



A Guide to...

An insight into the implications and effect of the Freedom of Information Act on public procurement

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An Insight into the Implications and Effect of the Freedom of Information Act on Public Procurement

The general right of access to information came into force on 1 January 2005 was enforced by an Information Commissioner. The following information draws on guidance published, others' experience and best practice procedures.

Background

The Freedom of Information Act (FOI) 2000 provides a general right of access to recorded information held by a public authority and places two general duties on the public authority: to confirm or deny that it holds the information requested, and, if it does hold the information, to give the person requesting it access to it.

The Act provides that the above general duties are subject to exemptions – some being absolute exemptions and some being exemptions which are to be subject to a public interest test. Because the Act applies to well over 100,000 public authorities, preparation will be no easy feat.

While the legislation differs slightly between England, Scotland, Wales and Northern Ireland the basic principles remain the same, albeit repackaged to cater for the local legislative culture.

Key Objectives

- Maximise openness
- Present information clearly and comprehensively
- Maintain a register of documents held or published
- Respect commercial confidentiality
- Respond promptly
- Provide information free of charge where possible

Public authorities across the UK should prepare for a stream of requests and authorities will be wise to engage suppliers in constructive dialogue to ensure there is confidence on both sides of the public procurement divide that the demands of the legislation are satisfied and sensitive supplier information is protected.

Public authorities should recognise that whilst in the past suppliers have not been keen to bite the hand that feeds them with regards to raising complaints about a tendering process and subsequent tender, other interested parties, such as researchers, political activists and press reporters, will likely have few qualms about using the Act to further their own agendas.

Exemptions and the Public Interest Test

The general aim of a public authority should be to facilitate effective access to information about its procurement. This will in turn provide greater accountability, encourage better internal management and contribute to better value for money. It is in the public interest to make information available unless there is evidence that doing so would prejudice the competitive position of the contracting company, or the position of the public authority, either at the time or in future tendering exercises.

The Public Interest Test

Whilst certain types of information are exempt, the Freedom of Information Act contains a presumption of disclosure. Therefore, in most instances authorities will only be able to withhold information if

they are satisfied that there is an overriding reason not to provide access to specific information. This opinion can, however, be challenged by the Information Commissioner. Suppliers must always be advised where disclosure of information is being considered under the FOI Act. They will be asked to provide reasons for any claim to confidentiality and the potential to do them harm. Legitimate claims to confidentiality may include where disclosure would damage the business interests of the supplier, eg commercial sensibility, proprietary information, trade secrets, etc.

The focus with regards to restricting access to information will be on issues such as commercial confidentiality clauses in contracts with third parties, and the public interest test.

In the case of exemptions which are not absolute exemptions, the public authority will be under a duty to assess whether the 'public interest' in invoking the exemption outweighs the 'public interest' in disclosing the information.

Apart from the exemption tests referred to above, the public authority may also refuse to grant access on grounds of non-payment of any fee, excessive cost or vexatious/repeated requests or where the applicant has not provided sufficient detail to identify the information required.

Publication Schemes

The Act requires public authorities to adopt, maintain, implement strictly and review regularly a publication scheme to be approved by an appointed Information Commissioner.

The scheme relates to the publication of information by the public authority and must specify:

- The classes of information which the public authority publishes or intends to publish.
- The manner in which the information is, or is intended to be, published.
- Whether the material is, or is intended to be, available free of charge or on payment.

The Information Commissioner will no doubt accept that in the area of competitive tendering there is a public interest in ensuring that there is a level playing field for contractors. A premature disclosure of contractual information might undermine the commercial position of the contractor. Because having a level playing field in procurement is in the public interest this will engage the exemption, meaning disclosure in this case runs contrary to the public interest.

Once a public contract has been awarded, there is public money going into it, and there is a strong argument that the public interest might require disclosure of information concerning the success of the project so that the public can be satisfied that the public money is properly accounted for and they are getting value for money.

Suppliers and public authorities are urged to remember that this exemption will always favour the balance of public interest. Should disclosure run contrary to the public good then the exemption will hold.

Because the exemption is qualified each case will have to undergo a public interest test. This means that every time the exemption is called upon, the question of its application will depend on whether disclosure is judged to be in the public interest.

The Act allows public authorities to charge fees in accordance with regulations made by the Government and exempts public authorities from disclosing information until the fee has been paid.

Key Points

- The Act provides statutory time limits for complying with a request for information and requires public authorities to provide advice and assistance to people seeking information.
- Public authorities must state the basis for the refusal of a request for information and provide advice on the complaints procedure, where one exists.
- Public authorities are, however, not obliged to comply with vexatious requests or with requests which are repeated, or substantially similar requests, from the same person.
- The Act exempts public authorities from the obligation to disclose the information requested if the cost of doing so exceeds a specified threshold.
- The Act is intended to encourage public bodies to be as open as possible when considering making available information in relation to public procurement.

Information is required to be provided on procurement policies and details of contracts awarded. As a minimum, contract award information made available should encompass that required under the EU Public Procurement Directives, including notification of award decisions. This notification should give such particulars as the date of award of the contract, the award criteria, the number of offers received, the name and address of the successful tenderer(s), and the price or range of prices paid.

Also to be considered is the provision of information on specific projects, including:

- Notification of bidding opportunities
- Decision criteria
- Contract performance standards
- Results of regular performance reviews, and results achieved where appropriate

This whilst respecting legitimate personal and commercial confidentiality.

Public authorities should set up a constructive dialogue with suppliers informing them of what is expected concerning FOI implementation and discussing what information can be released.

Absolute Exemption

- Information provided in confidence, ie by any other person (including another public authority) if its disclosure would constitute a breach of confidence actionable by that person or any other person.

Other Possible Exemptions

- Information intended for future publication ie in circumstances where it is reasonable that the information should not be disclosed until the intended date of publication.
- Information relating to defence if its disclosure would, or would be likely to, prejudice:
 - the defence of the British Isles (ie the United Kingdom, the Channel Islands and the Isle of Man) or any colony, or
 - the capability, effectiveness or security of any relevant forces (ie the armed forces of the Crown and any forces cooperating with those forces).
- Information which would prejudice the effective conduct of public affairs. This relates to information which is not exempt information by virtue of section 35. The information is exempt if, in the reasonable opinion of a 'qualified person', its disclosure:
 - would, or would be likely to, prejudice the maintenance of the convention of collective ministerial responsibility for UK Ministers, or

- would, or would be likely to, prejudice the work of the Executive Committee of the Northern Ireland Assembly or the Welsh Assembly, or
- would, or would be likely to, inhibit the free and frank provision of advice or exchange of views, or
- would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.
- Information relating to commercial interests where the information constitutes a trade secret or if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding the information).

Thus suppliers' information is protected primarily through two exemptions on the disclosure of information: the 'commercial interest' and the 'in confidence' exemptions.

Confidentiality

The Lord Chancellor's Code of Practice on the Discharge of the Functions of Public Authorities under Part 1 of the Freedom of Information Act requires that departments and their non-departmental public bodies (NDPBs) ensure that they consider the implications for Freedom of Information before agreeing to confidentiality provisions in contracts and accepting information in confidence from a third party more generally. In particular, departments and NDPBs should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of their functions. They should not agree to hold information received from third parties 'in confidence' which is not confidential in nature.

According to guidance from the Department for Constitutional Affairs on handling requests public authorities should refuse to include contractual terms which aim to restrict disclosure beyond the restrictions provided for in the Act: "Public authorities cannot 'contract out' of their obligations under the Act."

Public authorities should steer away from accepting confidentiality clauses blindly. The real value in them is that they flag up those things which may be confidential. So, rather than having a legally binding confidentiality clause covering the whole contract, authorities should instead use confidentiality notes or particular markings as guides to which areas of the contract should be kept confidential.

Public authorities would be sensible if they were to discuss the concerns that a supplier might have prior to the final introduction of confidentiality clauses and the signing of contracts. What should be avoided is simply giving the supplier a blanket veto over what should be disclosed. Ultimately it is the public authority's decision as to what should be disclosed.

Discussing confidentiality clauses with suppliers can be necessary as, at first glance, it may not be obvious to the authority that disclosure could be breaching confidence or could be prejudicial to the commercial interests of the company. Best advice is for authorities to establish constructive dialogue with suppliers, allowing them to present their case for which areas of their information should remain confidential. Legally binding clauses would leave authorities exposed to potential legal action for breach of contract, even if the release of information was necessary under FOI. Markings on contracts, denoting areas which should be kept confidential, also gives authorities greater flexibility because what may be confidential today may not necessarily be confidential tomorrow.

Remember, acceptance of any confidentiality provisions must be for good reasons and capable of being justified to the Information Commissioner.

The FOI and Contractors

Where a public authority arranges, under contract, for another person or body to provide services which are normally a function of that authority, the Act makes provision for Ministers to designate that person or body as a public authority.

Therefore, some non-public authority contractors will be regarded as public authorities although only in respect of the services provided under contract. As such and to that extent, the contractor will be required to comply with the Act like any other public authority.

It is for the public authority to disclose information – not for the contractor. However, an authority may wish to protect some information which it has provided to the contractor and which is exempt under the Act from disclosure by the contractor. In order to avoid unnecessary secrecy, any such constraints should be drawn as narrowly as possible and according to the individual circumstances of the case. Apart from such exceptional cases, authorities should not impose terms of secrecy on contractors.

Confidentiality in Brief

When entering into contracts public authorities should refuse to include contractual terms which purport to restrict the disclosure of information held by the authority and relating to the contract beyond the restrictions permitted by the Act.

Public authorities should reject confidentiality clauses wherever possible.

Public authorities cannot ‘contract out’ of their obligations under the Act unless an exemption provided for under the Act is applicable in relation to any particular information, a public authority will be obliged to disclose that information in response to a request, regardless of the terms of any contract.

Where, exceptionally, it is necessary to include non-disclosure provisions in a contract, they could agree with the contractor a schedule of the contract which clearly identifies information which should not be disclosed.

Authorities will need to be aware that any restrictions on disclosure provided for could potentially be overridden by their obligations under the Act.

In any event, public authorities should not agree to hold information ‘in confidence’ which is not in fact confidential in nature.

The exemption only applies if information has been obtained by a public authority from another person, and the disclosure of the information to the public, otherwise than under the Act, would constitute a breach of confidence actionable by that, or any other person.

On balancing confidentiality against the public interest the task may not be to weigh up the impact upon the individual against the good of society, but rather the good of society against the importance of preserving confidences. So, for example, would releasing confidential information about a company tendering for public sector contracts do more harm than good to the public?

Charges

The Act does not require charges to be made, but public authorities have discretion to charge applicants a fee in accordance with Fees Regulations made under sections 9, 12 and 13 of the Act in respect of requests made under the general right of access.

Details of charges must be made available on request. Schemes may include a standard charge for processing simple requests for information. Where a request is complex and would require extensive searches of records or processing or collation of information, an additional charge, reflecting reasonable costs, may be notified.

The levying of a nominal charge may in fact be more expensive to process and collect than the fee concerned. Most authorities are therefore opting to give information free of charge except where excessive expense is incurred.

The Fees Regulations do not apply:

- To material made available under a publication scheme under section 19.
- To information which is reasonably accessible to the applicant by other means within the meaning of the exemption provided for at section 21.
- Where provision is made by or under any enactment as to the fee that may be charged by the public authority for disclosure of the information as provided in sections 9(5) and 13(3) of the Act.

Public authorities should ensure that any charges they make in cases falling outside those covered by the Fees Regulations are in accordance

with any relevant legislation and are within the terms of any relevant guidance which has been issued or approved by the Government and which is applicable to the public authority.

A public authority's publication scheme must give details of whether (and how much) the authority will charge for providing information.

Where an authority is not obliged to comply with a request for information because, under the regulations, the cost of complying would exceed the ‘appropriate limit’ (ie cost threshold), and where the public authority is not prepared to comply on a discretionary basis because of the cost of doing so, the authority should consider providing an indication of what information could be provided within the cost ceiling.

Requests can be made in writing, by email or other electronic means and by telephone. If those requesting the information refuse to pay the fee, the public authority can refuse to supply it.

Openness – Good Practice Procedure

- Disclose information unless it can be clearly shown that it is in the public interest not to do so (disclosure would cause substantial harm or breach of confidentiality).
- Ensure staff receive the necessary internal guidance and training.
- Ensure you publish that which you say you will publish.
- Produce easy-to-read documents using clear language.
- Have an internet publishing scheme for above and below the threshold of the public procurement directives, which allows you to be transparent on your procurement and, if you want to use it to reduce minimum timescales under EC Procurement Directive 2004/18, ensure that it is compliant with its requirements with regards to a Buyer Profile.

Disclosure and Disposal

The Freedom of Information Act only requires disclosure of information held. It is therefore prudent to ask only for information that is truly necessary to ensure that best value for money in procurement is achieved. If other information is held it is in any case difficult to prove that it has not been taken into account improperly.

Furthermore, legitimate information should only be held for as long as necessary to ensure legal compliance or for commercial reasons. A disposal policy, if not in place, should be introduced and managed to ensure information is disposed of as soon as permitted. This way you can reduce your authority's liability to find and disclose information.

The Government is to issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would be desirable for authorities to follow in connection with the keeping, management and destruction of authorities' records.

Response Process

- Respond positively.
- If you intend to withhold information explain why.
- Respond speedily – within 20 working days.
- Inform the requesting person if more time is required to provide the information requested.
- Inform the requester if a fee is to be levied and detail the cost (you may withhold the information or work related to its provision until payment is received).

Refusal of a Request

Where a request for information is refused in reliance on an exemption, the Act requires that the authority notifies the applicant which exemption has been claimed and, if it would otherwise not be apparent, why that exemption applies. Public authorities should not (subject to certain provisos) merely paraphrase the wording of the exemption. The Act also requires authorities, when withholding information (other than under an ‘absolute’ exemption), to state the reasons for claiming that the public interest in maintaining the exemption

outweighs the public interest in disclosure. Public authorities should specify the public interest factors (for and against disclosure) which they have taken into account before reaching the decision (again, subject to certain provisos).

For monitoring purposes public authorities should keep a record of all applications where either all or part of the requested information is withheld. In addition to a record of the numbers of applications involved where information is withheld, senior managers in each public authority need information on each case to determine whether cases are being properly considered, and whether the reasons for refusals are sound. This could be done by requiring all staff who refuse a request for information to forward the details to a central point in the organisation for collation.

Contract Information Publication Scheme

Public authorities will no doubt use the internet as their core delivery tool for requested information. The internet should also be seen as the central point for all public procurement information as this will shortly provide public authorities with additional process benefits as defined in the new EC Procurement Directive 2004/18.

The internet also allows much of the process of administration of contract information and supplier management to be done automatically to aid your e-tendering processes.

Public authorities should consider updating their existing documentation, such as procurement manuals and strategy documents, guidelines, pre-qualification questionnaires, invitations to tender and terms and conditions to make it clear to bidders that the information they provide when bidding may ultimately have to be exposed in accordance with authorities' obligations under the Act.

Notification

- Identify in all contract announcements that information provided is subject to the Act.
- Include in contracts terms relating to the disclosure of information.

Contract Notice Announcements – Example Text

“This authority is subject to the provisions of the Freedom of Information (FOI) Act. If the tenderer considers that any information supplied by him is either commercially sensitive or confidential in nature, this should be highlighted and the reasons for its sensitivity given. In such cases, the relevant material will in response to FOI requests be examined in the light of the exemptions provided for in the FOI Act.”

Public authorities, when tendering, should adopt the policy: ‘if we don't need it, don't ask for it.’ And if you do need it, only ask for it when that need arises.

For instance, when seeking information to evaluate Expressions of Interest (EOI), do not at the EOI stage ask for information which you could ask for at the Invitation to Tender (ITT) stage, when far fewer suppliers would be involved: far less information therefore will be received.

The Role of Buyer Profiles in Your Access to Contract Information Policy

To meet your obligations for publication your publication policy should include use of the internet to deliver as much of the information as possible. The creation of a Buyer Profile (also known as a living PIN) as defined by the new EU Procurement Directive 2004/18 should be the central resource through which your contract information is published. In addition to meeting the EU Treaty obligation for transparency whether or not the Directives apply, the benefit of this approach is that you will also enjoy the ability to reduce your contract process timescales as if you had issued a Prior Information Notice (PIN). (See Panel ‘EU Consolidated Directive 2004/18 Timescales’, page 8.)

The Information Commissioner

The FOI Act establishes the Office of the Information Commissioner whose duties include the promotion of the observance of the requirements of the Freedom of Information Act and the provisions of statutory codes of practice under that Act; the investigation of complaints about a public authority's failure to comply with the statutory requirements of the Act; the promotion of good practice; and the approval of public authorities' publication schemes.

The Commissioner is appointed to interpret, promote and enforce the Freedom of Information Act, making sure that public authorities release information citizens are entitled to see.

Now that the Freedom of Information Act is fully in force, anyone who believes they have not received information to which they are entitled can appeal to the Commissioner. Following investigation he will determine whether the public authority concerned should provide the information requested. He will have powers to enforce these decisions, and will also take steps to promote good practice by public authorities.

The Information Commissioner's offices across the UK are not all-powerful, however. A senior Minister can veto the disclosure of information if it prejudiced national security. And Ministers can also invoke the Executive Override, which overturns the decisions of the Office of the Information Commissioner.

How Independent is the Commissioner?

The role of the Commissioner is completely independent of the executive arm of government or any other public authority. He has to make an annual report to Parliament and account for his finances to Parliament and to the Auditor General. The Commissioner employs his own staff and legal team to enforce and promote the Freedom of Information Act.

What's the Difference Between the Scottish Information Commissioner and the UK Information Commissioner?

The Scottish Information Commissioner and the UK Information Commissioner (UKIC) have separate roles and responsibilities. Broadly speaking, the Scottish Commissioner is responsible for all public authorities in Scotland, while the UKIC is responsible for public authorities in England, Wales and Northern Ireland, and for any agencies operating in both Scotland and another part of the UK. The UKIC's remit also covers Data Protection rights (personal information) for the whole of the UK.

The FOI and EU Public Procurement Directives

With the advent of the Freedom of Information Act, public authorities will not be able to give the guarantees of confidentiality which have previously been commonplace in public procurement. It is suggested instead that they should be proactive in taking measures to enable them to effectively manage the tendering process in an FOI context, while complying with EU obligations.

The EU Treaty imposes an obligation of non-discrimination on Member States and their public authorities. The European Court of Justice has held in several cases that in public procurement this involves the application of principles of equal treatment and transparency. Where the value of the contract is over specified thresholds, the EU Public Procurement Directives reinforce the Treaty by co-ordinating contract award procedures and information requirements. The guiding principles of the EU Treaty, in effect openness and fairness, will always apply, however, irrespective of the value of the particular contract.

EU Consolidated Directive 2004/18 Timescales

Principle of Sufficiency

The time limits for tenders and requests to participate must take account of the complexity of the contract and the time needed to prepare tenders. They must allow for site visits and late or bulky documents and must exceed the following minima where necessary.

Open Procedure

Must allow at least 52* days for tenders from despatch of notice by post or fax (ie GPA 40 + OJ 12) but following a full and current Prior Information Notice (PIN) or equivalent Buyer Profile, may reduce to 36 days in general, or at least 22 days.

- * May allow 7 days less if contract notice despatched electronically using a service such as BiP Solutions' Project e-notice service.
- * May allow 5 days less if contract documents are made available on the internet.

(The 7-day and 5-day reductions can be combined.)

Contract documents must be provided within 6 days of request to participate (RTP), if RTP timely.

Additional information must be provided not later than 6 days before deadline for tenders.

Selective Procedures (Restricted, Negotiated, Competitive Dialogue)

Must allow at least 37* days for requests to participate from despatch of notice by post or fax (15 days if accelerated procedure).

- * May allow 7 days less if notice sent electronically using a service such as BiP Solutions' Project e-notice service (net 10 days if accelerated).

Contract documents must be sent with invitation to tender (ITT) or participate (ITP) or made available online or without delay via a third party.

Additional information must be provided not later than 6 days before deadline (4 days if accelerated).

Restricted Procedure

Must allow at least 40* days from ITT for submission of tenders (10 days if accelerated) but following full prior information, may reduce to 36 days in general or at least 22 days.

- * May allow 5 days less if contract documents are made available on the internet.

All Procedures

Notification of decisions as soon as possible.

Debriefing on request, as quickly as possible and within 15 days of request.

OJEU Publication

The OJEU is allowed:

- 12 days to publish notices from despatch by post or fax (5 if accelerated).
- 5 days from despatch electronically (3 if accelerated) using a service such as BiP Solutions' Project e-notice service.

PIN Notices

Contracting authorities can in any case apply reduced timescales provided they make known either by the publication of a PIN or in their Buyer Profile, as much of the information needed for a contract notice as is available at the time. If so the deadline for receipt of tenders or expressions of interest can be reduced to 36 days in general or not less than 22 days, if necessary.

The PIN notice must either be sent to the Commission or published on the authority's own Buyer Profile as soon as possible after the decision approving the planning of works. For supplies and service contracts, a PIN needs to be published at the beginning of the contracting authority's financial year.

Contracting authorities who publish the PIN on their Buyer Profile site must send the Commission, electronically, a notice of the publication of the Buyer Profile, in accordance with the format and modalities for sending notices indicated in the Directive's Annex VIII.

Publication of Complementary or Additional Information

- Contracting authorities are encouraged to publish the specifications and the additional documents in their entirety on the internet.
- The Buyer Profile may include Prior Information Notices as referred to in Article 35(1), first subparagraph, information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an email address.

The formats for sending notices electronically are accessible through BiP Solution's Project Online service.

Visit: www.delta-ets.com

The following rules apply to the transmission of requests to participate:

- Requests to participate in procedures for the award of public contracts may be made in writing or by telephone.
- Where requests to participate are made by telephone, a written confirmation must be sent before expiry of the time limit set for their receipt.
- Contracting authorities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. Any such requirement, together with the time limit for sending confirmation by post or electronic means, must be stated by the contracting authority in the contract notice.

Suggested Steps to Meet the Changed Context Arising from FOI

General Procurement Requirements

- Develop a policy setting out the information that the authority would wish to routinely release regarding the tender process, outside of FOI requests.
- Be careful not to introduce bias into the specification of requirements for information and restrict them to the information which can legitimately be taken into account.
- Be specific about the criteria against which applications will be evaluated and any contract conditions which will apply. Where feasible, allocate weightings to the award criteria.
- *Advertisements or tender documents should clearly indicate the following:*
 - qualitative selection criteria (ie minimum mandatory requirements) – these might include evidence of financial standing, technical capability, etc,
 - the rules that will apply to the shortlisting of successful candidates in selective procedures,
 - the intended award criteria – may be either the lowest price or the most economically advantageous tender (ie using the relative importance of various criteria such as price, period for completion, running costs, technical merit, etc).
- Document carefully the decision-making process in relation to the selection of the successful tender.
- Give justified and sustainable reasons for decisions to unsuccessful tenderers and candidates.

Preparations for FOI Requests

- *Inform all applicants at the outset:*
 - about FOI when issuing requests for tenders or placing advertisements in the newspapers, and
 - of the authority's policy regarding information it intends to release of the FOI Act.
- Ask applicants to identify sensitive information, when forwarding material to you.
- Always consult with the person or company concerned before making a decision on an FOI request by a third party.
- Inform companies in advance about FOI.
- As many firms are unlikely to be familiar with the FOI Act, especially in the period immediately following commencement, it is suggested that information about FOI be included in a prominent position on the tender documentation.

Public authorities can also reduce significantly the work involved in consulting with third parties on FOI requests by alerting persons in advance to its existence.

Standard Statements

The following standard statement is suggested for inclusion in tender documents:

"The (insert name) proposes that the following information relating to this tender competition will be made available to third parties on request:

.....

The authority undertakes to hold confidential any information provided by you in this (tender) subject to:

- disclosure of the information specified above as liable for release to the public*
- the authority's obligations under law, including the Freedom of Information Act.*

You are asked to consider if any of the information supplied by you in this (tender) should not be disclosed because of its sensitivity (other than that referred to above). If this is the case, you should, when providing the information, identify same and specify the reasons for its sensitivity. The authority will endeavour to consult with you about sensitive information before making a decision on any Freedom of Information request received.

If you consider that none of the information supplied by you is sensitive, please make a statement to that effect."

What Information Should Routinely be Made Available Outside of FOI?

As a matter of course the following information should be made available:

- Qualitative selection criteria (ie minimum mandatory requirements) – these might include evidence of financial standing, technical capability, etc.
- Award criteria – may be either the lowest price or the most economically advantageous tender (ie using various criteria such as price, period for completion, running costs, technical merit, etc).
- Any other information required by the EU Directives, for example for the completion of standard notices including award notices.
- Detailed reasons to unsuccessful candidates as to why their application was rejected.

Authorities should note that where contracts are subject to the EU Public Procurement Directives, a written report on each contract awarded should be prepared the prescribed elements of which must be sent to the Commission at its request.

What About Details of the Successful Tender Price?

This is a matter for each authority to determine in relation to each individual product or service, having regard to the requirements of the FOI Act and bearing in mind that the tender price is not necessarily the same as the cost under the contract as evaluated by the contracting authority.

The criteria to be considered may differ depending on the nature of the product or service and the number of companies or persons in a position to submit tender applications in each instance.

In formulating their approach, authorities must have regard to:

- The extent to which disclosure could prejudice the competitive position of the successful company.
- The extent to which disclosure could result in disbenefits to the Department, eg resulting in less competitive tenders.
- The extent to which disclosure could prejudice the effectiveness of the tender process.

Note: Practice abroad favours release of the (unqualified/unevaluated) successful tender price in most cases.

Information Commissioner's Office (ICO)

Definition Document for the Model Publication Scheme for Government Departments

This guidance gives examples of the kinds of information that ICO would expect government departments to provide in order to meet their commitments under the model publication scheme.

ICO would expect departments to make the information in this definition document available unless:

- they do not hold the information;
- the information is exempt under one of the FOI exemptions or Environmental Information Regulations (EIRs) exceptions, or its release is prohibited under another statute;
- the information is archived, out of date or otherwise inaccessible; or,
- it would be impractical or resource-intensive to prepare the material for routine release.

The guidance is not meant to give a definitive list. The legal commitment is to the model publication scheme, and authorities should look to provide as much information as possible on a routine basis.

This information should also be provided for any executive agencies or other bodies within the department. References to "departments" in this guidance include these bodies. For example, we would expect an executive agency to publish information about its management board and accounts in the same way as the department itself.

A government department retains legal responsibility for ensuring that this information is made available in accordance with the publication scheme, even if practical responsibility for implementing it is delegated to the other body.

Who we are and what we do

Organisational information, structures, locations and contacts.

We would expect information in this class to be current information only.

- **Roles and responsibilities**
Departments should be providing outline and detailed information about their roles and responsibilities, and the roles and responsibilities of people working in them at senior level.
- **Organisational structure**
An explanation of the internal structures of the department: referring to their functions; indicating the relationship of different departmental sections with other departments, internal and external; and how the structure relates to the roles and responsibilities.
- **Information about legislation relevant to the department's functions**
An explanation of the legislative basis of the department's activities. An explanation of any legislation for which the department is the lead government department.
- **Lists of and information about organisations the department is responsible for, those it works in partnership with and those it sponsors**
As most of these bodies will be responsible for their own affairs, we expect this information needs only to be enough to identify the relationship between these bodies and the department.
- **Department Ministers, Permanent Secretaries, Chief Executives, management board members and senior executives**
Identification of, responsibilities of and biographical details of Ministers, senior civil servants in the department and those making strategic and operational decisions about providing the department's services. Biographical details that are not work related should be published only with consent.
- **Locations of, and contact details for, the authority**
This should cover the department at all levels, from the central body to offices open to the public for conducting the department's business. Where possible, give named contacts.

What we spend and how we spend it

Financial information about projected and actual income and expenditure, procurement, contracts and financial audit.

The minimum we would expect is that financial information for the current and previous two financial years should be available.

If money is allocated to specific cost centres in a department and this information helps to explain how public money is spent, departments should consider publishing it.

- **Financial statements, budgets and variance reports**

Financial information in enough detail to allow the public to see where money is being spent, where a department is or has been planning to spend it, and the difference between the two. Financial information should be published at least annually and, where practical, we would also expect half yearly or quarterly financial reports to be provided. Revenue budgets and budgets for capital expenditure should be included.

- **Capital programme**

Information should be made available on major plans for capital expenditure including any private finance initiative and public-private partnership contracts.

- **Spending reviews**

- **Financial audit reports**

- **Staff and board members' allowances and expenses**

Details of the allowances and expenses that can be claimed or incurred. It should include the total of the allowances and expenses paid to individual senior staff and management board members by reference to categories. These categories should be produced in line with the department's policies, practices and procedures and will be under headings like travel, subsistence and accommodation.

- **Ministerial expenditure**

The total of the allowances and expenses paid to and incurred by department Ministers by reference to categories. These categories should be produced in line with government guidelines and will be under headings like travel, subsistence and accommodation.

- **Pay and grading structures**

This may be provided as part of the organisational structure and should indicate, for most posts, levels of pay rather than individual salaries.

- **Procurement procedures**

Details of procedures for acquiring goods and services. Contracts available for public tender.

- **Lists of contracts awarded and their value**

We would normally expect the department to publish details only of contracts that are large enough to have gone through formal tendering.

- **Financial statements for projects and events**

If there are identifiable projects, we would expect the publication scheme to cover at least the financial reports that indicate actual expenditure against original project budgets. The larger the project, the greater the detail that should be available. Similarly, where organised events are publicised, their cost should be available through the scheme.

- **Internal financial regulations**

What are our priorities and how are we doing

Strategies and plans, performance indicators, audits, inspections and reviews.

We would expect information in this class to be available at least for the current and previous three years.

Below is a list of the type of information we would expect departments to have readily available for publication.

Any other reports or recorded information showing the department's planned or actual performance should normally be included.

- Strategic plans
- Annual business plan
- Annual report
- Internal and external organisation performance reviews
- Performance reports to Parliament
- Inspection reports
- Impact assessments
- Service standards
- Statistics produced in accordance with departmental requirements
- Public service agreements

How we make decisions

Decision-making processes and records of decisions.

We would expect information in this class to be available at least for the current and previous three years.

- **Major policy proposals and decisions**

Information that can be made available to the public without damaging relations with other governments or the development of government policy.

- **Background information for major policy proposals and decisions**

This will include facts, and analyses of facts, relevant and important to framing major policy proposals and decisions.

- **Public consultations**

Details of consultation exercises with access to the consultation papers or information about where the papers can be obtained. The results and outcomes of consultation exercises.

- **Minutes of senior-level meetings**

We would expect management board minutes and the minutes of similar meetings where decisions are made about providing services to be readily available. This excludes information that is properly regarded as private to the meeting.

- **Reports and papers provided for consideration at senior-level meetings**

Information presented to those at meetings making executive decisions. This excludes information that is properly regarded as private to the meeting.

- **Internal communications guidance, criteria used for decision-making, internal instructions, manuals and guidelines**

If access to internal instructions, manuals and guidelines for dealing with the business of the department would help the public understand how decisions are made, these should be readily available. We would not expect information that might damage the department's operations to be revealed.

Our policies and procedures

Current written protocols, policies and procedures for delivering our services and responsibilities.

We would expect information in this class to be current only.

- Policies and procedures for conducting departmental business
- Policies and procedures for delivering our services
- Policies and procedures for recruiting and employing staff

Codes of practice, memoranda of understanding and similar information should be included. A number of policies, for example equality and diversity,

and health and safety, will cover both the provision of services and the employment of staff. If vacancies are advertised as part of recruitment policies, details of current vacancies will be readily available.

- **Customer service**

Standards for providing services to the department's customers, including the complaint procedure. Complaints procedures will include those covering requests for information and operating the publication scheme.

- **Records management and personal data policies**

This will include information security policies, records retention, destruction and archive policies, and data protection (including data sharing) policies.

- **Charging regimes and policies**

Details of any statutory charging regimes should be provided. Charging policies should include charges made for information routinely published. They should clearly state what costs are to be recovered, the basis on which they are made, and how they are calculated.

Lists and registers

- **Public registers and registers held as public records**

If a department is required to maintain any register and make the information in it available for public inspection, the existing provisions covering access will usually be adequate. However, we expect authorities to publicise which public registers they hold, and how the information in them is to be made available to the public. Where registers contain personal information, departments must ensure that they consider the data protection principles.

- **Asset registers and information asset register**

We would not expect departments to publish all details from all asset registers. We would expect some information from capital asset registers to be available. If a department has prepared an information asset register for the Re-use of Public Sector Information Regulations 2005, it should publish the contents.

- **Disclosure logs**

If a department produces a disclosure log indicating the information provided in response to requests, it should be readily available. Disclosure logs are recommended as good practice.

- **Register of gifts and hospitality provided to Ministers and senior personnel**

- **Any register of interests kept in the department**

- **Other lists required by law**

The services we offer

Information about the services the department provides including leaflets, guidance and newsletters.

Generally this is an extension of part of the first class of information. While the first class provides information on departmental roles and responsibilities, this class includes details of the services the department provides, internationally, nationally and locally as a result of them. It will benefit the public to have ready access, for example, to everything from information about the services the department provides for the government, to the information readily available to individuals at a public counter.

The starting point would normally be a list or lists of the services the department is responsible for; linked to details of these services.

- Regulatory responsibilities
- Services for public authorities
- Services for industry
- Services for other organisations
- Services for members of the public
- Services for which the department is entitled to recover a fee, together with those fees
- Government department circulars
- Leaflets, booklets and newsletters
- Advice and guidance
- Media releases

Working Assumptions – Procurement Annex A

Contents

The table below is drawn from the Office of Government Commerce’s ‘Freedom of information (civil procurement) policy and guidance’, available at www.ogc.gov.uk.

NB – This annex is only intended as a summary of the information included in the procurement process and should be used by authorities as a starting point when making their own disclosure decisions, based on the circumstances of the particular case.

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1. General procurement information

Information type	Discussion	Working assumption decision
Information on suppliers compiled from widely available sources (e.g. product catalogues, press stories).	Already in the public domain, so clear exemption applies. However, requesters could be directed to the original information sources to satisfy their information need.	Not to be released (Section 21).
Information on suppliers aggregated from knowledge gained within the authority through their supplier dealings (e.g. performance over several contracts). Also includes derived information (e.g. opinions drawn from data).	If the aggregated information is critical of a supplier and released, it could (but may not) damage commercial interests. If it were known that only information relating to suppliers (where there are no concerns about performance) would be disclosed, a refusal to disclose aggregated information on a particular supplier would effectively identify them as performing badly. Anonymised information may generally be disclosed.	Not to be released (except for anonymised information). (Section 43 (2) may apply)
Information obtained from suppliers and not generally available (future product info, research plans, financial details).	This information will generally have been specifically requested by the authority and supplied with a reasonable expectation it would not be made public. Otherwise, companies may refuse to divulge the information, to the probable detriment of the public interest.	Not to be released (Section 41 may apply). (EIR regulation 12(5))
Gateway Review reports.	Refer to the Gateway Review information working assumption.	Refer to the Gateway Review working assumption.

2. Initiation information (start of procurement planning up to readiness to issue bid documentation)

Information type	Discussion	Working assumption decision
All vision, strategy and planning documentation, including business cases.	The key document in this phase is the business case (strategic outline, outline or full). NHS guidelines for PFI/PPP contracts mandates the publication of business cases within a month of their final approval, but allows for the possible redacting of information. However, non-PFI work may operate in a different environment and direct correlation may not be appropriate. In some cases, information may be subject to release as a managed process for early supplier involvement. Only disclosure outside of this process is detrimental.	Not to be released in phase (unless part of a managed process for early release of information). Disclose when bid documentation issued. (Section 36 and Section 43)
Requirements information.	Early disclosure of requirements, unless part of the procurement strategy, could prejudice the tendering process and give unfair advantage to some suppliers. In some cases, information may be subject to release as a managed process for early supplier involvement. Only disclosure outside of this process is detrimental.	Not to be released in phase. (Section 43(2))

3. Tender information (release of tender documents up to selection of preferred bidder)

Information type	Discussion	Working assumption decision
All project management documentation, with the following exceptions.	This covers the typical documentation generated during management of selection when run as a project (e.g. Prince 2 products). Demonstrates procurement was properly managed, but release during tendering could damage process.	Not to be released in phase. Disclose when contract let. (Section 36 and Section 43)
Project issue and risk logs.	These may contain critical information about tenderers.	Not to be released in phase. (Section 36 (2) (b) (i)). Decide by case thereafter
All information received from tenderers.	This covers tender documents, correspondence, negotiation notes, etc.	Not to be released in phase (thereafter, see table for following phase). (Section 43)
All evaluation information.	Covers evaluation reports.	Not to be released in phase (thereafter, see table for following phase). (Section 36 and Section 43)

4. Contract negotiation information (successful bidder notified up to contract signature)

Information type	Discussion	Working assumption decision
Tender information received from unsuccessful bidders.	This covers tender documents (including prices).	Not to be released, except for non-sensitive information. (Section 43(2))
Tender evaluation information on unsuccessful bidders (including ranking).	Although commercially non-sensitive information could be disclosed, the public interest in favour of disclosure of sensitive information is generally weaker than that for winning bidders.	Generally disclose, except for sensitive information. (Section 43(2))
Identity of unsuccessful bidders.		Generally disclose (unless security/H&S related).
Evaluation information for successful bidders.		Generally disclose
Tender information received from successful bidder, with the exceptions below.	General tender information, including total tender price (but not supplier's costing information, see below). Note that if cost information could be deduced from price information (e.g. consultancy, where total price = days * day rate), then consultation may be needed before a decision on disclosure is reached.	Generally disclose (unless security/health and safety related).
Payment terms.		Generally disclose after contract signature.
Information on the supplier's approach to the work.	Likely not to be sensitive unless the supplier has a unique approach that could be considered a 'trade secret' (see section 3.2 for definition).	Generally disclose except for information agreed as 'trade secret'. (Section 43(1))
Financial models.	For more complex work, detailed models of how the cash flow for both the authority and supplier would be managed over the life of the contract (e.g. recovering low initial capital charges through incentivised support work).	Not to be released (Section 43(2)).
Price breakdown.	Price breakdowns, without knowledge of the underlying financial model, could be misleading and need proper presentation.	Not to be released (until no longer sensitive) (Section 43(2)).
CVs and reference sites.	CVs are likely to come under the Data Protection Act. Reference site information was probably supplied to the bidder in confidence.	Not to be released (Section 40).
Information on supplier's costing mechanisms.	This covers information relating to profit margins, day rates (where used to calculate a fixed price), overhead costs, etc. This may give advantage to a competitor.	Not to be released (Section 43(2)).
Information relating to contract negotiation.	Covers correspondence, meeting minutes, emails, contract change notices, etc. Decision will depend on sensitivity and content, and should not comprise suppliers' negotiations with sub-contractors or the public authority's negotiations with any third parties.	Generally disclose except for information agreed as commercially sensitive, with time limits.



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5. Contract delivery information (from start of work to completion)

Information type	Discussion	Working assumption decision
All project management documentation, with the following exceptions:	This covers the typical documentation generated during management of contract when run as a project (e.g. Prince 2 products). Demonstrates project was properly managed.	Generally disclose.
Project risk logs.	The project should be able to explore issues freely and cooperatively between parties. Disclosure would damage this freedom, to the detriment of the project.	Not to be released in phase. (Section 36(2)(b)(i)). Decide by case thereafter.
Exception reports.	These may contain critical info about suppliers. Disclosure could prejudice process (due to a reluctance to raise/accept). See discussion under item 2.	Not to be released in phase. (Section 36 (2)(b)(i))
Lessons learnt report.	These may contain critical information about suppliers. Disclosure could prevent candour and hence restrict valuable information.	Not to be released (Section 36(2) (b)(i))
Contract information (general).		Generally disclose (unless security/health and safety related), but see below for exceptions.
<i>Contract information requiring particular attention:</i>		
Price breakdown.	See under tender information in previous table.	Not to be released (until no longer sensitive). (Section 43(2))
Service level agreements.	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact.	Generally disclose.
Performance measurement procedures.	As above, with possibly even lower commercial impact.	Generally disclose.
Incentive mechanisms.	Information provides key indicator that proper management is in place. Details of the mechanisms may be considered sensitive by suppliers, but there is a strong public interest element in disclosure. Summary information should be considered.	Generally disclose.
Criteria for recovering sums.	Stronger commercial argument, since it would indicate financial risk to which company is exposed. Subsequent knowledge of performance would mean financial impact could be deduced, possibly affecting company's financial position.	Generally disclose, but not full details.
Pricing mechanisms.	Covers milestone payments, price variation mechanisms (e.g. fee rate increases per year). Case law supports release of this information, based on public interest in disclosure.	Generally disclose.
Dispute resolution procedures.	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact.	Generally disclose.
Invoicing arrangements.	Probably no commercial impact, so exemptions unlikely to apply. However, if they did, it is difficult to see any public interest in non-disclosure.	Generally disclose.
Contract management arrangements.	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact.	Generally disclose.
Exit strategies and break options.	Information provides key indicator that proper management is in place. Strong public interest element, probably low commercial impact.	Generally disclose.
Sub-contractor details.	Covers their identity, management arrangements, flow-down of contract conditions.	Not to be released (except for their identity). (Section 36)
Assessing or reporting on contract performance.	This covers information relating to performance against SLAs, KPIs SPAs, benchmarks, etc. Mostly relevant to longer term service provision. Overall, likely to be in public interest to release, but financial sensitivity for supplier needs to expire.	Generally disclose once any financial sensitivity has expired.
Information on sums recovered.	Where contracts have liquidated damages clauses, information may be included about: a) have damages been imposed, b) the amounts involved. The former could arguably be disclosed, but the likelihood is that the latter could then be deduced from other information. The latter is probably commercially/financially damaging (but beware if covered under EIRs), but only for a definable period.	Not to be released until any financial sensitivity has expired. (Section 43 (2))
Information on project progress.	Covers progress review minutes, reports, correspondence. More relevant to start/end projects. Disclosure may be in public interest, but supplier reputation could suffer if major project known to be delayed (with fall in share price, loss of bids in progress, etc). Also, important that such information is put in context (e.g. delay may be due to new requirements or other valid reasons).	Generally disclose.
Product/service verification procedures.	Covers details of test documentation, e.g. strategy, procedures, acceptance plans. Also covers building acceptance/commissioning plans. Possible 'trade secret' and IPR issues, especially for service companies. Release of detailed procedures to competitors effectively enables re-use by them, possibly giving them competitive advantage.	Generally disclose except where 'trade secrets' agreed. (Section 43(1))
Product/service verification results.	Covers results from above activities. Same comments as above, as procedures may be deduced from results.	Generally disclose except where 'trade secrets' agreed. (Section 43(1))
Contract change information.	Same arguments as for contract. Disclosure of all information likely to be in the public interest.	As for contract.

Working Assumptions – Procurement

Annex B – worked examples

Contents

The worked examples are drawn from the Office of Government Commerce’s ‘freedom of information (civil procurement) policy and guidance’, available at www.ogc.gov.uk

The following worked examples illustrate how the working assumptions may work in practice. It is not feasible to offer examples of all possible situations, but those offered demonstrate some of the rationale underlying the working assumptions while highlighting where exceptions may be relevant. It must be emphasised that the examples are intended to be generic and the outcomes should therefore not form the basis of the decisions in a particular ‘real’ case (i.e. they are not taken from case law and should not be considered as ‘precedent setters’). The term ‘provisional decision’ is used to describe the initial outcome of the decision process, which will always be subject to any escalation mechanism or referral to the Ministry of Justice Clearing House.

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Example 1

Information requested: Price quoted in all tenders received for procurement of a licensing system.

Timing of request: Prior to contract award.

Working Assumption: Not to be released

Discussion

In this example, all the four bidders have made clear in their tenders that release of pricing information would damage their commercial interests. Additionally, the Office of Government Commerce policy says that the release of any tender information during the selection and award stages would prejudice the procurement process, delaying the procurement exercise and possibly requiring retendering. This would lead the authority to incur greater expense, and hence prejudice its own commercial interests. The Freedom of Information Act requires the same treatment of information requests regardless of the identity of the requester. Hence it is possible that a bidder (or potential bidder) would receive the information and this could affect bids submitted in terms of either content or price, reducing the value for money achieved.

Weighing these factors, the authority decides that the section 43 exemption applies and that there is a strong public interest in non-disclosure. As no public funds have yet been committed, the counter-balancing public interest in disclosure is weak and the authority therefore decides to withhold the information.

Provisional decision:

Withhold, citing section 43.

Example 2

Information requested: Total price of awarded contract for a licensing system, together with a full price breakdown for every element.

Timing of request: Post contract award, within first year of implementation.

Working assumption:

Total price – Generally disclose.

Price breakdown – Not to be released

Discussion

In this example, the tender was conducted as an Official Journal of the European Union exercise and the policy, in line with EU Procurement Directives, is that the total contract price should be disclosed. The supplier argued during contract negotiations that it considered the total price confidential, as its disclosure may prejudice a bid for a similar system it was submitting elsewhere. Although there may be rare examples where there is a strong public interest in not disclosing the total price (e.g. where sales to foreign governments are involved), there are no such considerations in this case. The authority rejected the supplier’s stance as the slight commercial harm that the supplier might suffer was insufficient to justify an exemption, and in any case was outweighed by the strong public interest, on transparency grounds, in disclosure.

Close inspection is needed of the price breakdown to assess the prejudice to the supplier of releasing detailed information. The supplier said during contract negotiations that all price breakdown information is confidential. The authority decides, after consultation with the supplier, that the prices of the top-level deliverables can be released (e.g. total hardware price, total support price, total training price, etc).

However, the authority decides that any further level of breakdown would reveal information that is likely to damage the supplier’s commercial interests (e.g. price of individual workstations would reveal bulk-buy arrangements negotiated by supplier, training breakdown would reveal day rates for training consultants, etc).

The authority judges that the public interest in disclosing this information is not outweighed by the public interest in upholding the supplier’s concerns.

Provisional decision:

Disclose total contract price and top-level breakdown.

Withhold detailed price breakdown, citing section 43.

Example 3

Information requested: Technical details of a new patient monitoring network within a PFI (Private Finance Initiative) hospital, together with the approach to determining the amount of monitoring to be provided in the NHS wards, compared to the private wards.

Timing of request: Post contract award, within first year of implementation

Working assumption:

Generally disclose, except for trade secret information

Discussion

In this example, the supplier has asked for both types of the information requested to be treated as confidential, as both cases raise issues related to trade secrets. The operating software underlying the network is a proprietary product of the company and releasing any details would provide advantage to competitors. The algorithms used to determine the monitoring required are likewise proprietary, but have been in use for some years and similar algorithms are generally available.

The authority decides that in both cases section 43 is relevant. It is judged that there is little public interest in disclosing technical details of the network, when weighed against the public interest in protecting the supplier’s position, and that therefore these should be withheld. However, the harm that the supplier would suffer from releasing details of the algorithms is outweighed by the public interest in being reassured that the approach used is equitable.

Provisional decision:

Withhold technical details of network, citing section 43

Disclose algorithms for monitoring.

Example 4

Information requested: The incentive mechanism included in the contract for the refurbishment of government offices over a four year period, together with the value of any sums recovered in years 1-3.

Timing of request: Post contract award, in fourth year of contract.

Working assumption:

Incentive mechanism – Generally disclose

Sums recovered – Not to be released

Discussion

The incentive mechanism provides for sums being recovered if the refurbishment slipped against the agreed project plan. Sums recovered would be based on a percentage of the relevant stage payment, with the percentage increasing in defined increments determined by the number of days slippage. The supplier wants the incentive mechanism to be confidential, as it feels that revealing its financial risk would affect its share price and harm its commercial interests. It is also concerned that disclosing actual sums recovered by the authority would likewise affect its market position, until its accounts are officially published.

The authority acknowledges that in both cases s43 is relevant. However, incentive mechanisms are a key element for managing risk and performance, and there is a strong public interest in opening such mechanisms to scrutiny. In this case, revealing all the details of the incentive mechanism could enable the sums recovered to be deduced. As the degree of harm to the commercial interests of the supplier would be greater if actual sums were revealed, which is not outweighed by the public interest in disclosure, it is decided that limited details of the mechanism should be disclosed (e.g. remove one of the calculation elements).

As the commercial sensitivity of sums recovered reduces significantly once accounts are published, the supplier acknowledges, after consultation, that the sums for years 1 and 2 can be disclosed, but withheld for year 3.

Provisional decision:

Disclose incentive mechanism and sums recovered for years 1 and 2, with some information removed.

Withhold sums recovered for year 3, citing section 43.

Example 5

Information requested: Total amount of money spent by the authority with supplier X over the last 10 years, broken down into price per contract and scope of the work in each case.

Timing of request: Immaterial

Working Assumption: Generally disclose

Discussion

The authority only holds information covering the last eight years. Its response is therefore limited to data covering eight years. Releasing the total sum spent does not significantly harm the supplier's commercial interests and there is a strong public interest in disclosure.

The price per contract has been made available on the authority's website for the past three years and under the Freedom of Information Act the authority is not obliged to supply information already publicly available (exemption section 21, 'Information accessible to applicant by other means'). Contract prices earlier than the three years (back to eight years) are not commercially sensitive and the authority decides these should therefore be disclosed.

The scope of the contracts has likewise been publicised for the past three years. However, there have been a number of exceptions where the contract has related to work for law enforcement agencies and these have not been published. Exemption 31 (law enforcement) is considered to apply in these instances and the authority considers that the public interest in disclosure is outweighed by the public interest against disclosure. These are excluded from the information to be disclosed, making it clear that the list is not complete for the reasons stated.

Provisional decision:

Inform requester that information older than eight years is not held.

Withhold contract prices and scopes for the last three years, citing section 21, but direct requester to where information is already available.

Withhold the scopes for certain contracts not already published, citing section 31

Disclose total money spent with supplier over eight years

Disclose contract prices and scopes not already published in last eight years (excluding those covered by section 31).

Example 6

Information requested: The reasons for choosing supplier Y to undertake a new road building programme.

Timing of request: One year after contract award

Working Assumption: Generally disclose

Discussion

The procurement exercise involved a full selection and award process, including the production of an Evaluation Strategy (ES), Evaluation Plans (EPs), Evaluation Models (EM) and an Evaluation Report (ER). An Evaluation Moderation meeting was held to refine the evaluation scores for the award phase. To answer the request, while avoiding releasing information not within scope of the request, the authority decides to respond by compiling a dossier of relevant information.

The information chosen comprises the following:

- overall procurement procedure, drawn from the ES
- selection criteria for the PQQ phase, drawn from the EP for the phase
- EM template used for the PQQ phase
- ER for the PQQ phase, with the following removed:
 - entrants' names (to anonymise information)
 - all information relating to an entrant's financial status
 - all information relating to an entrant's previous performance
 - any other information agreed as commercially sensitive.

Note that although information is made anonymous, the losing entrants may have been named elsewhere and the authority considers it too easy to connect information with the relevant bidders.

- selection criteria for the award phase, drawn from the EP for the phase
- EM template used for the award phase
- ER for the award phase, with the following removed:
 - o losing bidders' names (to anonymise information)
 - o all price information for losing bidders
 - o price breakdown information identified as sensitive by winning bidder
 - o information identified as commercially sensitive by losing bidders
 - o information agreed as commercially sensitive with winning bidder.

Note that although information is made anonymous, the losing bidders may have been named elsewhere and the authority considers it too easy to connect information with the relevant bidders. Note that in some cases, information is removed that has been identified as sensitive by the supplier, but not necessarily agreed as sensitive by the authority. To save time, the authority judges that the information in question is not strictly needed to properly meet the request and therefore consultation with all losing bidders is not needed; they pragmatically 'err on the side of caution'. Likewise, the policy indicates that losing bidder prices are not generally disclosed and again, prices are not needed to demonstrate 'due process' in this case.

- a summary of the overall findings of the evaluation moderation meeting (minutes were not kept of the meeting).

Provisional decision:

Disclose compiled dossier of information

Example Cases Involving Contracting

Case Ref: FS50084359

Date: 05/06/2008

Public Authority: Plymouth Primary Care Trust

Summary: The complainant requested a copy of a contract agreed by the Plymouth Primary Care Trust for the provision of an independent treatment centre. He also requested copies of correspondence concerning the contract. The public authority refused to disclose some of the requested information on the basis of the exemptions contained in sections 38 (health and safety), 40 (personal information), 41 (confidential information), 42 (legal professional privilege), 43(1) (trade secrets) and 43(2) (prejudice to commercial interests) of the Act. The Commissioner determined that some of the information contained in the contract, relating to how the service provider had calculated its prices, was exempt under section 41 and a limited amount of information contained in the additional documents was exempt under sections 40 and 43(2). He ordered the disclosure of the remainder of the information. This decision notice is currently under appeal to the Information Tribunal.

Section of Act/EIR & Finding: FOI 40 - Complaint Partly Upheld, FOI 41 - Complaint Partly Upheld, FOI 43 - Complaint Partly Upheld, FOI 17 - Complaint Upheld, FOI 38 - Complaint Upheld.

Case Ref: FS50115188

Date: 17/06/08

Public Authority: BBC

Summary: The complainant requested the number of staff in certain categories engaged to work on Eastenders, the annual staff costs of Eastenders and the range of contract values. The BBC provided to the complainant the number of staff engaged but refused to provide the remaining information on the basis that it was held for the purpose of journalism, art or literature. During the course of the investigation the BBC also sought to rely on exemptions under the Act to withhold the information. The Commissioner has investigated and concluded that the BBC misapplied the Schedule 1 derogation and that the information requested falls within the scope of the Act. The Commissioner investigated the BBC's application of the exemptions and found that the range of contract values is exempt under section 12 as to provide the information would exceed the cost limit. However the Commissioner found that the annual staff costs of Eastenders is not exempt under section 43 and should therefore be provided to the complainant within 35 calendar days of this notice. This decision notice is currently under appeal to the Information Tribunal.

Section of Act/EIR & Finding: FOI 12 - Complaint Not Upheld, FOI 43 - Complaint Upheld.

Case Ref: FS50131138

Date: 19/06/2008

Public Authority: Mid Suffolk District Council

Summary: The complainant requested the Council to release a copy of the tendering document submitted by the contractor awarded the contract to carry out the repairs, maintenance and work at Mid Suffolk Leisure Centre for compliance with the Disability Discrimination Act. The Council responded informing the complainant that it was willing to make a redacted version of the document available for his inspection. However, it advised the complainant that it was unwilling to disclose the financial details submitted by the contractor (mainly the price quoted for each task to be undertaken) as it considered this information was exempt from disclosure under section 43 of the Act. The Commissioner considered the requested information and concluded that section 43(2) of the Act is not engaged. He has therefore requested the Council to disclose the requested information within 35 days of this Notice.

Section of Act/EIR & Finding: FOI 43 - Complaint Upheld.

Case Ref: FS50141374

Date: 28/07/2008

Public Authority: Department for Transport

Summary: The complainant requested the Net Present Value ("NPV") figures offered by the unsuccessful bidders for the South Western rail franchise. This request was made to the Department for Transport (the "DfT"). The DfT confirmed that it held this information, but refused to disclose it, stating that it believed that this information was exempt from disclosure under section 43(2) of the Act. After investigating the case the Commissioner decided that section 43(2) was not engaged. Therefore he found that the DfT had acted in breach of section 1(1)(b) of the Act. He also found that it had acted in breach of section 17(1)(b) and (c) of the Act by seeking to rely upon an exemption not previously cited in its refusal notice. He also found that the DfT had breached section 10 of the Act. The Commissioner requires that the withheld information should be disclosed. Information Tribunal appeal (EA/2008/0070) has been withdrawn.

Section of Act/EIR & Finding: FOI 1(1)(b) - Complaint Upheld, FOI 10 - Complaint Upheld, FOI 17(1)(b) - Complaint Upheld, FOI 17(1)(c) - Complaint Upheld, FOI 43(2) - Complaint Upheld.

Case Ref: FS50088736

Date: 29/01/2009

Public Authority: Department of Health

Summary: The complainant requested a copy of a contract agreed by the public authority for the provision of a national broadband network under the NHS National Programme for IT with certain information removed. The public authority initially refused to disclose the contract under sections 12 (cost of compliance exceeds the appropriate limit) and 43(2) (prejudice to commercial interests) of the Act. It subsequently also sought to rely on sections 40(2) (personal information) and 41 (information provided in confidence). During the course of the investigation, the complainant accepted the public authority's application of section 40(2) to certain information in the contract. The Commissioner determined that sections 12, 41 and 43(2) were not applicable and ordered that a redacted version of the contract be disclosed to the complainant. He also found that the public authority had not complied with section 1(1)(b), as it did not provide the requested information by the time of the completion of the internal review, and section 10(1), as it did not provide the requested information within 20 working days of the request. In addition, it breached section 17(1)(b) and (c), as it failed to state in its refusal notice that it believed that sections 40(2) and 41 were applicable to the information requested nor explain why they applied.

Section of Act/EIR & Finding: FOI 1 - Complaint Upheld, FOI 10 - Complaint Upheld, FOI 12 - Complaint Upheld, FOI 17 - Complaint Upheld, FOI 40 - Complaint Not upheld, FOI 41 - Complaint Upheld, FOI 43 - Complaint Upheld.

Case Ref: FS50130225

Date: 23/02/2009

Public Authority: King's College London

Summary: The complainant requested a copy of a tender document that preceded a contract between the public authority and UK Sport for the public authority to carry out drug testing. The public authority initially refused the request on the grounds that the information was exempt under section 43(2) (commercial interests). Following the intervention of the Commissioner, the public authority altered its stance and stated that the information requested was not held. The Commissioner finds that the public authority is correct in stating that the information requested is not held and therefore that it is not obliged to disclose the information under section 1(1)(b) of the Act. However, in incorrectly confirming that

the information was held when initially refusing the request it breached section 1(1)(a) of the Act. The Commissioner also finds that the public authority failed to comply with the requirements of sections 17(1)(b) and (c) and 17(3)(b) when issuing an inadequate refusal notice.

Section of Act/EIR & Finding: FOI 1 - Complaint Partly Upheld, FOI 17 - Complaint Upheld.

Case Ref: FS50130293

Date: 10/06/2009

Public Authority: Office of Government Commerce

Summary: The complainant requested the traffic light status (RAG), project titles and recommendations of gateway reviews carried out in the previous year by a number of government departments. The Office of Government Commerce (OGC) disclosed all but one of the project titles and gateway numbers of the current projects. The OGC refused to disclose the name of one project, its RAG status and recommendations under section 23(1), 33(1)(b) and 35(1)(a) of the Act. The OGC also refused to disclose the RAG status and recommendations of the other projects under section 33 and 35. The Commissioner has investigated and found that all the exemptions are engaged. However, he also finds that in relation to section 33 and 35 the public interest in maintaining the exemptions does not outweigh the public interest in disclosure. The OGC must disclose the information withheld under sections 33 and 35 within 35 calendar days of this notice. The Commissioner has also concluded that in failing to make available to the complainant information to which he is entitled the OGC has breached sections 1(1)(b) and 10(1) of the Act.

Section of Act/EIR & Finding: FOI 1 - Complaint Partly Upheld, FOI 10 - Complaint Upheld, FOI 23 - Complaint Partly Upheld, FOI 33 - Complaint Upheld, FOI 35 - Complaint Upheld.

Case Ref: FS50178268

Date: 28/07/2009

Public Authority: Ministry of Justice

Summary: The complainant requested a list of companies having contracts with 8 named prisons for inmates to carry out paid work for them. He also wanted to know the nature of the work and the value of each contract. The public authority released information in respect of the majority of contractors but withheld the remainder citing section 43(2) of

the Act. As some concerns also related to health and safety issues the Commissioner has also considered the application of section 38, although this was not cited by the public authority. The Commissioner's decision is that the exemptions at section 43(2) and 38(1) are not engaged. The complaint is therefore upheld and the Commissioner requires the information to be disclosed. The Commissioner further finds that the public authority breached sections 1(1)(b), 10(3) and 17(3).

Section of Act/EIR & Finding: FOI 1 - Complaint Upheld, FOI 10 - Complaint Upheld, FOI 17 - Complaint Upheld, FOI 38 - Complaint Upheld, FOI 43 - Complaint Upheld.

Case Ref: FS50088016

Date: 27/11/2008

Public Authority: Department for International Development

Summary: The complainant requested a copy of the winning tender proposal for a particular consultancy post along with details of the scores awarded to all of the tenders which the Department for International Development ('DFID') received. While DFID provided the complainant with the overall score awarded to the winning tender and the average score awarded to his tender (the complainant's tender was unsuccessful), DFID refused to disclose the winning tender proposal on the basis of sections 40(2) (personal data) and 43(2) (commercial interests) of the Act and also refused to disclose a detailed breakdown of the scores awarded to the tenders on the basis of section 43(2). The Commissioner has concluded that the winning tender is not exempt on the basis of section 43(2) of the Act and although some of the information contained in the winning tender is exempt on the basis of section 40(2) of the Act, a significant proportion of this information is not. The Commissioner has therefore ordered DFID to disclose this information to the complainant. With regard to the detailed score sheets for each tender, the Commissioner has concluded that the score sheets are the personal data of each individual who submitted a tender. Therefore, the Commissioner has decided that the score sheets held by DFID in relation to the complainant's tender are exempt on the basis of section 40(1). The Commissioner has also concluded that disclosure of the winning tenderer's score cards would be unfair is therefore exempt from disclosure on the basis of section 40(2).

Section of Act/EIR & Finding: FOI 10 - Complaint upheld, FOI 17 - Complaint upheld, FOI 40 - Complaint partially upheld, FOI 43 - Complaint upheld.



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Can Details of Pricing Structures, Product Specification, etc Be Protected From Third-Party Access Under FOI?

Yes, in most instances.

The provision of the FOI Act requires that such information be protected where any of the following circumstances apply:

- The record contains trade secrets of a person other than the person making the request, or
- The record contains financial, commercial, scientific, technical or other information whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or
- Where disclosure could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation, or
- Where disclosure of information could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.

Where the authority wishes to release such information, it may only do so in the following circumstances:

- Where the person or company concerned consents to release.
- Where the information or information of a similar type is generally available to the public, eg where the Minister would give such information in answer to a Parliamentary Question.
- Where the person or company has been advised, at the time that the information is received, that the information will be released.
- Where the Department believes that the public interest would be better served by disclosing rather than by refusing to disclose the information. In this instance, the views of the persons or company concerned must be sought in advance of a decision being made. Where the company refuses to agree to disclosure of the information, the matter will fall for decision by the Information Commissioner.

Compliance With Public Procurement Procedures

UK Government policy requires that appropriate arrangements be in place to ensure compliance with public procurement procedures pursuant to the UK's EU and international obligations.

The Consultation Process in Summary

- A careful inspection of the contents of the records involved to determine if they concern the interests of a third party.
- An initial assessment as to whether disclosure in the public interest may be considered.
- If the initial assessment tends towards disclosure in the public interest, identification of the third parties with whom consultation is required in accordance with section 29.
- If the initial assessment tends towards refusal, consideration of consultation with relevant third parties to determine if they have views on release or disclosure which may not have formed part of your initial decision making.
- Take all reasonable steps to locate and make contact with relevant third parties.
- Within 2 weeks, notify them in writing:
 - of the request (but not necessarily the name of the requester) enclosing copies of the records concerned, where possible,
 - that the decision maker is considering a preliminary decision to disclose the information and details of the public interest criteria under consideration. Details of the exemption under consideration should also be explained,
 - of the third party's right to make a submission within 3 weeks,

- that any submission will be carefully considered before the final decision is made, and that the third party will be advised of any decision to release the information,
- that if the decision is to grant the request against the wishes of the person consulted, that person shall have the right to seek independent review of the decision by the Commissioner before any information is released.
- Within 2 weeks of receipt of submissions (or within 2 weeks of the expiration of the time limit available to the third party) critically analyse the submissions received in the light of the relevant exemption provision and public interest considerations.
- If unable to consult, request the permission of the Commissioner to proceed to a decision.
- Objectively assess the likely effects of disclosure.
- Consider the results of any other enquiries made to ascertain the public interest in disclosing or withholding the information.
- Weigh the various public and private interests involved.
- Inform the third party and the requester of the decision. If the decision is to grant the request, advise a) the third party of his or her rights of appeal and b) the requester that the information must be withheld until the time for appeal to the Commissioner has expired.

Information for Tenderers

Good practice dictates that unsuccessful tenderers for public contracts should be informed of their position. Where the EU Directives apply, public authorities are also required to provide specified information to unsuccessful candidates and tenderers on request. For unsuccessful tenderers who have submitted a compliant bid the specified information to be provided includes the relative advantages of the winning tender and, where appropriate, the name of the winning tenderer.

For contracts subject to the European Directives, the awarding authorities are also required to publish notices of contract awards. These notices provide for publication of the 'price or range of prices paid' and the 'value of winning awards or the highest and lowest offer taken into account in the award of the contract'. Contract award notices can be very useful sources of information and should not be ignored.

Confidentiality of Tenders

In general, sensitive tender information held by public bodies and utilities is required to be kept confidential at all stages especially during the periods prior to tender opening, during tender evaluation and after the contract is awarded.

Suppliers tendering for government business should be aware that under FOI the value of contract awards and other information will most likely be disclosed.

However, the FOI Act also provides for certain types of information, including confidential information and commercially sensitive material held by public bodies, to be withheld from disclosure:

- Suppliers should always highlight in their tender documentation any information that they would not want disclosed, particularly under FOI.
- (Note, however, that if a public body proposes to release information against a supplier's wishes, the supplier has a right of appeal, to the Information Commissioner in the first instance. They can of course seek legal redress.)
- Under the European Directives, certain information can be withheld by buyers, but only under certain circumstances and only with justification.

While the public interest will rarely justify disclosure of a trade secret, there will be circumstances where commercial sensitivity is not a sufficient justification for non-disclosure. Where disclosure is necessary for the protection of public health, public safety or the environment, for example, such considerations may clearly outweigh financial loss or prejudice to the competitive position of a third party.

As the FOI policy develops, decisions will be made which will impact on what previously may have been regarded as confidential information. Suppliers need to be aware of the possible threats in this regard.

Information Feedback

Under the EU rules suppliers should expect to have ready access to:

- Routine non-confidential technical specifications regularly referred to by buyers.
- The criteria and rules used by buyers in drawing up tender lists.
- Direct points of contact for clarification of information.
- Information as to whether a contract has been awarded or the procedure cancelled or re-advertised.
- Information within 15 days of a request by an eliminated bid-list candidate or tenderer of the reasons for their rejection.
- In the case of an eliminated tenderer, the characteristics and relative advantages of the tenderer selected and the name of the successful tenderer.
- A contract award notice published in the Official Journal of the European Union, despatched within 48 days of contract award.

Low-Value Contract Advertising

Recent actions by the European Commission against Member States have led to European Court of Justice case law that even when the value involved is below the thresholds of the EU Procurement Directives the contracting authority should ensure a degree of advertising sufficient to ensure competition, to avoid discrimination on the grounds of nationality and to allow the impartiality of procurement procedures to be reviewed.

As the Commission puts it this advertising should be of an adequate degree in order to enable different businesses to compete so that the contract may be awarded to the tenderer submitting the best bid, thus guaranteeing that public money is well spent.

The precise scope and form of the advertising required depends on the nature of the services in question and the extent to which the contract is of interest to potential regional, national or EU-wide service providers.

Mechanisms for Access

Information may be faxed or mailed to those requesting it. Alternatively, an appointment to view can be arranged. There is no requirement on public authorities to allow those seeking access to information held to copy it. Indeed, this may give rise to a breach of copyright.

Effect of FOI on Competition

Rightfully, many suppliers to the public sector will be anxious that sensitive information they provide to authorities, particularly at the time of tendering, does not find its way to competitors.

Suppliers in the private sector will have to consider the implications for them of the Act. It may make public sector contracts less attractive than bidding for private sector contracts. FOI could also stifle innovation as suppliers may be unwilling to put forward ideas that may end up in the public domain due to authorities' obligations under the Act.

EU Remedies Directive

The Remedies Directive is intended to provide clear and effective procedures for EU economic operators seeking redress in cases where they consider they have been harmed or risk harm from a breach of the Procurement Directives.

FOI does not have a direct effect on the Remedies Directive. However, a supplier or interested party may well be able to seek redress under the Directive as a result of having gained access to information under the Act.

FOI and the Alcatel Case

In its Alcatel judgment (Case C-81/98), the European Court of Justice held that Member States are required to set up review procedures permitting a decision to award a public procurement contract to be suspended or annulled while any infringement can still be rectified.

This should allow an aggrieved tenderer to have a contracting authority's decision suspended by way of interim measures and set aside, notwithstanding the possibility, once the contract has been concluded, of obtaining an award of damages.

In the European Commission's view, neither UK nor Irish legislation currently complies in full with these requirements.

The Commission considers that a period of at least 14 days should be established between notification of the award decision and conclusion of the contract to allow suppliers to raise any concerns.

The Freedom of Information Act may, where unsuccessful suppliers feel aggrieved, be used to access information in support of any concern or grievance. It may prove very difficult for authorities to deny aggrieved suppliers access to relevant information pertaining to the award.



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Addendum

Ministry of Justice Guidance

Freedom of Information and Public Procurement – Working Assumptions

How requests for certain kinds of information should be treated within the different phases of procurement processes.

What Information Does This Cover?

These working assumptions aim to guide you on how requests for certain kinds of information should be treated within the different phases of procurement processes, and in the period immediately after a contract has been completed. Information generated by and given to public authorities as part of the process of procuring goods and services from commercial suppliers is referred to as 'procurement information' throughout these working assumptions.

Working Assumption

The question of whether 'procurement information' should be released in response to a request made under the Freedom of Information Act or the Environmental Information Regulations will depend on what kind of information it is, and in what phase of the

procurement process the information is requested. Annex A contains five broad categories of information and details when it is appropriate to release information. Annex B provides some useful worked examples.

Referral Points

Where information is requested that is not covered by the assumptions, or you think for any reason that the assumption should not apply, then the request must be referred to the Clearing House.

Whenever information supplied to your public authority by a third party (for instance, a supplier) is requested, you should always seek its views about the sensitivity of the information in question. The final decision on the release or withholding of information rests with the public authority that holds the information. The views of third parties can inform your decision-making, but they cannot bind you, and you may sometimes find your authority releasing information against the wishes of the third party that supplied it.

For more detailed information about freedom of information and procurement information please see the Office of Government Commerce's freedom of information (civil procurement) policy and guidance.

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