

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2014

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about a government policy for identifying and managing underperforming suppliers of key goods and services. The Cabinet Office identified 38 items of information which it said were exempt under sections 35, 36, 40, 41, 42 and 43 of the FOIA. The Commissioner's decision is that the Cabinet Office was entitled to rely on the exemptions at sections 35, 36, 42 and 43 to withhold some of the information. However, the Cabinet Office had also applied the exemptions incorrectly in respect of other information. The Commissioner also found breaches of section 10 and section 17.
2. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant items 1, 6, 7, 11, 25 and 26 of the information which the Cabinet Office identified as falling within scope of the request.
3. 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

4. During 2012, the Cabinet Office led on the formulation, development and implementation of a policy intended to strengthen the performance management of strategic suppliers. Formal information on a supplier's performance would be shared across departments and would be taken into consideration at the start of and during all future procurement exercises. Suppliers with poor performance might therefore find it difficult to secure new government contracts.
5. The policy was publicised and implemented in July 2012. On 8 November 2012 the policy was replaced by a revised policy. Amongst the changes made by the November policy was the withdrawal of a so-called "high risk register" of strategic suppliers who were deemed to be under-performing.

Request and response

6. On 21 September 2012 the complainant made a request for information to the Cabinet Office, in accordance with the pre-action protocol for judicial review:

"...we should be grateful if you could provide, as soon as possible, the following information and documents:

(a) all correspondence, emails and notes of meetings regarding the introduction of the High Risk Register;

(b) the criteria for inclusion on the High Risk Register;

(c) the process for determining which suppliers are to be included on the High Risk Register, including the membership of any Board or other group tasked with determining inclusion and the notes of any meetings of that Board or other group;

(d) the intended consequences of inclusion on the High Risk Register, and any instructions given to Ministers or Government Departments accordingly;

(e) the criteria for a supplier included on the High Risk Register to be removed from that Register;

(f) all correspondence, emails and notes of meetings regarding [redacted]'s inclusion on the High Risk Register, and a full account of the process that led to its inclusion;

(g) the reasons [redacted] was included on the High Risk Register (to the extent not already set out in the documents requested above) and the identity of all persons who took the decision to include it;

(h) any notes or records of the meeting on 10 July 2012 referred to above;

(i) the identity of any other supplier currently or previously included on the High Risk Register;

(j) the reasons for the inclusion of any other supplier on the High Risk Register;

(k) the reasons for the removal of any other supplier previously included on the High Risk Register; and

(l) a list of all suppliers currently involved in a dispute with Government."

7. Following a telephone conversation with the Treasury Solicitor's Office (which was acting for the Cabinet Office with regard to the judicial review) on 30 October 2012, the complainant confirmed in an email that the request should be dealt with under the FOIA. He also asked for an additional item to be included in the request.

"When we spoke, I also asked for a copy of the communication sent to Government Departments and others in accordance with the assurance given by your client and referred to in our joint letter and draft order submitted to the Court on 18 October (the "Communication"). I also asked for details of to whom the Communication was sent and when. It would also be helpful if your client could include any internal communications within your client's Department, or communications to or from that Department relating to the Communication.

Again, I should be grateful if your client would treat these further requests as having been made under FOIA."

8. The Cabinet Office replied on 26 November 2012. It stated that it was treating the complainant's email of 30 October 2012 as clarification of what was required and that the request should be treated under the FOIA. It summarised the additional item of the request as:

"(m) 'The communication' [letter sent to departments informing them of suspension of old policy]."

9. It confirmed that it held some information which was described in the request, but said it was exempt under sections 35, 36 40, 42 and 43 of the FOIA.

10. Sections 35, 36, 42 and 43 are qualified exemptions. The Cabinet Office said that it required until 27 December 2012 to consider whether the public interest favoured maintaining the exemptions or disclosing the information. It subsequently extended its response deadline to 25 January 2013.
11. The Cabinet Office provided its final response on 24 January 2013. It had identified 34 documents as falling within scope of the request. For each document it provided a brief descriptive title and indicated what part of the request it related to (see annex A of this decision notice).
12. It added a further exemption, section 41, to its reasons for withholding the information. It stated that the public interest in maintaining each exemption was stronger than that in disclosing the information. It therefore refused the request.
13. The complainant asked for an internal review of the decision on 5 February 2013. He pointed out that the Cabinet Office had interpreted his request of 30 October 2012 (m), as being only for a copy of the communication, when in fact he had asked for other associated information as well. He also noted in respect of the information it provided on 24 January 2013 that the Cabinet Office had failed to identify what information it held which fell under (i), (k) and (l) of the request.
14. The Cabinet Office acknowledged his request for an internal review. However, it did not provide the outcome of the internal review until 9 August 2013, after the Information Commissioner intervened. It maintained that the requested information was exempt under sections 35, 36, 40, 41, 42 and 43 of the FOIA. For the qualified exemptions, it stated that the public interest favoured maintaining the exemptions over disclosing the information. It did not address the specific points made by the complainant in his request for a review except to say that it was satisfied that all relevant records had been considered.

Scope of the case

15. The complainant first contacted the Commissioner on 12 April 2013 to complain that he had not received an internal review.
16. Following the Commissioner's intervention, the Cabinet Office provided the internal review on 9 August 2013. The complainant contacted the Commissioner on 30 August 2013 to complain about the refusal to release the requested information and the delays that had occurred in dealing with the request.

17. This decision notice has considered whether the Cabinet Office was entitled to rely on sections 35, 36, 42 and 43 to withhold the information. The Commissioner has also considered the Cabinet Office's interpretation of the complainant's addition to the request, which it appended as point (m). He has also considered whether, on the balance of probabilities, the Cabinet Office holds information under (i), (k) and (l) of the request. Finally, he has looked at the delays in dealing with the request and the internal review.

Date of request

18. The request of 12 September 2012 was dealt with by the Cabinet Office under pre-action protocol rules for judicial review. This protocol is set out at sections C8-001 to C8-004 of the Civil Procedure Rules. The Commissioner accepts that the request did not fall to be dealt with under the FOIA until the complainant signalled that he did not intend to proceed with his application for judicial review and confirmed that the request should be dealt with under the FOIA. The Commissioner therefore considers the date of the request to be 30 October 2012.

Further information identified

19. During the course of the Commissioner's investigation the Cabinet Office identified further documents as relevant to the request (items 35, 36 37 and 38). A description of each, together with the part of the request it relates to, can be found in confidential annex A of this decision notice.

Reasons for decision

Section 1 – information held

20. The complainant stated that the Cabinet Office had failed to identify what information it held which fell under (i), (k), (l) and (m) of his request. He questioned whether the Cabinet Office had identified all the information it held which fell within scope of the request.
21. The Cabinet Office explained to the Commissioner that its failure to specify the information which fell within (i) was an oversight. It clarified what information it held which fell within point (i) of the request.
22. The Cabinet Office has stated that at the time of the request it did not hold any information which fell under (k) and (l). The Commissioner cannot divulge the reasons given in the main body of this decision notice as to do so may give some indication as to the content of other information held by the Cabinet Office which he believes is exempt. Therefore, they are set out in confidential annex B of this decision notice.

23. The Commissioner has accepted that, on the balance of probabilities, at the time of the request the Cabinet Office did not hold any information which fell under (k) and (l).
24. The Cabinet Office has stated that the only information it holds which relates specifically to (m) (items 13 and 38) was created after the date the request was received and therefore falls outside of the scope of the request.
25. When dealing with a request for information a public authority is only required to consider the information it holds at the point the request is received. The Commissioner accepts that the items which relate to part (m) of the request (items 13 and 38) were not "held" by the Cabinet Office at the time the request was received and that they therefore fall outside of the scope of the current request.

Section 42(1) – legal professional privilege

26. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
27. The principle of legal professional privilege (LPP) is based on the need to protect a client's confidence that any communication with their legal advisor will be treated in confidence. There are two limbs of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). The Cabinet Office has confirmed that it considers the information in question (items 14, 17, 19, 20, 21, 23, 24, 27, 28, 29 and 30) is subject to legal advice privilege.
28. Having inspected the withheld information to which the Cabinet Office has applied the exemption, the Commissioner is satisfied that, with the exception of item 14, it consists of communications with qualified solicitors for the dominant purpose of obtaining or giving legal advice. Therefore, with the exception of item 14, the information falls within the scope of the exemption at section 42(1). However, prior to determining whether the exemption is engaged, the Commissioner has considered whether the advice still attracted privilege at the time the request was received.

Does the advice still attract LPP?

29. When considering whether legal advice communications have been disclosed such that they can no longer attract LPP the Commissioner considers that the sole consideration under section 42(1) is whether the information is still confidential from the world at large.

30. The Cabinet Office has indicated that it is satisfied that the withheld information remains live and continues to attract LPP. Its disclosure would adversely affect its ability to protect the UK government's position with regard to its supplier performance management policy.
31. Based on his review of the withheld information and the Cabinet Office's submissions, the Commissioner is satisfied that the withheld information (with the exception of item 14) is subject to LPP. This is because the information in the communications is not publically known and there is no suggestion that privilege has been lost.

Public interest test

32. Section 42 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 42(1) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

33. The Cabinet Office argued that there is a strong public interest in maintaining confidentiality around the advice received from legal professionals. The Cabinet Office considers the topic of performance management still to be a 'live' issue, and that the legal advice sought continues to be relevant to this policy as a whole.
34. It is in the public interest that decisions taken by public authorities are taken in a fully informed legal context. Public authorities need to be able to consult their lawyers without being concerned that the advice provided will be disclosed. If information is liable to disclosure, this could result in poorer decision making because the policy decisions themselves may not be taken on a fully informed basis, which raises the additional possibility that those decisions may be legally unsound.
35. In the case of supplier performance management, it is essential that decision-makers have access to unbiased advice, so that effective policies around performance management can be developed. Decisions on managing supplier performance made without secure and frank legal advice pose a risk to realising policy aims, namely to apply due scrutiny to performance and associated risks when spending taxpayers' money.
36. Furthermore, if information regarding the seeking, giving and content of legal advice were to be disclosed in the context of this request, LPP would be waived in respect of that information. Therefore, the Cabinet Office would not be able to claim privilege for the disclosed material and its ability to protect the UK Government's position might be affected.

Public interest arguments in favour of disclosing the requested information

37. The Cabinet Office has acknowledged that there is a public interest in transparency in its decision-making processes. Disclosure of advice from lawyers would help individuals to understand the legal context for supplier performance management. There is also a public interest in public authorities being accountable for the quality of their decision-making. Ensuring that commercial decisions are made on the basis of good quality advice is part of that accountability, and release of the information covered by section 42(1) would demonstrate this to the applicant.
38. For his part, the complainant acknowledged that the inherent public interest in maintaining this exemption was likely to be strong. However, he disputed the legality of the government's high risk register and considered that if the legal advice in question addressed that, the public interest favoured disclosing it.

Balance of the public interest

39. The Commissioner acknowledges that there is an inherent public interest in the maintenance of LPP in ensuring the rule of law. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
40. It is well established that where section 42(1) FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

"...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it".

41. The Commissioner understands that the complainant has specific reasons for wanting the information. However, the public interest in the context of the FOIA refers to the broader public good. As the Commissioner has noted above, the Upper Tribunal and numerous First-tier Tribunal (Information Rights) decisions have highlighted the very strong in-built public interest in protecting the confidentiality of legal advice.

42. While the Commissioner accepts that the complainant has a legitimate interest in accessing the information, no public interest has been identified which even begins to reach the threshold for disclosure set by authorities such as the Upper Tribunal. The Commissioner has to consider the wider public interest in public authorities being able to conduct their functions in a way which secures best value for the public purse.
43. The Commissioner considers that it is not the purpose of the FOIA to provide private interests with a route to circumvent normal legal channels. Other remedies are available to the complainant should he wish to challenge the government's treatment of individual strategic suppliers.
44. In weighing the complainant's interests against those of the Cabinet Office and its ability to seek confidential legal advice for facilitating its wider public responsibilities, the Commissioner does not consider that the interests of the complainant or the public interest are sufficiently strong to warrant the disclosure of items 17, 19, 20, 21, 23, 24, 27, 28, 29 and 30. For these items the public interest in maintaining the exemption outweighs the public interest in disclosure.

Item 14

45. The Commissioner found that the exemption at section 42(1) was not engaged by item 14. Item 14 consists of draft policy documents relating to the development of the government's policy on strategic supplier management, and a covering email, dated 30 March 2012. The covering email contains a request for comments on the draft documents. The Commissioner is satisfied that it is not a communication to a qualified solicitor for the dominant purpose of obtaining or giving legal advice, since the recipient is not a legal adviser acting in a professional capacity. He is therefore satisfied that the Cabinet Office is not entitled to apply section 42(1) in respect of this item.
46. Where a public authority has not referred to a particular exemption or exception when refusing a request for information, the Commissioner may exercise his discretion and decide whether, in the circumstances of the case, it is appropriate to take the exemption or exception into account if it is raised by the public authority in the course of his investigation. The Commissioner has been guided by the Tribunal's comments in *Bowbrick v the Information Commissioner and Nottingham City Council* (EA/2005/0006, 28 September 2006) and, in view of the sensitive content of these documents, has gone on to consider the application of other exemptions not claimed by the Cabinet Office.
47. In this case the Cabinet Office has considered very similar information to be exempt under section 35(1)(a). Having regard to the information in

question, the Commissioner considers that it would be reasonable, having rejected the Cabinet Office's application of section 42(1), to consider whether section 35(1)(a) applies instead.

Section 35(1)(a) – formulation and development of government policy

48. The Cabinet Office has withheld the following documents on the basis of section 35(1)(a): 1 – 5, 8, 11, 12, 22, 25, 26 and 35. As explained above, the Commissioner has also included item 14 under his consideration of section 35(1)(a).

49. Section 35(1)(a) of FOIA states:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-
(a) the formulation or development of government policy'.

50. Section 35 is a class based exemption. If information falls within the description of a particular sub-section of 35(1) then this information will be exempt. There is no need for the public authority to demonstrate prejudice to these purposes.

51. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

52. At the very least 'formulation or development' suggests something dynamic, ie something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.

53. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007)* at paragraph

75(v), and *DWP v Information Commissioner (EA/2006/0040, 5 March 2007)* at paragraph 56.

54. In describing these general principles the Commissioner fully recognises that policymaking can take place in a variety of ways; there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the precise context and timing of the information in question.
55. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.

The Cabinet Office's position

56. The Cabinet Office argued that the information withheld on the basis of section 35(1)(a) related to the government's policy on managing supplier performance. It explained that at the time the request was received a coordinated, centralised approach to supplier management was still evolving and that the withheld information related to the development of thinking on how best to implement the policy over a period of time.

The complainant's position

57. The complainant argued that the government's policy on managing supplier performance was a settled policy by July 2012 and that the withheld information, some of which was created after that date, therefore relates to its implementation, and not to its formulation and/or development. He therefore argues that section 35(1)(a) is not engaged by the withheld information.

The Commissioner's position

58. The government's policy for supplier management was a new initiative, announced in July 2012. The Commissioner notes that some of the information which has been withheld under section 35(1)(a) contains deliberation about the ways in which the aims of the policy might best

be taken forward, and asks for agreement or further suggestions as to how it might operate.

59. He notes that an initial version of the resultant policy (item 1) was agreed and circulated in July 2012. Implementation of this policy commenced almost immediately, with suppliers identified for inclusion on a list of high risk suppliers that was to be maintained under the policy. Presumably it is this to which the complainant refers in paragraph 57, above.
60. The Commissioner is satisfied that although the agreed policy was put into practice quickly, it nevertheless continued to develop and evolve through its introductory phase. Ultimately, he notes that the policy was not subsequently adopted in the manner set out in item 1. By November 2012 fundamental changes had been made to the policy, including the withdrawal of the "high risk register", and a new policy note was published which superseded all previous versions¹.
61. In light of this and in line with the approach set out at paragraphs 51-55, the Commissioner is satisfied that the following items, withheld on the basis of section 35(1)(a), relate to the formulation and development of the government's policy on managing supplier performance and that the exemption at section 35(1)(a) is therefore engaged in respect of them: items 1, 2, 3, 4, 11, 12, 14, 22, 25 and 26.
62. The Commissioner does not accept that the following items contain information which relates to the formulation and/or development of government policy, and therefore does not accept that the exemption at section 35(1)(a) is engaged.
 - Item 5 - this contains a recommendation related to a supplier that appears to be purely a policy implementation matter.
 - Item 8 - this is a letter to departmental heads, notifying them of the new policy and identifying certain suppliers. It appears to be a policy implementation matter.
 - Item 35 - this contains a recommendation that appears to be a policy implementation matter.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80222/20121108_Strategic_Supplier_Risk_Management_Policy.pdf

63. In its correspondence with the Commissioner, the Cabinet Office specified that it considered item 5 to be exempt under section 36 if the exemption at section 35 did not apply. Similarly, it considered item 8 to also be exempt under section 43(2). The Commissioner has therefore gone on to consider these items under those exemptions.
64. In respect of item 35, he has been guided by the Tribunal's comments in *Bowbrick v the Information Commissioner and Nottingham City Council (EA/2005/0006, 28 September 2006)* and, in view of the sensitive content of these documents, has gone on to consider the application of other exemptions not claimed by the Cabinet Office (namely section 43(2)).

Public interest test

65. Section 35 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

66. The Cabinet Office referred the Commissioner to the reasoning it had provided to the complainant. These arguments are summarised below.
67. The disclosure of items 1, 2, 3, 4, 11, 12, 14, 22, 25 and 26 would inhibit the effective formation of government policy, and the ability of ministers and officials to assess policy options in a candid way.
68. Items 1, 14, 22, 25 and 26 are documents intended to progress a government commercial policy. Releasing this information would be liable to inhibit officials in future when formulating and implementing commercial policy. Cabinet Office officials need to be confident that the advice they provide to stakeholders within government is based on their best assessment of the facts, and should not give undue consideration to potential scrutiny by external parties.
69. Items 2 and 3 are submissions to the Minister for the Cabinet Office, seeking ministerial input into the development of a commercial policy. They contain advice in the form of background briefings for the purpose of deliberation. Release of this information would be likely to inhibit the provision of future advice to ministers and deliberation on the subject of supplier performance management.
70. Item 4 is submission to the CRB whose members take responsibility for overseeing the formulation of commercial policy across government. Item 12 is a copy of CRB meeting minutes. Disclosure of these items would inhibit the CRB's ability to engage in free and frank discussion of

commercial policy options, ultimately damaging the government's drive to introduce greater efficiency in the way it spends taxpayers' money.

71. Item 11 is the CRB's draft terms of reference. It sets out, amongst other things, the objectives, role, measurements and membership of the CRB. It is a draft document, and so represents ongoing consideration of the role senior officials have in shaping government commercial policy. Disclosure of this document would ultimately threaten future discussion of the role such officials have in shaping policy, and therefore potentially have a negative impact on the effective running of government.

Public interest arguments in favour of disclosing the withheld information

72. The Cabinet Office recognises there is a general public interest in openness in public affairs so that the public is able to scrutinise the manner in which government departments reach important decisions. This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with policy-making.
73. Openness around decisions made regarding managing supplier performance would allow the public to better understand the safeguards that the government has put in place to ensure that poor performance is recognised in the procurement process, and would show the procedure which led to government suppliers being classed as high risk.
74. The complainant's comments on the public interest were underscored by his central belief that section 35(1)(a) was not engaged and therefore that the public interest arguments submitted by the Cabinet Office were invalid.
75. That point notwithstanding, the complainant argued that the Cabinet Office had failed to take account of the significant public interest in those who contract with the government knowing whether they have been blacklisted from being awarded government contracts, and the reasons why.
76. Referring to the changes made to the policy in November 2012, the complainant also expressed the view that the public interest in withholding information about an abandoned policy was weak.
77. He also stated that, in his opinion, the policy had departed from routine procedures and standard practices (including fair process issues such as pre-consultation with interested parties). He argued that there was a strong public interest in disclosure in such circumstances.

Balance of the public interest arguments

78. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly, the timing of the request, and secondly, the content of the requested information itself.²
79. The complainant has argued that it is in the public interest that suppliers know the basis on which decisions about their performance are made. Having considered the withheld information the Commissioner has found that it was not significantly linked to this public interest.
80. The Commissioner also notes that the current policy on supplier management is in the public domain, and so current suppliers may refer to this to understand how decisions about their performance are currently made.
81. The Cabinet Office effectively submitted a combination of safe space and chilling effect arguments in favour of maintaining the exemption.
82. With regard to the safe space arguments, the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight.
83. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.
84. In the circumstances of this case the Commissioner is satisfied that at the time the request was received (30 October 2012) the formulation and development of the government's policy on supplier performance

² *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

management was at a very advanced stage and that there was significant overlap with the commencement of the implementation phase. The request came only a week before the government published a revised version of the policy and nearly two months after media reports first began to circulate that such a policy was in operation and that at least two suppliers had been "blacklisted".³

85. The Commissioner is therefore satisfied that by the time of the request, the development and implementation of the policy had progressed to the extent that the government's need for a safe space in which to discuss how to explain and defend its position on the policy would have weakened considerably. Consequently, in the circumstances of this case the Commissioner is of the opinion that the Cabinet Office's safe space arguments attract little weight.
86. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. Where the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
87. As discussed above, the Commissioner is of the opinion that the policy making in question was at the end stages by the time of the request. It is hard to conceive that any significant change or development in thinking would have occurred in the week between receipt of the request and the publication of the revised policy on 8 November 2012. The Commissioner therefore does not accept that disclosure of the withheld information would have had a significant chilling effect on the government's ongoing policy discussions regarding this specific policy.
88. However, the Commissioner does recognise that disclosure of information such as this certainly has the potential to have a chilling effect on future contributions to similar policy making discussions which

³ See, for example, <http://central-government.governmentcomputing.com/news/cabinet-office-blacklists-two-high-risk-it-suppliers-says-report>

focus on similar issues. The Commissioner has examined the information that has been withheld on the basis of this exemption and notes that it contains analyses of the proposed policy approach, assessments of potential risks, summarised legal advice and sensitive financial information about government spend on strategic suppliers.

89. In view of the nature of this information, the Commissioner accepts that some notable weight should be given to the chilling effect arguments in this context. Furthermore, although the policy making was all but complete by the time of the request, it would only have been completed relatively recently. In the Commissioner's opinion this adds significant weight to the chilling effect arguments made in respect of items 2, 3, 4, 12, 14 and 22. He has concluded that for those items, the public interest favours the maintenance of the exemption.
90. However, he does not consider that items 1, 11, 25 and 26 contain the elements described in paragraph 88 and that consequently the public interest in maintaining the exemption in respect of these documents is low.
91. Item 1 is a procurement policy note, setting out the initial version of the policy on managing supplier performance, which was circulated in July 2012. It was circulated to all government departments and their agencies and set out the procedure to be followed by anyone engaging with high risk strategic suppliers. It was superseded on 8 November 2012 by the Strategic Supplier Risk Management Policy, which, as noted in paragraph 60, has been placed in the public domain. While there are some differences between the two policies, much of the procedure outlined is very similar. Given that the new procedure is in the public domain, the Commissioner can see nothing within item 1 that would be likely to result in the sort of chilling effect the Cabinet Office envisaged, if it were to be disclosed. Furthermore, he notes that item 1 had a real and tangible impact. Suppliers were designated "high risk" while it was in operation, and this information was reported in the media (although this does not appear to have been as a result of any disclosure sanctioned by the Cabinet Office). Taking all this into account, the Commissioner therefore considers that the public interest in disclosing this item outweighs that in maintaining the exemption at section 35(1)(a).
92. Item 11 is the CRB's draft terms of reference. It sets out amongst other things, the objectives, role, measurements and membership for the CRB. Item 25 is a research questionnaire sent to EU member governments to elicit information about their strategic supplier arrangements. Item 26 is a briefing paper setting out approaches to performance management across the EU. The Commissioner has been unable to identify how disclosure of these items, which are neutral in tone and contain no opinion, analysis or deliberation, would be likely to

result in the sort of chilling effect the Cabinet Office has suggested. In view of this, and of the arguments put forward in favour of disclosing the information, the Commissioner has concluded that the public interest in maintaining the section 35(1)(a) exemption does not outweigh the public interest disclosing these items.

Section 35(1)(b) Ministerial communications

93. Section 35(1)(b) of FOIA states:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-
(b) Ministerial communications'.

94. The purpose of this exemption is to protect the operation of government at ministerial level. It prevents disclosures which would significantly undermine ministerial unity and effectiveness or result in less robust, well-considered or effective ministerial debates and decisions.

95. The Cabinet Office has argued that item 6 is exempt from disclosure by virtue of section 35(1)(b). Item 6 is a brief letter from the Minister for the Cabinet Office to fellow Cabinet Ministers, introducing the government's new policy on supplier performance management. The Commissioner is satisfied that this constitutes a ministerial communication for the purposes of the FOIA, and that the exemption at section 35(1)(b) is engaged in respect of the document.

Public interest test

96. Section 35(1)(b) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

97. In its submissions to the Commissioner, the Cabinet Office's public interest arguments in respect of exemption 35(1)(b) overlapped with those in respect of section 35(1)(a).

Public interest arguments in favour of maintaining the exemption

98. The Cabinet Office argued that withholding a communication between ministers ensures that the constitutional convention of collective responsibility of ministers is protected. Maintaining collective responsibility is fundamental to the continued effectiveness of cabinet government. Allowing ministerial correspondence to enter the public domain may make it more difficult in future for the cabinet to maintain collective responsibility, as the risk of a non-unified ministerial front on policy becomes greater.

Public interest arguments in favour of disclosing the withheld information

99. The Cabinet Office's arguments are the same as at paragraph 72-73, above.
100. The complainant offered no specific public interest arguments in favour of this exemption.

Balance of the public interest arguments

101. As set out in paragraph 78, when considering the balance of the public interest test the Commissioner has had regard to the timing of the request and the content of the requested information.
102. The Cabinet Office has argued that it is in the public interest to maintain the convention of collective cabinet responsibility. The Commissioner accepts that if collective responsibility arguments are relevant, they are likely to carry significant weight.
103. However, the Commissioner notes that by the time of the request the Minister for the Cabinet Office had been publically identified as spearheading the government's new approach to supplier performance management. The Cabinet Office issued a press release in June 2012 publicising his work in this area and promoting the resultant policy⁴. The Minister was also widely quoted in the media, talking about the anticipated benefits of the initiative. His pivotal role in taking the policy forward within government was therefore publicly known.
104. Furthermore, the content of the document in question here appears to have been widely shared beyond its original circulation list of fellow cabinet ministers. It was directly quoted from in media coverage of the time⁵ and has been published virtually in its entirety, on at least one industry blog⁶.

⁴ <https://www.gov.uk/government/news/whitehall-spending-controls-extended-permanently>

⁵ See, for example <http://www.computerworlduk.com/news/public-sector/3372361/francis-maude-set-to-blacklist-high-risk-government-suppliers/>

⁶ <http://spendmatters.com/uk/exclusive-government-introduces-supplier-blacklist-bad-news-g4s/>

105. In view of this, the Commissioner is satisfied that disclosure of this document under the FOIA would be highly unlikely to prejudice the convention of collective cabinet responsibility. He finds the general public interest in favour of transparency and accountability to be stronger than that in maintaining the exemption for the reasons cited by the Cabinet Office. Accordingly, he considers that the Cabinet Office was not entitled to rely upon section 35(1)(b) to withhold item 6.

Section 36 – prejudice to the effective conduct of public affairs

106. In its letters to the complainant and the Commissioner, the Cabinet Office stated that it was relying upon 36(2)(b)(i) and (ii) to withhold items: 7, 9, 10, 15, 16, 18, 31, 32 and 33. In addition, as set out at paragraph 63, the Commissioner has included item 5 in his consideration of this exemption.

107. Section 36(2) states that:

"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-...

(a) Would or would be likely to, prejudice –

(i) The maintenance of the convention of the collective responsibility of Ministers of the Crown,

...

(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".

108. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The Shorter Oxford English Dictionary defines "reasonable" as, "...in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd (in short, if it is an opinion that a reasonable person could hold) then it is reasonable.

109. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to

be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

110. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC* (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

"does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".

111. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, he is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

112. The Cabinet Office has explained that the qualified person in this case is Francis Maude, Minister for the Cabinet Office. The Commissioner is satisfied that this is in accordance with the requirements of section 36(5).

113. The opinion was requested on 3 December 2012 and obtained on 18 December 2012. The Cabinet Office provided the Commissioner with a copy of the submission to the qualified person and his confirmation that he agreed the engagement of section 36. The Commissioner notes that the level of prejudice claimed was not specified and so he has considered only whether the exemption is engaged at the lower threshold of "would be likely" to prejudice.

114. Although the Cabinet Office stated that the qualified person had given the opinion that the information in question was exempt under sections 36(2)(b)(i) and (ii), the Commissioner notes that it was in fact the opinion of the qualified person that items 7 and 31 were exempt under section 36(2)(a)(i). He has therefore considered whether the exemption at section 36(2)(a)(i) applies to those items and not the exemptions at sections 36(2)(b)(i) and (ii).

Section 36(2)(a)(i)

115. In respect of section 36(2)(a)(i) the submission to the qualified person argued that the content of the information exempted under that section (items 7 and 31) revealed the thinking of individual members of the government on government policy matters. It argued that maintaining the convention of collective cabinet responsibility is fundamental to the continued effectiveness of cabinet government.

116. Having considered the content and context the Commissioner is satisfied that it is a reasonable opinion that disclosure of item 31 would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown and that the exemption at section 36(2)(a)(i) is engaged.
117. However, he is not convinced by the argument that the disclosure of item 7 would reveal individual thinking on government policy to the extent that it would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown.
118. Item 7 is simply a draft version of the letter at item 6. The Commissioner has already considered item 6 in this decision notice, under section 35(1)(b). He specifically considered whether its disclosure would be likely to prejudice the convention of the collective responsibility of Cabinet government. The draft version of item 6 contains one minor change to the emphasis of a statement. For the reasons set out in paragraphs 103–104, above, the Commissioner does not consider that the disclosure of this draft letter would be likely to have the results the Cabinet Office has suggested. He therefore does not consider the qualified person's opinion to be reasonable in this regard, because it failed to take into account the significant amount of information about the Minister for the Cabinet Office's role in developing and leading the policy already in the public domain. The Commissioner therefore considers that the Cabinet Office is not entitled to rely upon section 36(2)(i)(a) to withhold item 7.

Section 36(2)(b)(i) and (ii)

119. Here, the submission to the qualified person argued that disclosure would be likely to have a chilling effect on the candour and frankness of the contributions made to the formulation and development of government policy (both this one and future policy) and to other government matters.
120. Officials would be more likely to be reticent in expressing their views. This would risk both the substance and implementation of government policy. It may also discourage ministers from seeking views and advice.
121. With regard to the reasonableness of this opinion, the Commissioner notes that the withheld information contains candid and frank exchanges that were clearly conducted with the expectation that they would be treated confidentially. Furthermore, the Commissioner recognises that at the time of the request much of the information was only a few months old. Taking these factors into account the Commissioner is satisfied that it was reasonable for the qualified person to find that disclosure of the withheld information would have been likely to result in a 'chilling effect' and thus potentially inhibit the contributions of individuals when

providing comment on government matters in the future. Therefore, the Commissioner accepts that the qualified person's opinion with regard to section 36(2)(b)(i) and (ii) is a reasonable one and that this exemption is engaged for items 5, 9, 10, 15, 16, 18, 32, and 33.

Public interest test

122. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions at section 36(2)(a)(i) and 36(2)(b)(i) and (ii) outweighs the public interest in disclosing the information.
123. The Cabinet Office submitted combined public interest arguments for 36(2)(b)(i) and (ii) and none for 36(2)(a)(i). The Commissioner considers the issues to be taken account of to be sufficiently similar to apply them across the exemptions. He has therefore considered the public interest arguments in respect of each exemption together.

Public interest arguments in favour of maintaining the exemption

124. Disclosure would inhibit the provision of frank analysis and advice to ministers. Ministers and their officials need to be able to think through all the implications of particular options. In particular, they need to be able to make rigid and candid assessments of the risks to the policy recommendations submitted to them. Disclosure may also inhibit the provision of good quality, reasoned advice in future, which would be harmful to the development of effective government policy.
125. Disclosure could jeopardise current or future decisions about managing suppliers, with the real risk that the government's ability to contract advantageously may be prejudiced. Loss of faith in the government's ability to protect information relating to supplier performance could inhibit its ability to effectively manage its commercial interests.
126. Disclosure of some information relating to specific suppliers could also be beneficial to competitors; this could not only result in direct harm to a supplier's commercial interests but also deter them, as well as other suppliers, from contracting with government in the future.
127. Items 9,10,15,16 and 32 in particular contain or are the product of deliberations on policy implementations. Their disclosure would be likely to inhibit the free and frank exchange of views in the future. Exchanges on the government's commercial stance towards certain suppliers could become more reticent or circumspect. Disclosing this information risks undermining the government's position, as well as compromising the identity of the suppliers in question.

Public interest arguments in favour of disclosing the information

128. The Cabinet Office recognised that there was a general public interest in openness in public affairs so that the public are able to scrutinise the manner in which government departments reach important decisions. This makes for greater accountability, increases public confidence in government decision making and helps to encourage greater public engagement with policy making.
129. Openness around decisions made regarding managing supplier performance would allow the public to better understand the safeguards that the government has put in place to ensure that poor performance is recognised when making new procurements, and would show the procedure by which government suppliers were classed as "high risk".
130. The complainant disputed that disclosure would be likely to have the chilling effect the Cabinet Office had suggested and cited what he referred to as Commissioner's "sceptical" published position on this. He also repeated the public interest arguments set out in paragraphs 76-77.

Balance of the public interest arguments

131. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
132. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and - with the exception of special advisers - impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
133. In this case, as set out at paragraph 87, the Commissioner recognises that at the point the request was submitted, the policy on supplier

management was at a very advanced stage and the Commissioner does not accept that the information would have had a significant chilling effect on the government's ongoing discussions regarding this specific policy. Furthermore, the Commissioner recognises that the Cabinet Office's line of argument suggests a rather broad chilling effect as a result of the withheld information being disclosed. However, despite these factors, the Commissioner is satisfied that the chilling effect argument needs to be given significant weight in the particular circumstances of this case for two reasons.

134. Firstly, given the direct and frank manner in which the advice in the withheld information is shared and expressed the Commissioner is persuaded that its disclosure would be very likely lead to officials who offer advice in similar circumstances in future being more reserved in the way they express themselves.
135. The Commissioner considers that it is clearly in the public interest for officials to be able to make frank assessments about strategic suppliers' performance without fearing that this information will be more widely shared. He considers it realistic that disclosure of such information would be likely to be damaging to both government interests and those of the suppliers in question, and that there is a real risk that officials would be likely to feel inhibited in the advice they give when faced with this possibility.
136. Secondly, although the decision making surrounding the policy would have been in its final stages at the time of the request, in the Commissioner's view the fact that the more recent communications contained in the withheld information were only exchanged a matter of weeks prior to the request being submitted adds credence to the argument that disclosure of such information would be likely to lead to future, related discussions being inhibited. In other words, the Commissioner accepts that it is logical to argue that those who had exchanged such recent communications would still expect them to be treated confidentially. The Commissioner considers that for information covered by the exemptions at section 36(2)(a)(i) and 36(2)(b)(i) and (ii), this would be a reasonable expectation.
137. Furthermore, not only does the Commissioner believe that the Cabinet Office's chilling effect arguments need to be given notable weight, he also accepts that it is logical to argue that the consequences of such a chilling effect would undermine effective government decision making in the manner it suggests, particularly so in respect of the information exempted under section 36(2)(a)(i). That is to say, the Commissioner accepts that decision making across government clearly depends on the free flow of information and that any significant infringement on the free flow of information would be contrary to the public interest.

138. Turning to the arguments in favour of disclosure, the Commissioner believes that the public interest arguments identified by the Cabinet Office should not be dismissed lightly. The Commissioner agrees that there is a clear public interest in ensuring that the processes by which the government reaches decisions is open and transparent. In this case, disclosure of the withheld information would inform the public about the process by which the introduction of the policy on supplier performance management was managed and implemented.
139. The Commissioner has considered the complainant's argument, that the policy departed from routine procedures and standard practices and that there was a strong public interest in disclosure in such circumstances. The Commissioner is not in a position to make a judgement as to whether what the complainant alleges is the case. There is not enough evidence on this aspect for the Commissioner to give strong weight, though he has given some weight to the general importance of transparency in the process.
140. In conclusion, and weighing all the facts against each other the Commissioner has concluded that the public interest in maintaining the exemptions at sections 36(2)(a)(i) and 36(2)(b)(i) and (ii) outweighs the public interest in disclosing the information. In reaching this finding the Commissioner has placed particular weight on the fact that consequences of disclosure risk undermining the effectiveness of communications between officials and ministers across a range of matters.

Section 43(2) – commercial interests

141. The Cabinet Office argued that items 1, 8, 11, 25, 34, 36 and 37 were exempt from disclosure under section 43(2). As explained previously, the Commissioner has also included item 35 in his consideration of section 43.

142. Section 43(2) states:

"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)."

143. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner believes that three criteria must be met.

- First, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.

- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the requested information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

144. With regard to the first criterion, the Cabinet Office argued that disclosure of the withheld information would or would be likely to prejudice the commercial interests of government as a whole, as well as those of individual government departments and strategic suppliers. It argued that disclosure would or would be likely to have a negative impact on governments negotiating positions and on named strategic suppliers' business reputations. The Commissioner is therefore satisfied that the harm described relates to the commercial interests of each party.

145. With regard to the second criterion, the Cabinet Office argued that disclosure would or would be likely to weaken a department's position in a competitive environment in that it would reveal market-sensitive information or information that is potentially useful for negotiation purposes.

146. In this case the information in question includes instances where the government maintains that a supplier has not met performance expectations. It is important that government can work privately with suppliers to resolve performance issues where they arise. Releasing information on supplier performance would or would be likely to damage government's ability to effectively address and manage risk when making procurements.

147. Where the requested information reveals disputes between government and suppliers which might result in litigation, disclosing information of this nature:

- makes it more difficult to reach a settlement, thus exposing government to greater litigation costs;
- exposes government to the risk of further proceedings by the supplier for defamation, thereby exposing government to further costs (both time and money); and
- is contrary to confidentiality provisions in agreements where disputes fall to be resolved by arbitration (government's

preferred dispute resolution procedure) rather than court proceedings.

148. The Cabinet Office also argued that the commercial interests of individual strategic suppliers would be or would be likely to be prejudiced if information about them were disclosed. Disclosure would or would be likely to harm the business reputations of the strategic suppliers identified in the withheld information and may reveal market-sensitive information about their performance.
149. Information on how a supplier is performing may be price sensitive for the purposes of stock exchange listing rules. Where a supplier has been designated "high risk", it should be for that supplier to determine whether details of its performance as assessed by government are price sensitive such that disclosure to the markets is necessary. Disclosing price-sensitive information otherwise than in the proper performance of a person's duties is a criminal offence under the Criminal Justice Act 1993 and may also amount to market abuse under the Financial Services and Markets Act 2000.
150. With regard to the third criterion set out at paragraph 143, the Cabinet Office declined to specify the level of prejudice it envisaged (ie "would" prejudice or "would be likely" to prejudice). The Commissioner has therefore treated its claim as though the lower level of "would be likely" to prejudice has been applied. In applying this lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk.

The Commissioner's view

151. The Commissioner accepts that the Cabinet Office has described scenarios in which prejudice to the commercial interests of various parties would be likely to occur. However, for the most part, he considers it has failed to demonstrate how the disclosure of *the information in question* would be likely to have these results. The majority of the information the Cabinet Office has exempted under section 43(2) does not have the level of sensitivity or confidentiality that the Cabinet Office has assumed.
152. Item 1 is a procurement policy note, setting out the initial version of the policy on managing supplier performance, which was circulated in July 2012. It was circulated to all government departments and their agencies and set out the procedure to be followed by anyone engaging with high risk strategic suppliers. It was superseded on 8 November 2012 by the Strategic Supplier Risk Management Policy, which, as noted in paragraph 60, has been placed in the public domain. While there are some differences between the two policies, much of the procedure

outlined is very similar. The Cabinet Office has not explained why, when a document containing substantially similar information is in the public domain, the disclosure of item 1 would be likely to prejudice its commercial interests.

153. Item 11 is the CRB's draft terms of reference. It sets out amongst other things, the objectives, role, measurements and membership for the CRB. Again, the Commissioner does not consider this information to be especially sensitive (he notes that information about the role and objectives of the CRB is available on the internet) and the Cabinet Office has not explained or shown why disclosure would be likely to prejudice its commercial interests.
154. Item 25 is a research questionnaire sent to EU member governments to elicit information about their strategic supplier management arrangements. It contains no information about recipient or sender and merely asks a series of standard questions about policies and procedures. Again, the Cabinet Office has not explained how disclosure of this specific document would be likely to prejudice its commercial interests, and the Commissioner can see nothing in it which would lead him to form that view.
155. Therefore, because the Commissioner considers that the Cabinet Office has not demonstrated that disclosure of items 1, 11 and 25 would be likely to result in prejudice to commercial interests, he has concluded that it is not entitled to rely upon the exemption at section 43(2) to withhold those items.
156. The items which the Commissioner considers would be likely to result in prejudice to commercial interests if disclosed are items 8, 34, 35, 36 and 37. Item 8 is a letter to departmental heads, notifying them of the new supplier management policy and identifying suppliers. Items 34, 35, 36 and 37 also identify suppliers. The Commissioner accepts that this information is sufficiently sensitive to be likely to result in the sort of commercial prejudice to the suppliers and to the government that the Cabinet Office has described, if it were disclosed. The Commissioner therefore considers that the exemption at section 43(2) is engaged by the information in items 8, 34, 35, 36, and 37.

Public interest

157. Section 43(2) is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

158. The Cabinet Office highlighted the public interest in the sound management of government suppliers, and the provision of advice to ministers about managing supplier performance that would be served by maintaining the exemption.
159. The Cabinet Office argued that it is in the public interest that the way in which commercial decisions are reached by government can be protected, so as to enable a stronger bargaining position when doing business with its suppliers. Complete disclosure of all procurement processes reduces the strength of this position. While the Cabinet Office recognised that there is a balance to be struck between this requirement and complete transparency, it is important that to ensure best value for taxpayers' money, information of this nature is sometimes withheld. A strong commercial stance, based on candid scrutiny of commercial options, is essential for ensuring that taxpayers' money is spent in the most effective way possible, particularly so in the current, challenging economic climate.

Public interest arguments in favour of disclosing the information

160. The Cabinet Office acknowledged the public interest in the disclosure of information about how government manages commercial relationships with its key suppliers to inform debate, supply information to Parliament and help the public.
161. It also accepted the public interest in transparency and accountability around government's commercial undertakings. This interest extends to the matter of how government money and resources are expended in order to achieve maximum efficiency. In this respect disclosure of the information requested would allow scrutiny to be brought to how government manages its strategic suppliers and in doing so inform the public debate as to whether public funds are being put to the best possible use.
162. The complainant accepted that the disclosure of certain information might prejudice the commercial interests of the strategic suppliers, but argued that this could be addressed by redacting any identifying information from the requested information.
163. The complainant did not accept that disclosure would have implications for the commercial standing of the government or individual departments, and contrasted this claim with the strong public interest in its accountability and transparency.

The Commissioner's view

164. The Commissioner accepts that there is a clear public interest in the government maintaining a strong negotiating position when contracting with providers of goods and services. The information under consideration here (items 8 and 34-37) relates principally to its assessment that certain strategic suppliers were underperforming. The Commissioner considers that it is in the public interest for government to be able to manage its commercial relationships from a position of strength and that disclosure of the information here might undermine that. It would be likely to damage confidence in the government's ability to manage its commercial relationships fairly and confidentially.
165. Furthermore, the fact that at least one strategic supplier disputes the decision to designate it as "high risk" suggests that it views the label with considerable concern. This would effectively be a disclosure of performance related information which would not otherwise be in the public domain. In view of this, the Commissioner considers that it would be damaging to the interests of public procurement to disclose this information and unfair to the suppliers in question. While he does not consider that the potential damage would be sufficient to deter the private sector from tendering for public sector contracts, he does consider that the government's ongoing relationship with the suppliers in question would be likely to be damaged.
166. The Commissioner has considered the complainant's suggestion that redaction of identifying information would address public interest concerns about identifying individual suppliers. However, he is aware that at the time of the introduction of the policy there was much speculation in the media as to the identities of suppliers who may have been designated "high risk". For this reason the Commissioner considers that it would be relatively easy to identify the suppliers in question, even if the information which specifically identified them was removed from the documents.
167. Taking all the factors of the case into account the Commissioner considers the arguments in favour of maintaining the exemption to be sufficiently important that they outweigh the public interest arguments in favour of disclosing the information.

Section 41 – information provided in confidence

168. The Cabinet Office applied the exemption at section 41 to item 34. As set out above, the Commissioner accepted that item 34 is exempt from disclosure by virtue of the exemption at section 43(2). Therefore he has not gone on to consider the Cabinet Office's application of section 41.

Section 40(2) – personal information

169. The Cabinet Office informed the Commissioner that it was applying the exemption at section 40(2) in respect of the personal data of junior officials (ie staff below the level of senior civil servant).
170. The only personal data contained in the documents which the Commissioner has determined are not covered by the exemptions cited by the Cabinet Office, are the names of a senior civil servant and government ministers. This information therefore falls outside of the scope of the information which the Cabinet Office considers to be exempt under section 40(2).

Section 10 - Time for compliance

171. For the reasons set out in paragraph 18 the Commissioner considers the date of the request to be 30 October 2012.
172. Requests for information should normally be dealt with within 20 working days. However, section 10(3) enables an authority to extend the 20 working day limit up to a 'reasonable' time in any case where it requires further time to consider whether the balance of the public interest favours maintaining an exemption or disclosing the requested information.
173. The FOIA does not define what might constitute a 'reasonable' extension of time. However, the Commissioner's view is that an authority should take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.
174. On 26 November 2012 the Cabinet Office informed the complainant that it needed until 27 December 2012 to consider the public interest in respect of the exemptions at sections 35, 36, 42 and 43. In the event, it provided the outcome of its deliberation on 24 January 2013, 59 working days after the request was submitted.
175. Because the Cabinet Office issued a public interest extension notice and then took unreasonable time to communicate the outcome of the public interest test, the Commissioner finds the Cabinet Office breached sections 10(1) and 17(3) of the FOIA.

Section 45 - Internal review

176. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code

states that reviews should be conducted promptly and within reasonable timescales.

177. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
178. The complainant asked for an internal review of the outcome on 5 February 2013. The Cabinet Office acknowledged receipt of this request the same day, but did not provide the results of its review until six months later, on 9 August 2013, after the Commissioner had intervened.
179. The Cabinet Office explained that the delay was due to the complexities of the issues under consideration and difficulties identifying someone suitably senior to conduct the review.
180. Although he acknowledges the complexities of the case, the Commissioner notes that the internal review did not result in the Cabinet Office altering its position. The Commissioner considers that the period of six months to conduct the internal review was excessive and does not conform with the section 45 code.

Right of appeal

181. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

182. 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.

183. 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

Annex A – list of information held by Cabinet Office

Response Item Number	Document	In response to which aspect of original request
1	Procurement Policy Note: Managing supplier performance	(b) + (d)
2	Submission to Minister for the Cabinet Office dated 21/05/12	(g)
3	Submission to Minister for the Cabinet Office dated 13/06/12	(b)+(c)+(d)
4	Submission to Commercial Relationships Board dated 02/07/12 with attached report dated 28/06/12	(b)+(c)+(e)+(f)+(j)
5	Submission to Minister for the Cabinet Office dated 04/07/12	(c)+(j)
6	Letter from Minister for the Cabinet Office dated 12/07/12	(c)
7	Draft version of item 6	(a)
8	Letter from Chief Procurement Officer dated 16/07/12	(c)
9	Draft version of item 8	(a)
10	Draft letter to Permanent Secretaries	(a)
11	Commercial Relationships Board draft Terms of Reference	(c)
12	Commercial Relationships Board Minutes (04/07/12)	(f)
13	Letter from Chief Procurement Officer dated 18/10/12	(m)
14	Email dated 16.10, 30/03/12 and others in this string	(a)

Response Item Number	Document	In response to which aspect of original request
15	Email dated 17.53, 18/05/12 and others in this string	(g)
16	Email dated 14.52, 07/06/12 and others in this string	(a)
17	Email dated 01.21, 14/06/12 and others in this string	(a)
18	Email dated 10.50, 15/06/12 and others in this string	(g)
19	Email dated 17.26, 19/06/12 and others in this string	(a)
20	Email dated 07.21, 21/06/12 and others in this string	(g)
21	Email dated 08.46, 22/06/12 and others in this string	(a)
22	Email dated 23.48, 26/06/12 and others in this string	(d)
23	Email dated 11.05, 28/06/12 and others in this string	(a)
24	Email dated 18.03, 29/06/12 and others in this string	(g)
25	Questions for obtaining information on performance management in the EU	(a)
26	Supplier performance management elsewhere in the EU	(a)
27	Email dated 15.35, 02/07/12 and others in this string	(g)
28	Email dated 07.22, 03/07/12 and others in this string	(a)

Response Item Number	Document	In response to which aspect of original request
29	Email dated 15.47, 10/07/12 and others in this string	(g)
30	Email dated 14.35, 10/07/12 and others in this string	(g)
31	Email dated 14.05, 11/07/12 and others in this string	(g)
32	Email dated 17.14, 20/06/12 and others in this string	(a)
33	Email dated 15.57, 06/07/12 and others in this string	(g)
34	Note of meeting between Duncan Tait and Bill Crothers 10/07/12	(h)