

Freedom of Information Act 2000 (Section 50)

Decision Notice

21 June 2011

Public Authority: Department for Communities and Local Government
Address: 2/H1 Eland House
Bressenden Place
London
SW1E 5DU

Summary

The complainant requested the Department for Communities and Local Government ('DCLG') to release information relating to two contracts it had entered into in 2006 and 2008 with Landmark Information Group ('Landmark'). The DCLG released some information but refused to release certain sections of the contracts themselves under sections 40(2) and 43(2) of the Act. As the complainant remained dissatisfied, he approached the Commissioner. The Commissioner has considered the application of sections 40(2) and 43(2) of the Act and he has concluded that the remaining information is exempt from disclosure by virtue of these exemptions. He therefore requires no action to be taken.

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.

Background

2. The DCLG entered into two service concession agreements with Landmark on 19 December 2006 and 5 March 2008; the first agreement is referred to as the 'Domestic Contract' and the second agreement is referred to as the "Non Domestic Contract". The agreements relate to the establishment and operation of Registers for Domestic and Non Domestic Energy Certificates.

3. The driver for the Domestic Contract was the coming into force in June 2007 of Part 5 of the Housing Act 2004 which required Home Information Packs to be provided by sellers of properties in the domestic market, and for those packs to include an Energy Performance Certificate and Home Condition Report; and provision was made for certification schemes to be established. Such Reports and certification schemes were to be kept on a public register and the DCLG ultimately appointed Landmark to provide an IT infrastructure to support implementation of the scheme and related registers.
4. In order to aid and monitor implementation of the Energy Performance of Buildings Directive 2002/19/EC through the Energy Performance of Buildings Regulations SI 2007/991 and to establish benchmarks, an automated register was required by the government in order to provide a way of effectively managing 'Energy Documents' (Certificates and so forth), and associated Energy Model Data. This was the driver for the Non Domestic Contract, which was also let to Landmark.

The Request

5. The complainant contacted the DCLG on 30 November 2009 to request the following information:

"In around 2006 the DCLG entered into a contract with Landmark Information Group for maintenance of the database of Energy Performance Certificates, Display Energy Certificates and Energy Assessors. [1] [2].

Please may I have:

- copies of all contracts and service agreements between DCLG and Landmark Information Group relating to these databases;
- detailed costs to the government for these contracts;
- the revenue raised by Landmark from fees made possible by this government concession.

I am particularly seeking details of any added costs for serving this contract caused by changes due to SI1900 (2009). [3]

[1] <http://www.theyworkforyou.com/wrans/?id=...>

[2] <http://www.theyworkforyou.com/wrans/?id=...>

[3] <http://www.uk-legislation.hmsso.gov.uk/si...>"

6. The DCLG responded on 31 December 2009. It provided the complainant with the necessary information to address bullet points 2 and 3 (in paragraph 5 above) and confirmed that there had been no added costs for serving the contract caused by the changes due to SI1900 (2009). Concerning the remaining element of the contract, bullet point 1 (in paragraph 5 above), the DCLG confirmed that it wished to apply section 43 of the Act but required to extend the time limit for its full response by 20 working days so that it could consider the public interest test.
7. The DCLG responded further on 26 January 2010. It confirmed that it had refused the remaining element of the complainant's request (bullet point 1) under section 43(2) of the Act and explained in more detail why.
5. The complainant requested an internal review on 26 January 2010. In his request for internal review the complainant explained why, in his view, the information should be disclosed.
8. The DCLG wrote to the complainant on 19 February 2010. It advised the complainant that it had reconsidered his request and decided that certain sections of the contracts in question could now be released. It confirmed that redacted versions would be provided in due course and that the information redacted had been withheld under sections 40(2) and 43(2) of the Act.
9. The redacted versions of the contracts were released to the complainant on 7 April 2010.

The Investigation

Scope of the case

10. On 27 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the DCLG had acted appropriately by withholding the remaining information (the redacted parts of the contracts released on 7 April 2010) under sections 40(2) and 43(2) of the Act.
11. For clarity, this Notice will only address the first element of the complainant's request, which was for:

"...copies of all contracts and service agreements between DCLG and Landmark Information Group relating to these databases."

The remaining elements of the request were resolved with the DCLG prior to the complainant referring the matter to the Commissioner.

12. During the Commissioner's investigation the DCLG decided to release further information to the complainant. This Notice will therefore focus on the remaining withheld information, which consists of the following:
 - 1) The IT software and development and management elements of the IT system used by Landmark (Schedule 17 of the Domestic and Non Domestic Contract). During the Commissioner's investigation the DCLG asserted that it wished to rely on section 43(1) of the Act for the non disclosure of this information in the first instance and then section 43(2) of the Act in the alternative.
 - 2) Landmark's cost model outlined in the Domestic and Non Domestic contracts (Schedule 6 Annex 1, parts of Schedule 16 and its Annex, Annex 1 Schedule 6 and Schedule 19 Annex 1). This information has been withheld under section 43(2) of the Act.
 - 3) With the exception of the Managing Director (information already disclosed), the names of six key personnel referred to in the Domestic Contract (Schedule 11), to which the DCLG has applied section 40(2) of the Act. The DCLG has also applied section 40(2) to the salaries of these key personnel and the salary of the Managing Director (Schedule 6 Annex 1). The withheld information (Schedule 6, Annex 1) also contains the salaries of twelve other positions in Landmark. As these salaries cannot be linked to a particular employee, they do not constitute personal data. This salary information will therefore be considered with item 2) of this paragraph, to which the DCLG has applied section 43(2) of the Act.

Chronology

13. The Commissioner wrote to the DCLG on 14 June 2010 to inform it that he had received a complaint from the complainant and to request a copy of the withheld information.
14. The Commissioner wrote to the DCLG again on 4 October 2010 to request a copy of the withheld information and further more detailed arguments to support its application of section 40(2), 43(1) and 43(2) of the Act.
15. The DCLG responded on 28 October 2010. It provided full copies of the contracts in question and redacted versions to demonstrate exactly what information had been withheld. It also supplied copies of

correspondence with Landmark to illustrate Landmark's objections to the disclosure of the remaining information and why it felt sections 40(2), 43(1) and 43(2) of the Act applied.

16. The Commissioner discussed the complaint and the information provided on 28 October 2010 in more detail with the DCLG over the telephone on 2 and 17 November 2010.
17. The Commissioner wrote to the DCLG on 4 January 2011 to request some further information.
18. The DCLG responded in full by 10 February 2011. It confirmed that it had reviewed the complaint in more detail and was now willing to release further information to the complainant. It advised that it remained of the view that some information remained exempt from disclosure under the exemptions previously cited (please refer to paragraph 12 above) and explained in more detail why.
19. The Commissioner wrote to the DCLG on 16 February 2011 to request fresh copies of the remaining withheld information and for the DCLG to contact the complainant directly to release the additional information. He also asked the DCLG to clarify one final point relating to its application of section 40(2) of the Act.
20. The DCLG responded on 1 March 2011. It provided fresh copies of the remaining withheld information and the further clarification the Commissioner requested in respect of its application of section 40(2) of the Act.
21. The DCLG confirmed on 17 March 2011 that it had now contacted the complainant to release the additional information to him.

Analysis

Exemptions

22. As stated previously the DCLG wishes to rely on sections 40(2), 43(1) and 43(2) of the Act for the non disclosure of the remaining withheld information. The Commissioner will now address each exemption in turn.

Section 40 – personal data

23. As explained in item 3 of paragraph 12 above, section 40(2) has been applied to the names of six key personnel and their respective salaries. It has also been applied to the salary of the Managing Director (his name was disclosed during the Commissioner's investigation).
24. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998.
25. In this case, the DCLG argued that the requested information is the personal data of seven employees of Landmark and that disclosure under the Act would breach the first data protection principle of the DPA. It explained that it felt the disclosure of the names of employees under Managing Director level would be unfair, as would the disclosure of an employee's salary at any level.
26. Firstly, the Commissioner must consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

“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.”
27. It is the Commissioner's view that an individual's name is quite obviously personal data. Salary information also constitutes personal data, as it is information which directly relates to that individual.
28. As the Commissioner is satisfied that the withheld information is personal data he now needs to consider whether the disclosure of this data would breach any of the data protection principles outlined in the DPA. As stated above, the DCLG has claimed that disclosure would breach the first data protection principle.
28. The first data protection 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."

29. The Commissioner will first consider the disclosure of the remaining six names of key personnel referred to in the withheld information. He will then consider the disclosure of these individuals' salaries and the salary of the Managing Director.

The remaining six names of key personnel

30. It is the Commissioner's view that as the key personnel in this case are private sector employees they would have less expectation that their personal data will be released into the public domain via a request of this nature when compared to public sector employees. Public sector employees should be aware of the Act and its implications in terms of the work they carry out. In particular public sector employees in senior roles should have an expectation that certain information relating to them and the decisions they make when working in an official capacity may be released into the public domain. Private sector employees may not, however, have the same expectation and the Commissioner considers that it is reasonable to assume that private sector employees would expect their personal data to remain private and confidential.
31. In these circumstances, the Commissioner considers it would be unfair to require the release of the names of these six individuals into the public domain. He considers disclosure would be in breach of the first data protection principle outlined in the DPA and therefore that section 40(2) of the Act applies.

Salary information

32. Section 40(2) of the Act has been applied to the salaries of seven key personnel referred to in the withheld information; six employees of Landmark whose names have also been withheld under this exemption (addressed above) and the Managing Director of Landmark. The Commissioner's guidance on section 40 is a useful starting point for the consideration of disclosure of personal data of this nature. The guidance draws a distinction between information which relates to a third party's public life and information which relates to a third party's private life. The guidance makes particular reference to personal finances and states that:

'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...'

33. It is the Commissioner's view that an individual's salary is information relating to one's private life and, if disclosed, releases information about their personal finances. The Commissioner considers such disclosure is an unwarranted intrusion into the private life of that individual and would cause that person unwarranted distress or unjustified damage.
34. The requested information here is the exact salary of key personnel involved in this contract from the Managing Director downwards. In other cases he has considered, the Commissioner has drawn a distinction between salary bands and exact salaries (case references FS50092819 and FS50163927). In these cases the Commissioner reached the conclusion that exact salaries would lead to a greater infringement into the privacy of those individuals concerned and would reveal specific information about their financial situation which would be unfair, even at Managing Director level.
35. For the reasons explained above the Commissioner considers that it would be unfair to release the exact salaries of key personnel involved in the contract. He considers disclosure would be in breach of the first data protection principle outlined in the DPA and therefore that section 40(2) of the Act applies.

Section 43 – commercial interests

36. As detailed in paragraph 12 above, the DCLG has applied section 43(1) of the Act to the IT software and development and management elements of the IT system used by Landmark. In the alternative, the DCLG wishes to rely on section 43(2) of the Act.
37. The DCLG has also applied section 43(2) of the Act to other financial information in the Domestic and Non Domestic Contracts (a more detailed explanation of what this financial information is can be found at paragraph 64).
38. The Commissioner will first consider whether this exemption is engaged for each element of the remaining information. If he finds that it is, he will then go on to consider the public interest test.

IT software (item 1 of paragraph 12)

Section 43(1)

39. Section 43(1) of the Act provides that information is exempt information if it constitutes a trade secret. There is no statutory definition of a "trade secret" but the Commissioner will follow the Information Tribunal's preferred view of the meaning of trade secret as outlined in the case of *Department of Health v Information Commissioner EA/200/0018* at paragraph 50. The Tribunal referred to the *Lansing Linde V Kerr [1991] WLR 251, Staughton LJ* Court of Appeal and the following interpretation:

"...Mr Poulton suggested that a trade secret is information, which, if disclosed to a Competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication."

40. The Commissioner's Awareness Guidance identified the following questions:

- Is the information used for the purposes of a trade?
- Would the release of information cause harm?
- Is the information already known?
- How easy would it be for the Competitor to discover or reproduce the information themselves?

41. The DCLG asserted that this information amounts to a trade secret and is exempt from disclosure for the following reasons:

- a) Each tenderer for the contracts was asked to design their own bespoke solution to meet DCLG's requirements in a cost-effective manner. As such, the software and hardware used in each solution and how these are configured to meet those requirements was unique and confidential to each tenderer.
- b) The way that Landmark arrived at this solution is that company's own intellectual property in the development of which the company has invested considerable time, money and resource.
- c) An important reservation expressed by Landmark regarding disclosure of the software and hardware solution is that if disclosed, a competitor or any skilled computer hacker, would be provided with invaluable knowledge giving them a head start in breaking the system. Disclosure of the software used would therefore jeopardise the security of the system.

- d) One of DCLG's most stringent requirements was for the solution to provide a 'zero data loss' capability. Landmark's solution is a unique and very cost-effective way of providing a combination of specialist hardware and software, network and physical site configuration development. None of Landmark's competitors offered the same solution. Its disclosure would not only potentially bring about economic harm to the company, it would also potentially devalue one of the unique features that enabled it to win the contract in the first place and jeopardise the security of the register in a manner that would threaten the viability of the entire register.
 - e) Directive 2002/19/EC (implemented in the UK as SI 2007/991) applies throughout Europe and other member states are highly likely to seek to establish methodology and invite tender bids for similar solutions, to which Landmark fully intends to respond. In these circumstances, details of Landmark's solution, if disclosed, could be used by a competitor as part of their tender response. This would clearly prejudice Landmark's own competitive edge.
 - f) To the extent that DCLG has intellectual property rights in the methodology, it also stands to lose value in those rights if the reverse-engineering possible from disclosure were to occur.
42. The DCLG stated that Landmark has made it clear that it regards this information to be highly sensitive and confidential. Landmark asserted that it has a low turnover of staff and all employees are bound by strict confidentiality provisions relating to any technical solutions developed for customers. It therefore argued for the above reasons (a to e of paragraph 41) that it considers the requested information falls within the definition of a trade secret and Commissioner's guidance outlined in paragraph 40.
43. It is the Commissioner's view that a trade secret implies that the information is more restricted than information that is commercially sensitive. It involves something technical, unique and achieved with a degree of difficult and investment. The information which the DCLG and Landmark are claiming is a trade secret is a specific selection of IT software and hardware chosen by Landmark to meet the requirements of the contracts. This package is clearly used for the purposes of a trade. Although no consideration has been paid by DCLG to Landmark for the provision of the services specified in the agreements, it is the IT package put together to provide these services from which Landmark will generate revenue. The Commissioner is therefore satisfied that the requested information satisfies the first bullet point outlined in paragraph 40 above.
44. However, the Commissioner is not convinced from the arguments presented by the DCLG and Landmark that the information has the

highest level of secrecy associated with it that a trade secret would appear to merit. He is therefore of the view that the requested information falls short of meeting the remaining bullet points outlined in paragraph 40 for the following reasons.

45. The IT specification is apparent to those using it i.e. Landmark's employees and possibly specific members of staff at the DCLG. Although Landmark states that employees are bound to strict confidentiality clauses in their contracts, it is the Commissioner's view that the IT specification is quite freely shared between those employees of Landmark and DCLG that are involved in the contracts. He also suspects that it would be revealed to any new members of staff that may be required should existing Landmark employees involved in the contracts were to leave the company.
46. It is also the Commissioner's view that the requested information is a specific selection of IT software and hardware which, individually, are universally recognised and available to other companies in the market place, including Landmark's competitors. Consequently, the Commissioner considers that it would not be difficult for a competitor to reproduce an element of this specification and indeed use it in future contracts or tenders. The Commissioner considers that it is possible that some of Landmark's competitors will already be using some of the individually named IT software and hardware themselves in the work that they do.
47. Although Landmark and DCLG has argued that it has intellectual property rights in the methodology used to design this specific IT package, neither has provided evidence to the Commissioner that such protection or patent is in existence. It is the Commissioner's view that the manufacturer of each individual software and hardware package will hold the copyrights over that design. He is not convinced that a selection of existing IT packages chosen to meet specific requirements would, itself, require or indeed obtain such protection.
48. For the reasons explained above, the Commissioner is not satisfied, on the basis of the submissions he has received from the DCLG and Landmark, that the requested information is exempt from disclosure under section 43(1) of the Act.
49. As stated in paragraph 12 above, in the alternative, the DCLG wishes to rely on section 43(2) of the Act for the non disclosure of this information. The Commissioner will now go on to consider whether this subsection of the exemption is engaged.

Section 43(2)

50. For the Commissioner to agree that section 43(2) of the Act is engaged, DCLG must first demonstrate that prejudice would or would be likely to occur to the commercial interests of DCLG and/or Landmark. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council (EA/2005/0030)* ('Hogan') the Tribunal stated that:

"The application of the 'prejudice test' should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of 'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

51. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

52. As stated above in paragraph 50, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The Tribunal stated that:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

53. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.

54. The DCLG has not explicitly stated which limb of the prejudice test it considers applies. The Commissioner will therefore proceed to consider the lesser threshold of "would be likely to". If this threshold is not met, it follows that the higher threshold of "would" does not also apply.
55. The DCLG presented the same arguments in support of its application of section 43(2) to those outlined in paragraph 41 above. The Commissioner will therefore not repeat them here.
56. Although the Commissioner does not agree that the requested information falls within the definition of a trade secret, he is satisfied that disclosure of the requested information would be likely to prejudice the commercial interests of Landmark. He will now explain why.
57. The Commissioner accepts that when these contracts were originally put out to tender, respondents were asked to design their own solution to meet the DCLG's requirements in a cost effective manner. The Commissioner understands that one specific requirement was for the solution to provide a 'zero data loss' capability. The DCLG confirmed that Landmark was the only respondent to present a cost effective solution to meet this requirement; none of its competitors offered such a solution. The Commissioner accepts that this information is likely to be of particular interest to Landmark's competitors and, if disclosed, could be used by such competitors in future tendering exercises. The Commissioner notes that this information made Landmark unique when compared to its competitors during the original tender with DCLG and he considers it would be prejudicial to Landmark if this expertise and knowledge was disseminated to the public and could then be openly used by its competitors to the disadvantage of Landmark.
58. The DCLG confirmed that there is a developing European and international market in this area and that it is highly likely that other states bound by the Directive will be seeking to establish similar methodology and invite tenders for similar IT solutions in the near future. The Commissioner accepts that if Landmark's unique solution was released into the public domain at this stage, this would be likely to place Landmark at a commercial disadvantage when these potential future contracts come up for tender. Disclosing this information at this stage prior to such likely tenders, would enable Landmark's competitors to gather valuable information about the solution which won Landmark the DCLG contracts which they could then use to their own advantage. This would be likely to damage Landmark's competitive edge and would be likely to hinder its ability to win these potential contracts.

59. The Commissioner also agrees with the DCLG's assertion that disclosure of the specific software and hardware solution would be likely to jeopardise the security of the current UK register in operation, which in turn would be likely to threaten the viability of the entire register. The Commissioner accepts that computer hacking is a widespread problem. Disclosing the specific details of the IT software and hardware would be likely to release invaluable knowledge into the public domain which could then be used by a competitor or skilled computer hacker to break into the system.
60. The Commissioner notes that the Information Tribunal reached a similar view in the case of the *Department of Health v Information Commissioner EA/2008/0018*. In this case the Tribunal considered various elements of a contract between the Department of Health and Consulting Methods Ltd and the application of sections 41, 44 and 43 of the Act. Concerning the application of section 43(2), the Tribunal provided a table at paragraph 90 of its decision which outlined the sections of the contract it considered were and were not exempt by virtue of this exemption. Referring to Schedule 10 in this table, the Tribunal decided that certain parts of this Schedule contained security standards and should not be disclosed as they:

"...might inform those wishing to sabotage or hack the system."

61. For the reasons explained above, the Commissioner has decided that there is sufficient evidence available to suggest that disclosure of this information would be likely to prejudice the commercial interests of Landmark. He is therefore satisfied that section 43(2) of the Act is engaged for this information.

Landmark's financial model

62. For clarity, the DCLG has relied on section 43(2) of the Act for the non disclosure of other financial information within the two contracts which constitutes Landmark's cost model.
63. The Commissioner understands that Landmark's cost model contains the following information:
- Landmark's costs year by year of the operation, the cash flow over the life of the contracts and internal rates of return.
 - Landmark's day rates and salaries for a further twelve positions in the company.
 - Termination payments that would be payable by the DCLG to Landmark if the contracts were cancelled at certain intervals.

- Landmark's supplier and subcontractor costs (for example, the cost of software licences and support arrangements).
64. The DCLG asserted that disclosure of this information would be likely to prejudice the commercial interests of Landmark for the following reasons:
- a) The financial model and IT solution when read together set out how to price the solution to deliver the services provided for in the contracts, the component parts of the solution, how the component parts interact and what Landmark is paying its third party suppliers. If a competitor obtained this information they could index or adjust the prices and use this information to undercut Landmark in future tenders.
 - b) Disclosure of Landmark's financial model would enable a competitor to calculate Landmark's internal rate of return. It considers this information is commercially sensitive.
 - c) Disclosure would release into the public domain the discounts Landmark negotiated with its suppliers and subcontractors and such discounts were agreed under confidential terms. The DCLG referred to the Office of Government Commerce (OGC) guidance which suggests that information relating to a contractor's relations and negotiations with its suppliers and subcontractors should not be disclosed. It explained that it felt disclosure of this information would be likely to enable a competitor to undercut Landmark in future tenders and result in Landmark suffering a commercial disadvantage in the market place.
 - d) It is likely that very similar contracts will be coming up for tender in the near future (please refer to paragraph 63). DCLG argued that Landmark intends to use this financial model when competing for these contracts. If disclosure were ordered at this stage, the requested information could be used by a competitor to undercut Landmark which would be likely to place Landmark at a commercial disadvantage in the market place.
 - e) Landmark uses the same financial model in other public sector contracts. The requested information is therefore very much current. The model includes the actual salary of twelve positions within the company and the number of days an employee in each position would be required under the contracts. Landmark uses this information to create a day rate and these rates form part of its tenders and cost models for other contracts it bids on. DCLG argued that competitors could apply indexation and come up with a relatively accurate view of Landmark's current day rates and pricing. If this information was disclosed, Landmark's competitors would gain knowledge of its day rates and cost base and would be likely to undercut it in other sectors of the market. This would in turn then

- be likely to place Landmark at an unfair advantage in the market place.
- f) The financial model contains headline costs for each are of Landmark's operating expenses and then provides a breakdown of how such headline costs are constituted. The DCLG again argued that disclosure of this information could be used by a competitor in future contracts.
65. As stated in bullet point c) of paragraph 64, the DCLG considered the OGC guidance in great detail when considering what information should and should not be released to the complainant. It considers the decision not to disclose the remaining information is in line with this guidance and other decisions reached by the Commissioner and the Information Tribunal.
66. In the Information Tribunal hearing of the *Department of Health v Information Commissioner EA/2008/0018* the Tribunal referred to the OGC guidance and stated that it is:
- "a useful approach to dealing with an information request".
- And that it would expect:
- "...the DOH in any future case to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out".
- The Tribunal therefore indicated that it considered this guidance is a useful starting point for all public authorities considering the disclosure of contractual information.
67. At paragraph 90 of its decision, the Tribunal provided a table of the information it considered was exempt from disclosure. It consider similar information to that being considered here and reached the decision that "pricing figures and structure" should be withheld as it could be indexed and provide competitors with information to undercut price and undermine the contractor's approach.
68. While the Commissioner agrees with this approach and considers the OGC guidance is a useful starting point for public authorities when considering disclosure of contractual information, each case should still be considered on a case by case basis. He will therefore now go on to consider the detailed arguments presented by the DCLG as outlined in paragraph 63 above.

69. The Commissioner accepts that there is a developing market in this area and that there are likely to be future contracts coming up for tender in the near future which Landmark intends to bid for. He acknowledges that Landmark uses this same model in other contracts and would be likely to use this financial information in the potential future bids it envisages will be coming up in the near future. The Commissioner notes that the requested information is detailed in that it reveals Landmark's costing structure year on year, internal rates of return, salaries of key personnel, its day rates and discounts it has negotiated with its suppliers. If this information were disclosed at this stage, it would be likely to be of particular interest to a competitor. It would provide valuable information to a competitor on how Landmark secured its bid with the DCLG which could then be used by them to undercut Landmark in future business opportunities. The Commissioner accepts that disclosure would therefore be likely to prejudice the commercial interests of Landmark. It would be likely to hinder Landmark's ability to bid competitively for these potential future contracts and place it at an unfair disadvantage in the market place.
70. The Commissioner accepts that these potential future contracts are likely to be very similar. Disclosure in this case would therefore be likely to enable a competitor to construct a reasonably accurate picture of any future bid Landmark may offer by applying indexation to its detailed cost model. He therefore agrees that disclosure would be likely to prejudice Landmark's ability to secure these future contracts and would release valuable information into the public domain which could be used by Landmark's competitors to their advantage.
71. The Commissioner also notes from the submissions he has received from the DCLG that disclosure would also reveal information about Landmark's relationships with its suppliers and contractors, including the discounts it negotiated. It is the Commissioner's view that disclosure of this information would be likely to damage the working relationships Landmark has with its current suppliers and subcontractors. This could then in turn hinder Landmark's ability to secure similar discounts for future contracts possibly preventing it from being in a position to offer similar costs and terms to future customers.
72. The requested information also contains the termination payments agreed between Landmark and DCLG, which the DCLG would pay Landmark if it cancelled the contracts early at certain intervals. Given the circumstances at the time of the request; the fact that the cost model is still very much current, the growing market identified by both the DCLG and Landmark and likelihood of similar contracts coming up for tender in the near future, it is the Commissioner's view that

disclosure of this information would be likely to be prejudicial to the commercial interests of Landmark. Disclosure would reveal information relating to the financial risk Landmark is exposed to under these contracts and the risks it was willing to accept. If disclosure were ordered at this stage, at a time when it is likely that similar contracts will be coming up for tender, it could hinder Landmark's ability to negotiate similar or more favourable terms with future customers. It would reveal Landmark's likely position prior to such tenders which would then create an unlevel playing field and distort true competition.

73. For the reasons explained above, the Commissioner has decided that there is sufficient evidence available to suggest that disclosure of this information would be likely to prejudice the commercial interests of Landmark. He is therefore satisfied that section 43(2) of the Act is engaged for this information.

Public interest test

Public interest arguments in favour of disclosing the requested information

74. The DCLG stated that it acknowledged that there is a well established public interest in placing information about contracts entered into by public bodies in the public domain.
75. It also stated that it was aware that there was an overall public interest in the general transparency and accountability of public bodies.

Public interest arguments in favour of maintaining the exemption

76. However, the DCLG confirmed that it considers that there are overriding public interest factors in favour of maintaining the exemption. It stated that disclosure would place Landmark at a disadvantage in future procurements, as competitors could use the details of this cost model to undercut Landmark in future bids. Whilst it confirmed that it could be argued that this could benefit the public sector by driving down price, the DCLG felt this was only a short term benefit. Long term, it considered disclosure would disadvantage the public sector, as disclosure in this case would reveal commercially sensitive information about a private sector company which would be likely to prejudice its ability to compete in the market place. This would in turn disincentivise businesses from contracting with the public sector and investing considerable amounts of time and money into devising innovative solutions that may be required in the future.
77. The DCLG argued that if Landmark's solution is no longer capable of "distinctiveness" due to the disclosure or risk of disclosure of its

technical solutions and financial structure, then this is likely to adversely affect Landmark's success rate in the re-let of the DCLG contracts and other contracts which are likely to come up in the near future. This would in turn result in a less innovative and efficient technical solution having to be accepted at the re-tendering, which would not be in the public interest.

Balance of the public interest arguments

78. The Commissioner accepts that there is a public interest in releasing contractual information relating to agreements between public authorities and third parties into the public domain. In this case, the DCLG awarded the contracts to Landmark to provide services to enable it to fulfil the obligations placed on it by statute. The Commissioner agrees that information relating to these arrangements, for example, why the contracts were awarded to Landmark, what specific services were required and how these are going to be met by the third party selected should be disclosed to enable the public to scrutinise such decisions and to ensure the DCLG is meeting its obligations and that procurement processes are being conducted in an open and honest way. However, the Commissioner considers these public interest factors have already been met by the considerable amount of information which has already been released to the complainant. He notes that redacted versions of these contracts have been released, which appear to be in line with the suggestions made in the OGC guidance.
79. The Commissioner considers that it can be argued that there is some public interest in detailed cost models of this nature being disclosed, as this would enable competitors to undercut Landmark in an effort to win future contracts, which could then possibly lead to more effective solutions being presented. However, he notes that this would be at considerable prejudice to Landmark and it is not necessarily in the public interest to disadvantage contractors in this way. The Commissioner accepts that disclosure of this information would be likely to prejudice the commercial interests of Landmark for the reasons he has already explained. He therefore also accepts that disclosure could distort competition in future tendering exercises. The Commissioner considers there is considerable public interest in maintaining fair competition in contract procurement.
80. The Commissioner also agrees that some weight should be attached to the DCLG's argument that disclosure could lead to a possible reduction in the number and quality of companies being willing in future to share such information and to tender for public sector work. In this case, it is apparent that Landmark offered the DCLG a unique innovative solution

to its requirements, which no other company offered during the original tender process. Landmark therefore appears to have genuine concerns over the disclosure of this information and how such disclosure could affect it commercially in the future, particularly as it is likely that very similar contracts will be coming up for tender. The requested information is very much current. Landmark confirmed that this cost model is used in other contracts in operation and that it fully intends to use it in any tender exercise that may come up in the future. The Commissioner therefore accepts, in this case, that disclosure could possibly lead Landmark and offer companies in the same market to rethink its future strategy and to weigh up the benefits of disclosing this sort of information to public authorities in the future against the likely returns.

81. For the reasons explained above, the Commissioner has decided in this case that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption.

The Decision

82. The Commissioner's decision is that the DCLG dealt with the following aspects of the request for information in accordance with the Act:

- It acted appropriately by withholding the remaining information detailed in paragraph 12 above under sections 40(2) and 43(2) of the Act.

83. The Commissioner's decision is that the DCLG did not deal with the following aspects of the request for information in accordance with the Act:

- It breached section 17(2)(b) of the Act by failing to inform the complainant of its intention to extend the time limit for its full response for it to consider the public interest test within 20 workings days of the complainant's request.

Steps Required

84. The Commissioner requires no steps to be taken.

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

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

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

Dated the 21st day of June 2011

Signed

**Graham 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 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 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 40(4)

Provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 40(5)

Provides that –

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

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).”