

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2013

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information in two separate but linked requests about a pensions' payroll contractor used by the Cabinet Office. The Cabinet Office withheld some of the information under sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) and 43(2) (commercial interests) of the FOIA. Further information that the Cabinet Office argued was not within the scope of the requests came to light during the Commissioner's investigation.
2. The Commissioner's decision is that the Cabinet Office cited the exemptions provided by sections 36(2)(b)(i) and (ii) correctly, but that where section 43(2) alone was cited this information should have been disclosed. The Commissioner has also found that in relation to the information that came to light during his investigation, this information is within the scope of the requests and the Cabinet Office was incorrect to state otherwise.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - In relation to the information specified in the annex supplied to the Cabinet Office with this notice that the Commissioner has found is within the scope of the requests, either disclose this to the complainant, or provide to the complainant a refusal notice valid for the purposes of section 17 of the FOIA.

- Disclose the information in relation to which section 43(2) alone was cited. This information is also specified in the annex supplied to the Cabinet Office.
 - Disclose the information specified in the second bullet point of paragraph 16 below; *"the full contract management paper"*.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The requests in this case were the subject of an earlier decision notice issued on 23 May 2011 (reference FS50368481). That notice found that the Cabinet Office had failed to provide a valid response to the requests. It was ordered to respond to the requests within 35 days of the date of that notice.

Requests and responses

Request 1

6. On 24 July 2010 the complainant requested the following information:

"In accordance with the Freedom of Information Act, please provide the following:-

- i. details of monitoring and supervision arrangements with set frequencies, of the pensions payroll contractor;*
- ii. minutes of meetings, letters or other forms of communication with Capita Hartshead or its parent companies over the last 12 months where these relate to backlogs, failure to reply to written correspondence in good time or at all, failure to ensure correct payments of pensions in good time;*
- iii. any records/communication relating to the imposition of a premium rate 0870 number for telephone or fax communication with Capita Hartshead in relation to Civil Service Pension enquiries;*

- iv. *any records/communication relating to Cabinet Office insisting on a change from the premium rate of 0870 to 0800 or 0845 for pensioner contact with Capita Hartshead."*

Request 2

7. On 6 January 2011, the complainant submitted a further request for the following information:

"In accordance with the Freedom of Information Act, please provide the following:-

- i. *minutes of meetings, letters or other forms of communication with Capita Hartshead or its parent companies since 24 July 2010 where these relate to backlogs, failure to reply to written correspondence in good time or at all, failure to ensure correct payments of Civil Service pensions in good time;*
- ii. *the total number of Freedom of Information Act requests for information received by Cabinet Office in 2010;*
- iii. *the total number of Freedom of Information Act requests for information received and accepted by Cabinet Office in 2010 but with the information not supplied within the 28 day limit."*
8. Following the issuing of the decision notice under FS50368481 the Cabinet Office responded to the complainant on 25 August 2011, more than a year after the date of the first request and over eight months after the date of the second request. The Cabinet Office also failed to respond within the 35 calendar days required by the earlier decision notice.
9. The Cabinet Office stated that the requested information was exempt by virtue of the following sections of the FOIA: 21 (information accessible to the applicant by other means), 35(1)(a) (formulation or development of government policy), 40(2) (personal information) and 43(2) (commercial interests).
10. The complainant requested an internal review on 3 October 2011. The Cabinet Office again failed to respond within the recommended timescale and the Commissioner intervened following the complainant's further complaint about the lack of any internal review response. The Commissioner comments further about the various delays of the Cabinet Office in relation to these requests in the "Other matters" section below.

11. The Cabinet Office subsequently wrote to the complainant on 5 December 2011 with its internal review result. It maintained its position in relation to withholding the requested information on the basis of sections 35(1)(a), 40(2) and 43(2), in relation to most of the information, but a minority of the information previously withheld under sections 35(1)(a) and 43(2) was now disclosed.

Scope of the case

12. Having received the internal review result the complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. The Commissioner initially set out to investigate whether the Cabinet Office had properly applied the exemptions contained within sections 35(1)(a), 40(2) and 43(2) to the withheld information, and advised both parties of the scope of his investigation.
14. During the course of the investigation, on 10 April 2012, the Cabinet Office wrote to advise both the Commissioner and the complainant that it no longer wished to rely on section 35(1)(a). Instead it now relied on sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs) and section 41(1) (information provided in confidence) in respect of the withheld information.
15. Due to incomplete and unclear responses from the Cabinet Office during the investigation, including it not marking up the withheld information to show which exemptions applied to which parts, the Commissioner had cause to issue an information notice on 13 September 2012. The response to the information notice was due on 13 October 2012. The Cabinet Office responded late to the information notice by providing part of its response on 15 October 2012, with the remainder being sent on 22 October 2012.

Withheld information at outset of investigation

16. The Commissioner has viewed the withheld information in this case which, at the outset, consisted of the following.
 - Relevant extracts from a contract management agreement in respect of the contract between the Minister for the Civil Service and Capita Business Services Limited for the provision of Civil Service and judicial pensioner payroll and associated services.

- The Cabinet Office had initially reviewed the contract to extract only those aspects of it which it considered to be in scope of the requests. During the course of the Commissioner's investigation, however, having been asked to 'mark up' the complete contract to show any exemptions it wished to rely on, together with any areas it considered to be out of scope, the Cabinet Office decided to disclose the full contract management paper to the complainant with a view to meeting "*its commitment to transparency*".

The Cabinet Office was contacted by the Commissioner's office a number of times to verify whether this disclosure had taken place, and was asked to confirm to the Commissioner's office as soon as that disclosure had taken place. Unfortunately, by the date of this notice the Cabinet Office had yet to inform the Commissioner's office that this disclosure had taken place. At paragraph 3 above, the Cabinet Office is now required to disclose this information.

- On 3 September 2012 it also disclosed to the complainant four letters about the move to an 0870 number for the Civil Service pensions helpline.
- Relevant extracts from minutes of contract management meetings between Capita Hartshead and My CSP. The Cabinet Office explained this was an evolving system of contract management and that minutes were not taken at meetings prior to August 2010. It stated that it did not hold any correspondence between meetings.

Additional information potentially in scope

17. The Commissioner referred back to the previous case (reference FS50368481) and noted that, on 1 September 2011, the Cabinet Office had forwarded various documents to him in response to the previously issued decision notice. The documents included a copy of the Cabinet Office's response to the complainant on 25 August 2011; a letter dated 'October 2010' addressed to the complainant entitled 'draft reply' which detailed a number of enclosures, such as a contract management paper in respect of the requested contract; various 'Action Logs' from contract management meetings; and other information.
18. On 9 May 2012 the Commissioner checked whether the complainant had received the letter and enclosures and the complainant confirmed he had not. The Commissioner then contacted the Cabinet Office to ask it to explain why it had forwarded the bundle of documents. It said that it was "*most likely*" that the documents had been sent to give a broad

indication of the scope of the request but that no redaction for relevance had been carried out at that time. It also said that it had probably sent the letter to the Commissioner in error and confirmed that the letter was a draft version.

19. The Cabinet Office stated that the decision was taken not to disclose this information to the complainant following the complainant making this complaint to the ICO. The view of the Commissioner, however, is that this explanation does not appear to make sense. It seems more likely to be the case that this information was prepared as the response to the earlier decision notice, but that subsequently a decision was taken that this information would not be disclosed and that the complainant would instead be issued a refusal notice. This complaint came about because of the refusal to disclose that information. It was not the case that the disclosure of that information was somehow prevented by this complaint.
20. As to why the Cabinet Office sent a draft letter and copies of this information to the ICO when it had yet to decide to issue that response, it appears unlikely that a satisfactory explanation for this will come to light. In any event, the provision of this information to the ICO revealed the existence of further information beyond what the Cabinet Office had previously identified as falling within the scope of the request.
21. The Commissioner has reviewed the Action Logs included in the Cabinet Office's 'draft response' sent on 1 September 2011. He is satisfied that many of the logs are out of scope because they pre-date the first request by more than twelve months, so are outside of the timeframe specified in that request. The Commissioner has considered those logs which would potentially fall in scope, and whilst there are some references to payment related issues, there are no specific issues as to the time taken or whether there are 'backlogs' per se, or failures to respond to written correspondence in good time. The Commissioner has concluded that there is nothing of relevance in the Action Logs to either of the complainant's requests.
22. The remainder of the information supplied to the ICO by the Cabinet Office, on 1 September 2011 falls into three batches:
 - i. Information that the Cabinet Office has accounted for and that it regards as falling within the scope of the requests.
 - ii. Other information that has been accounted for, but that the Cabinet Office regards as not falling within the scope of the requests.
 - iii. Information that has been unaccounted for by the Cabinet Office.

23. In relation to (i) above, the Cabinet Office has acknowledged that some of this is within the scope of the requests and has cited exemptions. The analysis of whether these exemptions have been cited correctly is given below. In relation to (ii) and (iii), the Commissioner has considered whether any of this information does fall within the scope of any of the requests and his analysis of this is given under the Section 1 heading below.
24. For clarity, the withheld information in this case at the conclusion of the Commissioner's investigation comprised:
- relevant extracts from minutes of contract management meetings between the Cabinet Office and Capita Hartshead.
 - submissions/email chain about submissions from Civil Service Pensions to the Minister for the Cabinet Office.
 - emails and submissions covered in paragraphs 25 to 31 below and specified in the annex supplied to the Cabinet Office.

Reasons for decision

Section 1

25. In relation to information falling within batch (ii) described above, the reasoning of the Cabinet office is that this information "*does not relate to the introduction of an 0870 number*". The Commissioner notes that the wording of the request makes it clear that the intended scope of it is broad: "**any** records /communications relating to...". The view of the Commissioner is that the information falling within batch (ii) does fall within an objective reading of this request, for the following reasons.
26. The complainant has requested all information that *relates* to the introduction of this 0870 number. The information in question here concerns actions taken in response to the introduction of this number and, therefore, it does relate to this introduction. The Commissioner is confident that the complainant would agree that this information falls within the scope of an objective reading of his request.
27. In relation to batch (iii), the Commissioner has reached the same conclusion. Although this information is unaccounted for by the Cabinet Office, it is similar to the information within batch (ii) and so the Commissioner considers it safe to assume that the stance of the Cabinet Office would be that this information does not fall within the scope of the request.

28. This information is similar to that within batch (ii) in that it also concerns action taken in response to the introduction of the 0870 number. Therefore, for the same reason as stated above in relation to (ii), the view of the Commissioner is that the information within batch (iii) is within the scope of the request.
29. At paragraph 3 above the Cabinet Office is now required to either disclose this information, or to issue a valid refusal notice setting out why this information will not be disclosed. The exact information in relation to which this step applies is set out in an annex supplied with this notice to the Cabinet Office.
30. The Commissioner appreciates that the complainant may believe that this step will leave this situation no further on from the situation as it was at the time that he made the complaint to which this notice relates. In the previous decision notice, reference FS50368481, the Cabinet Office was required to take a similar step. The complainant may argue that the Cabinet Office should not be given a further opportunity to consider issuing a refusal notice in relation to this information; instead it should now be required to disclose it.
31. However, the Commissioner is mindful that the argument of the Cabinet Office would be likely to be that it has not previously considered the content of this information as it did not consider it to be within the scope of the request. This would mean that the Cabinet Office would not have had the opportunity to consider whether it may be appropriate to withhold any part of the content of this information. In the interests of exercising the Commissioner's powers responsibly and avoiding the potential of an unnecessary appeal to the First-tier Tribunal (Information Rights) and the expenditure of public money that this would entail, the step is as specified at paragraph 3.
32. As part of his information notice issued on 13 September 2012 the Commissioner asked the Cabinet Office to provide details of the searches it had undertaken in response to the requests. In reply, the Cabinet Office advised that its search included its electronic records management system ('ERM') and the personal folders of the contract manager. It gave details of the relevant folders within the ERM and the search terms used.
33. Section 1 of FOIA states 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."*

34. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* which clarified that the test to be applied when determining whether information is held was not certainty but the balance of probabilities. Therefore, this is the test that the Commissioner has applied in this case.
35. When reaching a decision about whether requested information is held by a public authority, the Commissioner will generally take into account the scope, quality, thoroughness and results of the searches carried out by the public authority and/or any other reasons it has offered to explain why the information is not held. This may include explanations about whether there is any business purpose for recording and/or retaining information.
36. The Cabinet Office confirmed that the information, if held, would be held in electronic form only. It said that it had no reason to believe that any of the recorded information ever held had been deleted or destroyed, and explained that the contract manager would have saved any emails she considered important to the relevant folder within the ERM, in accordance with the policy, and would have deleted non-important emails in line with the policy, typically after one month.
37. It said that information should be retained as long as there is a business or statutory requirement to keep it, in line with the guidance issued by the National Archives. The departmental policy requires that information not needed for business or public records purposes should be deleted within three months. It confirmed that the information it identified is held for business purposes and that there are no statutory requirements on the Cabinet Office to retain the requested information.
38. The Commissioner has concluded on a balance of probabilities, that the Cabinet Office has located all the information it holds within the scope of the requests.

Section 36

39. The Cabinet Office relied on section 36(2) to withhold extracts from minutes of meetings between the Cabinet Office and Capita Hartshead. This exemption was also relied upon to withhold Ministerial submissions and associated emails.
40. Section 36(2) of FOIA states that:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

41. Section 36 operates in a different way to the other prejudice-based exemptions contained in the Act. Section 36 is engaged only if, in the reasonable opinion of a qualified person ('QP'), disclosure of the information in question would, or would be likely to, have any of the results described in sections 36(2)(b) and (c).
42. When investigating cases involving the application of section 36, the Commissioner will:
 - ascertain who is the QP for the public authority in question;
 - establish that an opinion was given and when it was given;
 - consider whether the opinion given was reasonable.
43. Section 36(5)(a) states that in relation to information held by a government department, the QP is any Minister of the Crown. In this case the Commissioner has established that the first reasonable opinion was given by Francis Maude MP, Minister for the Cabinet Office. In relation to the additional information for which section 36 was cited, the Attorney General acted as QP. Both of these individuals are QPs in relation to this information for the purposes of section 36.
44. As to whether and when these opinions were given, the first opinion was sought in a submission dated 27 March 2012. The response to this submission confirming the opinion of the QP was dated 5 April 2012 and has been evidenced through an email supplied to the ICO. The second opinion was sought in a submission dated 16 July 2012 and confirmed in a letter dated 18 July 2012. Again, evidence of the provision of this opinion was supplied to the ICO. On the basis of the evidence supplied to his office, the Commissioner accepts that an opinion was given by a QP on both occasions.
45. Turning to whether these opinions were reasonable, the approach of the Commissioner here is that if the opinion that disclosure of the information in question would be likely to result in inhibition or prejudice

is in accordance with reason and not irrational or absurd, then it is reasonable.

46. The reasoning for the QPs' opinions is set out in the submissions provided to them. The first submission argues that disclosure would mean the contractor in question would be less open in their dealings with the Cabinet Office due to the concern that information that is supplied to the Cabinet Office may later be disclosed. The submission states that this would be prejudicial to the service provided to civil service pensioners.
47. The second submission concerns the frankness of communications between officials and Ministers and exchanges between officials. The QP was advised that the information in question includes frank comment and it was stated that it is important that Ministers are given full advice in order that they have a thorough understanding of any situation in which their input is required. It was suggested that disclosure here would cause officials to be less frank in their communications.
48. Having reviewed the withheld information the Commissioner is satisfied that this does engage the issues referred to in the submissions and overall that the QPs' opinions that inhibition would result were reasonable. The QP was given a submission that set out arguments that were relevant to sections 36(2)(b)(i) and (ii). These arguments were also relevant to the content of the withheld information. The Commissioner has therefore found that the opinion was in accordance with reason.
49. Having found that sections 36(2)(b)(i) and (ii) are engaged, the next step is to go on to consider the public interest test. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.
50. As to the frequency of inhibition, the Commissioner accepts that the provision of advice from officials to Ministers, and between officials, plays an important role in the functioning of the Cabinet Office. It follows, therefore, that such advice is provided frequently. The Commissioner would not, however, accept that the frequency of the inhibition here would be as high as in every case where advice is provided by officials to Ministers.
51. The first opinion related specifically to inhibition in dealings with the contractor in question. Inhibition of the nature identified in that

Ministerial submission would only result as frequently as the Cabinet Office has dealings with that specific contractor.

52. As to the inhibition identified in the second submission, this referred more generally to the need for officials to be uninhibited in their advice to Ministers and with other officials. The Commissioner would accept that this inhibition could occur frequently as officials are required to provide advice about sensitive issues.
53. On the issue of the severity and extent of the inhibition, the Commissioner accepts that it is important for the Cabinet Office to be able to effectively run programmes with contractors, and that there is likely to be a wide range of such arrangements in place. Given this, the Commissioner finds that the inhibition would be of a considerable severity and extent and overall that the severity, extent and frequency of the inhibition that the QP found would result through disclosure contributes significant weight in favour of maintenance of the exemptions.
54. Turning to those factors that favour disclosure of the information, the Cabinet Office suggested that there is a public interest in openness and in improving public understanding of the operation of the civil service pension scheme, recognising that the decisions made by officials and contractors affect the lives of citizens, including retired civil servants. The Commissioner believes that this greater understanding could be very informative to the public debate surrounding the issue of how those decisions are made. Added to this is the general public interest in improving the transparency and openness of government.
55. The Commissioner also notes that there has been some controversy about the decision to introduce the 0870 number referred to in the request. A perception exists that this number was introduced to create revenue and that telephone calls to this number are more costly for users than a geographical number. Given this controversy, there is a public interest in the disclosure of information that records the decision making process leading to the introduction of this number and to resolve any inaccuracy in perceptions.
56. The Commissioner acknowledges that the factors on both sides are strong but he has concluded that the public interest in maintaining each of the exemptions outweighs the public interest in disclosing the information. Whilst the Commissioner has recognised strong public interest arguments in favour of disclosure, the arguments in favour of maintaining sections 36(2)(b)(i) and (ii) are stronger, in the circumstances of the case. The Cabinet Office is not, therefore, required to disclose the information in question. As this conclusion has been

reached on sections 36(2)(b)(i) and (ii) it has not been necessary to also consider section 36(2)(c).

Section 43(2)

57. The Cabinet Office has cited section 43(2) in relation to a small portion of the information in relation to which it did not also cite section 36. Section 43(2) provides an exemption for information the disclosure of which would be likely to prejudice the commercial interests of any organisation. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of prejudice to commercial interests being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
58. Due to the conclusion on sections 36(2)(b)(i) and (ii), it has only been necessary to consider section 43(2) in relation to two documents. These are identified in the annex supplied to the Cabinet Office with this notice.
59. The Cabinet Office has specified that the commercial interests in question are its own and those of Capita. It believes that prejudice to its own commercial interests would be likely to result through disclosure causing Capita to be unwilling to bid for contracts in future, thus reducing the ability of the Cabinet Office to secure the best value. As to the prejudice to Capita, the argument that is possibly relevant to the content of the information in question here concerns the creation of a negative perception about Capita.
60. Covering first whether prejudice to the commercial interests of the Cabinet Office is likely, the Commissioner recognises that it is likely that Capita would prefer that this information remain confidential. However, it is also the case that where a private organisation enters into an agreement with a public authority, it must be aware that information relating to its work held by a public authority will be covered by the FOIA and could be subject to disclosure.
61. In the case particularly of Capita, the Commissioner notes that this company carries out many functions outsourced to it from the public sector. It is reasonable to expect that Capita will be well aware of the various legislative requirements that public sector organisations are subject to and that it will be prepared to cope with the impact of these. Given the importance of public sector contracts to Capita, the Commissioner does not consider it likely that disclosure in this case would cause Capita to cease bidding for contracts with the Cabinet Office.

62. This means that there would be no reduction in the field of bidders for Cabinet Office contracts and so no harm to its ability to secure the best value. The Commissioner does not, therefore, accept that prejudice to the commercial interests of the Cabinet Office would be likely to result through disclosure.
63. Moving to the second ground given for the citing of this exemption, that prejudice would be likely to result to the commercial interests of Capita, the argument of the Cabinet Office was that the content of the information could harm perceptions of Capita and this would harm its future chances of securing new business.
64. Where a public authority cites this exemption on the basis of prejudice that it believes would be likely to occur to the commercial interests of a third party, as a matter of good practice the public authority should consider consulting the third party for their views on disclosure. However, even where no consultation has taken place the Commissioner will accept arguments about prejudice occurring to the commercial interests of a third party provided it is reasonable to accept that the third party would share the concern described by the public authority.
65. In this case the Cabinet Office has not consulted with Capita. It has, however, stated that there was an understanding of confidentiality with Capita in relation to information concerning the contract to operate this helpline. The Commissioner also notes that the content of the withheld information is suggestive that Capita would share the concerns expressed by the Cabinet Office.
66. Whilst it is not possible to go into detail about the content of the information in question here, the Commissioner agrees that this could create a negative perception about Capita. As to whether this would be likely to have a prejudicial effect on its commercial interests, the Commissioner notes that this information records an issue that arose in relation to a contract to carry out a service outsourced from the public sector. As referred to above, this is a central part of the business of Capita. As a result, the Commissioner accepts that the creation of a negative perception around the actions of Capita in relation to a public sector contract would be likely to result in prejudice to the commercial interests of Capita. The exemption provided by section 43(2) of the FOIA is, therefore, engaged.
67. Having found that this exemption is engaged, the next step is to consider the balance of the public interest. In forming a conclusion on the balance of the public interest here the Commissioner has taken into account the general public interest in improving the transparency and openness of the Cabinet Office, as well as the specific factors that apply in relation to the information in question.

68. Covering first those factors that favour disclosure of the information, the view of the Commissioner is that there is a strong argument in favour of disclosure here on the grounds that this will enhance openness and transparency in relation to an issue that arose with this contract. Whilst again it is not possible to go into detail here about the content of the information, disclosure of this content would inform the public of a concern that arose in relation to this contract. The view of the Commissioner is that the disclosure of information which would inform the public about an issue with a contract between a public authority and a private company is in the public interest. The Commissioner considers this a valid factor in favour of disclosure of the information of considerable weight.
69. Turning to the arguments in favour of maintenance of the exemption, these must be relevant to the basis on which the exemption was engaged; that is, relevant to it being likely that prejudice would occur to the commercial interests of Capita if this information were to be disclosed. It is not relevant here to refer to public interest factors that relate to prejudice to the commercial interests of the Cabinet Office as this is not the basis on which the exemption is engaged.
70. The view of the Commissioner is that there is a public interest in avoiding a situation in which disclosures that the Cabinet Office is obliged to make under the FOIA prejudice the commercial interests of private companies. This is on the basis that the Cabinet Office should be able to attract a full range of contractors for its various outsourced services in order to provide best value for the taxpayer. Although the Commissioner has found above that disclosure in this case would not be likely to deter Capita from bidding for public sector contracts, other potential contractors less reliant on the public sector may be deterred. The Commissioner regards this as a valid public interest factor in favour of maintenance of the exemption of some weight.
71. The Commissioner has recognised valid factors both for and against disclosure. However, the factor that he considers carries by far the greatest weight is that relating to informing the public about a concern that arose in relation to the operation of this contract. This is a particularly pertinent factor given that the exemption was engaged on the basis of the requirement to protect the commercial interests of the contractor.
72. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption provided by section 43(2) does not outweigh the public interest in disclosure. At paragraph 3 above the Cabinet Office is required to disclose this information.

Other matters

73. At every stage during the handling of these requests and the investigation of this case, the Cabinet Office has been responsible for causing severe delays. As noted above, the complainant did not receive a substantive response to his requests until more than a year had passed following his first request, and over eight months following the second.
74. These responses were only forthcoming after the Cabinet Office was ordered to provide these in the earlier decision notice issued by the Commissioner. Even then, the Cabinet Office did not respond within the time limit specified in the notice. The internal review was also late and again was only provided following the intervention of the ICO.
75. During the Commissioner's investigation the responses provided to his office were frequently late and incomplete. This necessitated the issuing of an information notice, which the Cabinet Office also failed to comply with within the specified time.
76. Given this background, the Commissioner trusts that the Cabinet Office will view the steps required in this notice as providing an opportunity to demonstrate to the complainant its commitment to its obligations under the FOIA and to providing a better service than the complainant has received thus far.
77. A record of the various issues that have arisen in relation to these requests and during this investigation has been made by the ICO. Issues relating to responding to requests in accordance with the FOIA and about responding promptly to correspondence in section 50 investigations have been raised with the Cabinet Office by the ICO in the past. The Commissioner is concerned that, despite this, issues of such severity have arisen in relation to the requests in this case. It is essential that the Cabinet Office ensures that there is no repetition of these issues in relation to future requests.

Right of appeal

78. 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

79. 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.

80. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF