of suppliers and DFID will consult with the relevant tenderer before disclosing the information.'*

37. The Commissioner notes that whilst the guidance provided to tenderers explicitly references the exemption contained at section 41 of the Act, and makes an implicit reference to the exemption contained at section 43 of the Act, this guidance does not make any reference to section 40 of the Act or the provisions of the DPA. Furthermore, the Commissioner notes that the ITT documentation only suggests that information 'may be disclosed' in response to a freedom of information request. In the Commissioner's opinion this should not therefore be taken to suggest, as the complainant appears to argue, that tenderers should therefore **always** expect information to be disclosed in response to an information request. Nor should it be taken to mean that information will **never** be disclosed in response to an information request, i.e. DFID's position that there is no expectation on the part of the tenderer.
38. Rather the phrase 'may be disclosed' suggests that whether a tenderer would expect the information submitted to DFID to be disclosed will depend on a number of circumstances such as: the nature of the information submitted (i.e.,



would the complainant expect some types of information to be disclosed and not others?); the types of information that DFID had previously placed in the public domain; and whether a winning tenderer would have different expectations from a tenderer who did not win the contract in question. In effect a judgment has to be made on a case by case basis.

39. In the Commissioner's opinion any tenderer should have at least had an awareness that details about their bid, including details of their pricing may be disclosed if they were awarded the contract. This is because, to some extent, the Commissioner agrees with the complainant, that the basis upon which public authorities award large financial contracts should be open to some level of scrutiny to ensure accountability. Therefore those who are awarded the contracts, be it an individual as in this case, or companies, cannot expect to receive payments for such contracts without the basis upon which they were awarded such contracts being open to some degree of public scrutiny. This is particularly true when one considers the fact that DFID made it clear to all tenderers that information provided to DFID may be disclosed in response to an information request under the Act.
40. Therefore, the Commissioner believes that Mr Preston should have expected that some information contained in his tender submissions such as information which details why he should be awarded the bid and what pricing he would accept to undertake the work for may be disclosed. However, the Commissioner does accept that Mr Preston would not have expected the more 'personal' types of information included in this documentation to be disclosed, for example details in his CV relating to marital status, address, contact numbers etc.
41. With regard to whether the information relates to the individual's public or private life, it is clear that in this case Mr Preston's personal life is inextricably linked to his public or professional life. Although he was awarded the contract in his professional or public capacity, it is clear that it was a Mr John Preston, rather than say a company entitled JP Ltd who was undertaking the contract. So for example, the price DFID paid to Mr Preston to undertake the work reveals not only something about his professional life, (i.e. he accepted a fee of £69,750 to undertake the role of 'competition policy consultant') but also his personal life, (i.e. he was earned at least £69,750 in 2005).
42. With regard to this potential conundrum on balancing both public and private aspects of Mr Preston's life, the Commissioner has been guided by the Information Tribunal's findings in the case *House of Commons v Information Commissioner and Norman Baker MP (EA2006/0015 and 0016)* in which the Tribunal commented that:
- 'where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives'. (Tribunal at paragraph 78).*
43. The withheld information that was the focus of the Tribunal's considerations was the level of travel expenses claimed by MPs. The Tribunal accepted the House of

Commons' argument that travel arrangements would inevitably reflect personal and family circumstances to some degree but the Tribunal found that the above principle 'still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject's public life.' (para 78).

44. In this case, in the Commissioner's opinion the personal data held by DFID about Mr Preston, although intertwined in places with his personal life, relates overwhelmingly to his professional life and the contract he entered into with DFID.
45. Therefore, in the Commissioner's opinion, the approach taken by the Tribunal supports the view that Mr Preston should have had some expectation that the basis upon which he asked DFID to award him the contract, i.e. the tender documentation he submitted, should be subject to scrutiny.
46. DFID has not provided the Commissioner with any submissions to indicate that Mr Preston has specifically refused to allow the tender documentation he submitted to be disclosed in response to this, or indeed any other, information request.
47. On the basis of the above, in the Commissioner's opinion disclosure of information contained in the tender documents that would allow an assessment of why Mr Preston was awarded this contract would not be unfair. Furthermore, in the Commissioner's opinion disclosure of such information would not be unlawful.
48. However, for personal data to be disclosed under the Act, disclosure must not only be fair (and lawful) but must also meet one of the conditions contained in schedule 2 of the DPA. In this case the Commissioner believes that the most appropriate condition is the sixth condition which states that:

'The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a 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.'

49. The Commissioner has followed the approach taken by the Information Tribunal in another case involving the House of Commons: *House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc)*, in which the Tribunal interpreted the sixth condition as setting out a three part test which must be satisfied, namely
  - there must be **legitimate interests** in disclosing the information,
  - the disclosure must be **necessary** for a legitimate interest of the public, and
  - even where the disclosure is necessary it nevertheless must not cause **unwarranted interference** (or prejudice) to the rights, freedoms & legitimate interests of the data subject.

### *Legitimate interests*

50. The Commissioner has touched upon the legitimate interest in disclosure of the information above, i.e. disclosure of this information would ensure that DFID was accountable for the decision that it made to award this contract, at this price level, to Mr Preston. Furthermore, the Commissioner's opinion the amounts of money involved in this case are not insignificant – Mr Preston was awarded £69,750 and there is a clear public interest in public authorities being accountable for this level of public spending. Disclosure may also increase public confidence in DFID's procurement system if it demonstrates that the system is fair and effective. Such legitimate interests follow the line of argument the High Court took when hearing the House of Commons appeal to the Tribunal's decision referenced above: 'the expenditure of money through the payment of MPs' salaries and allowances is a matter of direct and reasonable interest to taxpayers...the nature of legitimate interest engaged by these applications is obvious'.

### *Necessity*

51. With regard to the necessity test, the Commissioner is mindful of the Tribunal's (and subsequently the High Court's) considerations of the House of Commons case involving Leapman, Brooke and Thomas. In brief summary, the Tribunal concluded that the system MPs' used to claim the additional costs allowance (ACA) was so flawed and that there was no public confidence in it so that disclosure of virtually of all of the withheld information was necessary in order to achieve the objectives that it described as accountability, transparency, value for money and the health of democracy.
52. In the circumstances of this case, the Commissioner has not been provided with any evidence which suggests that DFID's system of procurement is one that is fundamentally flawed or lacks the appropriate checks and balances. As a consequence, unlike the situation with House of Commons' ACA system, there is not, therefore, a lack of public confidence in the DFID's procurement system. Consequently, in this case the Commissioner does not believe that disclosure of tender information is necessary because of any weakness or flaws in DFID's procedures and processes. Also the Commissioner acknowledges that in terms of profile and public focus, there is a clear distinction between the individuals bidding for work under the procurement system used by DFID and MPs.
53. Rather, the necessity of disclosure in this case is due to more generic legitimate interests involving accountability and transparency. In the Commissioner's opinion it is correct to argue that because the interests in favour of disclosing the information are less weighty than in the House of Commons case, there is less necessity in disclosure in order to meet the legitimate interests outlined above. This is certainly not to dismiss the interests in this case as irrelevant, but in the Commissioner's opinion, where there is not a question of say a flawed expense system resulting in the public lacking confidence in their elected representatives, it will be harder to argue that disclosure of information is 'necessary'.
54. Practically, then the Commissioner accepts that disclosure of the *all* of the tender documentation may not be necessary in order to satisfy the legitimate interests of the public. Rather, any necessary interests may be met simply by disclosure of parts of the tender documents.

55. With reference to the information which comprise the tender documents, the Commissioner believes that disclosure of the executive summary (i.e. Part A of documents listed above at paragraph 15); the technical response (i.e. section 2 of Part B) and the pricing information contained on the completed pro-forma forms 1, 2 and 3 (i.e. section 2 of Part C) would be sufficient to satisfy the legitimate interests set out above. This is because these sections confirm the nature of Mr Preston's academic and professional background; include an indication as to how he would undertake the consultancy position in question; and detail the rate of remuneration he would require to undertake the project.
56. In the Commissioner's opinion disclosure of any other information contained in the tender documentation cannot be said to be necessary in order to satisfy the legitimate interests in this case. For example, the Commissioner does not think that it is necessary that Mr Preston's CV is disclosed because the public do not need to be provided with such a detailed breakdown of his experience and qualifications as contained in the CV in order to meet the legitimate interests set out above; the summary of information contained in the executive summary and technical response is sufficient.

#### *Unwarranted interference*

57. The Commissioner believes that the consideration of unwarranted interference is essentially an exercise of weighing up the accumulative value of the public interest factors in favour of disclosure established in the preceding section against the prejudice to the rights, freedoms and legitimate interests of the data subject in which disclosure may result. In effect, this consideration is similar to the balancing exercise set out at section 2 of the Act and the public interest test which must be applied to qualified exemptions.
58. The Commissioner accepts that disclosure of the information he identified in paragraph 55, would reveal relatively detailed biographical information about Mr Preston, e.g. the organisations he has previously worked for, and by implication the places he has lived, and types of work that he has undertaken. Although the individuals who enter into contracts with public organisations should expect some level of scrutiny into their professional background, this does not mean that they have no rights of privacy at all. Furthermore, the Commissioner notes that DFID has specifically argued that the disclosure of the detailed proposals, business methods, and pricing policies contained in Mr Preston's tender would harm his commercial interests by undermining his competitive position.
59. With regard to balancing these interests, the Commissioner does not believe that any prejudice which may occur following disclosure of the tender documents to Mr Preston's commercial interests can be taken into account when assessing the whether the sixth condition is met. This is because the prejudice to 'the rights and freedoms or legitimate interests of the data subject' is limited to protecting the data subject's right to privacy and does not extend to protecting his commercial interests. This approach makes sense when one remembers that the DPA comes from a European Directive inspired by the European Convention on Human Rights and therefore the DPA is intended to protect the right to privacy and family

life enshrined in the Convention rather than any broader prejudice that may be suffered by individuals.

60. In the Commissioner's opinion the public interest factors in favour of disclosing the tender documentation that the Commissioner has identified would meet the legitimate interest are strong and compelling and on balance outweigh any prejudice to Mr Preston's privacy.
61. In summary, the Commissioner has concluded that the following parts of Mr Preston's tender documents are not exempt from disclosure on the basis of section 40(2) are:
- The executive summary (Part A);<sup>3</sup>
  - The technical response (i.e. section 2 of Part B);
  - The pricing information contained on the completed pro-forma forms 1, 2 and 3 (i.e. section 2 of Part C).
62. On the basis of the reasoning set out above, the Commissioner believes that disclosure of this information would be fair, lawful and meet the sixth condition in schedule 2 of the DPA.
63. However, the Commissioner has concluded that the following tender documents are exempt from disclosure on the basis of section 40(2) because although disclosure would not be unfair, the sixth condition contained in schedule 2 of the DPA cannot be met:
- Sections 1 and sections 3 to 6 of Part B;
  - Section 1, 3 and 4 of Part C.

#### *Section 43(2)*

64. As DFID has also argued that disclosure of the tender documentation is exempt from disclosure on the basis of section 43(2) of the Act, the Commissioner has gone to consider whether the information listed at paragraph 61 is exempt from disclosure on the basis of this exemption. For the purposes of section 43, the Commissioner believes that this information can be split into two different classes of information: firstly, the executive summary and the technical response, and secondly, the pricing information.
65. Section 43(2) states that information is exempt from disclosure if its disclosure would, or would be likely to prejudice the commercial interests of any party, including the public authority holding it.
66. The Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. With regard to likely to prejudice, the Tribunal in *John Connor Press Associates Limited v The*

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<sup>3</sup> The only exemption to this is one sentence in the executive summary which relates to Mr Preston's nationality and the Commissioner does not believe that disclosure of this information is necessary to satisfy the legitimate interests identified in the main body of the decision notice.

Information Commissioner (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).

#### *DFID's position*

67. In submissions to the Commissioner DFID argued that it believed that the likelihood of prejudice was one that 'would' prejudice both its commercial interests and those of Mr Preston; i.e. it was relying on the higher test.
68. DFID believed that its commercial interests would be prejudiced by disclosure of complete tenders because this would reduce the frankness and openness with which information and opinions were provided to it. This would harm DFID's ability to procure goods and services cost effectively.
69. DFID believed that the commercial interests of Mr Preston would be prejudiced because disclosure of detailed proposals and business methods outlined by tendering contractors in their tenders would prejudice their commercial interests by harming their competitive position.

#### *The Commissioner's position*

70. On the basis of the DFID's brief submissions, the Commissioner is not persuaded that disclosure of either class of the tender documents would result in tenderers being less frank and open with the information that they provide to DFID. In the Commissioner's opinion potential tenderers clearly have an inherent interest in being frank and open with DFID so that they can ensure that they are in the best position possible to be awarded the tender from DFID. If they do not provide DFID with sufficiently detailed proposals they risk not being awarded the contract by undermining the strength of their tender proposal. Furthermore, DFID has not identified any real life examples of where tenderers have told DFID that if it discloses their tender documents, they will include less detailed proposals in the future. Simply put, the Commissioner believes that the argument advanced by DFID – i.e. that the frankness and openness with which information and opinions were provided to by tenderers would be reduced - is simply one based upon speculation. Moreover, even if DFID had been able to provide evidence that this effect would (or would be likely to) occur, the Commissioner does not believe that DFID have provided any evidence to demonstrate exactly **how** receipt of less detailed tender proposals would affect DFID's ability to procure goods and services efficiently; at best the connection between the two is one that is simply implied rather than substantiated.
71. Therefore, in the Commissioner's opinion DFID has failed to provide sufficient evidence to demonstrate how disclosure of the tender documents 'would' prejudice its commercial interests in order to meet the threshold needed to engage the exemption on this basis. Furthermore, in the Commissioner's opinion,

on the evidence submitted by DFID, it is not clear that the likelihood of prejudice occurring is one that it even 'real and significant' and thus the lower threshold of engaging the exemption contained at section 43(2) is also not met.

72. Turning to the potential prejudice to the commercial interests of Mr Preston, the Commissioner has been guided by the approach adopted by the Tribunal in the case *Derry City Council v The Information Commissioner (EA/2006/0014)*. In this case Derry City Council claimed that releasing the requested information would prejudice the commercial interests of both itself and third party, Ryanair. Ryanair were not represented at the Tribunal nor were they joined to the proceedings. Although the Council argued that disclosure of the requested information would prejudice Ryanair's commercial interests, it was established by the Tribunal that these were the Council's thoughts on the matter and were not representations made to the Council by Ryanair.
73. The Tribunal did not take the commercial interests of Ryanair into account in reaching its decision regarding the application of section 43(2), commenting that:
- 'Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair's commercial interests would be likely to be prejudiced.'
74. In the Commissioner's opinion, it could be inferred from this comment by the Tribunal that when considering prejudice to a third party's commercial interests only arguments provided by the third party itself in relation to the request should be taken into account and any arguments formulated by the public authority should be disregarded.
75. However the Commissioner considers that whilst this approach was appropriate in the particular circumstances of the *Derry* case, in other cases it may be that, due to time constraints for responding to requests, arguments are formulated and argued by a public authority, based on its prior knowledge of the third party's concerns. The Commissioner accepts that these may be valid arguments and that where a public authority can provide evidence that genuinely originate from the third party or reflect the concerns of the third party involved, then they may be taken into account.
76. Nevertheless, if it is established that a third party does not itself have any arguments or concerns about prejudice to its commercial interests, then any speculative arguments put forward by a public authority should clearly not be taken into account.
77. Turning to the circumstances of this case, it is the Commissioner's understanding that the arguments advanced by DFID in relation to the potential prejudice to Mr Preston's commercial interests are based on DFID's speculation as to what may happen if this information was disclosed, rather than on concerns that originate

from Mr Preston. It is the Commissioner's understanding that following receipt of this request, DFID did not contact Mr Preston in order to establish if he had any concerns with regard to disclosure affecting his commercial interests. Moreover, as the Commissioner has established above in paragraph 36, the ITT documents specifically asked tenderers to highlight any information contained in their submissions that they would not wish to be disclosed under the Act. Having reviewed the tender documents submitted by Mr Preston, the Commissioner has established that Mr Preston did not highlight to DFID any sections of his tender documentation that if disclosed, he believed would result in prejudice to his commercial interests.

78. In the Commissioner's opinion the arguments that DFID has advanced which focus on prejudice occurring to Mr Preston's commercial interests are purely speculative ones and therefore the Commissioner has not taken these into account in his assessment as to whether the requested information is exempt on the basis of section 43(2).
79. On the basis of the above arguments, the Commissioner does not accept that disclosure of the tender documents identified in paragraph 61 would, or would be likely to prejudice the commercial interests of any party and therefore section 43(2) is not engaged.

### **The score cards**

80. The complainant requested 'the copy of the score sheets showing the points awarded to each tender received'. As the Commissioner has explained above, DFID holds the following information falling within the scope of his request:
- The score card awarded to each proposal when initially assessed by DFID.
  - The three separate score cards of the three interview panel members.
81. These score cards include the marks awarded to each criteria which the tender and interview were assessed against.
82. DFID holds the relevant scores for the complainant's tender and subsequent interview, as well as Mr Preston's tender and subsequent interview.
83. In the Commissioner's opinion the score cards constitute the personal data of the two individual's concerned, i.e. the complainant and Mr Preston. The Commissioner's guidance on personal data referenced above, explains that if data is used, or is to be used, to inform or influence actions or decisions affecting an identifiable individual then that data will be personal data (see point 5.1 on page 9).
84. It is clear that the scores contained on the various score cards were used by DFID to determine which of the individual's tender proposals – the complainant's or Mr Preston's – should be awarded this contract. Both individual's are identifiable from the score cards because their names are on the top of the score card.



85. With regard to disclosure of the complainant's score cards, as this information is his personal data as defined by the DPA, this information is exempt from disclosure under the Act by virtue of section 40(1). This exemption states that:

'Any information to which a request for information relates is exempt information it constitutes personal data of which the applicant is the data subject'.
86. Therefore, the correct regime under which the complainant may be able to access this information is under the DPA rather than the Act.
87. With regard to disclosure of Mr Preston's score cards under the Act, the Commissioner has considered whether this information is exempt under section 40(2). In doing so he has followed the test set out above: i.e. whether disclosure is fair and lawful and if so, whether a condition in schedule 2 of the DPA can be met.
88. As DFID has not in fact claimed that the score cards are personal data, it has not provided the Commissioner with any explanation as to whether Mr Preston (or indeed any other individual who may have won the contract) would have expected the score cards used to assess their tender would be disclosed under the Act. Nor does the ITT documentation prove instructive on this point – it simply outlines to tenderers what may happen to the tender documents that they submit to DFID but gives no indication as to what may happen to DFID's internal considerations of the tenders.
89. The Commissioner is conscious of DFID's decision following the European Court of Justice ruling on the Alcatel Case to disclose the following when issuing notification of an award decision: the score awarded to the tenderer against those criteria; and the name of the winning tenderer, when issuing notification of an award decision. However, as DFID only started publishing this type of information in August 2005 which was a number of months following completion of the tendering process for this contract it is clear that Mr Preston's expectations could not have been shaped by DFID's decision to follow the Alcatel Case.
90. There is therefore an element of speculation in the Commissioner's determination as to what Mr Preston's expectations would have been with regard to disclosure of the various the score cards which follows:
91. The Commissioner notes that under previous tendering processes i.e. those which pre-dated the process under which Mr Preston won this contract, DFID did not disclose the score cards of winning tenderers. Consequently, in the Commissioner's opinion it would have been reasonable for Mr Preston to assume that the score cards used to assess his tender would also not be disclosed.
92. Furthermore, the Commissioner has considered what level of information those who applied for a permanent job vacancy with a public authority would expect to happen to the information generated by the public authority when considering their application. In the Commissioner's opinion and experience, individuals who apply for posts with public authorities, even those who apply for senior posts with

a level of remuneration equivalent to that awarded to Mr Preston for this contract, would not expect that the public authority would disclose the detailed score cards recording the marks awarded to their application, be it their application form (or CV) or the interview process to be disclose under the Act. In the Commissioner's opinion, if permanent employees of public authorities would have a legitimate expectation that such information would not be disclosed under the Act, then it would be incongruous for such information to be disclosed about individual's who are entering into short term contracts, such as that which is the focus of this request.

93. On the basis of DFID's previous policy of not disclosing the score cards of winning tenders, and the expectations that employees of public authorities would have regarding disclosure of such information, the Commissioner is satisfied that Mr Preston would have reasonably expected that score cards DFID holds in relation to his tender would not be disclosed.
94. The Commissioner is therefore satisfied that disclosure of the score cards DFID holds in relation to Mr Preston's tender would be unfair and is therefore exempt from disclosure on the basis of section 40(2).

### **Procedural matters**

95. The complainant submitted his request on 21 April 2005 and DFID responded to this request on 24 May 2005, just outside of the 20 working day time period in which public authorities are required by the Act to respond to requests.
96. By failing to respond to this request within 20 working days the Commissioner has therefore concluded that DFID breached section 10(1) of the Act and also section 17(1) by failing to issue the complainant with a refusal notice within 20 working days.
97. By failing to specify in the refusal notice the sub-sections of the exemptions upon which it was relying (e.g. the refusal notice simply stated section 43 rather than section 43(2)) DFID breached section 17(1)(b).
98. Finally, by failing to provide the complainant with the information that the Commissioner has concluded is not exempt from disclosure, DFID also breached section 1(1)(b) of the Act.

### **The Decision**

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99. The Commissioner has decided that the following elements of the request were not dealt with in accordance with the Act:
  - The information listed at paragraph 61 is not exempt from disclosure on the basis of either section 40 or section 43.

- DFID also breached the following procedural sections of the Act in dealing with this request: 1(1)(b), 10(1), 17(1) and 17(1)(b).

100. However, the Commissioner has also decided that:

- The remainder of the information contained within Mr Preston's tender document is exempt from disclosure on the basis of section 40(2) as are the score cards which detail the marks awarded to Mr Preston's tender.
- The Commissioner has also decided that the score cards recording the marks awarded to the complainant's tender are exempt from disclosure on the basis of section 40(1) of the Act.

### Steps Required

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101. The Commissioner requires DFID to take the following steps to ensure compliance with the Act:

To disclose to the complainant the information contained in the following sections of Mr Preston's tender:

- The executive summary (i.e. Part A);<sup>4</sup>
- The technical response (i.e. section 2 of Part B);
- The pricing information contained on the completed pro-forma forms 1, 2 and 3 (i.e. section 2 of Part C).

102. DFID must take the steps required by this notice within 35 calendar days of the date of this notice.

### Failure to comply

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103. 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.

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<sup>4</sup> With the last sentence of the third substantive paragraph redacted. (See footnote 3).

## Right of Appeal

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104. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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

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

**Dated the 27<sup>th</sup> day of November 2008**

**Signed .....**

**David Smith  
Deputy Commissioner**

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

## Legal Annex

### 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(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

#### Section 17(1) provides that -

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

(a) states that fact,

(b) specifies the exemption in question, and

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

#### Section 17(2) states –

“Where–

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

(i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3)

or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

**Section 17(3)** provides that -

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

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

**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 40(3)** provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of

the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

**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).”

## **Data Protection Act 1998**

### **Part I**

1) In this Act, unless the context otherwise requires—

“personal data” means data which relate to a living individual who can be identified—

(a)

from those data, or

(b)

from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

2) Sensitive personal data

In this Act “sensitive personal data” means personal data consisting of information as to—

(a) the racial or ethnic origin of the data subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the [1992 c. 52.] Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

## Schedule 1

The first principle states 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.

## 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
  - (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.

## Schedule 3

Conditions relevant for purposes of the first principle: processing of sensitive personal data



1. The data subject has given his explicit consent to the processing of the personal data.

2.

(1) The processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with employment.

(2) The Secretary of State may by order—

(a) exclude the application of sub-paragraph (1) in such cases as may be specified, or

(b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

3. The processing is necessary—

(a) in order to protect the vital interests of the data subject or another person, in a case where—

(i) consent cannot be given by or on behalf of the data subject, or

(ii) the data controller cannot reasonably be expected to obtain the consent of the data subject, or

(b) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld.

4 The processing—

(a) is carried out in the course of its legitimate activities by any body or association which—

(i) is not established or conducted for profit, and

(ii) exists for political, philosophical, religious or trade-union purposes,

(b) is carried out with appropriate safeguards for the rights and freedoms of data subjects,

(c) relates only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes, and

(d) does not involve disclosure of the personal data to a third party without the consent of the data subject.

5. The information contained in the personal data has been made public as a result of steps deliberately taken by the data subject.

6. The processing—

(a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),

(b) is necessary for the purpose of obtaining legal advice, or

(c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

7.

- (1) The processing is necessary—
  - (a) for the administration of justice,
  - (b) for the exercise of any functions conferred on any person by or under an enactment, or
  - (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

- (2) The Secretary of State may by order—
  - (a) exclude the application of sub-paragraph (1) in such cases as may be specified, or
  - (b) provide that, in such cases as may be specified, the condition in sub-paragraph (1) is not to be regarded as satisfied unless such further conditions as may be specified in the order are also satisfied.

**8.**

- (1) The processing is necessary for medical purposes and is undertaken by—
  - (a) a health professional, or
  - (b) a person who in the circumstances owes a duty of confidentiality which is equivalent to that which would arise if that person were a health professional.
- (2) In this paragraph “medical purposes” includes the purposes of preventative medicine, medical diagnosis, medical research, the provision of care and treatment and the management of healthcare services.

**9.**

- (1) The processing—
  - (a) is of sensitive personal data consisting of information as to racial or ethnic origin,
  - (b) is necessary for the purpose of identifying or keeping under review the existence or absence of equality of opportunity or treatment between persons of different racial or ethnic origins, with a view to enabling such equality to be promoted or maintained, and
  - (c) is carried out with appropriate safeguards for the rights and freedoms of data subjects.
- (2) The Secretary of State may by order specify circumstances in which processing falling within sub-paragraph (1)(a) and (b) is, or is not, to be taken for the purposes of sub-paragraph (1)(c) to be carried out with appropriate safeguards for the rights and freedoms of data subjects.

**10.** The personal data are processed in circumstances specified in an order made by the Secretary of State for the purposes of this paragraph.