

Internal review of response to requests under the Freedom of Information (Fol) Act 2000 by Mr Peter Collingbourne (reference 10676 and 11863)

Responding Unit: Identity and Passport Service

Chronology

Request 10676 (Thales contract)

Original Fol request:	28 November 2008
Acknowledgement:	5 December 2008
IPS letter explaining delay:	28 December 2008
Request for internal review (time delay):	28 March 2009
Internal review (time delay) response:	29 May 2009
IPS response:	9 July 2009
Follow-up questions	10 July 2009
IPS response to follow-up questions	17 August 2009

Request 11863 (CSC contract)

Original Fol request:	12 May 2009
Acknowledgement:	19 May 2009
PIT extension letter	11 June 2009
IPS response:	10 July 2009
Request for internal review: (both requests)	19 August 2009

Subject of requests

1. In his request of 28 November 2008, Mr Collingbourne asked for a copy of the following documents, which he said formed part of a contract signed on 1 August 2008 with Thales Information Systems to support IPS in delivering early releases of the National Identity Scheme (NIS):
 - The thirty-six Service Agreement Schedules and annexes (in the order 1-36, or 2-36 followed by 1 if Schedule/Annex 1 is entitled "Definitions").

- The Service Agreement which contains conditions specific to a contract.
 - The Framework Agreement which sets out the core terms for contracts awarded.
 - Any and all other documents which form a part of this contract, in ascending order of the number of pages within the document. For documents with the same number of pages, the documents should be considered in ascending alphabetical order of their titles.
2. Mr Collingbourne asked that IPS should supply “as many pages as possible, starting with page 1 of the document appearing first in the ordering as specified above, and proceeding sequentially through the pages of this document followed by the remainder of the above listed documents, in order, to the extent that my request would not be subject to exemption under section 12 of the FOIA”.
3. Mr Collingbourne made a similar request on 12 May 2009, for documents which he said formed part of a contract awarded on 7 April 2009 to CSC to upgrade the application and enrolment system in IPS:
- The Service Agreement Schedules and annexes (in the order 1-x, or 2-x followed by 1 if Schedule/Annex 1 is entitled "Definitions", where x is the number of documents).
 - The Service Agreement which contains conditions specific to a contract.
 - The Framework Agreement which sets out the core terms for contracts awarded, if different to the Framework Agreement with Thales.
 - Any and all other documents which form a part of this contract, in ascending order of the number of pages within the document. For documents with the same number of pages, the documents should be considered in ascending alphabetical order of their titles.
4. Mr Collingbourne again asked that IPS should “supply as many pages as possible, starting with page 1 of the document appearing first in the ordering as specified above, and proceeding sequentially through the pages of this document followed by the remainder of the above listed documents, in order, to the extent that my request would not be subject to exemption under section 12 of the FOIA”.

Procedural issues

5. IPS acknowledged Mr Collingbourne’s first request (relating to the Thales contract) on 5 December 2008. On 28 December 2008 IPS wrote to Mr Collingbourne to say that they were unable to provide a full response to the request within 20 working days, as required by the Fol Act, but were dealing with the request as a matter of urgency and would aim to send a substantive reply by 26 January 2009. On 28 March 2009, not having received a reply, Mr Collingbourne wrote to ask for an internal review of the IPS handling of his request. That internal review, which was carried out by the Information Access Team and sent to Mr Collingbourne on 29 May 2009, concluded that section 10(1) of the Fol Act had been breached. A reply to Mr Collingbourne’s first request was finally sent by IPS on 3 July and again on 9 July 2009 (as the e-mail of 3 July did not reach Mr Collingbourne).

6. IPS acknowledged Mr Collingbourne's second request (relating to CSC) on 19 May 2009 and on 11 June sent a Public Interest Test extension letter, explaining that the requested information had to be considered under the exemption in section 43 of the FoI Act (Commercial interests) and that they aimed to respond by 8 July. The response to Mr Collingbourne's second request was sent on 10 July.
7. It is good practice to acknowledge FoI requests, even though this is not a requirement of the FoI Act. I note that IPS did so in both these cases, although the acknowledgements might have been sent a little sooner. Acknowledgements should wherever possible be sent within one or two days of receipt of an FoI request.
8. The IPS letter of 28 December 2008, while it was helpful in providing Mr Collingbourne with a progress report on his first request, did not say explicitly that the public interest was being considered in relation to any part of the request. The letter therefore did not constitute a notice under section 17(1) of the FoI Act and it did not provide a valid public interest extension of the time allowed for a response under section 10(3) of the Act. I agree with the conclusion of the internal review (time delay) of May 2009, which concluded that section 10(1) of the FoI Act was breached in relation to the first of Mr Collingbourne's two requests.
9. The IPS letter of 11 June 2009 was a properly worded notice under section 17(1) of the Act and gave Mr Collingbourne notice that the public interest was being considered in relation to his second request. As such it provided a proper extension of the time allowed for a response under section 10(1). I would add the caveat that it was sent one day outside the time limit for sending a notice under section 17(1) (i.e. 20 working days, the same time for responding to a request under section 10(1)). I also note that the letter of 11 June referred to section 43 of the Act (Commercial interests) rather than to sections 12 and 22 under which the information was eventually withheld.

The responses by IPS

10. The IPS response to Mr Collingbourne's first request (Thales) was that the information requested is exempt from disclosure under sections 12(1) and 22(1) of the FoI Act (relating to cost and intention to publish respectively). In applying these exemptions, IPS acknowledged that there is public interest in disclosure because IPS are committed to providing as much transparency on contracts for the National Identity Scheme as they can. IPS explained to Mr Collingbourne that an exercise had been commissioned within IPS to release further contractual information, under which IPS would publish summaries of the contracts for the Scheme including those to be awarded in the coming months. IPS said that this would provide as much information as IPS was able, without prejudicing commercial interests, personal data or security interests. The information would be made available on the IPS website and a copy would be sent to Mr Collingbourne.
11. IPS said that the section 12(1) exemption applied to Mr Collingbourne's first request as a whole, not on an 'incremental' basis. The case against disclosure was that, in order for IPS to comply with the request without incurring excessive cost, a more refined request would be required to understand the exact

information Mr Collingbourne required. A public interest test could then be conducted in regard of any potential commercial, technical or security information within the documentation. IPS nevertheless believed that the summary contracts they intended to publish would, as far as practically possible, provide the information Mr Collingbourne had requested.

12. The IPS response to Mr Collingbourne's second request (CSC) was essentially the same as that to the first.

Mr Collingbourne's follow-up questions and requests for internal review

13. On 10 July 2009 Mr Collingbourne asked a number of questions in respect of the IPS response to his first request. These questions, which were treated by IPS as a new FoI request, are set out in the attached **Annex**.

14. IPS replied to these points on 17 August 2009. The IPS response is set out below each question in the **Annex**.

15. On 19 August 2009 Mr Collingbourne asked for an internal review of the IPS response to his first request, in the following terms:

"I disagree that IPS is able to apply the section 22(1) exemption. The language of this exemption refers to an intention to publish that existed "at the time when the request for information was made" (FOIA s.22(1)(b)). However, according to a further response received from IPS (ref FOICR 12395/09), the decision to prepare the information to be published was made on 1 July 2009, well after my request was made on 28 November 2008.

Even if this were not the case, IPS does not have an apparent intention to publish the information I requested in all cases. According to the same response from IPS, the intention to publish does not exist for documents with "commercial, security or technical sensitivity". Instead of the redacted documentation being released, IPS only plans to release a summary which may not contain all releasable information in the document.

Turning to the section 12 exemption, I disagree that this applies at all due to Mr J Jenkins v Information Commissioner and Department for Environment, Food and Rural Affairs, EA/2006/0067. Please remember that your own policy cannot override the decisions of the Information Tribunal which in our common law legal system should be considered law. Even if the exemption did apply, I also disagree that a refined request is necessary to "understand the exact information [I] require". In my original request I have been very specific about which documents and even which pages I would like you to consider and in which order and I fail to see how I can be more specific than this."

16. On the same date, 19 August 2009, Mr Collingbourne also asked for an internal review of his second request (CSC) in similar terms.

Consideration of the response

17. The two requests were similar in form, albeit in respect of different information, and the responses were the same in each case. The main point at issue in this

review is therefore whether sections 12(1) and 22(1) of the FoI Act were properly applied in withholding the information which Mr Collingbourne requested in the two requests.

Section 12(1)

18. Section 12(1) exempts a public authority from complying with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit. The factors which may be taken into account when estimating the cost are set out in regulation 4(3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Under regulation 4(3) a public authority make take account only of the costs it reasonably expects to incur in:
 - (a) determining whether it holds the information;
 - (b) locating the information, or a document which may contain the information;
 - (c) retrieving the information, or a document which may contain the information;
 - and
 - (d) extracting the information from a document which may contain it.
19. The full information which Mr Collingbourne requested is, I understand, held in a discrete and readily accessible document or set of documents. It therefore seems clear that none of the factors at (a) – (c) in paragraph 18 apply in this case. It is less clear whether (d) can be said to apply. In citing section 12(1) in response to these two requests, IPS based their estimate on the cost of physically removing information which is exempt from disclosure under one or more of the exemptions in Part II of the FoI Act.
20. The Information Tribunal case (Jenkins) to which Mr Collingbourne refers in his request for an internal review considered, among other things, whether the words “extracting the information from a document containing it” (in regulation 4(3)(d)) include the redaction of exempt information containing it. In that case the Tribunal found that “the removal of what may be thought to be exempt material, even at the stage at which the exercise is carried out, cannot sensibly be viewed as coming within the provisions of regulation 4(3)(d) as it is presently drafted” and that “the exercise which a public authority may embark on in order to consider whether an exemption applies and the extent to which material otherwise disclosable may be subject to an exemption, is a separate exercise”. It should be pointed out that the Tribunal did also say in its judgement that “the point is not entirely free from doubt”.
21. It is well established that the estimated cost of examining documents in order to identify exempt information may not be taken into account in estimating costs for the purpose of section 12. This was fully recognised when the responses to the two requests were first formulated. The position established by IPS at the time was that removal of exempt information, even where it had already been identified, would mostly have to be done on a line by line basis and would exceed the cost limit if it were carried out for the entire documents.

22. The Government recognises the position of the Information Commissioner and the Information Tribunal that the cost of physically removing exempt information may not be taken into account in estimating costs for the purposes of section 12(1), but does not necessarily accept it. The Government's position, reflected in existing Ministry of Justice (MoJ) guidance on FoI, is that the cost of physical redaction can and should be taken into account where appropriate and this will remain the position until such time as it is tested in the courts.
23. There is clearly room for disagreement on this point, but given that the use by IPS of section 12(1) in this case was based on the costs of physical redaction and reflected the Government's current interpretation of the legislation and MoJ guidance, it is difficult to conclude that it was in principle unreasonable. However, the use of section 12(1) was not based on a detailed assessment of the cost of redacting material from the two contracts. At that stage, IPS had not identified what parts of the documents were exempt from disclosure, so any estimate of the costs involved in redacting such information would necessarily have been broad. The documents are very large and the cost of physically redacting exempt information might well have been over the limit, but in general the use of section 12(1) in responding to an FoI request should be backed up by evidence of the costs involved. In the absence of a more detailed estimate than was provided at time, the use of section 12(1) at the time is difficult to uphold.
24. Mr Collingbourne specifically asked that extracts from the two contracts should be provided on a progressive basis up to the point at which the cost limit was incurred. IPS were not obliged to do this, although it is not entirely clear what was meant by the statement that the section 12(1) exemption applied to the requests "as a whole, not on an 'incremental' basis" or by the suggestion that a more refined request was required to understand the exact information that Mr Collingbourne required.

Section 22(1)

25. Information is exempt from disclosure under section 22(1) if the following three conditions are met:
- (a) the information is held with a view to future publication;
 - (b) the information was already held with a view to such publication at the time the request was made; and
 - (c) it is reasonable in all the circumstances that the information should be withheld until the publication date.
26. IPS have stated that they intend to publish summaries of the contracts with Thales and CSC for the National Identity Scheme by the end of February 2010. I understand that these summaries will provide as much information as IPS are able to publish without prejudicing commercial interests, personal data or security interests. I also understand that the summaries will where possible use the documents themselves, unaltered. Where this is not possible, due to commercial, security or technical sensitivities, a summary will be provided (the summaries will not be redacted versions of the originals). IPS will publish the reasons for

withholding any information which is not released, citing the relevant sections of the Fol Act.

27. By definition a summary does not constitute the full information in the two contracts which Mr Collingbourne requested. Publication of the summaries cannot, therefore, in itself be used as a basis on which to withhold under section 22(1) all the information which has been requested. Any information not included in the summaries will, I understand, be exempt from disclosure under some other section of the Act because of the commercial, security or other considerations to which IPS have referred, but if so exemption must be on those grounds rather than section 22(1). Exemption under section 22(1) can by definition only apply to information which will be published.
28. It is questionable whether the condition at section 22(1)(c) was met in this case, i.e. whether there was an intention to publish at the time the requests were made. IPS have said explicitly, in response to a question from Mr Collingbourne, that the decision to publish the contract summaries was made following Ministerial approval on 1 July 2009. Both requests were made before that date and it therefore seems clear that the condition is not met.
29. The fact that summaries of the contracts are to be published at some stage is, clearly, relevant to Mr Collingbourne's requests and it was quite right that IPS should explain this to Mr Collingbourne, not least in order to provide the 'advice and assistance' required by section 16 of the Fol Act. For the reasons considered in paragraphs 27 and 28, such publication cannot in itself be used as a reason for withholding under section 22(1) all the requested information. The correct course would have been to apply section 22(1) to the information which is to be published and the relevant sections of the Act to the information which is to be withheld because of commercial, security or other sensitivities.

Other exemptions

30. The responses to both of Mr Collingbourne's requests relied wholly on sections 12(1) and 22(1) to withhold information. As mentioned in paragraph 9, however, the public interest extension letter sent to Mr Collingbourne in respect of his second request referred to section 43 of the Act (Commercial interests), suggesting that this exemption was at least under consideration at some stage. It would be surprising if some parts of two contracts of this nature were not commercially sensitive and hence exempt under section 43. Moreover, IPS have referred to commercial sensitivity in their responses to the two requests, in the context of the summaries which are to be published.
31. IPS have also referred, in the context of the summaries, to personal data and security and technical considerations, which suggests that other exemptions in the Fol Act are relevant to some parts of the two contracts. IPS did not rely on section 43 or these other exemptions presumably because that would have required a detailed examination of the documents which had not yet been completed.
32. I understand that a detailed examination of the contracts for information which is sensitive from a personal, commercial, security or other point of view has been

undertaken in order to prepare the summaries which IPS intend to publish. IPS have stated that, although they do not intend to publish a redacted version of the actual contracts, they will nevertheless use the documents themselves unaltered where possible and will provide a summary where it is not. IPS have also said that they will include the reasons for not releasing information and under which part of the FoI Act information has been withheld. The summaries which will be published, together with the references to the sections of the FoI Act under which information is withheld, will in terms of the information which they provide (if not the exact format) be that which would be provided in a full and proper response to an FoI request such as those which Mr Collingbourne has made.

Conclusions

33. The IPS response to Mr Collingbourne's first request was provided well outside the 20-working day limit and, in the absence of a public interest extension, was in breach of section 10(1) of the FoI Act.
34. The IPS response to Mr Collingbourne's second request was subject to a proper public interest extension, subject to the caveat that the extension letter was sent one day outside the 20-working day limit and that it referred to section 43 of the FoI Act when the final response relied on completely different exemptions.
35. The use of section 12(1) of the FoI Act in responding to Mr Collingbourne's requests reflected the current Government position and MoJ advice that the cost of physically redacting exempt information may be taken into account. However, in the absence of a detailed estimate of the costs involved, based on the cost of redacting information which had been identified as being exempt, the use of section 12(1) should not have been relied upon.
36. IPS were not obliged to provide extracts from the two contracts up to the point at which the cost limit was incurred. IPS should have considered whether to provide some information to Mr Collingbourne to help him refine his request, but this has now been rendered unnecessary by the intention to publish the summaries.
37. Section 22(1) of the FoI Act was used incorrectly in responding to Mr Collingbourne requests, first because the published information will not cover all the information which he requested and secondly because the decision to publish was not taken until after the requests were made. The relevant sections of the Act should have been applied to the information which is to be withheld because of commercial, security or other sensitivities.
38. IPS should send a revised response to Mr Collingbourne's requests, based on the summaries which will be published together with the references to the sections of the FoI Act under which information is withheld.

**Information Access Team
Home Office
4 February 2010**

Annex: Mr Collingbourne's follow-up points on request 10676 and the IPS response

Mr Collingbourne's question:

"You mention an exercise commissioned within IPS to release further contractual information. On what date did IPS make a decision to embark on this exercise?"

IPS response:

"IPS gained Ministerial approval to embark on this exercise on 1 July 2009."

Mr Collingbourne's question:

"You mention contract summaries. Are these planned to be redacted versions of the full contracts or separately drafted documents? If the former, are the redactions planned to be only those allowed by the Freedom of Information Act? Please state the date on which the plans referred to in this question were made."

IPS response:

"The documents will be summaries of the contracts awarded. Where possible this will use the documents themselves unaltered and where this is not possible due to a commercial, security or technical sensitivity we would provide a précis of the relevant document. We will also include the reasons for not releasing the information, under which part of the Freedom of Information Act this has been made and an indication of how long such a position is likely to be maintained. We do not intend to publish a redacted version of the actual contract documentation. The decision to produce the contract summaries was, as stated earlier, made following Ministerial approval on the 1st July 2009."

Mr Collingbourne's question:

"Please confirm or deny whether IPS holds a draft of its summary of the Thales contract."

IPS response:

"IPS does not hold a draft summary of the Thales contract. Work has already been commissioned to produce the summaries and this work continues."