Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: **EA/2008/0018**
Information Commissioner's Ref: **FS 50083381**

Heard at the Care Standards Tribunal, London
On 8th and 9th September 2008

Decision Promulgated
18th November 2008

BEFORE

CHAIRMAN

Fiona Henderson
and

LAY MEMBERS

Henry Fitzhugh
Andrew Whetnall

BETWEEN

DEPARTMENT OF HEALTH

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:
Public interest test s.2
Absolute exemptions
- Confidential information s.41
- Prohibitions on disclosure s.44

Qualified exemptions
- Commercial interests/trade secrets s.43

Cases:

Derry City Council v Information Commissioner (EA/2006/0014)

Bellamy v IC and Secretary of State for Trade and Industry EA/2005/0023

Varec v Belgium C-450/06, 14 February 2008

Lansing Linde v Kerr [1991] 1 WLR 251

John Connor Press Associates Limited and the Information Commissioner [2006] EA/2005/0005

Pugh v IC and MOD EA/2007/0055

Representation:

For the Appellant: Mr Jason Coppel
For the Respondent: Ms Anya Proops

Decision

The Tribunal allows the appeal in part and amends the Decision Notice FS50083381 dated 21st January 2008 as set out below. The information to be disclosed (as defined in the table at paragraph 90 below) should be provided to Mr Stimson within 30 days from the date of this Decision.

Information Tribunal **Appeal Number: EA/2008/0018**

SUBSTITUTED DECISION NOTICE

Dated 18th November 2008

Public authority: **Department of Health**

Address of Public authority: **Richmond House, 79 Whitehall, London SW1A 2NS**

Name of Complainant: **Mr Gary Stimson**

The Substituted Decision

1. Having reviewed the content of the Contract, at the time that the request was made, the disclosure of such of the terms of the Contract as are alleged to be commercially sensitive would have been likely to prejudice the commercial interests of the Department or the Contractor. The public interest lies in favour of withholding some of the information and it lies in favour of disclosing other information as set out in the table at paragraph 90 below.

73-77 should refer to regulation 30 of the Public Contract Regulations 1993 which requires the information to be "obtained" from the Contractor. The findings remain the same.

The Decision

78.The Department did not deal with the following elements of the request in accordance with the Act:

- The Department of Health having now found copies of schedules 6 and 14 which they accept they held at the time of the request, there was a breach of section 1 FOIA as they failed to tell Mr Stimson that they did in fact hold this material.

- It failed to state in its refusal notice that it was also relying upon sections 43(1), and 44 in relation to the information that had been requested in addition to the exemptions already cited, and to explain why the exemptions applied and therefore breached section 17(1)(b) and (c) FOIA.

- There was a further breach of sections 17(1)(a)(b) and (c) FOIA in that the refusal notice did not identify which exemptions applied to schedules 6 and 14 or why.

- It incorrectly applied sections 41 and 44 to the information that had been requested, it incorrectly applied section 43(2) to some of the information requested.

- There was a breach of section 1 FOIA in that information that should have been disclosed pursuant to the information request has not been provided.

Steps Required

79 The information to be disclosed (as defined in the table at paragraph 90 below) should be provided to Mr Stimson within 30 days from the date of this Decision.

Dated this 18th day of November 2008

Signed

Fiona Henderson

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. Following a process of competitive tendering, the Department of Health (DOH) entered into a Contract with Methods Consulting Ltd (Methods) to set up and then support an electronic recruitment service website for the NHS. The Contract was agreed in 2003 and the service was up and running by the date of the information request in January 2005.

The request for information

2. On 7 January 2005, Mr Gary Stimson made a request for information from the Department of Health in an email entitled "*Freedom of Information Act Request*" in the following terms:

   "A copy of the Contract between the Department of Health and Methods Consulting Ltd, signed on 11th August 2003, for the provision of an Electronic Recruitment Service for the NHS".

3. Having had no response Mr Stimson chased the request on 9th February 2005 and received a refusal email dated 21 March 2005 which stated that the DOH had decided not to disclose the information:

   "the information you requested is being withheld as it falls under the exemptions in section 43 and 41 of the Freedom of Information Act" . The DOH relied upon the following factors:

   (1) the Contract contained a confidentiality clause;

   (2) disclosure would harm the DOH's working relationship with Methods which would undermine the effectiveness of the Contract;

   (3) disclosure would prejudice the commercial interests of the DOH and Methods;

   (4) the public interest did not favour release of the information.

and attached an annex which set out the factors considered in applying the public interest test.

4. Mr Stimson applied for an internal review on 4th April 2005 noting that:

> *"The Department of Health and the English NHS employ between 70%-80% of all health sector workers in the UK. The introduction of the Department's E-Recruitment service is having a major impact on the UK health sector recruitment market by limiting choice for both English NHS and other health sector employers"*

And arguing that:

- confidentiality clauses cannot be used to provide a blanket exemption from FOIA.
- The Contract was signed 3 years after FOIA became law by a company specialising in working on government Contracts.
- It was unlikely that a similar Contract would be tendered before 2009-10.
- There was a strong public interest in the disclosure of the Contract as the e-recruitment service had *"the potential to distort an entire recruitment market and have both positive and negative impacts on employers and other recruitment actors"*.

5. The result of the DOH review dated 21st June 2005 upheld the initial refusal on the same grounds as before.

The complaint to the Information Commissioner

6. Mr Stimson complained to the Commissioner about the DOH's refusal to disclose the Contract on 11th July 2005. Due to the backlog that arose at the Commissioner's office shortly after FOIA was implemented, it was not allocated to a Case Officer until July 2006. During the course of the investigation, Mr Stimson confirmed that notwithstanding the time taken to respond to his initial request by the DOH, the aspect of the complaint that he wished the Commissioner to investigate was the refusal to provide the Contract.

7. During the course of the investigation:

- the DOH disclosed a copy of the Contract to the Commissioner (excluding schedules 6 and 14 a copy of which the DOH was unable to locate at the time),

- the DOH also provided more detail relating to why it regarded the Contract as exempt from disclosure under FOIA, specifying that its reliance upon section 43 was both in relation to commercial sensitivity and also in relation to trade secrets.

- the DOH further relied upon section 44 FOIA as an additional reason why the Contract was exempt from disclosure because of the terms of regulation 43 of *The Public Contracts Regulations 2006* ("the 2006 Regulations"). That regulation provides that:

> *'(1) Subject to the provisions of these Regulations, a Contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential;*
>
> *(2) In this regulation, confidential information includes technical or trade secrets and the confidential aspects of tenders.'*

However, it is now accepted by all parties that these regulations were not the regulations that applied at the date of the request.

8. The DOH were very slow to provide information and to respond to the Commissioner's requests, explaining that they were having to consult with the Contractor (Methods) and the NHS to whom the Contract had been novated. Despite Mr Stimson's request to the DOH in his letter of 4th April 2005:

"If you do not provide the Contract please provide details of the different sections of the Contract and state clearly how release of each section will damage the commercial interests of the department and its suppliers",

no such detailed breakdown was provided to Mr Stimson or the Commissioner by DOH prior to the issue of the Decision Notice.

9. The Decision Notice dated 21st January 2008 ordered the DOH to disclose the Contract. The Commissioner found that the Contract was not exempt from disclosure under any of the provisions cited:

- section 41- The information contained in the Contract was not provided to the DOH, so the exemption did not apply,

- Section 43(1) – The information was not a trade secret because following the Commissioner's Awareness Guidance No. 5:

    a) None of the information appeared particularly unique,

    b) It did not appear that the release of the information would cause harm,

    c) The information had been used on other projects, so it seemed likely that the techniques would be known beyond a narrow circle of people, and they might not be difficult for a Competitor to discover,

- section 43(2) –whilst the information fell within the scope of the exemption, the Commissioner was not satisfied that disclosure was likely to cause prejudice because:

    a) The DOH did not provide details of any similar negotiations in which it or Methods were involved and might have been prejudiced, at the time of the request,

    b) This Contract was unique, and likely to differ from future Contracts,

    c) The Contract was 18 months old at the date of the request and the Information Technology field was fast moving,

    d) The Contract did not provide an insight into Method's pricing mechanisms and would not assist in predicting how Methods would price future Contract bids.

    e) The Contract did not reveal technical know-how of value to Competitors,

    f) Disclosure would not harm the DOH working relationship with Methods or limit the quality of firms willing to tender with DOH or materially impact upon Methods' ability to secure future Contracts because:

i) Methods should be aware that, as a result of FOIA, there will be more scrutiny of Contracts with public authorities.

ii) Public sector Contracts, are highly lucrative thus remaining attractive prospects.

- Section 44 – the information was not "forwarded" by Methods so regulation 43 did not apply and hence section 44 was not engaged.

10. Additionally the Commissioner found that:

a) in light of the DOH's contention that they could not locate schedules 6 and 14 there was a breach of section 1 in that they had not informed Mr Stimson that they did not hold all of the information

b) that there was a breach of section 17(1)(b) and (c) in that the refusal notice did not state section 43(1) and 44 of FOIA were applicable or why the exemptions applied,

The appeal to the Tribunal

11. The Department of Health appealed to the Tribunal on 15th February 2008. The grounds of appeal were not sufficiently particularized and amounted to a bare assertion that the Commissioner had erred in concluding that each of the exemptions relied upon did not apply. These grounds were subsequently amplified in further and better particulars served on 9th June 2008.

12. The original applicant did not apply to be joined to this appeal.

13. By the date of the Appeal the DOH had managed to locate a copy of schedules 6 and 14 which they accepted was being held on their behalf by the Department of Work and Pensions Solicitors who had been involved in supervising the preparation of the Contract. The DOH accepted that these were being held on their behalf and they had been so held at the date of the request. The Decision Notice was therefore in error in concluding that these schedules were not held, and that there had been a breach of section 1. However the Tribunal is satisfied that there must have been an additional breach of 17(1)(a), (b) and (c) FOIA. Since the 2 schedules were not considered at the time the decision was made, the refusal notice cannot be said to record the exemptions which applied or consideration of the public interest test.

The questions for the Tribunal

14. i) Whether the Commissioner erred in finding that the Contract was not exempt from disclosure under s. 41 FOIA:

    a) Was the information in the Contract (or any of it) obtained from Methods?
    b) If it was obtained, was it confidential in nature?
    c) If so, was there was a sufficient public interest defence to permit its disclosure?

ii) Whether the Commissioner erred in finding that parts of the Contract were not exempt from disclosure under section 43(1) FOIA in that he held they were not a trade secret?

iii) Whether the Commissioner erred in finding that the exemption in s. 43(2) FOIA (prejudice of commercial interests) did not apply?

    a) Would disclosure create a real risk of such prejudice?
    b) Did the public interest in maintaining the s. 43(2) exemption outweigh the public interest in disclosure?

iv) Whether the Commissioner erred in finding that section 44 FOIA read together with reg. 30 of the *Public Service Contracts Regulations 1993* did not apply?

    a) Was all or any of the information provided to DOH by Methods?
    b) If so, was it reasonable for Methods to require the information was treated as confidential?

Evidence

15. Both parties agree the following chronology:

Pursuant to an advertisement and an Invitation To Tender, Methods Consulting Ltd submitted their tender to the DOH on 9th April 2003. The DOH entered into negotiations with 2 tenderers on 9th May 2003 until 13th June 2003. Methods submitted their Best and Final Offer on 20th June 2003 and the Contract was signed on 11th August 2003.

16. The Tribunal viewed the Contract and all 14 schedules in unredacted form. It was noted that the Contract contained the following Contract terms:

"Confidentiality

22.1 Each Party:

(A) Shall treat as confidential all information obtained from the other Party under or in connection with the Contract;

(B) Shall not disclose any of that information to a third party without the prior written consent of the other Party, except to such persons and to such extent as may be necessary for the performance of the Contract and

(C) Shall not use any of that information otherwise than for the purposes of the Contract....

22.3 Nothing in this clause shall prevent the Authority

(A) Disclosing such information relating to the outcome of the procurement process for the Contract as may be required to be published in the Supplement to the Official Journal of the European Communities in accordance with EC directives or elsewhere in accordance with requirements of United Kingdom government policy on the disclosure of information relating to government Contracts;"

And in Schedule 8:

"Schedule 8 : Termination/Exit Plan

6 KNOW HOW

6.1 The Authority and the New Contractor shall be entitled to use and disclose for the use of the Authority all know-how and other information acquired or used by the Contractor in the provision of the Services, where it was:

(A) Produced specifically for the Authority; or

(B) Used exclusively in the provision of the Services."

17. Mark Johnston (Managing Director of Methods Consulting Ltd) gave evidence. He did not recall that his attention was drawn to the provisions of FOIA when tendering for the Contract. Since FOIA has come into force there are no longer blanket confidentiality clauses in his experience, matters that are confidential are placed in a "confidential schedule". His recollection of the drafting process was that it was not collaborative with the DOH as it was a competitive process. He stated that the DOH would provide feedback so

that modifications could be made but that most of the alterations were by way of clarification. Some specific schedules were drafted by Methods and others by DOH.

18. He outlined specific examples within the Contract which he said demonstrated a unique approach by Methods (e.g. schedule 6) and explained that although he did not have sight of other successful Contracts entered into by other firms:

    - He had 21 years of experience in his field,
    - He had employed personnel who had worked for other firms and so had some insight into the way other firms approached Contracts such as this,
    - From general industry knowledge he was not aware that other firms had his approach which he believed was unique.
    - Although his firm had made no special provisions for staff confidentiality, his firm had a low turn-over of employees and he believed that the unique approaches used remained confidential.

19. He felt that even where the Contract could not be said to be wholly unique in areas such as pricing, costing, service levels etc. the way that the Contract had been constructed would still be valuable information for Competitors and that in some cases even partial information would enable a bidder to extrapolate e.g. a level of service and a total price. From that a Competitor could infer the structure and approach to charging.

20. Mr Johnson agreed that the 42 clauses of the Contract were in effect standard terms and conditions drafted by the DOH and he did not object to their disclosure. Similarly, notwithstanding the blanket confidentiality clause, the areas of the schedules that he did not raise in his evidence he did not consider to be confidential or commercially sensitive.

21. Mr Johnson gave evidence that his company had been bidding for other public service Contracts around the time of the request in 2005; he believed they were tendering for a Post Office Contract at the time. His company invested a substantial amount in a tender which might prove to be unsuccessful, in the belief that they would be able to "re-use" the work when making a subsequent tender for a different Contract. The contents of schedule 6 he gave as an example of work re-used in a subsequent Contract with the Department of Transport. His company undertook private and public work. Whilst his company would

still tender for public work they would be less inclined to bid for smaller Contracts and reluctant to invest much time or innovation into a public bid if they thought that unique work done by them would become public and would lose its value to them.

22. He accepted that in time his unique approach would leak out and that in any re-tendering process the DOH would be likely to use some Contract detail in formulating the Invitation To Tender. Additionally if the Contract was renewed with another company they would be likely to gain a significant insight into the way Methods had run the project (as provided for in schedule 8 of the Contract).

23. Deborah Mellor, Deputy Director, Workforce Capacity at the Department of Health also gave evidence. She had overseen the negotiations between the DOH and Methods which gave rise to the Contract. Notwithstanding her use of the term "negotiations" within her witness statement her oral evidence was that these were in relation to detail and not substance, the methodology or way the service was built. DOH had asked Methods for clarification and pointed out some suggestions to clarify terms. She agreed it was very difficult to untangle which bit of which provision came from DOH or Methods.

24. She did not recall whether DOH raised the fact that FOIA was coming into force with Methods, however her evidence was that the DOH awareness raising was "ramped up" in 2004 and in 2003 it was fairly limited. Her recent experience of procurement was that the level of interest in tendering from companies had not been good and although she could not say that was down to FOIA concerns, she was reluctant to do anything that might act as a disincentive for companies to bid. She wanted to attract the best quality and variety of potential bidders. During discussion with Methods over whether there was to be disclosure of all or any of the Contract there were "frictions" between Methods employees and DOH employees. She felt there was a risk that disclosure of the Contract, in the face of Methods' objections, might hinder the smooth running of the Contract on a day to day level. Her concerns might be speculative but she had to balance the risks.

25. She agreed that the NHS Jobs Contract was bespoke but that it bore similarities to other public Contracts. At the date of the information request it was impossible to say whether the re-tender would be for a similar service or something different.

26. Mrs Mellor accepted that some of the Contract could be considered to be in the public domain. The Commissioner suggested that there might be 7000 employer users of NHS

Jobs which she thought was a bit high. Equally a number of people were involved in the workshops and some elements of the Contract would be apparent to those members of the public who used the service. When the project was launched there was hostility from the other recruitment services who felt threatened. Mrs Mellor felt that providing the Contract would fuel the misinformation as it would enable people to quote parts out of context and appear authoritative.

27. The open bundle of documents contained numerous memos and minutes of meetings that had taken place to discuss the contents of the Contract and the schedules. The DOH's position is that these discussions largely centred around syntax, and that the DOH would state what they wanted from the Contract and that Methods would then go away to devise the way in which this would be achieved.

28. The Tribunal rejects the contention that the DOH were presented with a fait accompli which they could either accept or reject, or that the negotiations were mostly about wording. The discussions demonstrate the DOH being asked to make choices, making suggestions, rejecting proposals, providing feedback on ideas and providing its own proposals for Methods to assess. The Tribunal does not accept that the DOH's input into the negotiation was limited to or largely comprised clarification, wording and formatting. In coming to this view the Tribunal has been influenced by the following:

- the email from Mark Johnston of Methods dated 16 May 2003 where feedback is being sought in relation to the services required, the service levels, and that the DOH is often being offered a choice and being asked to choose which they prefer,

- from the internal DOH email of 18th May 2003, it is clear that the service credit levels emanated from DOH,

- the email from Mike Clements of DOH dated 19th May – related to the DOH evaluation of the cost implications of Methods supplying certain types of hardware and contained proposals on service levels,

- the email dated 20 May 2003 from Mike Clement of DOH is an example of DOH suggesting what was to be included in particular categories and the pricing mechanism/ structure.

- The minutes of the meetings of 23rd and 29th May 2003 show that the negotiations were very detailed, wide ranging and largely driven by DOH and dealt with content and approach in the schedules.

Legal submissions and analysis

1**) Whether the Commissioner erred in finding that the Contract was not exempt from disclosure under s. 41 FOIA.**

29. Section 41(1) FOIA appears under the heading *"Information provided in confidence"* and states that:

Section 41 (1) Information is exempt information if –

*(a) it was **obtained** by the public authority from any other person (including another public authority), and*

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

30. The DOH argue that:

- All the information in the Contract was obtained from Methods, because the entirety of the information in the Contract was provided to DOH by Methods, in a document they compiled following the negotiations in June 2003. Hence the information in the Contract *was* the proposal presented by Methods,
- Alternatively all the information drafted by Methods was obtained by DOH from Methods. Although the DOH "clarified" issues, in the drafts it made no significant alterations,
- Alternatively all the technical specifications, or details of particular processes or methodologies were obtained from Methods; since this was the service being provided by Methods it cannot be said that this information was generated by DOH.

31. They rely upon the case of *Derry City Council v Information Commissioner* (EA/2006/0014) as authority that commercial Contracts *can* fall within the scope of the section 41 exemption:

> *"We are also conscious of the fact that Contracts will sometimes record more than just the mutual obligations of the Contracting parties. They will also include technical information, either in the body of the Contract or, more probably, in separate schedules. Depending, again, on the particular circumstances in which the point arises,* ***it may be that material of that nature could still be characterised as confidential information 'obtained' by the public authority from the other party to the Contract, (or perhaps a 'trade secret' under section 43(1) of the act)*** *in which event it may be redacted in any disclosed version.* ***(emphasis added).***

32. The DOH further argues that section 41 should be read in broadest terms and refers the Tribunal to *Hansard*. The Tribunal does not feel that it is necessary in this instance to go behind the statute, as "obtained" is a word capable of clear meaning.

33. The Tribunal does not agree that the information within the Contract and schedules has been "obtained" from Methods for the purposes of section 41 FOIA. If information has been provided by e.g. DOH, its inclusion in a document compiled by Methods subsequently or a draft does not then transfer "ownership" of the information to Methods for the purposes of considering the Contract. From the evidence it is clear that DOH undertook a detailed review of all the proposals and made suggestions of substance, often before a draft had been proposed. The installation of DOH ideas from the Invitation To Tender or discussions certainly negates the assertion that the information in the Contract was obtained from Methods just because it appeared in a document they compiled subsequently.

34. If the Contract signifies one party stating: "these are the terms upon which we are prepared to enter into a Contract with you" by the acceptance of that Contract the other party is simultaneously stating "and these are the terms upon which we are prepared to enter into a Contract with you". Consequently the Contract terms were mutually agreed and therefore not obtained by either party.

35. The Tribunal notes the observations made in *Derry* and does not feel that such technical aspects as are present here are the type of specification envisaged in *Derry*. Here they

represent e.g. service levels, costings and the details of the practicalities of setting up the service. Unlike for example a chemical formula or the blue print for a machine where a variation might change the nature of the product, the DOH were able to and in some instances did alter the detail of the proposals to suit their requirements.

36. As a general point of principle the Tribunal considers it an impossible task to expect either the Commissioner or the Tribunal to wade through the evidence of a negotiation, working out who had an original idea and at what point it was tinkered with sufficiently that it became someone else's idea. Even in a case such as this where there are minutes of the meetings it is still impractical to designate ownership to each clause.

37. In light of the Tribunal's findings that the information was not "obtained" from Methods, section 41 FOIA is not engaged and, the Tribunal has not gone on to consider the questions of whether any of the information was confidential, whether disclosure would result in an actionable breach of confidence, or the public interest defence to disclosure.

2.Whether the Commissioner erred in finding that section 44 FOIA read together with *reg. 30 of the Public Service Contracts Regulations 1993* did not apply?

38. Section 44(1) FOIA provides:

> *"Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*
>
> *a) is prohibited by or under any enactment,*
>
> *b) is incompatible with any Community obligation, or*
>
> *c) would constitute or be punishable as a contempt of court."*

39. The tender exercise carried out by DOH for this Contract was governed by *the Public Service Contracts Regulations 1993*, which were in force at the date of the information request and which state:

> *"30 A Contracting authority shall comply with such requirements as to confidentiality of information provided to it by a services provider as the services provider may reasonably request."*

From 31 January 2006, they were superseded by the *Public Contracts Regulations 2006* ("the 2006 Regulations") which state:

> *"43 "(1) Subject to the provisions of these Regulations, a Contracting authority shall not disclose information forwarded to it by an economic operator which the economic operation has reasonably designated as confidential..."*

It was unfortunate that the DOH's references to regulation 43 of the *2006 Regulations* in correspondence with the Commissioner, in the Decision Notice, and in its earlier pleadings were mistaken. It was regulation 30 which bound DOH at the relevant time. However, they seek to argue that regulation 43 of the *2006 Regulations* would be relevant to the extent that were the Tribunal now to consider ordering DOH to disclose any information (such an order must be compatible with reg. 43).

40. The Tribunal does not consider that there is a material difference between the regulations for the purposes of considering this request. However, the Tribunal must consider the applicability of section 44 FOIA at the date of the request. If at the date of the request a set of regulations applied which would enable the information to be disclosed but the public authority wrongly failed to apply them, the Tribunal would not consider that they were entitled to rely upon later regulations which did not apply at the time, in justification for their failure to comply with their obligations. The date for considering whether section 44 applies is around the date of the request (as per *Bellamy v IC and Secretary of State for Trade and Industry EA/2005/0023.)*

41. DOH contends that Regulation 30 presents an absolute bar to the disclosure of this Contract, under section 44 FOIA, because of a document compiled by Methods after the majority of the negotiations were completed which was reasonably designated by Methods as being confidential. The DOH relies upon *Varec v Belgium C-450/06, 14 February 2008*, however, the Tribunal does not find that case to be of assistance as there is a difference between a tender (which may be unsuccessful) and a Contract which is the terms upon which both parties have chosen to agree. It is not the tender which has been requested, it is the Contract – there is an argument that a tender is a unilateral document in that it is an offer by one party. The Tribunal on the facts of this case does not accept that this is the case here

because of the extent of the negotiations that took place from the outset (see para 33-35 above), however, even if that were the case, at the time when it becomes the Contract, the nature of the information changes to become mutual information.

42. DOH referred to a body of EU case law dealing with the public interest arguments in favour of keeping bid information confidential, arguing that the Tribunal should adopt a generous approach to the breadth of section 44 insofar as it applies to information contained in tenders. The Tribunal disagrees. The arguments are public interest arguments. Section 44 is an absolute exemption, therefore it is not appropriate to include public interest arguments in favour of withholding information to shore up an exemption with no public interest test.

Was all or any of the information provided (or forwarded) to DOH by Methods?

43. The Tribunal is satisfied that in the context of these regulations "provided" has the same meaning as "obtained". The Tribunal gathers support for this view from the subheading under which section 41 FOIA, falls namely "*Information **provided** in confidence*", notwithstanding that the section itself uses the word "obtained". The Tribunal is satisfied that both terms can be paraphrased in this context to mean did the public authority "get" the information from the Contractor.

44. The Tribunal is also satisfied that even if the consideration were the 2006 regulations, for information to be "forwarded" it is in effect being provided. In light of this, the Tribunal's analysis of the facts and arguments at paragraphs 30-35 above are equally relevant and for the same reasons the Tribunal is satisfied that the information in the Contract has not been "provided" or "forwarded" by Methods.

45. Having determined that because of the inapplicability of the regulations, Section 44 FOIA is not engaged, the Tribunal does not go on to decide what was "reasonably" designated confidential. However, the Tribunal would at this stage make some observations. The Tribunal was disappointed that despite Mr Johnson's acknowledgement in his evidence that it was only in relation to specific items that he objected disclosure, the Department of Health still sought to argue that none of the Contract should be disclosed under this section. The Tribunal notes that this section if applicable would have no public interest balancing test. However, the regulations do have an element of "reasonableness" built in.

46. The DOH took a very restricted view of reasonableness, relying upon the appearance of a blanket confidentiality clause, and arguing that reasonableness, must be considered in the light of the public interest considerations emphasised by the ECJ in *Varec*, and independently of provisions of national law, including FOIA. Other relevant factors were that the designation of tenders and Contractual provisions as confidential was standard practice, and that the Contract in this case was pre-FOIA came into force (even if FOIA were already on the statute books).

47. The Tribunal notes:

- 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,
- In deciding what it is reasonable for a Contractor to designate as confidential in light of FOIA it is helpful to look at the Office of Government Commerce (OGC) guidance (see para 79 et seq below),
- In deciding what it is reasonable for a Contractor to designate as confidential the Tribunal would expect the public authority to acknowledge that if the Contractor does not object to its disclosure (and is not alleging any passage of time arguments) it was not reasonable for them to designate it as confidential in the first instance.

48. Additionally the Tribunal looks at the blanket confidentiality clause:

- It contains a requirement that the information is "obtained" and

- The clause contains the following caveat:

> *"22.3 Nothing in this clause shall prevent the Authority*
>
> *(A) Disclosing such information relating to the outcome of the procurement process for the Contract as may be required to be published in the Supplement to the Official Journal of the European Communities in accordance with EC directives or elsewhere in accordance with requirements of United Kingdom government policy on the disclosure of information relating to government Contracts;"*

Since FOIA had already been enacted it was clearly government policy that FOIA be complied with once it came into force.

3.Whether the Commissioner erred in finding that parts of the Contract were not exempt from disclosure under section 43(1) FOIA in that he held they were not a trade secret and whether the Commissioner erred in finding that the exemption in s. 43(2) FOIA (prejudice of commercial interests) did not apply?

Trade secrets

49. Section 43(1) FOIA provides that:

> *Information is exempt information if it constitutes a trade secret.*

50. Section 43(1) is a qualified exemption with a public interest test, there is no statutory definition of a "trade secret". In *Lansing Linde v Kerr* [1991] 1 WLR 251, Staughton LJ in the Court of Appeal proposed:

> *...Mr Poulton suggested that a trade secret is information which, if disclosed to a Competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.*
>
> *That is my preferred view of the meaning of trade secret in this context.*

51. In the Decision Notice the Commissioner relied upon his *Awareness Guide No.5* and identified the following questions:

- *Is the information used for purposes of trade?*
- *Would the release of information cause harm?*
- *Is the information already known?*

- *How easy would it be for the Competitor to discover or reproduce the information for themselves?*

52. The Tribunal considers these tests are strikingly similar to those applicable to section 43(2) commercial sensitivity. A trade **secret** implies that the information is more restricted than information that is commercially sensitive. The ordinary understanding 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. In relation to the item of information which it is argued most strongly constitutes a trade secret by the DOH, namely schedule 6, this information sets out in detail a method and approach used in fulfilling an aspect of the set up of the Contract. It clearly is used for the purposes of trade in that the DOH are paying Methods to structure the Contract in this way. The release of the information would cause harm in that Methods would have lost their individuality and it represents an investment of time and money.

53. In relation to the next two questions it is less clear cut. Although the schedule sets out the technical specifications of the approach, much of this would be apparent to those using it. It does not have the highest level of secrecy associated with it that a Trade Secret would appear to merit. The approach involves the structuring of a process using universally recognised methods to create something different. Consequently it would not be difficult for a Competitor to discover elements of the information or to reproduce elements of the information, indeed they may already be using some of it. For these reasons the Tribunal does not find that the information sits easily with the definition of Trade Secret. It is however, clearly commercially sensitive (see para 57 et seq below).

54. Adopting the tests set out in paragraph 50 above, the Tribunal is satisfied that any of the material in dispute in this case which could constitute a trade secret would also fall more comfortably within the definition in section 43(2) FOIA. Both sections are subject to the same public interest test and on the facts of this case no different arguments are advanced in relation to the public interest test relevant to each section. For this reason (beyond the remarks set out in paragraphs 52-53 above) the Tribunal does not consider it necessary to decide the applicability of section 43(1) FOIA separately as this is subsumed by the decisions made under section 43(2) FOIA.

Prejudice to commercial interests

55. By section 43(2) FOIA:

> *"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).*

56. Section 43(2) is a qualified exemption subject to the public interest test section 2 FOIA.

It is accepted that the Contract relates to the commercial activities of both DOH and Methods, and Jobsite, Methods' sub-Contractor.

Will disclosure prejudice or be likely to prejudice the commercial interests of DOH, Methods and Jobsite?

57. The Tribunal agrees that the test is would there be *any* prejudice likely as a result of disclosure; it need not seek evidence of such substantial prejudice. The Tribunal also adopts the approach taken in *John Connor Press Associates Limited and the Information Commissioner*, [2006] EA/2005/0005 at [15] where the Tribunal (differently constituted) states that the test will be met wherever that possibility is a "real" one.

Prejudice to Methods' commercial interests

58. DOH argues that disclosure of those sections which Methods has identified as being of particular commercial sensitivity, was (and is) likely to cause substantial prejudice to Methods' commercial interests:

a) The public sector consultancy market is highly competitive. Methods is established as a leader in that market by developing innovative services and methodologies which make it stand out from Competitors,
b) Disclosure would make Methods' methodologies available to Competitors e.g. it would enable product providers to offer the same sort of supportive set-up service as Methods already offers because:
   i) The Contract will be re-tendered. If a Competitor had Methods' detailed proposals and pricing structures they could index the prices to undercut Methods.
   ii) Prospective clients could also use the information to force Methods' price down,

iii) This prejudice would be likely to apply to other government Contracts in which Methods wanted to use similar processes or pricing structures.

iv) If Methods is no longer "distinctive" its success rate may fall, and it is likely to lose consultancy work assisting others to prepare bids.

Prejudice to Jobsite's commercial interests

59. This is argued in relation to schedule 14 insofar as it relates to screenshots that are not available to the general public. DOH argues that Jobsite's core business entails the development of sites such as "NHS Jobs", and disclosure of "screen shots" not ordinarily available to the public would enable Competitors to copy those attributes which make its work "unique". This is likely to result in a loss of revenue from project work and advertising sales.

Prejudice to DOH's commercial interests

60. At the time when prejudice to the DOH must be assessed (January 2005) the Contract had not been novated to NHS Employers. The DOH rely upon *John Connor Press Associates*:

> *"...the commercial interests of a public authority might be prejudiced if certain information in relation to one transaction were to become available to a counterparty in negotiations on a subsequent transaction. Whether they were or not would depend on the nature of the information and the degree of similarity between the two transactions."*

and the following arguments in support of their case:

a) Disclosure of the breakdown of prices agreed, and the precise specification of the services provided, will seriously weaken DOH's own negotiating position in future procurement exercises, making it harder to negotiate increased services or reduced prices.

b) There would be no incentive for tenderers to depart from Methods' approach or to offer innovative solutions which may improve the quality of service or reduce the price.

c) This might affect other government departments seeking to negotiate similar Contracts.

d) There was friction between DOH and Methods in relation to the potential disclosure of this Contract which might have led to a reduction in quality of the service, impacting upon value for money and the success of the service.

e) Any reduction in the number of qualified tenderers will prejudice DOH's own commercial position.

f) Other websites operate in competition with "NHS Jobs". DOH invested considerable sums of money in developing this service, it would prejudice its commercial interests for the specifications including, e.g screen shots, to be available to Competitors.

61. The Commissioner seeks to argue that:

(a) the Contract did not contain know-how or pricing information **of value** to Competitors (emphasis added);

(b) the delay of 18 months between conclusion of the Contract and the request meant that any future tenders would be very different;

(c) the service that was going to be re-tendered would not be identical;

(d) they were not at the time of the decision notice told of any similar ongoing negotiations; and

(e) private Contractors "should be aware" of FOIA and therefore disclosure of this Contract would be unlikely to affect their commercial relationship with DOH.

62. Some of these risks outlined by the DOH are slight or ought not to come to pass in a competitive world, and there is force in all of the Commissioner's arguments. Additionally the Tribunal did not accept Mrs Mellor's concern that disclosure of the Contract would add to misinformation thus reducing the take up, the Tribunal found that the converse was more likely. However, the Tribunal accepts that in relation to the circumstances outlined above there is a real risk of commercial prejudice to Methods, Jobsite and DOH if commercially sensitive information is disclosed.

Commercially sensitive information

63. To fall within the exemption at the date of the request, the information must be;

- still current and commercially important
- not widely known (if it is common knowledge it ceases to be sensitive).

64. The DOH argue that Methods have developed particular processes (or "methodologies") in setting up and supporting a service such as NHS Jobs. These are vital to Methods' commercial success and are highly confidential. The schedules to the Contract also provide evidence relating to staffing levels, pricing information, the support package and the structure of the service provided.

65. The Commissioner suggests that the "information technology sector" is "fast moving" and that the information therefore ceases to become commercially sensitive as the field has moved on.

66. The Tribunal is satisfied that whilst there is some strength in that argument there was clear evidence that the pricing could be index linked, the staffing levels would demonstrate the level of resources Methods was prepared to devote to a Contract and that Methods were still using the same methodology in other Contracts now (which certainly means that the information remained commercially useful in January 2005).

67. The Tribunal saw evidence of the fair use policy of the internet site and heard evidence of the low turnover of staff that Methods has which assists them in keeping their processes confidential. The Tribunal also noted that participants in the workshops were not required to agree to any confidentiality provisions and no attempt had been made to register, copyright or patent any of these methodologies. Methods asserted that they do not believe the information is publicly known.

68. The Commissioner challenged this, arguing that anything that the NHS employers had access to may have been seen by 7000 people, and that the contents of the workshops were likely to have become fairly well disseminated. The Commissioner further argued that much appeared to be common sense and some would leak out at the time of re-tendering and if a new Contractor was employed. If those employed on other projects using similar methodologies were included, the total pool of those in the know was quite large.

69. The Tribunal has considered both sets of arguments as it applied to each piece of information that is in dispute, and is satisfied that there is a difference between a large group of users the NHS employers (who are not themselves Competitors) using a website and becoming aware of certain properties or being able to make assumptions about e.g the level of support being given, and having a blue print for the whole service handed to the public at large. The Contract comprises different pieces of information and there is a different level

of dissemination for each. In some cases the Tribunal is satisfied that it remains secret, in others it is not. Fuller details are given in the table at para 90 below.

The public interest balance

70. The DOH rely upon the public interest arguments advanced in *Varec v Belgium C-450/06, 14 February 2008* and argues that:

    a) Releasing confidential information submitted in tenders for public sector Contracts could distort competition in a given award process or in subsequent competitions,
    b) Contract award procedures can only work properly where there is a relationship of trust between the Contracting authorities and participating economic operators, so that operators do not fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them,
    c) The protection of business secrets is a general principle of European law and the maintenance of fair competition in Contract award procedures is an important public interest. In addition, Article 8 of the *European Convention on Human Rights*, provides additional protection for the rights of a tenderer which has provided confidential information.

71. DOH concedes that there is a general public interest in the transparency of government procurement decisions, and in the proper accountability of government departments for the way in which they spend public funds. However, their case is that sufficient information was available in the public domain to further any public debate in that:

    - The advertisement in the Official Journal of the European Union ("the Official Journal") set out the nature of the project and its probable duration.
    - A "Contract award notice" was published in the Official Journal (pursuant to reg 22 of the 1993 Regulations), setting out:
        a) the nature of the services being provided,
        b) the total Contract price,
        c) Methods' name and
        d) the reasons for choosing Methods' bid.

- John Hutton MP, Minister of state in the Department of Health, answered a Parliamentary Question in December 2003, indicating that the overall cost of the service would be £6 million over five years.

There is additional scrutiny and accountability for public funds in that:

- The DOH has to report the results of procurement decisions to the Treasury,
- All DOH's procurement decisions are examined internally by the OGC and the Public Accounts Committee.

72. However, the Tribunal finds that there is considerable weight in the Commissioner's arguments that there is very little material in the public domain and as such is insufficient to inform public debate. That there is internal scrutiny whilst important does not meet the argument that the public have no opportunity to participate in this scrutiny.

73. Additionally the DOH argue that there is no particular public interest in disclosure of the Contract to enable public consideration of any particular issue or concern. The Tribunal takes this to mean that this is not a case where there is a general outcry because the service has failed or gone substantially over budget. Whilst it would appear that the Contract is a success that does not mean that there would be no public criticism or input were the opportunity afforded to the public

74. The Commissioner argues that disclosure of the Contract would:

- further competition and
- ensure value for money.

Whilst the Tribunal can see that if the prices, service levels etc. are known other tenderers will seek to undercut in an effort to win the Contract, and the public interest will be served to some extent by the greater value for money, but notes that this is at considerable prejudice to the Contractors and that it is not necessarily in the public interest that Contractors should be so disadvantaged. The Commissioner also argued that significant disclosure might enable a member of the public (or rather more likely in the eyes of the Tribunal) another company to view the Contract and realize that in fact it could be done better, more cheaply or more efficiently which would benefit the public.

75. The Tribunal adds its own observations 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.

76. The Tribunal does accept that there is also merit in the DOH's arguments that disclosure would:

- reduce Methods' commercial advantage,
- there was a slight risk that it might diminish the number and quality of companies willing to tender for public sector work,

However, in light of the applicability of FOIA to all government Contracts and the Office of Government Commerce (OGC) guidance (see para 79 et seq below) a redacted version (redacting areas of particular commercial sensitivity) would not place Methods in a worse position than any other government Contractor in light of FOIA. As such, any general arguments relating to the impact of disclosure upon those prepared to bid for government Contracts has to be seen in the light of FOIA and the recommendations concerning its interpretation in commercial contexts promulgated by the Office of Government Commerce (see para 79 below). The Tribunal also accepts the Commissioner's contention that government Contracts can be attractive prospects of high value and high prestige.

77. From their arguments it is clear that the DOH cannot see any real public interest in the disclosure of the detailed provisions of the Contract. This Tribunal is assisted by the general principles outlined by the Tribunal (differently constituted) in *Pugh v IC and MOD EA/2007/0055*:

"53. .. a. There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest and the strength of competing interests must be assessed on a case-by-case basis.

b. The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining an exemption diminishes over time.

c. In considering the public interest factors in favour of maintaining the exemption, the focus should be upon the public interests expressed explicitly or implicitly in the particular exemption provision at issue.

d. The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process."

78. In addressing these factors specifically the Tribunal notes that:

- there is currently very little material in the public domain relating to the Contract between Methods and the DOH. The arguments in favour of disclosing material in order to promote transparency and accountability are therefore strong.

- The passage of time is a relevant consideration. On the one hand it is accepted that some of the disputed information was still in use by Methods in other projects and procurement exercises and that Methods would wish to use it to re-tender for this Contract. Additionally indexation could be used to provide up to date figures. However, the longer the Contract (and other Contracts in which the processes are used) runs the less inherent confidentiality remains as the pool of people who have used or dealt with the service increases. Methods accept that at the point of retendering and in the event that a new Contractor is appointed much of the information will be disclosed. The Tribunal is satisfied that this means that in this case the commercial sensitivity has a "shelf life" and that as the shelf life gets shorter the value of the information reduces and the necessity to protect it becomes less strong.

79. The Office of Government Commerce (OGC) have issued the *OGC (Civil Procurement) Policy and Guidance version 1.1*. This includes a table summarising the starting point disclosure position included in the guidance note from what was the Department of Constitutional Affairs (DCA), on the applicability of exemptions to various types of information, highlighting the public interest considerations to be balanced when considering an information request.

80. The Tribunal were provided with the *OGC (Civil Procurement) Policy and Guidance version 1.1* and the DCA working assumptions note, which the Tribunal believes dates from

December 2004, and hence would have applied at the date of the information request. The Tribunal finds the guidance and working assumptions a useful approach to dealing with an information request and in broad terms it reflects the approach that we have adopted in our consideration of this Contract. For this reason the Tribunal sets out in detail the relevant parts of the guidance and working assumptions below.

81. The Guidance states:

- its purpose is as a general guide with working assumptions, not absolute rules.
- it applies to "legacy" Contracts (those entered into prior to FOIA coming into force)
- whilst it is appropriate to seek the views of the third party supplier which can inform the public authority, the final decision on release or withholding is for the public authority holding the information.

82. The working assumptions recognizes that the time at which a request for disclosure is made, and the phase of procurement to which it relates, are relevant to the balancing test to be conducted. Under the heading "*Requests for Procurement Information Made after a bidder has been selected and during delivery of the Contract"* it notes:

> "*For the purpose of this Working Assumption, the public interest is generally in favour, once a procurement exercise has been completed, disclosing the information contained in the categories set out in* ***section 1***.
> *Some information will remain sensitive for a certain amount of time, even after a Contract is let and is being delivered. These categories of information are set out in* ***section 2****."*

83. Section 1 says that

> *"Generally speaking, there is a public interest in disclosing information about public procurement to ensure:*

- *that there is transparency in the spending of public money;*

- *that public money is being used effectively, and that public authorities are getting value for money when purchasing goods and services;*
- *that authorities' procurement processes are conducted in an open and honest way."*

84. The note accepts that much information that may be sensitive before a Contract has been let, ceases to weigh as heavily in the public interest balancing test:

> *"Once a Contract has been awarded, many of the reasons for withholding information are no longer relevant, either because commercial interests would not be prejudiced or because once a decision has been reached on the spending of public money, the balance of public interest shifts in favour of disclosure".*

85. The heads for information listed which are relevant to the present case include:

- *"Identity of the successful bidder, Contract price and high level price breakdown (i.e. not the supplier's detailed pricing structure) – disclose*

There is a strong public interest in showing who public money is being spent with, how much public money is being spent on a particular service or good, and how the supplier arrived at the price that is being charged. Care must be taken to ensure that no information is released which would allow the supplier's internal pricing structure to be deduced, prejudicing its commercial interests. Subject to this, the information should be released."

- *"Information about the Contract and the management of the Contract – disclose*

There is a strong public interest in demonstrating how the goods or service bought with public money will be delivered, and how the Contract will be run, its terms enforced, and how, if necessary, the Contract will be terminated".

86. There follows a list of 12 bullet points on which the working assumption is that disclosure will be appropriate in the public interest. These are:

1 Service level agreements
2 Product/service verification procedures
3 Performance measurement procedures
4 Contract performance information
5 Incentive mechanisms
6 Criteria for recovering sums

7 Pricing mechanisms and invoicing arrangements

8 Payment mechanisms

9 Dispute resolution procedures

10 Contract management arrangements

11 Project management information

12 *Exit strategies and break options.*

87. The note summarizes the public interest arguments in favour of disclosure and notes that "*Departments may wish to consider putting this information pro-actively in the public domain"*.

This guidance was only provided to the Tribunal at the Tribunal's request. There is no indication from the evidence that the DOH ever consulted this guidance in considering this information request. It certainly has never prepared a suitably redacted version in line with this guidance and continues to argue against many of the working assumptions. The Tribunal would expect the DOH in any future cases of this type to consider the information request by direct reference to these guidelines and in the event that the guidance was not followed in any respect, be able to provide the Commissioner with a clear explanation of why it was departing from the general principles set out.

88. Section 2 notes that:

"Although the public interest favours the release of most information once a Contract has been let, there will be some information which it is necessary to withhold during the Contract delivery phase, and for a short period of time after the Contract has been completed".

89. Section 2 sets out those categories of information. Reproduced below are the headings which apply to this Contract. In each case the *initial* working assumption is that it will be withheld under section 43(2) FOIA and in some cases 43(1) FOIA as well):

1 Risk Assessments and Risk Logs.

2 *Supplier's Approach to the Work (the techniques, methods, systems etc, with which the supplier will work to)* ***(sic)***: – this sets out in detail the way in which they will deliver the work for which they are Contracted. It includes the approach the supplier will take, and contains commercially sensitive information which the company would not wish to put

into the public domain. Disclosure of the approach might reveal other information which *"could prejudice [their] commercial interests"*, and would if revealed *"weaken their competitive advantage"*. It may also contain trade secrets s43(1) *"Where the approach is so specialized as to be a unique approach not known about by Competitors in the same field"* .

3 Financial models: "(*detailing how the cash flow for the authority and supplier will be managed over the life of the Contract*)" would provide detailed information revealing a picture of one part of the supplier's income over the life of the Contract. Suppliers have a "*justifiable expectation"* that such knowledge of their cash flow and financial risk would be protected as exposure might prejudice their commercial interests.

4 Suppliers costing mechanisms (both the general costing mechanisms that suppliers use, and the detailed costs on a particular Contract) – disclosure of such detailed information *"could enable (at least) the following commercially prejudicial information to be deduced, to the detriment of the supplier:*

- *discounts negotiated with sub-Contractors or equipment/material suppliers;*
- *day rates for supplier staff;*
- *discounts given by the supplier for some elements of the work;*
- *pricing strategy for certain work, material, services etc.*

90. The Tribunal has considered the elements of the Contract where there may be continuing commercial sensitivity in light of the above arguments and guidance and has decided as set out in the following table:

Contract	Sensitive material Case for redaction	Case for disclosure	Tribunal's Decision
Contract 1-42	Not sensitive, disclose in full		Disclose in full
Schedule			
1	Not sensitive, disclose in full		Disclose in full
2	2.1 Service management escalation arrangements. Not unique to Methods, but not standard. Not everyone could write it.	Common place, not technical, really the prose being protected not the provisions. Already large public dissemination.	2.1 disclose in full per working assumptions, public interest in knowing that DOH made appropriate provisions to manage and monitor the system and

			transfer from pilot to general service.
	2.2 Not commercially sensitive		Disclose in full
	2.3.1 Asserted truly sensitive, a novel approach that causes them to stand out in the market place and took creativity	There is a public interest in knowing who bears which responsibility, so that the public can judge whether DOH is asking enough of the Contractor.	2.3.1 withhold. Although finely balanced the prejudice to Methods and damage to the relationship between DOH and Methods outweighs for the time being (at the time of the request) the public interest in transparency.
	2.10 This shows Methods' approach, the resources they are prepared to commit, and the standards that they are prepared to suggest/accept. Although people will see marketing is taking place, they will not see what is going on behind the scenes	It is known, there is a pilot project, Marketing is a public activity. The success of marketing needs to be evaluated in conjunction with resources expended.	Disclose **except** for the part of the first sentence of 2.10.1 which shall be redacted to read: *The Contractor shall commit marketing expertise xxxxxxxxxxxxx in order to maximize…* This demonstrates Methods' approach and has cost implications both of which would be very useful to a Competitor and this prejudice outweighs the public interest in being able to evaluate that aspect of the marketing strategy.
	2.11 .1 -2.11.7 No difference between this and schedule 6, a process devised by Methods, representing a unique approach and their technical expertise. The detail is what takes it out of the public domain.	Due to the number of users there will be wide dissemination of this information by the date of the request. It is relevant to evaluation of quality of service.	Withhold all. Working assumptions followed. Disclosure would substantially prejudice methods and DOH in current and future negotiations and because of damage done, harm relationship between DOH and Methods. Risk could impact on those willing to tender in future. Which outweighs the public interest in disclosure.
2	3.4 .1 and 3.4.2 would	Competitors will not know	Disclose all – there is little

	disclose the charging basis.	how priced without the details in schedule 4. No way of knowing if priced per vacancy, priced per user, priced per time scale, whether a sliding scale is involved or some other method or a combination.	commercial sensitivity attached and the public interest in withholding disclosure is substantially outweighed by the public interest in transparency.
3	5.1.6 would show the standards and penalties prepared to suggest or accept, provides an insight into methods approach. 5.1.10 would show Method's approach. 6.1.6 would show Method's approach, what they were prepared to offer/accept in terms of penalty. Indicative of revenue stream.	Public interest in knowing that the DOH sets high standards, measures deliverables and whether there is any consequence for the Contractor if they fail to meet the standards Mr Johnson accepted material likely to be well disseminated because of pool of those involved. Reassuring to the public that feedback is being sought. Public interest in knowing if DOH setting sufficiently stringent penalties. No indication of revenue stream in absence of service charge figure	Disclose all – in keeping with working assumptions and strong public interest arguments in terms of reassurance and accountability. And does not indicate whether they have had to apply service credits
4	Withhold all- sets out pricing figures and structure. Can be indexed and provide Competitors with information to undercut price, and undermine approach. Reduce DOH ability to negotiate lower price next time	Public interest in knowing whether DOH are paying too much for the service	Withhold all. Working assumptions applied, and disclosure would substantially prejudice Methods and DOH in current and future negotiations, and because of damage done, harm relationship between DOH and Methods. Risk could impact on those willing to tender in future.
5	Redact section 7 – relates to Method's unique approach, still in current use. Huge value to Competitors increasing pool of those who could compete, risk	Limited commercial sensitivity due to numbers of participants. Show the public why Methods were chosen.	Withhold section 7. Working assumptions applied, and disclosure could substantially prejudice Methods and DOH in current and future negotiations and, because

	of reducing success rate. Represents financial investment in original work		of damage done, harm relationship between DOH and Methods. Risk would impact on those willing to tender in future.
6	2.1.4-2.8.1 + annex A "Blue Print" of Methods' unique approach. Technical information. Represents competitive edge and financial investment in original work. Commissioner concedes this should not be disclosed. Remainder not argued to be sensitive.	Public scrutiny of all aspects of the Contract encourages debate. In broad terms some already in public domain. Might encourage competition with other tenderers who could provide a similar service at a lower rate, and might increase the pool of those able to tender.	Withhold all of 2.1.4-2.8.1 + annex A. Working assumptions applied. Disclosure could substantially prejudice methods and DOH in current and future negotiations and, because of damage done, harm relationship between DOH and Methods. Risk could impact on those willing to tender in future.
7	Not sensitive, disclose in full		Disclose in full
8	Not sensitive, disclose in full		Disclose in full
9	Not sensitive, disclose in full		Disclose in full
10	Redact table at the end as security standards might assist those wishing to sabotage or hack the system.	The table doesn't provide the actual documents, it is a list of standards. Will reassure the public if standards are perceived to be high, or alert the public if they are perceived to be insufficiently rigorous.	Redact A,C,E,G and H as they might inform those wishing to sabotage or hack the system. B,D,F can be disclosed as either harmless or already in the public domain.
11	Not sensitive, disclose in full.		Not sensitive, disclose in full.
12	Not sensitive, disclose in full		Not sensitive, disclose in full
13	Not sensitive, disclose in full		Not sensitive, disclose in full
14	Screen shots and descriptions of their content/purpose– with exception of those viewable by public, argued to be sensitive, it is what Jobsite do. Although lots of users, contrast using screen at	They have been widely viewed so have limited commercial value, and in public interest to know whether website has good functionality	Withhold screenshots and descriptions of their content/purpose with the exception of those viewable by the public. It represents Jobsite's product, they would have less work if people had a guide to their methodology.

	work and having a user guide and copy to use as a crib. Steps taken to limit maintain commercial value through fair use policy.		The public interest lies in knowing that users are satisfied rather than the detail of the screen shots.

Conclusion and remedy

91. The Tribunal has considered each aspect of the Contract and 14 schedules that can reasonably be considered commercially sensitive applying the general principles as set out above.

92. For the reasons set out above the Tribunal has concluded that the Commissioner was correct to find that:

- section 41 FOIA was not engaged as the information contained in the Contract was not obtained by the DOH from Methods.

- section 44 FOIA was not engaged as the information was not "provided" or "forwarded" by Methods and hence neither the 1993 or 2006 Regulations applied.

93. The Tribunal found that whilst under section 43(2) all of the information fell within the scope of the exemption and in relation to the majority of the Contract the public interest lay in disclosure, there were some passages as set out in the table at paragraph 90 above that should be redacted as the public interest lay in withholding the information. Consequently there was a breach of section 1 FOIA in that the information that should have been disclosed to Mr Stimson had not been.

94. In light of the Tribunal's findings under section 43(2) FOIA the Tribunal was satisfied that it was not necessary to consider whether any of the commercially sensitive material was also a trade secret as the same public interest factors applied and all of the material that it was alleged was a trade secret was caught by section 43(2) FOIA.

95. On the evidence then before him the Commissioner was justified in concluding on a balance of probability that the DOH did not hold schedules 6 and 14, the Commissioner had investigated the matter thoroughly. In light of the fresh evidence (DOH have found the schedules) the Tribunal is satisfied that the breach of section 1 FOIA which should have

been recorded was a failure to tell Mr Stimson that they did in fact hold this material. Additionally there was a further breach of sections 17(1)(a)(b) and (c) FOIA in that the refusal notice did not identify which exemptions applied to these schedules or why.

96. Our decision is unanimous.

Other matters

97. The Decision Notice has already made findings in relation to the way that the DOH handled the information request in particular in relation to:

- the late raising of exemptions,
- the extraordinary length of time they took to respond to the Commissioner's requests,
- the fact that a detailed consultation with Methods only appears to have happened once the matter was before the Commissioner,
- the blanket approach taken to the exemptions, notwithstanding the existence of guidance from the OGC which did not require a blanket approach and gave a reasoned basis for redacted disclosure,
- the "loss" of 2 schedules with no explanation.

98. The Tribunal also wishes to record its concern at the lack of detail provided to the Commissioner during his investigation. If a party wishes to rely upon an exemption it is up to them to establish that this is valid. Bearing in mind the length of the Contract it is unacceptable to expect the Commissioner to review a Contract clause by clause applying very general principles which contain no detail. The fact that the Commissioner conceded that schedule 6 was commercially sensitive and that Methods would be prejudiced by its disclosure upon being provided with evidence as to its significance indicates to the Tribunal that substantial time and effort could have been saved had the DOH adopted this approach at the start.

99. Additionally although it is accepted that schedules 6 and 14 were found during the Tribunal process it was unsatisfactory that not until the first day of the hearing did the DOH concede that they were held on the date of the request and should form part of the appeal.

100. The Tribunal has already recorded its disquiet at the DOH's persistence in arguing that all of the Contract was exempt when Mr Johnson of Methods had conceded in his evidence that in fact there were large swathes of the Contract which he did not allege were confidential or commercially sensitive.

Signed

Fiona Henderson

Deputy Chairman

Dated this 18th day of November 2008