Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 January 2012

Public Authority: **Cabinet Office**
Address: **Admiralty Arch**
London
SW1A 2WH

Summary

The complainant requested information relating the termination of a key contract on a major public IT project. The public authority provided some information within the scope of the request. However, it refused to provide the remainder citing the audit, commercial interests and development of government policy exemptions as its basis for doing so. It upheld this position on internal review. The Commissioner has decided that the public authority was entitled to rely on the audit exemption (section 33) as a basis for withholding the requested information.

The Commissioner's Role

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

The Request

2. On 27 July 2011, the complainant requested information of the following description:

    - *"All information held by the Efficiency Reform Group concerning its assessment of the e-Borders programme, which was referred to by the Minister of State for*

Immigration made on 22 July 2010, a copy of which is attached[1].

- *The above information should include (to the extent that it is held by the Efficiency Reform Group) the reasons for the termination of the agreement for the design, development, testing, supply and support of an IT system and supply of related services entered into between the Secretary of State for the Home Department and Raytheon Systems Limited on 14 November 2007. This is commonly referred to as the "e-Borders" contract. The agreement was terminated in a letter 22 July 2010 from Lin Homer of the UK Border Agency to [named individual]."*

3. On 25 August 2010, the public authority advised the complainant that it was intending to rely on the audit, commercial interests and development of government policy exemptions but would need further time to consider the balance of public interest in relation to each of these exemptions. It anticipated providing a full response by 24 September 2010 and this was, in fact, the date that it did so.

4. It wrote again on the 24 September 2010. In that letter, it itemised documents containing information pertinent to the request. These were:

- Project Assessment Report (14-18 June 2010). It then referred to this as "the Report".
- Assessment Review Summary.
- Note of meeting held on 1 July 2010.
- Emails and other pieces of general communication.

5. It disclosed background and general information contained in the Report, parts of the Assessment Review Summary and of a meeting note. It withheld the remainder confirming its reliance on provisions of the three exemptions identified above. It also argued that the public interest in maintaining those exemptions outweighed the public interest in disclosure.

[1] http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/wms-eborders-contract-cancel/

6. The complainant requested an internal review of the public authority's decision on 8 October 2010. On 12 November 2010 the public authority wrote to the complainant with the details of the result of the internal review it had carried out. It upheld its original decision and provided some further detail of its arguments as to the likelihood of prejudice and the balance of public interest.

The Investigation

Scope of the case

7. On 14 December 2010, the complainant contacted the Commissioner to complain about the way its request for information had been handled. It also sent further submissions on 12 January 2011. The complainant specifically asked the Commissioner to consider the following points:

- The exemptions cited by the public authority were not engaged.
- To the extent that the exemptions were engaged, the public interest in maintaining these exemptions was outweighed by the public interest in disclosure.

Chronology

8. There was an exchange of correspondence and telephone calls between the Commissioner and the public authority and the Commissioner and the complainant between 29 January 2011 and 9 August 2011.

9. During these exchanges, the Commissioner obtained further detailed arguments from the public authority as well as a copy of the withheld information. He also sought to identify options for informal resolution of this matter to the satisfaction of all parties. Unfortunately, these efforts proved unsuccessful.

Analysis

Exemptions

The Audit Exemption – Section 33

10. This exemption is engaged where disclosure would, or would be likely to, prejudice the public authority's audit functions. In this case, the public authority has explained that its audit function relates to section 33(1)(b) because it has a role to examine "*the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions*".

11. The Commissioner accepts the public authority's explanation as to how it has been charged with this role. On 15 June 2010, the Prime Minister, David Cameron, announced that the Office of Government Commerce was to be transferred into the public authority. It would become part of the new Efficiency and Reform Group (ERG). Although ERG is not a public authority in its own right, it is part of the public authority[2].

12. It also explained that a Major Projects Review exercise was conducted over a period of 6 weeks from June 2010. At the end of each review a report was produced on each identified project by the Major Projects Review Group (MPRG)[3].

13. The Commissioner notes that since the events which gave rise to this request, the Coalition Government has set up the Major Projects Authority[4].

14. The public authority declined to state whether it believed disclosure would or would be likely to give rise to these prejudicial outcomes. It believed that the decision to engage the audit exemption could only be open to challenge where the lower threshold of likelihood was not reached.

---

[2] http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/wmstext/100615m0001.htm#10061518000002

[3] http://www.ogc.gov.uk/programmes___projects_major_projects_review_group.asp

[4] http://www.cabinetoffice.gov.uk/news/government-launches-major-projects-authority

15. The public authority set out the following in support of its reliance on the audit exemption:

    - Disclosure would reduce the documentation made available for scrutiny and would impact on the quality of debate. MPRG recommendations would not be based on full and frank assessments and the quality of advice given and decisions taken would be put at risk.

    - Departments are not obligated to provide information to MPRG and there is a significant reliance on their co-operation. Without this co-operation, there would be a real and significant risk of harm to MPRG's effectiveness.

    - The e-Borders programme itself has not been terminated although the contract with a particular supplier has been cancelled. The withheld information was still being used at the time of the request and was therefore still "live".

16. The complainant drew attention to the fact that, in its view, the public authority had failed to demonstrate a causal link between disclosure and the prejudicial outcomes it described. It queried the public authority's assertion that disclosure would risk future co-operation from departments.

17. When considering likelihood of prejudice, the Commissioner follows a three-step test.

    - Has the public authority identified a prejudicial outcome which is inherent in the exemption in question?

    - Is that prejudicial outcome insignificant or trivial such that the exemption cannot be relied upon?

    - Is the prejudicial outcome likely to arise?

Has the public authority identified a prejudicial outcome which is inherent in the exemption in question?

18. The public authority is concerned that it would not be able to obtain free and frank assessments and comments from relevant parties. It believes it needs this information in order to carry out its audit work. The Commissioner is satisfied that the public authority has identified a prejudicial outcome which is inherent in the audit exemption. This does not mean that he is satisfied that

the prejudicial outcome would be likely to occur. The first step is therefore satisfied.

Is that prejudicial outcome insignificant or trivial such that the exemption cannot be relied upon?

19. The Commissioner does not consider the prejudicial outcome described to be insignificant or trivial. The public authority is examining the cost-effectiveness of major projects which place significant demands on the public purse. If it is unable to carry out this activity effectively, such an outcome is not insignificant nor is it trivial. The second step is therefore satisfied.

Is the prejudicial outcome likely to arise?

20. As noted above the public authority refused to commit itself to an argument as to whether disclosure would or would be likely to prejudice its audit functions.

21. The public authority used both the phrases “would” and “would be likely” throughout its submissions although the former was used more frequently than the latter. With this in mind, the Commissioner has focussed on the lower threshold of likelihood when considering the application of the audit exemption in this case.

22. In order to analyse the merits of the public authority’s assertions as to likely prejudice, the Commissioner has first considered whether disclosure would, as it asserts, have an impact on the voluntary supply or free flow of information. If this is the case, the Commissioner has considered whether such a change in the voluntary supply of information would be likely to give rise to the prejudice to its audit function.

Would disclosure have an impact on the voluntary supply/free flow of information?

23. In examining the first point, the Commissioner has looked at:

- the content of the information;
- the timing of the request;
- whether it has any statutory powers to compel the supply of information;
- any incentives which might encourage third party engagement; and

- whether third party or parties would consider disclosure to be damaging.

24. For obvious reasons, it is not appropriate for the Commissioner to set out an in-depth description of the withheld information on the face of this notice. However, he is satisfied that it is information which is at the heart of the audit process in question. He notes that the decision to cancel a contract with a particular supplier to the project had been taken at the time of the request. However, having read the withheld information, he accepts the public authority's assertion that it would be relevant for other work related to the assessment and audit of the e-Borders project which was still ongoing at the time of the request.

25. The public authority has not set out any statutory power which it could call upon to compel parties to co-operate. The Commissioner is satisfied that the public authority's audit work does rely on co-operation from third parties to carry out its work.

26. Regarding incentives that might encourage third party engagement the Commissioner thinks that, as a general principle, it would not be in the interests of any of the parties actively to disrupt a thorough and time-bound audit of such a high profile project. The Commissioner believes this applies to both government departments who sponsor a project and to private companies who are contractually connected to the project.

27. However, as had been widely reported at the time of the request, the e-Borders project has been the subject of delay. Inevitably, this means that the withheld information may well include information the disclosure of which third parties could consider to be damaging. As such, it is likely they would prefer that its distribution be limited to the audit process.

28. In light of the above, the Commissioner is satisfied that disclosure of the withheld information would have an impact on the voluntary supply of information to the public authority in similar circumstances.

Would a change in the voluntary supply of information be likely to give rise to prejudice to the public authority's audit function?

29. As has already been noted the ERG's major project review was strictly time-bound. The Commissioner accepts that where a

major project review is commenced it can best be progressed where all relevant parties supply information and comment voluntarily and promptly. The Commissioner is therefore satisfied that a change in the voluntary supply of information would be likely to prejudice the public authority's audit function, particularly given that there was a focus on making progress on the review in a timely manner.

30. In light of the above, and having considered all the withheld information, the Commissioner is satisfied that it is exempt information by virtue of section 33(1)(b) and section 33(2).

Section 33 – Balance of public interest

31. Section 33 can only be applied to the withheld information where the public interest in maintaining that exemption outweighs the public interest in disclosing the information. The Commissioner has therefore gone on to consider the arguments of both parties in this regard.

Public interest arguments in favour of disclosing the requested information

32. The complainant submitted the following arguments in favour of disclosing the requested information:

- The public authority's arguments as to likely prejudice are speculative and therefore are of insufficient merit to warrant maintaining the exemption.
- There is a well publicised drive towards best value in public spending. It is difficult to accept that any government department is free to choose what it discloses to an audit.
- Some departments may provide more information if they knew that their decision making was going to be subject to wider scrutiny.

33. The public authority set out the following arguments in favour of disclosure:

- The e-Borders project is a high-profile programme affecting the lives of many of the UK's citizens and visitors to this country. The public has a right to know about any problems that arise with the main supplier to that project.

- Openness in government thinking and policy making increases public trust in and engagement with the government which, in turn, has a beneficial effect on the quality of government.

- There is a public interest in this case in accountability and transparency, particularly given that the e-Borders programme involves considerable public expenditure and potential public benefit.

- There is a generic public interest in disclosure of information about public programmes to inform debate.

Public interest arguments in favour of maintaining the exemption

34. The public authority submitted the following arguments in favour of maintaining the exemption:

- The information was still being used by the public authority and other relevant departments (including HM Treasury ("HMT")) for review purposes at the time of the request. There is a strong public interest in ensuring that these departments are able to carry out these discussions in private to ensure that they achieve the best possible outcome.

- There is a strong public interest in the MPRG's duty to review being fully discharged in order to ensure sound decisions are taken on major projects. Any significant change to MPRG's process (such as this disclosure) puts its future value at risk.

- It is imperative that an open debate take place between relevant departments about the project under review. A "full and frank" assessment of the project is required and disclosure would prejudice the MPRG's assessment process. It is not in the public interest to have weakened and less effective MPRG scrutiny.

- In order to protect future project costs, it is in the public interest to protect any information which discloses the public authority's (or any other department's) negotiating position.

- Overall, the public interest in ensuring strong policy development, meaningful audit of departmental programmes and obtaining best value for money in commercial contracting

significantly outweighs the public interest in transparency and accountability.

- The requested information relates to one supplier and to one contractual relationship within the e-Borders programme. As such, transparency and accountability about the programme as a whole are unlikely to be advanced by disclosure in this case.

Balance of the public interest arguments

35. The Commissioner notes that the delays to the implementation of the e-Borders programme have been the subject of considerable public attention and query. The decision to end the contract with one of that programme's major suppliers was, in itself, the subject of further public debate and query. The Commissioner understands that this decision has been taken to arbitration[5].

36. The Commissioner thinks that there is a considerable public interest in understanding how the MPRG came to its decision and, in particular, what factors it took into consideration as part of its review. The decision to end the contract had been taken at the time of the request and, arguably, little harm could occur to the review process as regards that contract once the decision had been taken.

37. However, the Commissioner notes that a review of the e-Borders programme was still ongoing at the time of the request, notwithstanding any decision that had already been taken regarding the ending of a particular contract within that programme. The Commissioner accepts the public authority's assertion that the withheld information informed that ongoing review. With this in mind, the Commissioner thinks that, at the time of the request, there was a compelling public interest in allowing that review to continue in private.

38. The purpose of the public authority's review of the e-Borders programme was to ensure value for money. The review is timebound to ensure prompt decision making. The Commissioner agrees that it would not aid the timebound nature of the review to make public the facts and assessments under consideration during the review itself. While external voices may well add useful insight, it is important that the body charged with undertaking the

[5] http://services.parliament.uk/hansard/Commons/ByDate/20101221/writtenanswers/part014.html

review is permitted to carry out its work in private without the distraction of debating the matter in public.

39. The Commissioner also believes that, given the timebound nature of an MPRG audit, there is a public interest in protecting the timely flow of information to auditors from relevant parties. For reasons set out above, the Commissioner agrees that disclosure would give rise to a change in the voluntary flow of information to the ongoing e-Borders audit and to other audits.

40. In the Commissioner's view, the public interest in protecting the integrity of this timebound process outweighs the public interest in disclosure. For this reason, the Commissioner has decided that the public authority is entitled to rely on the exemption at section 33(1)(b) by virtue of section 33(2) as a basis for withholding all the requested information.

Application of other exemptions

41. Given that the Commissioner has agreed that all the requested information is exempt under section 33, he has not gone on to consider the application of the other exemptions cited by the public authority.

The Decision

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

Steps Required

43. The Commissioner requires no steps to be taken.

Failure to comply

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

Right of Appeal

45. 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,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0116 249 4253
    Email: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.

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

Signed ……

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF