

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 March 2011

Public Authority: British Broadcasting Corporation

Address: 2252 White City
201 Wood Lane
London
W12 7TS

Summary

The complainant requested a copy of all contracts and relevant documents in force at the time of his request between the British Broadcasting Corporation (the "BBC") and Capita Business Services Ltd ("Capita") and the BBC and iQor/Revenue Management Services Ltd (referred to in this decision notice as "RMS") which related to the enforcement of the television licensing system and the collection of television licence fees. Although a redacted copy of these two contracts was provided to the complainant he remained dissatisfied with the redactions made. The Commissioner has determined that section 43(2) is engaged in relation to the commercial interests of RMS and the BBC as disclosure would be likely to be prejudicial to either party. He also accepts that section 43(2) is engaged in relation to the commercial interests of Capita and the BBC. However he considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information in the case of both contracts. He has therefore ordered that the requested information be disclosed to the complainant. The Commissioner has determined that the BBC's application of section 43(1) to the RMS contract is not engaged and has therefore ordered that the requested information be disclosed to the complainant. The Commissioner has also determined that the BBC incorrectly applied section 31 to the requested information in respect of the RMS and Capita contract as he does not find this exemption to be engaged. Additionally the BBC cited section 38 but the Commissioner has determined that this exemption is not engaged. In relation to the application of section 40(2) the Commissioner accepts that this information was correctly withheld. The Commissioner also finds that the BBC has not met the requirements of sections 1(1)(b), 10(1) and 17(1)(b) in its handling of the request.

The Commissioner's Role

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

Background

2. According to the BBC Capita Business Services Ltd ("Capita") administers most of TV Licensing. Revenues Management Services ("RMS") administers TV Licensing's cash related payment schemes. Cash payment plans allow TV Licensing customers to pay for their licence in regular weekly, fortnightly or monthly payments in small manageable instalments. Fee collection arrangements are considered by the BBC to be closely linked to its enforcement strategy. RMS merged with iQor UK Ltd in November 2010.

The Request

3. On 20 June 2009 the complainant requested the following:

"... a copy of all contracts currently in force relating to the collection of television licence fees and enforcement of the television licensing system, between the BBC and the following organisations:

(1) Capita Business Services

(2) Revenue Management Services

By contracts I mean all relevant documents that form part of the contract, as described by you in our previous correspondence on the subject.

(3) In cases where you hold contracts relating to work subcontracted out by either of these two organisations, either directly or indirectly, I request a list of these contracts. This list should include the names of all parties to the contract and a brief description of what the contract relates to, but it is not necessary to list all relevant documents separately.

If you cannot produce all of (1), (2) and (3) within the costs

limit, then this request is for (1)+(2), or failing that just (1). I remind you that you are not entitled to consider the time required for any redactions you choose to make.

In order to provide advice and assistance for any potential future requests of this nature, please could you provide details of how long each part of the request takes to collate, and in the case that you refuse or reduce the request because of the costs limit, an estimate of how long it would take to deal with any omitted parts."

4. On 22 July 2009 the complainant reminded the BBC that it had not responded and was now out of time.
5. On 23 July 2009 the BBC accepted that it had overlooked his request. It was stated that it was unlikely that the BBC would respond earlier than 20 working days because of the difficulties of collation and redaction.
6. On 16 September 2009 a partial response was provided. The BBC did not provide its response to the request for information relating to the contract between Capita and the BBC at this time as it was still being considered. The partial response consisted of redacted versions of the main contract document and redacted versions of 2 side letters between the BBC and RMS. Various parts of this document were redacted under section 43(2) prejudice to its own commercial interests and to RMS. A consideration of the public interest factors was provided.
7. Other information under the RMS contract was withheld under section 31 – law enforcement. The reason given was that the redacted information might be of benefit to “people attempting to evade the licence fee”. Again the public interest factors were provided.
8. The names of individuals were withheld under section 38 - health and safety – on the basis that revealing these names might endanger the individuals involved. The public interest factors were again considered.
9. The BBC also withheld information under Section 40(2) – personal information – consisting of names and signatures. It was suggested that employees no longer working for the BBC would consider it unfair that their personal data be revealed and that this would breach the Data Protection Act 1998.
10. On 12 October 2009 the BBC wrote again with its response to the remaining part of the requested information – the Capita contract. It explained that the contract was a consolidated version that included any amendments that had subsequently been made to the contract. Two appendices that could not be incorporated into the

consolidated contract were also provided. Parts of the requested information had been redacted. Sections 43(2), 31(1)(a), (b), (d), (g) and 2(a) were cited as was section 40(2). The public interest factors were also provided.

11. The supplementary questions the complainant had asked in his request under point 3 were responded to on 26 October 2009. A list was provided of Capita's third party contracts and, with regard to RMS, one third party contractor
12. On 16 November 2009 the complainant requested an internal review of the response he had been given on 2 main grounds: he was unhappy with the length of time the BBC had taken to respond and he felt that the material that had been redacted was excessive. He also took issue with the public interest arguments provided by the BBC against disclosure with regard to section 31. The complainant also stressed that he did not agree with the redactions made, though he did accept those under section 40(2) if they related to junior members of staff.
13. The BBC's internal review on 24 December 2009 upheld the complaint he made regarding the lateness of the response. Although the reviewer accepted that the BBC was correct with regard to the exemptions it applied at section 31 and some of 43(2) a considerable amount of the material withheld under section 43(2) was not considered to be commercially sensitive, either with regard to the BBC or the supplier. New versions of the contracts were ordered to be sent to the complainant.
14. Subsequently the information that the reviewer had ordered be unredacted was sent to the complainant on 8 January 2010. The BBC confirmed that it held copies of other contracts (previously omitted) that had been subcontracted out by RMS and these were listed.

The Investigation

Scope of the case

15. On 14 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - the BBC's response took substantially longer than 20 days;
 - the BBC had partially refused his request;

- that he did not believe that it took 26 hours to collate the requested contracts and questioned why the BBC was not in possession of copies itself and had to go to the contractors involved;
 - that he did not accept the redactions under section 31 or 43(2) as he felt that the arguments presented were “thin”. He stated that if the BBC needed to redact precise numbers he would accept “approximate ranges”.
16. During the course of the Commissioner’s investigation further information was disclosed to the complainant by the BBC as a result of the Commissioner’s decision in the case of FS50228493. This decision ordered the disclosure of incentives information within the Capita contract. Subsequently the BBC has disclosed further information regarding FS50228493 which goes beyond the incentive information originally identified by the BBC and ordered to be disclosed by the Commissioner. As a consequence the Commissioner has considered the remaining withheld information and the BBC’s application to it of sections 31, 38, 40(2) and 43(2) in respect of both contracts. As noted below at paragraph 22 the BBC later also cited section 43(1) and this has also been considered.

Chronology

17. On 11 March 2010 the Commissioner wrote to the BBC to get their further arguments with regard to this complaint. He outlined the scope of the case as primarily concerned with section 31 and section 43(2).
18. The BBC responded on 16 April 2010 providing redacted and unredacted versions of the requested information and the arguments to support its use of the exemptions at section 31 and section 43(2). The BBC confirmed that it was seeking to rely on the higher evidential test for prejudice and that disclosing the requested information with regard to sections 31 and 43(2) “would” prejudice its law enforcement activities and the commercial interests of the BBC, Capita and RMS. The public interest arguments for both these exemptions were also provided.
19. On 21 May 2010 the BBC sent further correspondence to the Commissioner containing additional information that it had omitted to include in the 16 April 2010 submission.
20. On 30 June 2010 the BBC responded to further questions asked by the Commissioner on 16 June 2010. In this letter the BBC stated that the RMS contract was initially for 5 years but could be extended up to 5 times for up to a period of 12 months on each occasion. At the point at which the BBC wrote to the Commissioner there were no plans to

contract these services out again. The BBC also identified additional information that could be released to the complainant after further consideration but confirmed that it had not, so far, done so.

21. On 25 January 2011 the BBC provided further argument regarding its application of section 38 and section 40(2). Whilst maintaining its previous arguments regarding section 38 and some of section 40(2) the BBC explained that it had disclosed some of the previously withheld information under section 40(2) concerning the names of individuals no longer working for Capita or no longer employed in a TV Licensing capacity by the BBC.
22. On 28 January 2011 the BBC submitted a final response which included further disclosures it was prepared to make from both contracts. Additionally the BBC provided further argument on its own behalf and its contractors regarding the application of section 43(2). In this letter the BBC cited section 43(1) which was the first occasion that this exemption had been specifically cited.
23. On 2 February 2011 the BBC confirmed that a copy of the Capita contract would be sent to the complainant that included the disclosures made subsequent to the Commissioner's decision in FS50215269¹ and additional disclosures it was currently prepared to make. The BBC also stated that the decision had been taken "in recent months" to retender for the RMS (iQor) contract contrary to its position in June 2010. The Commissioner notes that the position at the time of the request in June 2009 would have been that there were no plans to retender for this contract.
24. On 23 February 2011 the Commissioner wrote again to the BBC asking if the BBC wished to continue to apply the exemptions it had applied at section 31 in respect of the Capita contract as he considered that further disclosures made post Decision Notice FS50228493 meant that the BBC's argument for withholding one part of one clause was not, in his opinion, sustainable.
25. The BBC responded on 23 February 2011 disagreeing with the Commissioner's analysis and providing additional argument to support its application of section 31 to the remaining withheld information.

¹ Found at http://www.ico.gov.uk/~//media/documents/decisionnotices/2010/FS_50215269.ashx

Analysis

Substantive Procedural Matters

Exemptions

The RMS Contract

Section 31

26. The full text of section 31(1)(a), (b), (d), (g) and 2(a) can be found in the Legal Annex at the end of this Notice.
27. The BBC claimed that certain redacted clauses of the RMS contract were exempt by virtue of section 31(1)(a), (b), (d), (g) and 2(a) as defined in Appendix 9 of its letter to the Commissioner, dated 16 April 2010. These specific redactions were contained within Schedule 2 of the RMS contract entitled 'Services'. Section 31(1) states that information which is not exempt by virtue of section 30 (information held for the purposes of investigations and proceedings conducted by public authorities) is exempt if its disclosure under the Act would or would be likely to prejudice:
- (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature;
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2); and
- (2) The purposes referred to in subsection (1)(g) to (i) are –
- (a) the purpose of ascertaining whether any person has failed to comply with the law"

This is a qualified exemption, and is therefore subject to the public interest test.

28. There are two levels of prejudice that can be cited by a public authority. The lower threshold "would be likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote, whereas "would prejudice" places a much stronger evidential burden on the public authority and must be more probable than not.

29. Following the Information Tribunal decision in Hogan v ICO (EA/2005/0026, EA/2005/0030), the Commissioner uses a 3 step test to indicate whether prejudice would or would be likely to occur from the disclosure of the information in question. The Commissioner applies a three tier test to ascertain whether the exemption is engaged:
1. Do the activities that will be prejudiced relate to law enforcement?
 2. What is the nature of the prejudice in question?
 3. What is the likelihood of the prejudice occurring?

The applicable prejudice within section 31

30. The Commissioner considers the BBC's arguments regarding prejudice to be non-specific in relation to any particular section 31 exemption. Whilst the Commissioner notes a lack of specificity by the BBC in relation to the requested information he accepts that the requested information potentially encompasses all the cited exemptions. The Commissioner has been guided in his consideration of the application of section 31 to the RMS contract by his previous Decision Notice FS50215269. The Commissioner considers that each of the exemptions claimed by the BBC relates to its overall responsibility to collect and enforce the TV licence fee. He therefore notes that the arguments provided by the BBC are relevant to the application of all 4 exemptions and has gone on to consider all the quoted exemptions together.
31. On 16 April 2010 the BBC argued that the release of this information -
- "...would prejudice the prevention and detection of crime, the apprehension or prosecution of offenders, the collection of the licence fee and the BBC's ability to discharge its public functions in respect of such matters".*
32. In FS50215269 the BBC explained that its responsibility to enforce the licensing regime arises as a consequence of its powers to issue TV licences and to collect and recover licence fees under sections 364 and 365 of the Communications Act 2003. This responsibility was expressly confirmed by the Home Office in 1991 which was the year in which the BBC became the statutory authority for the licensing regime. It is a criminal offence to install or use television receiving equipment without a valid licence. TV Licensing investigates and prosecutes unlicensed use of television receiving equipment.
33. Therefore the Commissioner is satisfied that the arguments made by the BBC directly address the applicable prejudice.

The nature of the prejudice

34. The Commissioner has gone on to consider the nature of the prejudice to (a) the prevention or detection of crime; (b) the apprehension or prosecution of offenders; (d) the assessment or collection of any tax or duty or of any imposition of a similar nature; (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2); and (2) The purposes referred to in subsection (1)(g) to (i) are – (a) the purpose of ascertaining whether any person has failed to comply with the law”.
35. An evidential burden therefore rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice, i.e. that the arguments advanced by the BBC are relevant to the exemptions cited. This effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.
36. In its letter, dated 16 April 2010 the BBC stated that the estimated evasion rate for paying for a television licence in the United Kingdom was 5.3% in the 2008-09 financial year which equates to an estimate of £195 million in lost revenue. It also argued that the BBC’s enforcement activities to ensure that people pay their television licence rely upon a number of deterrents. The release of detailed information about enforcement activities will increase general public knowledge of how TV Licensing catches TV Licence evaders. The BBC went on to suggest that this specific information could be used by individuals to evade paying for their TV Licence and it listed certain points in support of its view:
- Evasion increased from 5.2% in 2007/08 to 5.3% in 2008/09.
 - A growing number of individuals try to evade paying the licence fee due to dissatisfaction. The numbers of complaints from people who objected to paying their licence fee had risen from 100 in 2007-08 to 242 in 2008-09.
 - The rise of internet blogging and forums meant that people shared information on how to evade the licence fee and that enforcement methodology was shared in this way.
37. In Appendix 9 of its submission to the Commissioner the BBC asserted that disclosure of the clauses it had redacted could be useful to anyone attempting to evade the licence fee. Fee collection arrangements are inextricably linked to enforcement activity. To release such detailed process information would increase the number of people who ‘play the system’ in order to avoid paying. The Commissioner is therefore satisfied that the arguments provided by the BBC are relevant to the circumstances of this case and that there is a causal relationship

between potential disclosure and the prejudice outlined in the exemptions. He therefore accepts that if the effects of the disclosure predicted by the BBC were to occur that this would or would be likely to result in prejudice as described in paragraph 27. The arguments advanced by the BBC are therefore relevant to this exemption. He also concludes that the prejudice that could arise is not insignificant and is not trivial and has therefore gone on to consider the likelihood of prejudice.

The likelihood of the prejudice

38. *In R (on the application of Lord) v Secretary of State for the Home Office 2003]* Mr Justice Munby expressed the view that:

"...likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

39. As outlined in paragraph 28 the second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.
40. The BBC argued that disclosure "would prejudice" its law enforcement activity and lead to an increase in people 'playing the system'. It explained that knowledge of its fee collection arrangements cannot be separated from its enforcement activity. In attempting to establish a causal link the BBC stated that the release of detailed process information would increase the number of people able to manipulate the system. However the BBC was not able to specifically cite an example of similar information being used to do this, it highlighted the rise of online discussions in which individuals share information about the BBC's enforcement activities and the tactics employed. The requested information could be shared and result in evasion amongst those individuals who do not wish to pay the licence fee. A rise in evasion of 0.1% between 2007-2008 and 2008-2009 was used to support this assertion.
41. In FS50215269 the BBC explained in relation to another part of its enforcement activity that public perception is part of its overall

deterrence methods. The Commissioner recognises the importance the BBC places upon the deterrent effect provided by public perceptions of TV Licensing's enforcement tactics. In light of the evidence that a significant number of people seek to avoid payment of the licence fee, he also accepts that disclosure of the processes involved in the determination of the appropriate actions resulting from certain scenarios could change public perception of the BBC's enforcement tactics because it lays out predetermined outcomes. The Commissioner has also noted the BBC's argument that a change in perception would lead to an increase in the evasion rate for payment of the licence fee by individuals.

42. The Commissioner recognises the importance of the BBC's arguments detailed above and has considered the information carefully to which these arguments have been applied. However, he has had to consider whether the disclosure of this specific information would have the prejudicial effects argued by the public authority, or whether that prejudice would be more probable than not were the information to be disclosed. The BBC has relied on a generic argument that fee collection arrangements are inextricably linked to enforcement activity. The withheld information is RMS's strategy for the enforcement of its collection methods as contracted to do so by the BBC. It includes a payment flowchart and the triggers in the enforcement cycle dependent on such matters as payments made and savings accrued under its cash schemes. Having considered the nature of the withheld information, whilst he accepts that those intent on evading the licence fee may use information on this subject to seek out ways of doing so, he is not convinced that disclosure of this particular information would have the prejudicial effects argued by the BBC. In reaching this view the Commissioner has concluded that the submissions provided by the BBC, whilst providing detail of the potential ramifications were this information to be disclosed, have offered little detail as to how this prejudice would happen.
43. Although not argued by the BBC the Commissioner has therefore gone on to consider whether disclosure would be likely to have the prejudicial effects it describes above. Having considered the above arguments and the application of section 31 again in relation to the lower test of prejudice he does not accept that the release of this specific information would be likely to aid licence fee evasion. For the same reasons he does not agree that disclosure would be likely to prejudice the stated exemptions applied by the BBC. The Commissioner accepts that the release of each extra piece of information might lead to the demystification of the enforcement process which is part of its effectiveness. Nonetheless he remains unconvinced that the release of

detailed process information would increase the number of people who 'play the system' for the following reasons:

- The BBC has not provided any detailed argument in support of its view.
 - The withheld information might equally prove to be an impetus to compliance as it details a process that the customer has already signed up to at some stage. In having signed up to the cash collection schemes the Commissioner suggests that the customer has bought in to the enforcement process and that the customer is likely to be aware that any deviation from payment will ultimately lead to the non-issuing of a licence and eventual penalty.
 - That some of the information is in the public domain by virtue of customers who receive statements and a licence and that the various permutations involved in this process cannot ultimately be kept secret for the same reason.
44. The Commissioner therefore finds that sections 31(1)(a), (b), (d), (g) and 2(a) are not engaged. The reasoning for this conclusion is that the BBC has not demonstrated to the Commissioner that a real and significant likelihood of prejudice relevant to these exemptions would be likely to result through the disclosure of the information in question. He does not accept that, to any significant degree, disclosure would increase the risk of evasion or undermine the BBC's deterrent effect in relation to its licence fee collection activities. Consequently he has not gone on to consider the public interest test in this case.

Section 38

45. The full text of section 38 can be found in the Legal Annex at the end of this Notice.
46. Section 38(1)(b) states that information is exempt if disclosure would, or would be likely to, endanger the safety of any individual. This is a qualified exemption, and is therefore subject to the public interest test.
47. The BBC identified 2 sections of one of the Schedules where it explained to the complainant in its letter of 16 September 2009 that the names of 2 senior members of staff had been redacted as identification "could endanger their personal safety".
48. When the BBC submitted further arguments to the Commissioner on 25 January 2011 it quoted certain website discussions by anti-TV Licensing groups which identified certain individuals involved in TV Licensing and made covert threats. The BBC expressed the opinion that identifying senior TV Licensing Enforcement managers would expose them to potential intimidation and threats from members of the

public. Conversely the BBC pointed out that TV Licensing Enquiry Officers are obliged to identify themselves.

Would the release of this information endanger, or be likely to endanger, the health and safety of any individual?

49. The first steps in considering this exemption are to establish that the arguments advanced by the public authority are relevant to the exemption. The Commissioner accepts that the argument of the BBC is relevant to the endangerment described in this exemption and that the subjects of the endangerment have been identified in the unredacted copy provided to him.
50. Turning to the likelihood of this endangerment, the Commissioner has considered whether endangerment “would be likely” to occur. The test for this is as set out at paragraphs 28-29 above, that the prejudice/endangerment must be real and significant.
51. The Commissioner considers that it is relatively easy to identify senior members of staff and that the name of at least one of these individuals is in the public domain as having responsibility for an area of work that is likely to involve the BBC contract. However, he has had to consider whether the disclosure of this information would have the prejudicial effects argued by the BBC, or whether that prejudice would be anything more than hypothetical if the information was disclosed. The withheld information is the names of senior individuals, not those who are tasked with door to door visits. As the BBC stated that TV Licensing Enquiry Officers are obliged to identify themselves he does not consider that senior TV Licensing individuals should not be identified or are any more likely to be targeted.
52. Having considered the argument presented by the BBC to the complainant, the Commissioner is not persuaded that the disclosure of this information “would be likely to” have the prejudicial effects argued by the BBC.
53. The Commissioner has not gone on to look at the balance of the public interest test with regard to the application of section 38 because he does not accept that it is engaged.

Section 40(2)

54. The full text of section 40 can be found in the Legal Annex at the end of this Notice.
55. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its

disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the "DPA").

56. For each category of information currently being withheld under section 40(2), the Commissioner must first consider whether the requested information is personal data. Personal data is defined in Section 1 of the DPA as follows:

" 'personal data' means data which relate to a living individual who can be identified -

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

57. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the DPA. The BBC originally argued that the names of people who no longer worked for or with TV Licensing should not be disclosed as it would be unfair and breach the first data protection principle. Similarly it argued that disclosing the redacted signatures of the individuals who had signed the contract and side letters would make them vulnerable to identity theft.
58. On 25 January 2011 the BBC wrote to the Commissioner explaining that it was now prepared to disclose the names of certain key personnel who no longer worked for RMS, previously withheld under section 40(2). It is his understanding that no names continue to be withheld under this exemption. As this is the case he does not propose to look at the BBC's earlier application of this exemption to this information except with regard to the BBC's continuing application of this exemption to the signatures of certain individuals.
59. The Commissioner considers that the relevant data protection principle in this case is the first data protection principle as set out at Schedule 1 to the DPA. The first data protection principle states that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met.
60. The Commissioner will now look at the BBC's use of this exemption as outlined above in order to decide whether disclosure would breach the first data principle and make this information exempt from disclosure under section 40(2).

61. As explained above, the first consideration is whether the withheld information in this contract is personal data.
62. In this case the Commissioner is satisfied that the withheld information is personal data because an individual's signature clearly relates to a living individual.
63. As the Commissioner is satisfied that the withheld information is personal data, he has gone on to look at whether the disclosure of this information would breach the first data protection principle. Would the disclosure of this information be unfair and/or unlawful?
64. In considering whether disclosure of the names of the individuals concerned would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
 - The consequences of disclosure.
 - The data subject's reasonable expectations of what would happen to their personal data.
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
65. The Commissioner does consider the release of the signatures of the named employees in the contract and the side letters to be unfair. These individuals were acting as the representatives of their respective employers and, although the BBC has released the names and positions of those people, he agrees that it would be unfair to release their signatures as it could leave those individuals vulnerable to identity theft.

Section 43(1)

66. See paragraph 22 for the BBC's late application of this exemption at section 43(1). The Commissioner notes that the BBC stated in its letter of 28 January 2011 that all the information it had latterly determined was exempt under section 43(1) was "in the alternative" exempt under section 43(2) as consisting of RMS's unique business model and methodology.
67. In a recent recent Upper Tribunal case *DEFRA v the ICO and Simon Birkett* the following analysis concerning this matter was provided at paragraph 18:

*"... I analyse the nature of the duties imposed on the Information Commissioner and the First-tier Tribunal as requiring them to consider any new exemptions identified by the public authority."*²

68. In view of the Upper Tribunal's decision the Commissioner has accepted the BBC's late application of this exemption.

Section 43(1)

69. The full text of section 43 can be found in the Legal Annex at the end of this Notice.

70. Section 43(1) provides an exemption for information which constitutes a trade secret. This is a qualified exemption, and is therefore subject to the public interest test.

71. When the FOI Bill was being considered by the Scottish Parliament, the Justice Minister at that time said:

*"Although trade secrets are often considered to be commercial interests...they are materially different from the normal interest that a business has in the confidentiality of its affairs. A trade secret can be regarded as an asset - perhaps the most valuable asset - of the business. The recipes for Drambuie and Irn Bru are examples of trade secrets that people would readily recognise as being of a different quality from commercial interests. Sometimes trade secrets attract legal protection, such as a patent or copyright, but often the only protection is in maintaining their secrecy."*³

72. The Commissioner acknowledges that the term "trade secret" is not defined in the Act. However his own published guidance (*Awareness Guidance number 5*) suggests that the term "trade secret" encompasses technical secrets such as secret formulae or recipes and business secrets such as pricing structures or unique strategies or methodologies if such information gives a company a "competitive edge". The Commissioner has also considered the Tribunal decision *Department of Health v Information Commissioner (EA2/2008/0018)*. He notes comments made by the Tribunal at paragraph 52:

"A trade secret implies that the information is more restricted than information that is commercially sensitive. The ordinary understanding

² GIA/2098/2010

³ Quoted in:
<http://www.itspublicknowledge.info/nmsruntime/saveasdialog.asp?IID=2583&SID=123>

of the phrase usually suggests something technical, unique and achieved with a degree of difficulty and investment. Few would dispute that the recipe for "Coca Cola" is (or has been) a trade secret."

73. The Commissioner has considered the four points referred to in his guidance in relation to the information the BBC is withholding:
- Is the information used for the purpose of trade?
 - Is it obvious from the nature of the information or, if not, has the owner made it clear that he or she considers releasing the information would cause them harm or be advantageous to their rivals?
 - Is the information already known?
 - How easy would it be for competitors to discover or reproduce the information for themselves?
74. In addition to the arguments presented to him by the BBC, the Commissioner has also taken account of the comments of the Information Tribunal in the case of *Department of Health v The Information Commissioner (EA/2008/0018)*. The Tribunal made its comments in the context of considering the extent to which information in an IT contract between the public authority and a contractor should be disclosed under the Act.
75. It was argued that since 2003 RMS had been engaged in the development of a bespoke and complex approach which was specifically designed to meet the BBC's needs. RMS states that this is the result of significant investment over a 4 year time period. The Commissioner accepts that the information was conceived for the purposes of trade with the BBC.
76. The BBC stated on behalf of RMS that disclosure of the information is equivalent to a trade secret because, quoting *Lansing v Linde v Kerr [1991] 1 WLR 251*, it 'would be liable to cause real (or significant) harm to the owner of the secret', in other words RMS.
77. The BBC asserts that the information is not widely known. Despite this the Commissioner considers that the information here does not represent a 'blueprint' in the words of RMS. It is an approach that is qualified by being based on information available at the time of input and subject to subsequent data gathering which could not be taken account of in the initial modelling process. Any models provided are not static. Though it may represent a bespoke approach the withheld

information is not drilled down and contains so many unknown quantities and possible permutations that it does not represent a secret that once known could cause real or significant harm. Despite RMS's assertion that its unique approach is contained in the withheld information the fact that something has involved a considerable investment of time and money to produce does not in itself indicate that it constitutes a trade secret.

78. Finally the Commissioner has considered how easy it would be for competitors to discover or reproduce the information for themselves. RMS stressed the significant time and investment it had put into the development of its unique methodology and modelling. However, the Commissioner does not agree having viewed the specific information to which it has applied section 43(1) that "...the approach is so specialized as to be a unique approach not known about by Competitors in the same field".⁴ Whilst the Commissioner acknowledges this, he also notes his guidance states that generally the less skill, effort, or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret. By the same token, the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret.
79. The Commissioner has considered the application of section 43(1) by reference to his guidance. Whilst the Commissioner acknowledges that some of the points referred to above may suggest the information withheld points to being a trade secret, on balance he has concluded that the exemption under section 43(1) is not engaged in this case. He simply does not consider that the information contained within its delivery strategy would constitute a "trade secret" as defined by the Tribunal in *EA/2008/0018*. He is therefore satisfied that the BBC incorrectly applied the exemption under section 43(1) and has not gone on to consider it further. Although the Commissioner does not accept that section 43(1) is engaged he is satisfied that he has given due consideration to the BBC's and RMS's arguments concerning these same clauses under section 43(2).

⁴ Quoted in:

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20\(EA-2008-0018\)%20Decision%2018-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20(EA-2008-0018)%20Decision%2018-11-08.pdf)

Section 43(2) – Prejudice to commercial interests

80. The Commissioner first considered whether the information withheld by the BBC was exempt from disclosure under section 43(2).
81. Section 43(2) provides an exemption for information which would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it).
82. The Commissioner applies a three tier test to ascertain whether the exemption is engaged.
1. Are the interests which will be prejudiced commercial?
 2. What is the nature of the prejudice in question?
 3. What is the likelihood of the prejudice occurring?
83. The BBC confirmed to the Commissioner that the disclosure of the requested information “would prejudice” the commercial interests of the BBC and RMS. However, on 28 January 2011 when the BBC provided its final response to the Commissioner he notes that both the letter and the attached two Schedules used both “would” and “would be likely to” be prejudicial to the commercial interests of the BBC, RMS and Capita.
84. In considering the prejudice in relation to the application of section 43 the Commissioner has applied the same criteria as outlined in paragraphs 81 to 82 above.
85. The redacted information in the contract to which the BBC has applied section 43(2) includes the following categories:
- Service Charges
 - Service Level Agreement
 - Termination
 - Profit Share
 - Pricing structure
 - Key Personnel
 - Reports
 - Forecasting

- Benchmarking
- Indemnities
- Limitation of liability
- Insurance

The applicable prejudice under section 43(2)

86. In relation to the first of the three tier test referred to above the Commissioner accepts that the information withheld in this case relates to the commercial activities of the BBC and RMS - namely the buying and selling of services in relation to TV licensing, and consequently he accepts that the interests which would be likely to be prejudiced are commercial and relevant to section 43(2). He has therefore gone on to consider the nature of the prejudice and whether release of the information would or would be likely to prejudice the commercial activities of either of the two parties to the contract as the BBC suggests.

The nature of the prejudice to the commercial interests of the BBC

87. The contract with RMS is dated 7 February 2008. The contract was initially for 5 years but the agreement, it was explained, could be renewed up to a maximum of 12 months for up to 5 further periods. The BBC confirmed on 30 June 2011 that it had no current plans to retender for the services that RMS provides. The proviso was made, however, that the BBC operated in a dynamic regulatory environment and there was uncertainty over the future collection of the licence fee. However, the BBC took the decision in recent months to reprocure both the Capita and RMS (iQor) contracts at the same time. This followed an assessment of how the existing TV Licensing contracts operated and reflects the BBC's desire to make costs savings in collecting and enforcing the licence fee, with the ultimate aim of achieving value for money for licence fee payers.

88. In its letter of 16 April 2010 the BBC listed the reasons why it considered the release of the RMS contract to be commercially prejudicial to the BBC:

- Because much of the contract is bespoke and the result of lengthy negotiations. Any concessions made which enter the public arena would be commercially prejudicial to the BBC's bargaining position.
- Because the functions carried out by the BBC are integral to the operation of the TV licensing operation. The contractual arrangements are significant in terms of cost.

Disclosure would therefore, according to the BBC, prejudice its ability to secure the best possible terms with potential future suppliers of these services. This could lead to the BBC being unable to attract bids from the widest range of bidders and suffering a drop in quality of the operation of the licence fee or increasing its payments which would affect value for money for the licence payer.

89. The BBC provided further consideration of the redacted clauses in the RMS contract in an appendix attached to the same letter. Here it argued that:
- Some of the detail within the service level agreements and forecasting would be of value to a competitor.
 - Some of the withheld detail regarding services would compromise the BBC's negotiations with a future contractor.
 - Specific details regarding benchmarking should remain confidential so as not to prejudice future negotiations
 - That some of the indemnity/limitation of liability/insurance/and termination clauses are the subject of negotiation and non-standard.
 - That other redacted elements of its service charges and liquidated damages clauses would undermine the BBC's ability to obtain the best value for money upon retender.
90. These same arguments were reiterated in the 28 January 2011 submission from the BBC. Though the BBC had taken the decision to disclose more information it continued to maintain that the disclosure of certain figures would limit its negotiating tactics as it would allow bidders to know its parameters and expect those to be the same in any new contract.

The likelihood of prejudice to the BBC

91. The Commissioner has taken into account the fact that the contract was relatively recent when the request for information was made. Whilst he cannot provide any detail within this Notice regarding the nature of the clauses contained in the RMS contract he accepts that a proportion of them are bespoke, non-standard negotiated clauses which may not be offered or agreed with other suppliers. Despite these considerations, having considered the remaining redacted clauses within the RMS contract, the Commissioner accepts that if the present commercial terms contained in these clauses were disclosed in advance of any retendering process beginning this would be likely to prejudice the BBC's negotiating position.
92. The BBC's argument is that these clauses are bespoke and the result of lengthy negotiations. This would suggest that the terms in the clauses

were tailored to the requirements of the BBC and RMS and that their bespoke nature means that future terms would have to be similarly tailored, specific and the result of detailed negotiation. The Commissioner also understands that the specification in respect of the new contract is likely to be substantially similar to the existing one.

93. The Commissioner has taken into account the fact that the contract ends in 2013. The Commissioner is aware that the BBC's position at the time of the request and until the last few months was that there were no plans to retender this contract. However, he has also noted the BBC's comments outlined in paragraph 87 that whilst this was the case the BBC did also stress the dynamic nature of this regulatory environment and the potential uncertainty surrounding the collection of the licence fee which existed at the time of the request. He therefore accepts that such uncertainty may change the position very rapidly. Indeed circumstances have now materially altered in that the BBC has now put the contract out to tender which is a material alteration since the request was made. He accepts that the new contract, whoever it is with, will be of a substantially similar nature. Whilst he cannot provide any detail within this Notice regarding the content of the withheld clauses he accepts that they are bespoke, non-standard negotiated clauses which may not be offered or agreed with other suppliers. As a result the Commissioner accepts that if the present commercial terms were disclosed in advance of the retendering process beginning this would be likely to prejudice its negotiating position.
94. The Commissioner recognises that release of the requested information is likely to enable other bidders to review the terms and expect the same or similar in any contract they secure in the future. He agrees that this is something that future bidders are likely to do given the potential commercial benefits to them. This would therefore be likely to reduce the competitiveness of future bids that, in the absence of this knowledge, may have offered the BBC alternative options that in fact represent better value for money for the BBC. He is satisfied that there is a causal relationship between the disputed information and the future tendering of the BBC TV contract for the Administration of TV Licensing cash schemes which would create a risk to the competitive environment in this area. He is therefore willing to accept that disclosure of the withheld information would be likely to prejudice the commercial interests of the BBC.
95. However the Commissioner does wish to clarify that he is not convinced that disclosure of the remaining withheld information would be likely to prejudice the BBC's ability to secure the best possible terms with potential suppliers because of a reduction in the range of bidders prepared to tender for the business. Firstly, he does not accept the premise that knowledge of concessions necessarily leads to a reduced

field of bidders. Conversely other potential bidders might be alerted by what they perceive as favourable terms. Secondly, this contract is both lucrative and unique and as a result he is not convinced that the disclosure of terms agreed with RMS in a different commercial environment would be likely to dissuade potential suppliers from tendering for the business because of concern about their own information potentially being released in the future.

96. Whilst the Commissioner has accepted that section 43(2) is engaged on the basis that some prejudice to the BBC is likely, he does not accept the BBC's contention that the disclosure of the requested information "would" prejudice its commercial interests. This is because he has not been presented with any evidence to support the argument that the likelihood of such prejudice occurring is more probable than not.
97. As the Commissioner finds section 43(2) to be engaged with regard to the BBC's commercial interests he has gone on, at paragraph 109 below, to consider the public interest arguments.

The nature of the prejudice to the commercial interests of RMS

98. The Commissioner has gone on to consider whether the disclosure of the information "would be likely to" cause the prejudice to the commercial interests of RMS described in the paragraphs below.
99. In the BBC's letter of 16 April 2010 RMS argued that it operates in a personnel-centric industry. Its ability to innovate on pricing and maintain competitive pricing is necessary to compete with its competitors. The release of the requested information could potentially allow its competitors to know its costs in general and specifically in relation to the BBC. It stated that these costs could be estimated by using pricing information, profit thresholds or by knowing the actual deliverables. There were new concepts contained in the contract and some innovation. Any management information disclosed had the potential to expose its innovations to a potential competitor in the marketplace generally and not just in the context of the BBC.
100. An appendix was also provided with more detailed arguments from RMS regarding the detriment to its commercial interest that would result from the release of the information:
 - The pricing structure was designed by RMS specifically in response to the BBC tender process and that it would be adversely affected in submitting similar bids.
 - Any disclosure of termination charges mean that estimates could be made of staff costs and give competitors an understanding of the pricing barrier to overcome in winning a future BBC bid

whilst it would not be in possession of similar information regarding its competitors.

- Estimated revenues along with the threshold of profit share provide a clear indication of its costs.
- In revealing a pricing structure that RMS specifically designed in response to the BBC tendering process it would be adversely impacted when submitting similar bids.
- Data behind the reporting has the potential to expose its delivery structure, the tools used for operations and actual results.
- Providing details of the service level agreement thresholds gives a competitor the advantage in any potential bids by helping them structure their resources, costs and effort.

101. On 28 January 2011 the BBC provided further arguments on behalf of RMS. In an attached Schedule the remaining withheld information was considered alongside the OGC guidelines (see paragraphs 115-116).

The likelihood of the prejudice to RMS

102. The Commissioner has considered the more detailed arguments that RMS has provided and how they relate to the redacted information. The Commissioner has taken account of the BBC's 28 January 2011 submission where it was suggested that certain figures relating to pricing mechanisms should not be released under OGC guidelines without knowledge of the underlying financial models which could be withheld under those same guidelines. He has also taken account of the BBC's contention that a price breakdown should not be released under these guidelines until it is no longer commercially sensitive. However, he has concluded the following:

- That most of the clauses are standard indemnity/benchmarking/service level/termination clauses.
- That matters such as the availability of services, service provisions and methods of payment are normal provisions that would not necessarily aid a competitor.
- That performance engineering is bespoke but the contract does not reveal exactly how RMS will carry it out.
- That although certain models are mentioned they are not drilled down. He also notes that some of these models are commonplace in marketing.
- That the contract contains many samples, examples, estimates and projections that are necessarily theoretical or hypothetical prior to the start of the contract.
- That the redacted information regarding transition is unlikely to have been relevant by the time of the request.
- That the redacted figures from the second side letter are headline figures; that these figures are likely to have been paid

out by the time of the request; and that any figures for any future contract are unlikely to be the same.

103. The Commissioner understands that the BBC Licensing cash scheme contract is unique and notes that no evidence has been provided that similar considerations would apply in relation to other contracts pursued or secured by RMS. In fact RMS specifically states in its arguments that the pricing structure had been specifically designed for the BBC tender. RMS has not explained why its current or potential clients would expect similarly favourable terms as the BBC. Therefore the Commissioner is not convinced that sufficiently similar calculations or mechanisms would be relevant in relation to services provided to other clients or why a competitor would be able to utilise those calculations or mechanisms with regard to any future non-BBC tendering process where their relevance is not immediately obvious.
104. However, as explained in paragraph 93 above the Commissioner has also taken into account the fact that the retendering process in relation to the BBC TV Licensing cash schemes contract has commenced and the fact that it will be of a substantially similar nature, when considering the arguments about prejudice to RMS's interests in respect of this particular contract.
105. As he has explained above in relation to his consideration of the likely commercial prejudice to the BBC he accepts the arguments presented by the BBC that a new licence fee contract is unlikely to vary greatly from the present terms and conditions. As stated above, whilst the Commissioner cannot provide any detail within this Notice regarding the nature of the remaining withheld information he accepts that these are bespoke, non-standard negotiated clauses specifically agreed for this contract with RMS which may not be offered or agreed with other suppliers. As a result the Commissioner accepts that if this information was disclosed in advance of the retendering process beginning it would be likely to prejudice RMS's commercial interests.
106. Given the content and level of detail present within the disputed clauses he is satisfied that there is a causal relationship between the information and the prejudice to RMS's ability to compete for the future BBC Licensing cash scheme contract. He is therefore willing to accept that disclosure of the withheld information would be likely to prejudice the commercial interests of RMS in this regard.
107. Although the Commissioner has accepted that some prejudice to RMS's commercial interests is likely to occur he does not consider that the higher threshold of "would prejudice" has been demonstrated by the evidence supplied by the BBC and RMS.

108. Having concluded that the exemption is engaged the Commissioner has gone on to consider the public interest test in this case.

The Public Interest Test

109. In considering the public interest in this matter the Commissioner has taken into account *Hogan & Oxford City Council v IC EA/2005/0026 & 30*. The Tribunal in relation to a different exemption found that when the "would be likely to" prejudice was engaged,

"... the public interest in maintaining the exemption will be more difficult to determine than where the alternative limb of the test has been applied." (paragraph 54)

Public interest arguments in favour of disclosing the requested information

110. The BBC's arguments in favour of disclosing the requested information centred on its public functions and what it owes to the public in terms of accountability.
111. The Commissioner agrees that the BBC needs to be seen to be exercising its Licensing Authority functions appropriately and proportionately and therefore that public money is being used effectively. The BBC points out that its enforcement operations need to be seen to be particularly appropriate and proportionate.
112. There is a public interest in the BBC being transparent about how it is getting value for money in respect of its use of the licence fee when purchasing goods and services.
113. There is a considerable amount of public debate around licence fee collection which, at the time of the request, was being generated in response to the BBC Trust's open consultation (available at http://www.bbc.co.uk/bbctrust/consult/open_consultations/tv_licence.html). This can be facilitated by placing as much information as possible in the public domain including material which focuses on the terms agreed with those contracted to collect the licence fee.
114. In addition to the arguments presented to him by the BBC that he has identified as being relevant in this case, the Commissioner has also taken account of the comments of the Information Tribunal in the case of *Department of Health v The Information Commissioner (EA/2008/0018)*. The Tribunal made its comments in the context of considering the extent to which the public interest favoured disclosing information in an IT contract between the public authority and a contractor.

115. In reaching its decision the Tribunal went on to place significant reliance on the guidance issued by the Office of Government Commerce on the application of the Act to various types of contractual information. It stated that the guidance, *OGC (Civil Procurement) Policy and Guidance version 1.1*, and the DCA working assumptions note accompanying it, was "...a useful approach to dealing with an information request and in broad terms reflects the approach that we have adopted in our consideration of this contract." (paragraph 80)
116. The Tribunal made reference to 12 areas within a contract which the guidance indicated should normally be disclosed by a public authority in the public interest because it would further the public's understanding of how services bought with public funds would be delivered and how contracts should run. These were: -
- i. Service level agreements
 - ii. Product/service verification procedures
 - iii. Performance measurement procedures
 - iv. Contract performance information
 - v. Incentive mechanisms
 - vi. Criteria for recovering sums
 - vii. Pricing mechanisms and invoicing arrangements
 - viii. Payment mechanisms
 - ix. Dispute resolution procedures
 - x. Contract management arrangements
 - xi. Project management information
 - xii. Exit strategies and break options

117. The Commissioner considers that the remaining withheld information contained in the RMS contract is within the areas highlighted by the OGC as disclosable.

Public interest arguments in favour of maintaining the exemption

118. The BBC stated that it would not be in the public interest to disclose sensitive information about a particular company, in this case RMS, if that information would be likely to be used by its commercial competitors. There is a public interest in preserving the ability of companies to invest in developing particular approaches and to use those approaches when competing fairly for public sector contracts.

119. There is also a public interest in maintaining the exemption to preserve the BBC's ability to negotiate optimal contractual terms in relation to TV Licensing and obtain the best value for money and efficient expenditure of the licence fee income paid by approximately 25 million TV Licence holders.

Balance of the public interest arguments

120. The Commissioner considers that the arguments in favour of maintaining the exemption in this case do have some weight particularly given the relative proximity of the request to the start of the retendering process for the next TV Licensing Cash Scheme contract.

121. He considers that preserving the ability of the BBC to negotiate a contract that represents the best possible value for money for licence holders has significant weight given the amount of money involved and the number of people affected.

122. However, in the Commissioner's view, the value of the contract and the number of people affected also adds weight to the arguments in favour of disclosure which are significant.

123. The BBC considers that the general public interest in the transparency and accountability of the BBC in respect of its use of the licence fee is served by the broad range of oversight mechanisms, both internal and external. This includes oversight of the BBC Trust and the Executive Board. These mechanisms also include Ofcom, the fair trading regime and competition law in general. The Commissioner does not accept the BBC's arguments in this regard. In his view the simple existence of oversight mechanisms does not necessarily reduce the weight that should attach to the public interest arguments in disclosure in this case and two of the mechanisms mentioned are not independent of the BBC.

Furthermore, the BBC mentioned Ofcom as one of the oversight mechanisms but this would not appear to be relevant in this particular case. This is because Ofcom expressly states on its website that it is not responsible for regulating the BBC TV licence fee.

124. It was the BBC's contention that the release of details beyond what was currently available at the time it made its final submissions to the Commissioner posed considerable harm to the BBC's commercial interests, without offering a proportionate benefit to the public. The Commissioner notes that the BBC has recently decided to release additional information from this contract.
125. The Commissioner also considers that the level playing field argument presented by the BBC in relation to competing for contracts operates both ways. The BBC has argued that when the contract is retendered RMS will be at a disadvantage and that other potential contractors will use the requested information to their commercial advantage whilst RMS will not have similar knowledge of its rivals' bids. The Commissioner has recognised this and attributed some weight to this argument in favour of maintaining the exemption.
126. However in *Department of Health v The Information Commissioner (EA/2008/0018)* at paragraph 75 the Information Tribunal observed that:

"... in long running Contracts a "cosy" relationship can develop with the incumbent Contractor, especially if the Contract appears to be going well. A cosy working relationship can lead to the smooth running of a Contract, however it can also reduce innovation and value for money if all parties are content to keep the status quo. Mr Johnson accepted in his evidence that there is a huge inbuilt advantage given to the incumbent at re-tender as they do know all the commercially sensitive information."

127. The Commissioner has considered the Tribunal's comments above in relation to this case and as a result has given less weight to the level playing field argument in favour of maintaining the exemption than he may have done in some cases. This is because he recognises that RMS is in a commercially superior position as the existing contractor in possession of full knowledge of the BBC's previous concessions and the bespoke elements of the contract. In the Commissioner's view there is a public interest in disclosing the remaining withheld information as this may have the effect of improving the competitiveness of the bids. In reaching this view the Commissioner has again taken into account the fact that the BBC is in a strong position to push bidders for a good deal given the value and profile of the contract in question.

128. Whilst the Commissioner has given some weight to the arguments in favour of maintaining the exemption in this case, he does not consider that they are sufficient to outweigh the public interest in disclosure in this case. For the reasons given at paragraphs 124-127 above, the Commissioner has concluded that the arguments in favour of disclosure are compelling.

The Capita Contract

Section 31

129. The Commissioner has already considered the use of this exemption when considering the withheld information in the RMS contract. As he has looked at the withheld information with regard to the RMS contract and the BBC relied on very similar arguments in relation to this exemption for both contracts, the Commissioner has also relied on the arguments he referred to in paragraphs 26-44 above.
130. The BBC's final argument in relation to the application of these exemptions was provided to the Commissioner on 23 February 2011. The Commissioner had questioned the fact that the BBC was continuing to apply this exemption to what amounted to one phrase in one clause of the contract. In light of further disclosures made by the BBC during his investigation he questioned the BBC's continued application of section 31 to this one phrase.

The applicable prejudice within section 31

131. In considering the applicable prejudice the Commissioner has referred to his arguments in paragraphs 30-33 above. Having done so he is satisfied that the arguments provided by the BBC directly relate to the applicable prejudice.

The nature of the Prejudice

132. The Commissioner has gone on to consider the nature of the prejudice to (a) the prevention or detection of crime; (b) the apprehension or prosecution of offenders; (d) the assessment or collection of any tax or duty or of any imposition of a similar nature; (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2); and (2) The purposes referred to in subsection (1)(g) to (i) are – (a) the purpose of ascertaining whether any person has failed to comply with the law".
133. See paragraph 38 for the Tribunal's view regarding the chance of prejudice and the establishment of a causal relationship between the potential disclosure and the prejudice.

134. In its letter, dated 16 April 2010, the BBC provided arguments to support its application of these exemptions in relation to the evasion rate for paying for a television licence. These arguments were applied to both contracts (see paragraph 36).
135. The BBC also stated that the result of increased evasion would be that it would lose out on funding and would be forced into a position where it would have to spend more of the licence fee on enforcement activities.
136. In Appendix 8 of its submission to the Commissioner the BBC asserted that disclosure of the part-clause it had redacted could be useful to the public in understanding what Capita's field staff are empowered to do and thus prove detrimental to its enforcement abilities. The Commissioner is therefore satisfied that the arguments provided by the BBC are relevant to the circumstances of this case and that there is a causal relationship between potential disclosure and the prejudice outlined in the exemptions.

The likelihood of prejudice

137. See paragraph 38 for the Commissioner's definition of "likely" with regard to the prejudice in this case.
138. The BBC argued that disclosure "would prejudice" its law enforcement activity and lead to an increase in people 'playing the system'. Although the BBC did not specifically cite an example of similar information being used to do this, it highlighted the rise of online discussions in which individuals share information about the BBC's enforcement activities and the tactics employed. The requested information could be shared and result in evasion amongst those individuals who do not wish to pay the licence fee. A rise in evasion of 0.1% between 2007-2008 and 2008-2009 was used to support this assertion.
139. In FS50215269 the BBC explained in relation to another part of its enforcement activity that public perception is part of its overall deterrence methods. The Commissioner recognises the importance the BBC places upon the deterrent effect provided by public perceptions of TV Licensing's enforcement tactics. In light of the evidence that a significant number of people seek to avoid payment of the licence fee, he also accepts that disclosure of certain information could change public perception of the BBC's enforcement tactics. The Commissioner has also noted the BBC's argument that a change in perception would lead to an increase in the evasion rate in payment of the licence fee by individuals.

140. The Commissioner recognises the importance of the BBC's arguments detailed above and has considered the information carefully to which these arguments have been applied. However, he has had to consider whether the disclosure of this specific information would have the prejudicial effects argued by the public authority, or whether that prejudice would be more probable than not were the information to be disclosed. Having done so, whilst he accepts that those intent on evading the licence fee may use the information to seek out ways of doing so, he is not convinced that disclosure of this information would have the prejudicial effects argued by the BBC. In reaching this view the Commissioner has concluded that the submissions provided by the BBC, whilst providing detail of the potential ramifications were this information to be disclosed, have offered little detail as to how this prejudice would happen.
141. Although not argued by the BBC the Commissioner has therefore gone on to consider whether disclosure would be likely to have the prejudicial effects it describes above. The Commissioner accepts that the release of each extra piece of information might lead to the demystification of the enforcement process which is part of its effectiveness. Nonetheless he remains unconvinced that the release of this particular piece of information would increase the number of people who 'play the system' because he does not accept that the release of the withheld information undermines the deterrent effect of its enforcement process as the BBC has argued. Having considered the arguments above and the application of section 31 again in relation to the lower test of prejudice he does not accept that the release of this specific information would be likely to aid licence fee evasion for the same reasons as he agreed that disclosure would not be likely to prejudice the stated exemptions applied by the BBC to the RMS contract.
142. The Commissioner has considered the arguments presented to him by the BBC in relation to section 31(1)(a), (b), (d), (g) and 2(a) and, having seen the confidential information, he has concluded that disclosure of the information would not be likely to cause prejudice to the activities listed in section 31.
143. The Commissioner therefore finds that sections 31(1)(a), (b), (d), (g) and 2(a) are not engaged. The reasoning for this conclusion is that the BBC has not demonstrated to the Commissioner that a real and significant likelihood of prejudice relevant to these exemptions would be likely to result through the disclosure of the information in question. He does not accept that, to any significant degree, disclosure would increase the risk of evasion or undermine the BBC's deterrent effect in relation to its licence fee collection activities. Consequently he has not gone on to consider the public interest test in this case.

Section 40(2)

144. The full text of section 40 can be found in the Legal Annex at the end of this Notice.
145. The Commissioner notes that the names of certain key personnel previously withheld under section 40(2) have now been disclosed by the BBC as part of its response to the Commissioner's Decision FS50228493. It is his understanding that no names continue to be withheld under this exemption. As this is the case he does not propose to look at the BBC's earlier application of this exemption to this information.

Section 43(2) – Prejudice to commercial interests

146. In considering the application of section 43(2) to the Capita contract the Commissioner has relied mainly on the arguments presented in his previous Decision Notice FS50228493 which, although related to the withholding of incentives according to the BBC, equally apply in relation to the remaining information redacted in the Capita contract.
147. Section 43(2) provides an exemption for information which would, or would be likely to, prejudice the commercial interest of any person (including the public authority holding it).
148. In considering the application of section 43(2) the Commissioner has again referred to the three tier prejudice test outlined in paragraph 29 in order to determine whether this exemption is engaged.
149. Having considered the remaining redacted information under section 43(2) he notes it falls into similar categories as defined under the RMS contract outlined in paragraph 85 above but also including those relating to exit and service transfer arrangements, due diligence, BBC responsibilities, transformation responsibilities, dispute resolution procedure, and liquidated damages. In addition it has also redacted the headline title of one clause and two schedules.

The applicable prejudice under section 43

150. In relation to the first of the three tier test referred to above the Commissioner accepts that the information withheld in this case relates to the commercial activities of the BBC and Capita, namely the buying and selling of services in relation to TV licensing, and therefore he accepts that the interests which would be likely to be prejudiced are commercial and relevant to section 43(2). He has therefore gone on to consider the nature of the prejudice and whether release of the information would be likely to prejudice the commercial activities of either of the two parties to the contract as the BBC suggested.

The nature of the prejudice to the commercial interests of the BBC

151. Disclosure of the requested information would, according to the BBC, lead to a ratchet effect amongst potential future suppliers of these services to the BBC. It stated that the contract with Capita runs until 2012 and the BBC anticipates that the re-tendering for the supply of these services will commence in late 2010. The Commissioner understands that at the time of the drafting of this Notice this process is now underway. It explained that Capita is not guaranteed the contract in 2012 and will compete alongside other bidders. Since suppliers will assume that a minimum level of funds is available for particular services, they will have a reason to price their bid beyond that level.
152. In its letter of 16 April 2010 the BBC listed the reasons why it considered the release of the Capita contract to be commercially prejudicial to the BBC:
- Because much of the contract is bespoke and the result of lengthy negotiations. Any concessions made which enter the public arena would be commercially prejudicial to the BBC's bargaining position.
 - Because the functions carried out by the BBC are integral to the operation of the TV licensing operation. The contract is coming up for renegotiation and were future bidders to be aware of concessions made they would be in a commercially superior position.
 - Because disclosure would prejudice the BBC's ability to secure the best possible terms with potential future suppliers of these services. This could lead to the BBC being unable to attract bids from the widest range of bidders and suffering a drop in quality of the operation of the licence fee or increasing its payments which would affect value for money for the licence payer.

The likelihood of the prejudice to the BBC

153. The Commissioner is specifically looking at the remaining withheld clauses subsequent to the disclosures he ordered under FS50228493 and the additional disclosures the BBC made at that point and has subsequently agreed to make. The BBC's argument is that these clauses are bespoke and the result of lengthy negotiations. This would suggest that the terms in the clauses were tailored to Capita and the BBC's requirements and that their bespoke nature means that future terms would have to be similarly tailored, specific and the result of detailed negotiation. The Commissioner also understands that the specification in respect of the new contract is likely to be substantially similar to the existing one.

154. The Commissioner has taken into account the fact that the contract ends in 2012 with the retendering process commencing in 2010 and the fact that the new contract, whoever it is with, will be of a substantially similar nature. Whilst he cannot provide any detail within this Notice regarding the content of the withheld clauses he accepts that they are bespoke, non-standard negotiated clauses which may not be offered or agreed with other suppliers. As a result the Commissioner accepts that if the present commercial terms were disclosed in advance of the retendering process beginning this would be likely to prejudice its negotiating position.
155. The Commissioner recognises that release of the requested information is likely to enable other bidders to review the terms and expect the same or similar in any contract they secure in the future. He agrees that this is something that future bidders are likely to do given the potential commercial benefits to them. This would therefore be likely to reduce the competitiveness of future bids that, in the absence of this knowledge, may have offered the BBC alternative options that in fact represent better value for money for the BBC. He is satisfied that there is a causal relationship between the disputed information and the future tendering of the BBC TV Licensing contract which would create a risk to the competitive environment in this area. He is therefore willing to accept that disclosure of the withheld information would be likely to prejudice the commercial interests of the BBC.
156. However the Commissioner does wish to clarify that he is not persuaded that disclosure of the remaining withheld information would be likely to prejudice the BBC's ability to secure the best possible terms with potential suppliers because of a reduction in the range of bidders prepared to tender for the business. The contract for TV Licensing is both lucrative and unique and as a result he is not convinced that the disclosure of terms agreed with Capita some years previously would be likely to dissuade potential suppliers from tendering for the business because of concern about their own information potentially being released in the future.
157. Whilst the Commissioner has accepted that section 43(2) is engaged on the basis that some prejudice to the BBC is likely, he is not persuaded by the BBC's contention that the disclosure of the requested information "would" prejudice its commercial interests. This is because he has not been presented with any evidence to support the argument that the likelihood of such prejudice occurring is more probable than not.

The nature of the prejudice to the commercial interests of Capita

158. The Commissioner has gone on to consider whether the disclosure of the information “would be likely to” cause the prejudice to the commercial interests of Capita described in the paragraphs below.
159. Capita argued in its letter, dated 14 April 2010, the likely detriment to its commercial interests if the redacted elements of the contract were disclosed:
- That if Capita’s rivals had access to its commercial business processes and approach to risk-sharing that approach could be cloned and erode Capita’s commercial advantage. Capita provided an example of the release of certain identified information that it believed would enable one of its competitors (unspecified) to erode Capita’s market advantage.
 - Disclosure of this information would place Capita at a disadvantage when negotiating with existing and potential clients for other, non-BBC work, as similar terms might be demanded.

The Commissioner has looked at the remaining withheld information that is the subject of this complaint as prejudicial to its commercial interests in line with the bullet points above and the more specific arguments Capita supplied in relation to that information.

160. Capita argued that the agreement with the BBC was entered into prior to the FOIA coming into force. As the requirements of freedom of information were not considered at the time, it would not have contemplated any disclosure of the redacted sections of the contract. It was also argued that an exemption such as section 43(2) would not have been considered for the same reason.
161. In the 14 April 2010 letter Capita also argued that the TV Licensing contract is one of its most important in terms of value and prestige and the award of the contract had meant an expansion in the Capita organisation. It was argued that any release of the commercial terms of the contract would be detrimental. The Commissioner understands the remaining withheld information to form part of the commercial terms of the contract.
162. Businesses outsource to Capita and its trade secret is its “*commercial mechanisms, such as charges calculation, service level/service credit detail etc., described in the negotiated terms of the contract...*” This could enable competitors to “clone” Capita’s approach. The Commissioner notes Capita’s reference to a trade secret. Section 43(1) provides an exemption in relation to trade secrets. However the BBC did not cite 43(1) as a basis for refusal in this case and therefore the Commissioner has not considered whether the disputed information

constitutes a trade secret or whether section 43(1) is applicable in this case.

The likelihood of the prejudice to Capita

163. The Commissioner has considered the more detailed arguments that Capita provided and how they relate to the remaining withheld information . There was some emphasis placed on its approach to risk sharing and the risk reward structure as outlined in the contract.
164. The Commissioner does not consider that Capita's argument concerning the fact that the contract between it and the BBC was negotiated before the implementation of the FOIA is relevant in relation to the engagement of the section 43(2) exemption. Capita stated that exemptions such as section 43 were not considered at the time. The Act itself was passed in 2000 and the Commissioner is not convinced that a company of the size of Capita was unaware of the possible implications in 2002 that it might be obliged to disclose information under the terms of the Act at some point subsequently. In *Department of Health v The Information Commissioner (EA/2008/0018)*. The Tribunal noted:
- "In 2003 some 3 years after FOIA was enacted it was not reasonable to expect that the entirety of a Contract which would continue into the years when FOIA would apply should remain entirely confidential. (paragraph 47)" ⁵
165. The Commissioner understands that the BBC Licensing contract is unique and notes that no evidence has been provided that similar considerations would apply in relation to other contracts pursued or secured by Capita. Therefore the Commissioner does not consider that sufficiently similar calculations or mechanisms would be relevant in relation to services provided to other clients. Furthermore Capita has not explained why its current clients would expect similarly favourable terms as the BBC or demonstrated how future clients would be able to trade-up on the strength of knowing the terms of a contract currently nearly 9 years old.

⁵ Found at [http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20\(EA-2008-0018\)%20Decision%2018-11-08.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i272/Dept%20of%20Health%20v%20IC%20(EA-2008-0018)%20Decision%2018-11-08.pdf)

166. However, the Commissioner has also taken into account the fact that the retendering process in relation to the BBC TV Licensing contract was set to start in 2010 and the fact that it will be of a substantially similar nature when considering the arguments about prejudice to Capita's interests in respect of this particular contract.
167. As he has explained above in relation to his consideration of the likely commercial prejudice to the BBC he accepts the arguments presented by the BBC that a new licence fee contract is unlikely to vary greatly from the present terms and conditions. As stated above, whilst the Commissioner cannot provide any detail within this Notice regarding the nature of the remaining withheld information he accepts that these are bespoke, non-standard negotiated clauses specifically agreed for this contract with Capita which may not be offered or agreed with other suppliers. As a result the Commissioner accepts that if this information was disclosed in advance of the retendering process beginning it would be likely to prejudice Capita's commercial interests.
168. Given the content and level of detail present within the disputed clauses he is satisfied that there is a causal relationship between the information and the prejudice to Capita's ability to compete for the future BBC Licensing contracts. He is therefore willing to accept that disclosure of the withheld information would be likely to prejudice the commercial interests of Capita in this regard.
169. Although the Commissioner has accepted that some prejudice to Capita's commercial interests is likely to occur he does not consider that the higher threshold of "would prejudice" has been demonstrated by the evidence supplied by the BBC and Capita.
170. Having concluded that the exemption is engaged the Commissioner has gone on to consider the public interest test in this case.

The Public Interest Test

171. In considering the public interest in this matter the Commissioner has taken into account *Hogan & Oxford City Council v IC EA/2005/0026 & 30*. The Tribunal in relation to a different exemption found that when the "would be likely to" prejudice was engaged,

"... the public interest in maintaining the exemption will be more difficult to determine than where the alternative limb of the test has been applied." (paragraph 54)

Public interest arguments in favour of disclosing the requested information

172. See paragraphs 110–113 above for the BBC's arguments in favour of disclosing the requested information.

Public interest arguments in favour of maintaining the exemption

173. The BBC stated that it would not be in the public interest to disclose sensitive information about a particular company, in this case Capita, if that information would be likely to be used by its commercial competitors. There is a public interest in preserving the ability of companies to invest in developing particular approaches and to use those approaches when competing fairly for public sector contracts.

174. There is also a public interest in maintaining the exemption to preserve the BBC's ability to negotiate optimal contractual terms in relation to TV Licensing and obtain the best value for money and efficient expenditure of the licence fee income paid by approximately 25 million TV Licence holders.

Balance of the public interest arguments

175. The Commissioner considers that the arguments in favour of maintaining the exemption in this case do have some weight particularly given the relative proximity of the request to the start of the retendering process for the next TV Licensing contract.

176. See paragraphs 114-117 for the Commissioner's further consideration of the public interest arguments in disclosing the requested information or maintaining the exemption.

177. It was the BBC's contention that the release of details beyond what was currently available at the time it made its final submissions to the Commissioner posed considerable harm to the BBC's commercial interests, without offering a proportionate benefit to the public. However, the Commissioner understands that, following his instruction to the BBC to release the incentive information in the Capita contract, additional information from this contract has been released into the public domain. The BBC has recently decided to release further additional information from this contract.

178. The Commissioner also considers that the level playing field argument presented by the BBC in relation to competing for contracts operates both ways. The BBC has argued that when the contract is retendered Capita will be at a disadvantage and that other potential contractors will use the requested information to their commercial advantage whilst Capita will not have similar knowledge of its rivals' bids. The

Commissioner has recognised this in attributing some weight to this argument in favour of maintaining the exemption.

179. See paragraph 126 for the Information Tribunal's view of the relationship between contractors and those they contract for.
180. The Commissioner has considered the Tribunal's comments above in relation to this case and as a result has given less weight to the level playing field argument in favour of maintaining the exemption than he may have done in some cases. This is because he recognises that Capita is in a commercially superior position as the existing contractor in possession of full knowledge of the BBC's previous concessions and the bespoke elements of the contract. In the Commissioner's view there is a public interest in disclosing the remaining withheld information as this may have the effect of improving the competitiveness of the bids. In reaching this view the Commissioner has again taken into account the fact that the BBC is in a strong position to push bidders for a good deal given the value and profile of the contract in question.
181. Whilst the Commissioner has given some weight to the arguments in favour of maintaining the exemption in this case, he does not consider that they are sufficient to outweigh the public interest in disclosure in this case. For the reasons given at paragraphs 175-180 above, the Commissioner has concluded that the arguments in favour of disclosure are compelling.

Procedural Requirements

Section 1(1)(b): duty to provide information

182. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that the remaining withheld information from the complainant's request to which section 43(2) has been applied ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

183. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than 20 working days after the request has been received.

184. As the Commissioner finds that the public authority wrongly withheld some of the requested information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.
185. Additionally the Commissioner finds the public authority in breach of section 10 for the following reasons:
- The initial response was issued after 60 working days. Further responses were provided on 12 October 2009 and on 26 October 2009 after 88 working days.
 - The late, piecemeal disclosures breach section 10. The BBC's internal review confirms that measures have been put in place to ensure there is not a recurrence.

Section 17(1)(b): refusal of request

186. Section 17(1) states that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

187. The Commissioner has considered whether the BBC has complied with section 17(1)(b) of the Act. In failing to specify in its refusal notice an exemption on which it later relied in the course of the Commissioner's investigation the Commissioner considers that the BBC breached section 17(1)(b) in its handling of this request.

The Decision

188. The Commissioner's decision is that the BBC did not deal with the request for information in accordance with the Act by incorrectly concluding that sections 31(1)(a),(b),(d),(g) and (2)(a), 38, 43(1) and

43(2) applied and that the public interest favoured maintaining the exemption.

In consequence of the above the BBC breached sections 1(1)(b) and 10(1) of the Act in failing to provide the requested information to the complainant within the statutory time limit. It also breached section 17(1)(b) in failing to cite an exemption, section 43(1), upon which it later sought to rely in respect of some of the withheld information.

189. However the Commissioner has decided that the BBC dealt with the following elements of the request in accordance with the requirements of the Act:

- The withheld signatures under section 40(2) of certain members of staff working for or with TV Licensing.

Steps Required

190. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- To disclose the requested information withheld under section 38.
- To disclose the requested information withheld under sections 43(1) and 43(2) as detailed in the BBC's two Schedules attached to its final submission of 28 January 2011.
- To disclose the requested information withheld under sections 31(1)(a), (b), (d), (g) and (2)(a) of the RMS contract as outlined in the Schedule attached to the BBC's submission to the Commissioner (28 January 2011).
- To disclose the remaining requested information withheld under sections 31(1)(a), (b), (d), (g) and (2)(a) of the Capita contract.

191. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

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

Right of Appeal

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

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

Tel: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

194. 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.

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

Dated the 30th day of March 2011

Signed

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

Legal Annex

1 General right of access to information held by public authorities

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

10 Time for compliance with request

(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

“the date of receipt” means—

(a)

the day on which the public authority receives the request for information, or

(b)

if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

17 Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

31 Law enforcement.

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),

(h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or

(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in subsection (1)(g) to (i) are—

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

38 Health and safety

(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, have either of the effects mentioned in subsection (1).

40 Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

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

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.

43 Commercial interests

(1) Information is exempt information if it constitutes a trade secret.

(2) 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).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).