

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

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

Summary

The complainant asked the National Police Improvement Agency (the “public authority”) to provide a copy of a contract. The public authority refused to disclose some of the contract using the exemptions under sections 31(1) and 43(2) of the Freedom of Information Act 2000 (the “Act”).

During the course of the investigation further information was disclosed to the complainant which resulted in him withdrawing his complaint in respect of everything other than the financial models. These continued to be withheld under section 43(2).

The Commissioner’s decision is that the exemption at section 43(2) is engaged and that the public interest in maintaining the exemption outweighs that in disclosure. The complaint is not upheld.

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. This request relates to the contract known as the MIDAS Contract (the "Contract"). MIDAS is an acronym for Mobile Identification at Scene. On the public authority's website the Contract is described as being used: *"to provide mobile identification devices and services to [Police] Forces nationally"*, with a start date of 23 February 2010 and end date of 30 June 2013¹. The Service was due to 'go live' in May 2011.

3. The public authority also has the following background information on its website²:

"Police officers across the country will soon be able to check an individual's identity at the roadside within two minutes, following the introduction of a new mobile fingerprinting device later this year.

The Agency has signed a contract with Cogent Systems ... to supply mobile fingerprint identification devices which will allow police officers to scan a person's fingerprints while on the beat and check them against the national fingerprint database for verification. This will enable faster identification of those whose details are verified without having to take up much of their time, and also quickly identify those who are known to the police. This will save the public's time, police officer's time and help increase the number of offenders brought to justice.

During the first year of roll-out, up to 3,000 new devices will be deployed to forces in England and Wales, helping to cut the number of trips police make back to the police station and giving them more time to spend on the frontline. For example, rather than arresting and detaining an individual to establish their identity, which can take up to several hours, it will take a couple of minutes".

4. The Office of Government Commerce (the "OGC") has produced guidelines³ which provide assistance when considering which parts of a contract can generally be disclosed under the Act and at what time.

¹ <http://www.npia.police.uk/en/14784.htm>

² <http://www.npia.police.uk/en/15405.htm>

³ http://www.ogc.gov.uk/documents/OGC_FOI_and_Civil_Procurement_guidance.pdf

The request

5. On 12 July 2010 the complainant made the following information request:

"I request a copy of the contract plus any appendices and indexes for the MIDAS system".

6. On 21 July 2010 the public authority responded. It provided much of the information but withheld some citing the exemptions in sections 31(1) (law enforcement) and 43(2) (commercial interests).
7. On 21 July 2010 the complainant requested an internal review. On 7 August 2010 the complainant asked the public authority to confirm it had received this request. Having had no response he chased an acknowledgement again on 20 August 2010.
8. On 2 September 2010 the public authority acknowledged the request for an internal review and apologised for the delay. Following further correspondence, on 24 September 2010 the public authority sent out its internal review. It advised that it was prepared to disclose further information and would do so within ten working days. This was provided on 11 October 2010.

The investigation

Scope of the case

9. On 28 October 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 the following points:
- the length of time taken to conduct the internal review;
 - the withholding of information.

Chronology

10. On 11 January 2011 the Commissioner wrote to the complainant to advise him that he was commencing his investigation. He asked him to confirm whether or not he was satisfied that any of the exemptions had been properly applied to the withheld information.

11. On 16 January 2011 the complainant responded. He advised as follows:

"I am content with the reasoning for all redactions in the Service Agreement Schedules 2.1 and 2.5, and in the Framework Agreement Schedules 2.1 and 2.5. I am also content with the redactions in Service Agreement Schedule 4.1 on page 31 and in the Framework Agreement Schedule 4.1 on pages 27 and 28 all relating to security. You may therefore remove 2.1 and 2.5 in both the Framework and Service Agreement from the scope of your inquiry and the 4 redactions relating to security in Schedules 4.1 of the Framework and Service Agreements".

12. On 19 January 2011 the Commissioner advised the public authority that he was removing these elements from the scope of his investigation. At the same time he also raised some queries.
13. Following further correspondence the public authority agreed to disclose the remainder of the contract except for a system architecture diagram and the financial models. The complainant accepted the withholding of the diagram but still required the Commissioner to make a decision on the financial models.
14. In light of this, the Commissioner asked the public authority whether it wished to submit any further arguments which were specific to the financial models only. A full response was provided on 23 March 2011 and the arguments are attached as a non-confidential annex.

Analysis

15. The withheld information is contained within six Financial Models. The Framework Agreement Schedule 7.4 contains one Financial Model and the Service Agreement Schedule 7.4 contains five. As explained above, this is the only information on which the Commissioner needs to make a decision.

Schedule 7.4 of the Framework Agreement

16. The wording of the main part of the Schedule has been provided. The withheld information is contained in an Appendix referenced as SD1. SD1 consists of 19 Financial Model worksheets.

Schedule 7.4 of the Services Agreement

17. The wording of the main part of the Schedule has been provided. The withheld information is contained in five Appendices referenced as SD2, 3, 4, 5 and 6. These consist of a total of 54 Financial Model worksheets.

Exemption

Section 43 – commercial interests

18. 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)”.

19. For the Commissioner to agree that section 43(2) of the Act is engaged, the public authority must first demonstrate that prejudice *would* or *would be likely to* occur to the commercial interests of itself and/or another party.

20. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council* [EA/2005/0030] 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”.

21. When considering the nature of the prejudice, the Tribunal stated in the above hearing 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”.

22. As stated by the Tribunal above, 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; this is the level of prejudice identified by the public authority.

23. *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".

24. If the prejudice test is satisfied and the exemption is engaged, then the public authority needs to apply the public interest test, weighing up the arguments for, and against, disclosure.
25. The public authority has advanced arguments about the Financial Models in the accompanying non-confidential annex to this Notice. They all focus on disclosure of the information being harmful because it would reveal internal costs to the Contractor, thereby putting it at a disadvantage to its competitors in the marketplace.
26. The public authority also confirmed to the complainant that it had approached the Contractor to determine its view regarding the impact of supplying the withheld information. In its response the Contractor claimed that it covered detailed competitive information that would provide their competitors with information which would assist them in future bids. It provided the following arguments to support non-disclosure of the withheld information:

"... the information details competitive information (rates, overhead, etc.) that would provide competitors [sic] with data that would harm us in future bids. As you are most likely aware, from time to time our competitors have priced bids at a price point that is near break even, or even a loss, anticipating that profits will be obtained through change orders, or other scope changes. Because our installations are unique in the industry, being based upon our proprietary Programmable Matching Accelerators, COTS [Commercial Off The Shelf] software, and personal services to conform the systems to user requirements, knowledge of our hardware component pricing, software licensing pricing, and labor rates for professional services would seriously impact, or potentially neutralize, our competitive economic advantage."

As you are aware from our proposal and the pricing which we submitted, our base labor rates are very competitive in the industry. As you also know, our applied overhead rates are unusual because of the substantial amount of our total corporate budget which is devoted to research and development. Further to this, we have agreed to provide NPIA with complete transparency as to our costing models, and have agreed to in-depth audits to be conducted by NPIA to provide adherence to the profit margins provided under the Services and Framework Agreements. Knowledge of our estimates for the total amount and types of labor that are required under the contracts, the amount of labor which will be required for customization of our COTS products, and the application of our overhead rates and ratios would be very detrimental to our position in future pricing exercises, both with opportunities in the United Kingdom and elsewhere.

As the successful bidder, we fully comprehend the necessity of releasing information concerning our aggregate bid, and the amount of major cost categories. The fact that the other competitors are not required under the Freedom of Information Act to release their respective pricing models is indicative of the unfairness or [sic] requiring us to release detailed information, at a disaggregated level, of our pricing models".

Is the exemption engaged?

27. The Commissioner understands the Contractor's concerns regarding disclosure, in line with its submission above. Having himself viewed the withheld information he accepts that it is very detailed and that the Contractor would be disadvantaged by its competitors being able to view breakdowns of its internal costs when determining this bid. He agrees that if its pricing models were released it would put the Contractor at a distinct disadvantage.
28. The public authority's detailed arguments are appended to this Notice and also identify those areas where the Contractor's competitive advantage may be prejudiced by disclosure. Again the Commissioner recognises that the Contractor has provided extremely detailed cost analyses to the public authority. These analyses focus on the Contractor's internal costs in areas such as product development, its own third party costs and its staff costs. The Commissioner recognises that these provide a detailed reflection of how the Contractor manages its business and that their release could undermine its position within a competitive market place.

29. Therefore, in line with the arguments provided by both the public authority and the Contractor, the Commissioner considers that disclosure of the financial information from the worksheets would be likely to prejudice the commercial interests of the Contractor.
30. Accordingly, the Commissioner finds that the exemption is engaged in relation to the information withheld in the financial models which form part of Schedules 7.4 of the Framework Agreement and 7.4 of the Services Agreement. He will therefore go on to consider the public interest in disclosure of this information.

The public interest test

31. Section 43 is a qualified exemption which requires that a public interest test is carried out to ascertain whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
32. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account those factors that relate to the specific information in question, including the arguments advanced by the complainant and the public authority.

Public interest arguments in favour of disclosing the requested information

33. The public authority has provided the following relevant arguments:

“Accountability

There is a strong public interest in ensuring the NPIA is fully accountable in the way that it discharges its duties and commits public funds and that there is transparency in that accountability. The release of this information would contribute to that accountability and allow the public to scrutinise the actions of the Agency.

Use of Public Funds/Resources

Disclosure of this information would shows[sic] that public fund [sic] have been used in a cost-effective and efficient and effective manner, thus ensuring that value for money in the operation of this service is being achieved”.

34. Conversely, the complainant submitted that the Commissioner had previously found in favour of disclosing the financial elements from a

different contract involving this public authority⁴, and he believed his request presented a similar situation. He has further argued:

“I do not accept ... that pricing information for a bespoke contract is likely to disclose useful information to competitors”.

35. The Commissioner recognises that there is always some public interest in the disclosure of information for its own sake. This is because disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.
36. There is also a more specific public interest in understanding how public money has been spent when a contract is awarded to a third party and understanding what the contractor is doing or is going to do in order to provide the most effective and value-for-money service possible. It is also the Commissioner's view that disclosure of information of this nature should to some extent be within the reasonable expectations of contractors when they agree to perform services on behalf of a public body, using public money. However, the Commissioner does here note that the main part of the Contract has been provided in full to the complainant, except where small redactions were agreed between the two parties. The undisclosed element consists only of the Contractor's own financial elements and how it arrived at its costings. He therefore understands that a Contractor may not reasonably expect such information to be disclosed.

Public interest arguments in favour of maintaining the exemption

37. The public authority has provided the following arguments:

“Efficient and Effective Conduct of the Service

Disclosure of commercially sensitive information would severely inhibit the NPIA's ability to achieve value for money in its operations and deliver appropriate technical solutions to the UK Police Forces. If, through the disclosure of this information, current and future suppliers become reluctant to engage with the Agency on future procurement exercises, the NPIA could be faced with an impaired competitive landscape that does not represent an accurate picture of the range of potential solutions and suppliers that should be available to it. Those supplier[sic] who do choose to engage with the Agency could offer less or

⁴http://www.ico.gov.uk/~media/documents/decisionnotices/2010/FS_50280571.ashx

incomplete information in response to Expressions of Interest or tenders in response to the risk that any information supplied may be released into the public domain. The subsequent impact on the quality and number of bids to select from may hinder the efficient workings of a tender evaluation process and lead the Agency into having to select a sub-optimal solution both in terms of the operational benefits that it will bring and the value for money that it will achieve. Tenderers may also increase the risk premium that they include within the bid pricing to protect themselves for the lost [sic] of commercially sensitive information and the competitive advantage that comes from it. The ultimate impact of these effects will be to prevent the Agency effectively supporting UK Policing in ensuring public safety and the delivery of value for money and the appropriate use of public funds.

Interests of Third Parties

The disclosure of the withheld information into the public domain could decrease the differentiation between suppliers, as processes, practices and commercial offerings may become homogenised, thus endangering true and fair competition.

This would further hinder the ability of suppliers to act competitively within the market. Internal processes that allow such suppliers to create and maintain a competitive advantage would be lost as they become public knowledge, creating unfair competition and stifling innovation and creativity”.

38. The Commissioner notes that the exemption under section 43(2) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party. There is a public interest in ensuring that the commercial interests of a third party are not prejudiced in circumstances where it would not be warranted and proportionate.
39. The Commissioner has also taken into account the public interest in avoiding prejudice to the commercial interests of the Contractor, which he has already concluded *would be likely* to occur through disclosure of the information in question.

Balance of the public interest arguments

40. The public authority has drawn the following conclusions in finding that disclosure is not in the public interest:

- its actions and procedures are audited by the National Audit Office (NAO) and therefore the NPIA is accountable to an independent external body;
 - whilst it recognises the public has a genuine interest in knowing that the NPIA achieves value for money, releasing this information would hinder its ability to achieve this;
 - the information would be of more value to the Contractor's competitors than to the general public.
41. The Commissioner's general position is that information concerning contracts will be more sensitive before the contract is signed. After that, it is generally the case that the competition element will diminish - this falls in line with the OGC Guidelines referred to above. It is also important for public authorities to make details of contracts transparent because they involve the investment of a sum of public money, usually over a few years. However, as already noted above, the public authority has released almost the entire contract, other than a few agreed elements, and has only withheld information within the Financial Models. The OGC Guidelines find that financial information of this type should continue to be withheld whilst any sensitivity remains.
42. The Contract was signed in February 2010 and, at the time of the request, was less than five months old. It is therefore, in the Commissioner's view, fairly recent. The service itself is not yet 'live' and is therefore very current. Therefore, although not a factor highlighted by the public authority, the Commissioner appreciates that the risk of competitors copying ideas and trying to undercut bids had not diminished significantly when the request was made. A detailed knowledge of how the Contractor's costs had been calculated, particularly after only a relatively short time of the Contract being signed, would be likely, in the Commissioner's view, to harm its ongoing commercial position in respect of its competitors.
43. Arguments have been put forward by the complainant to support his view that the withheld financial elements of this Contract are of a similar nature to the financial elements of a different Contract where the Commissioner was also required to make a decision (see paragraph 34 above). In this earlier case, the Commissioner found in favour of disclosing the information. However, although the complainant is obviously disadvantaged as he does not know the exact extent of the withheld Financial Models, the Commissioner can state that the level of detail in the Financial Models in this case is significantly greater than that in the earlier case he considered. To this effect, the public authority advised the complainant that:

"The pricing information that we have kept back in MIDAS is the internal supplier costs that the supplier has used to create the final, total cost and which include details of what the supplier pays his manufacturers, subcontractors and staff".

It further clarified that:

"These types of costs were not included in the [earlier] contract, as Open-book accounting was not so prevalent in 2003/4 when this tender exercise was commenced and as such no precedence by the ICO in this area".

The Commissioner concurs and does not consider that it is appropriate to compare the financial elements of the two contracts.

44. As stated above, whilst the complainant is of the opinion that pricing information for a bespoke contract is of limited use, on this occasion the Commissioner does not agree. Some pricing-related information has been properly disclosed in the body of the main Contract, but the remaining information within the Financial Models details how the Contractor has arrived at the prices it has produced for the main Contract. The Commissioner considers that this would be likely to be of considerable commercial value to its competitors.
45. The Commissioner understands that when public authorities have committed public funds within a contract there is a strong public interest in ensuring that the public authority is as accountable as possible in relation to that decision, and that it is clear what the contractor is promising to deliver once a contract has been entered into. Furthermore, being exposed to the possible risk of some commercial harm is often the price that organisations have to pay for securing lucrative and valuable public sector contracts. The Act has been in place for some time and organisations entering into agreements with public authorities should be aware of their obligations to be as transparent and accountable as possible. However, on this occasion the Commissioner believes that the public authority has already disclosed a considerable amount of the Contract and he therefore finds that it has already fulfilled these obligations.
46. In view of the above, overall the Commissioner concludes that the public interest in maintaining the exemption under section 43(2) outweighs the public interest in disclosing the remaining information. The complaint is therefore not upheld.

The Decision

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps required

48. The Commissioner requires no steps to be taken.

Other matters

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

Internal review

50. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
51. The Commissioner does consider this case to be 'exceptional' in that it involves a very lengthy contract which the public authority has had to consider. However, he is concerned that it took 46 working days for an internal review to be completed.

Right of Appeal

52. 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 29th day of June 2011

Signed

**Gerrard Tracey
Principal Policy Adviser**

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