

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2019

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted three requests to the Ministry of Defence (MOD) about the procurement of a particular contract. The MOD disclosed some information falling within the scope of the request but sought to withhold further information on the basis of sections 21 (information reasonably accessible to the requester), 40 (personal data), 41 (information provided in confidence), 44(1)(b) (statutory prohibition), 26(1)(b) (defence), 38 (health and safety) and 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the information which the MOD is seeking to withhold is exempt from disclosure on the basis of sections 26(1)(b), 43(2) and 40(2) of FOIA.

Background

2. The requests which are the subject of this complainant concern the MOD's procurement of covert body armour. In particular, they concern the MOD tender, SSP/00135, which sought bids for the manufacture and supply of a scalable body armour system.
3. The MOD's evaluation process of the tenders submitted comprised three phases. Only the two highest placed bidders at the end of phase two were taken through to the third phase. Following the completion of this evaluation process the MOD awarded the contract in December 2016 to the winning bidder. However, as part of this process the MOD concluded that neither of the two bidders considered at the third phase of the assessment of the original tender met the criteria in respect of the 'level

2 requirement' of the tender. Therefore the contract awarded in December 2016 did not cover this requirement.

4. Instead the MOD re-ran the competition for the outstanding Level 2 requirement as a 'Revise & Confirm' exercise which allowed all of the original bidders, ie not just the two taken through to the third phase, to revise their original solutions. The contract for the level 2 requirement was awarded in July 2017.
5. The tender in question was conducted under the Defence and Security Public Contracts Regulations 2011¹ (DSPCR). Under the DSPCR the MOD is obliged to provide unsuccessful tenderers with the characteristics and relative strengths of the successful tender once the tender is awarded. However, regulation 33(11) of the DSPCR provides details of the circumstances when information can be withheld, two of which are if:
 - Information would prejudice the legitimate commercial interest of any economic operator;
 - Might prejudice fair competition between economic operators.
6. As will become apparent from the complainant's submissions summarised below, it is relevant to note that the complainant's company submitted a bid for this contract which was not successful.
7. It is also relevant to note that prior to submitting the requests which are the subject of this request, the complainant had also submitted other requests to the MOD seeking information about this procurement contract. Two such requests resulted in the MOD disclosing some information but withholding further information on the basis of section 43(2) (commercial interests) of FOIA. The complainant subsequently complained to the Commissioner about the MOD's reliance on section 43(2) of FOIA in respect of both requests. In decision notices [FS50689233](#) and [FS50657134](#) the Commissioner upheld the MOD's application of the exemption in respect of each request. The complainant appealed decision notice FS5065713 to the First-Tier Tribunal and the Tribunal rejected the complainant's appeal.²

¹ <http://www.legislation.gov.uk/ukxi/2011/1848/made>

² [EA/2017/0129](#)

Request and response

8. The complainant submitted three requests to the MOD on 18 May, 24 May and 19 July 2017. These requests are set out in an annex at the end of this notice.
9. The MOD originally refused to comply with these requests on the basis of section 14(1) of FOIA because it considered them to be vexatious.
10. The Commissioner issued a decision notice (reference [FS50689229](#)) on 11 September 2017 which upheld the MOD's reliance on section 14(1) of FOIA. The complainant appealed this decision notice to the First Tier Tribunal and it issued its decision on 10 June 2018 which rejected the MOD's reliance on section 14(1) and ordered it to issue a fresh response to these three requests.³
11. The MOD contacted the complainant on 13 July 2018 and confirmed that it held information falling within the scope of his requests but it considered this to be exempt from disclosure on the basis of sections 21 (information reasonably accessible to the requester), 41 (information provided in confidence) and 44 (prohibitions in disclosure) of FOIA. The MOD also explained that the qualified exemptions contained at sections 26 (defence), 38 (health and safety) and 43 (commercial interests) applied but it needed additional time to consider the balance of the public interest test in relation to these exemptions.
12. The MOD provided the complainant with a substantive response to all three requests on 3 August 2018. The MOD disclosed some information falling within the scope of the requests but sought to withhold further information on the basis of the following sections within FOIA: 21, 40(2) (personal data), 41, 44(1)(b), 26(1)(b), 38 and 43(2).
13. The complainant contacted the MOD on 7 September 2018 and asked it to conduct an internal review of this response.
14. The MOD informed him of the outcome of the internal review on 9 October 2018. The MOD upheld the application of the various exemptions cited in the refusal notice with the exception of section 44(1)(b) which was not considered as part of the review. The review also concluded that some of the information falling within the scope of the request was also exempt from disclosure on the basis of section

³ EA/2017/0247

40(1) of FOIA as it was either provided by the complainant or related to him.

Scope of the case

15. The complainant contacted the Commissioner on 15 October 2018 in order to complain about the MOD's decision to withhold information falling within the scope of his three requests. He disputed the MOD's reliance on the various exemptions which it has cited either on the basis that such exemptions are not engaged, or if they are engaged, then for the qualified exemptions the public interest favours disclosure of the information. During the course of the Commissioner's investigation, the MOD located further information which fell within the scope of the requests which it had not previously considered. The MOD apologised to the complainant for this oversight and provided him with a redacted copy of this information with redactions being made on the basis of the exemptions contained at 40(1), 40(2), 43(2) and 41(1).
16. At the point that this decision notice is being issued, the information which the MOD is seeking to withhold consists of the following:
 - Two spreadsheets ('Technical Evaluations' and 'JITRO Integrated Test, Evaluation and Acceptance (ITEAP)'). Both spreadsheets are withheld in full on the basis of sections 26(1)(b), 38(1) and 43(2) of FOIA.
17. And the following sets of minutes which were provided to the complainant in redacted form:
 - Loose Minute SSP/00135 dated 22 June 2016;
 - Loose Minute SSP/00135 dated 7 July 2016;
 - Loose Minute SSP/00135 dated 26 October 2016;
 - Loose Minute SSP/00135 dated 24 May 2017; and
 - Loose Minute SSP/00135 dated 31 January 2017.
18. Each set of minutes had a number of redactions made to them, redactions which the MOD argued were all covered by the exemptions contained at sections 41, 43(2) and 44 of FOIA. The MOD also redacted the names of junior staff members on the basis of section 40(2) from each of the minutes. In addition, the minute of 24 May 2017 also had a

small amount of information redacted on the basis of section 26(1)(b) and sections 38(1)(a) and (b).⁴

Reasons for decision

Section 43(2) – commercial interests

19. Section 43(2) states that:

'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).'

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

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

21. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account

⁴ Although the MOD had cited section 40(1) as a basis to withhold information falling within the scope of the request the copy of the withheld information provided to the Commissioner did not contain any such redactions.

speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

The MOD's position

22. In its internal review response the MOD argued that disclosure of the information withheld on the basis of this exemption would be considered a breach of commercial confidentiality and would weaken a company's position in a competitive environment by revealing market sensitive information and/or information of usefulness to its competitors. The MOD further added that the provision of this specialist service is limited to a small number of companies and any harm to the commercial interests of a company could reduce competition in this niche market in the future. The MOD argued that this could result in companies involved in the tendering process being reluctant to provide commercially sensitive information to the MOD and would undermine the MOD's ability to secure value for money. The MOD also referred the complainant to the Tribunal's decision in EA/2017/0129 which it noted explained its position in respect of this contract and noted that its position in terms of section 43(2) applying to such information remained unchanged.
23. In its submissions to the Commissioner, the MOD confirmed that its position as set out in its internal review remained unchanged. It also directed the Commissioner to its submissions on FS50657134. The MOD also explained that it had contacted the companies involved in the procurement exercise again and they had all confirmed that the information that they had provided as part of the tender exercise, including pricing and technical data, was considered to be commercially sensitive. (The Commissioner was provided with extracts of each company's response). The MOD argued that disclosure of the information provided to it by the companies in question would allow rivals to gain an unfair advantage in light of the additional knowledge about a competitor's strategy, plans and techniques. Again, the MOD emphasised that this is a highly specialist and competitive market and the same companies compete against one another for other MOD and Her Majesty's Government contracts and contracts from allied nations thus increasing the risk of prejudice occurring if the information was disclosed.
24. The MOD also emphasised that disclosure of the information would provide a direct insight into the MOD's assessment of the merits of each company's competitors which would prove useful to each company's competitors as it would allow competitors to understand in greater detail about their rivals' products and their technical properties.

The Commissioner's position

25. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
26. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information withheld on the basis of section 43(2) has the potential to harm the commercial interests of the companies who had submitted the tenders in question and on the commercial interests of the MOD. As with the previous decision notices cited above, the Commissioner has reached this decision essentially because she agrees with the MOD's rationale that disclosure of this information would provide a company's competitors with an unfair advantage having gained additional knowledge about competitors' strategy, plans and techniques by virtue of being able to access their tender material. Moreover, the disclosure of the withheld information would obviously also provide a direct insight into the MOD's assessment of the merits of each company's bid which again could prove useful to each company's competitors.
27. The Commissioner has also taken into account the timing of the three requests. The tender exercise in question was not completed until July 2017 and therefore disclosure of the information falling within the scope of the first two requests at least would cast doubt on the ability of the MOD to protect commercial sensitive information and/or conduct a tender exercise objectively. In the Commissioner's view it is plausible to see both outcomes as having the potential to impact on the commercial interests of the MOD.
28. With regard to the third criterion, the Commissioner is satisfied that there is a more than a hypothetical risk of prejudice occurring to the various companies in question if the withheld information was disclosed; rather the risk of such prejudice occurring can be correctly described as one that is real and significant. Again, in reaching this decision the Commissioner has placed particular weight on the fact that the market is a specialist and competitive one and it is likely that the same companies will complete against each other in similar competitive exercises. In the Commissioner's view this increases the risk of prejudice occurring to the companies' commercial interests if the withheld information was disclosed. Moreover, the Commissioner considers that the actual information that has been withheld on the basis of section 43(2) would provide a direct and detailed insight into the companies various tenders and the MOD's assessment process of these tenders.
29. Section 43(2) is therefore engaged.

Public interest test

30. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure of the information

31. The complainant alleged that in handling this procurement exercise the MOD has failed to mark his company's tender accurately, failed to provide accurate records for the tender evaluation and has falsified the tender documents. (The complainant provided the Commissioner with detailed submissions to support these allegations, which although not directly referenced in this decision notice, have been considered by the Commissioner). In light of these circumstances, the complainant argued that there was a compelling public interest in the disclosure of the withheld information.
32. The complainant also argued that the MOD had failed to take into account the decision of the Court of Justice of the EU (CJEU), *Veloss International SA & Attimedia SA v European Parliament* Case T-667/11, (the 'Veloss case'). The complainant argued this case had direct relevancy to his requests. As detailed in the previous decision notices issued by the Commissioner, the *Veloss* case concerned an application by an unsuccessful bidder, *Veloss*, in a tendering exercise run by the European Parliament for Greek translation services. *Veloss* applied to the CJEU for an annulment of the decision not to award it the contract and for compensation for the loss of opportunity and damage to its reputation. As part of its application, *Veloss* alleged non-compliance with the financial regulation which concerns procurement in relation to the award of works, services and supply contracts by the EU institutions, bodies and agencies. *Veloss* claimed that the Parliament had not provided it with the information that it was required to provide in the context of the tendering process in question and thus it had not complied with the provisions of the aforementioned financial regulation. The CJEU concluded that the Parliament had not provided the applicant with the name of the successful tenderer or any information about the characteristics and relative advantage of the successful tender and it had therefore failed to comply with its obligations.
33. The complainant also argued that the DSPCR must be compatible and interpreted in a way compatible with the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular article 346 which promotes the need for the procurement process to be transparent. The complainant explained that he interpreted this as providing tenderers with a mechanism for checking that the

procurement process has been properly implemented prior to the award of a contract.

Public interest in maintaining the exemption

34. The MOD argued that there is a very strong and inherent public interest in ensuring fairness of competition and it would be firmly against the public interest if companies' commercial interests are harmed simply because they have submitted tenders for public sector contracts. It also argued that there is an equally strong case for ensuring that the MOD's own commercial interests are not undermined.
35. With regard to the complainant's allegations in the procurement process, the MOD referred the Commissioner to a response it had provided to her in respect of complaint FS50657134 which stated that:

'the [MOD's] Defence Commercial Director, wrote to [the complainant] on 12th September 2016 answering his accusations and re-iterating that no evidence had been produced to substantiate his serious allegations. As well as the FOI responses, two MCs [Ministerial Correspondence] have been sent which have addressed the issue in detail. The Minister for Defence Procurement has written to [the complainant's] MP explaining that the MOD takes its responsibilities to the public seriously, but cannot investigate his allegations if no evidence is forthcoming.'

36. The MOD noted that it was aware that the complainant continued to make allegations about the conduct of the procurement process and these had been raised via Ministerial Correspondence and responded to outside of FOIA. The MOD noted that the issues which the complainant was raising were ones that had been dealt with in earlier standstill/debrief letters. The MOD also explained that it recognised that there were minor errors in the marking, but such inaccuracies made no difference to the final outcome of the competition and have been acknowledged previously. The MOD also explained that it had refuted the accusation that tenders were not treated equally or marked accordingly along with the accusation that tender documents were falsified. The MOD suggested that the complainant had produced no evidence to substantiate them. The MOD also noted that none of the other companies in the procurement process have raised issues with impropriety and have accepted the outcome.
37. The MOD explained that during the hearing for EA/2017/0129 the Tribunal Judge asked whether MOD could undertake a mediation process to resolve any matters out of court. The MOD referred the Commissioner to correspondence it had sent the complainant in which it made several offers of discussing these issues with him to allay his concerns, but to no avail. The MOD noted that he was insistent that he should be allowed to

view the withheld information to assess whether the procedure has been properly followed.

38. The MOD also explained that the complainant had the opportunity to bring proceedings against it pursuant to regulation 51 of the DSPCR if he considered that MOD had not complied with its legal obligations in respect of the information provided in the Standstill Letters within the timescales set out in that legislation. The MOD explained that he chose not to do so and is now out of time to bring such proceedings. The MOD also argued that it should also be noted that the complainant did not require the withheld information from MOD under FOIA in order to raise such a challenge under the DSPCR.

Balance of the public interest test

39. As the Commissioner has discussed in the previous decision notices, she recognises that there is weighty public interest in the MOD being transparent about decisions upon which contracts are awarded. Such transparency will obviously be more directly helpful to parties who have a particular interest in the tender process in question, but the Commissioner accepts that more broadly such transparency could improve the wider public's confidence in the MOD's tendering processes and potentially provide re-assurance that these processes are being conducted fairly. In the circumstances of this case, the Commissioner recognises that the complainant continues to raise a number of serious concerns about the manner in which the MOD has conducted this procurement exercise, concerns which in the complainant's view can only potentially be addressed by him having access to the withheld information. As the Commissioner has noted in the previous cases, it not for her to comment on the validity or otherwise of the complainant's criticisms of the MOD's handling of this tender process. However, the Commissioner acknowledges that disclosure of the information withheld on the basis of section 43(2) of FOIA would provide a detailed insight into the procurement process.
40. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have submitted tenders for public sector contracts. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that the government's own commercial interests are not undermined. The Commissioner has also taken into account the fact that at the point the complainant submitted his first two requests the tender process in question was not yet completed given the ongoing competition in relation to the level 2 aspect of the tender. Given the cumulative weight that should be attributed to protecting the commercial interests of both the MOD and tenderers the Commissioner

is satisfied that the public interest favours withholding the information and maintaining section 43(2) of FOIA.

41. With regard to the complainant's reliance on the *Veloss* case, for the reasons outlined in the previous decision notices, and accepted by the Tribunal, the Commissioner does not accept that the *Veloss* case is relevant to her consideration as to whether the MOD has complied with FOIA in handling these requests. Similarly, in respect of the complainant's arguments about the DSPCR, the Commissioner considers these to operate as an entirely different regulatory scheme to FOIA. If the complainant has concerns about the DSPCR have, or have not been adhered to, this is not a matter that is relevant to the balance of the public interest test under FOIA.

Section 26 - defence

42. The MOD sought to withhold a small portion of information from the minute of 24 May 2017 on the basis of section 26(1)(b) of FOIA. This exemption states that:

*'Information is exempt information if its disclosure under this Act would or would be likely to prejudice-...
... (b) the capability, effectiveness or security of any relevant forces.'*

43. The MOD explained that disclosure of the information which it had redacted on the basis of this exemption would provide a detailed insight into body armour and the level of protection it affords. It argued that if this information was released it could be used by potential adversaries to their advantage and enable them to plan and defeat UK military capability. The MOD therefore argued that disclosure of this information would prejudice the capability and safety of the military personnel using this equipment, potentially resulting in injury or loss of life.
44. With regard to the three limb test out above, the Commissioner is satisfied that this clearly met. The interests are clearly ones which the exemption is designed to protect; there is a clear causal relationship between disclosure of information about the level of protection that body armour provides and prejudice occurring; and finally given the specific nature of the withheld information the chance of prejudice occurring is clearly one that is more than a hypothetical risk.
45. Section 26(1)(b) is therefore engaged.

Public interest test

46. As discussed above, the Commissioner agrees that there is a public interest in the MOD being open and transparent about how it conducts procurement exercises and given the complainant's concerns in respect of this particular exercise this public interest is arguably increased.

However, the Commissioner is not persuaded that disclosure of the small amount of information withheld on the basis of section 26(1)(b) would provide any real insight in to the nature of this procurement process, and certainly not to the extent that it would address the complainant's concerns. In contrast the Commissioner is satisfied that disclosure would prejudice the capability and effectiveness of the armed forces and that there is clearly a compelling public interest in ensuring that such an outcome does not occur. Therefore, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 26(1)(b) of FOIA.

Section 40(2) – personal data

47. The MOD relied on section 40(2) of FOIA to redact the names of staff members from the documents provided to the complainant.
48. As the MOD's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 ('DPA') and General Data Protection Regulation ('GDPR') legislation came into force, the Commissioner considers that the DPA/GDPR applies.
49. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
50. In this case the relevant condition is contained in section 40(3A)(a)⁵. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the GDPR ('the DP principles').
51. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 of the FOIA cannot apply.
52. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

53. Section 3(2) of the DPA defines personal data as:
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⁵ As amended by Schedule 19 Paragraph 58(3) DPA.

"any information relating to an identified or identifiable living individual".

54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
55. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
56. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
57. The MOD redacted the names of members of staff on the basis of section 40(2) of FOIA. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the redacted information constitutes personal data as it both relates to and identifies a number of specific individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
58. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
59. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

60. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

61. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
62. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

63. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

64. The Commissioner considers that the lawful basis most applicable is basis (f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*⁶.

65. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

66. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

⁶ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

67. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
68. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
69. The Commissioner accepts that there is legitimate interest in the disclosure of information in relation to how the MOD processed and assessed this procurement exercise. However, she is not persuaded that there is a particularly strong or compelling interest in the disclosure of the names of officials involved in order to inform the public about the procurement exercise.

Is disclosure necessary?

70. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
71. As the Commissioner's comments above suggest, she is not persuaded that disclosure of the names of officials is necessary in order to inform the public about the way in which this procurement exercise was conducted by the MOD.
72. Given this finding the Commissioner has concluded that disclosure of the redacted names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure would therefore breach the first data protection principle and thus the information is exempt from disclosure on the basis of section 40(2) of FOIA.

Other exemptions cited by the MOD

73. In light of the Commissioner's findings in respect of sections 43(2), 26(1)(b) and 40(2) of FOIA she has not gone on to consider the MOD's reliance on the other exemptions it has cited.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

75. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

Details of requests submitted by complainant

18 May 2017 – FOI2018/09333

I would be grateful to be informed of the current status of the competition.

May I formally request to be informed of the detailed reasons for our rejection from the competition, including the notes that gave rise to the scoring of points to enable us to effectively review the decision making process in respect of our tender and those two companies selected to go forward. I am informed we are entitled to be informed of this under European legislation and that this should be provided as 'rapidly as possible'. Please also treat this as a formal request under the Freedom of Information Act'.

24 May 2017 – FOI2018/09335

- 1. The evaluation notes of individual evaluators.*
- 2. Notes of evaluation meetings particular moderation meetings.*
- 3. Reports and records required to be maintained for compliance European Communities Act 1972 that I believe is contained within The Defence and Security Public Contracts Regulations 2011.*

19 July 2017 – FOI2018/09336

- 1. The evaluation notes of individual evaluators.*
- 2. Notes of evaluation meetings particularly moderation meetings.*
- 3. Reports and records required to be maintained for compliance of European Communities Act 1972 that I believe is contained within The Defence and Security Public Contracts Regulations 2011.*
- 4. Price tendered for the award winning contract by the winner.*
- 5. The price tendered for the company taken to phase 3, but unsuccessful to evaluate if Englands should have been allowed to proceed to phase 3.*
- 6. The detailed reasons why in the initial tender those two companies who were taken to Phase 3 previously failed and why instead of being excluded from the competition they were allowed to continue in the subsequent revised tender for the same contract. I understand normal MOD and international tender rules should have meant both companies should have been excluded, so allowing other companies to proceed. I am informed we are entitled to be informed of this under European legislation and that this should be provided as 'rapidly as possible.' Please also treat this as a separate formal request under the Freedom of Information Act.*