



**FREEDOM OF INFORMATION ACT 2000**

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**Introduction**

The Freedom of Information Act 2000 (FOIA) came into full effect on 1 January 2005. It provides for a general right of access to information held by public authorities in England, Wales and Northern Ireland. There is similar legislation for public authorities in Scotland.

FOIA applies to approximately 100,000 public authorities, operating at all levels, for example: Central Government departments and agencies; local authorities; NHS bodies, including individual GPs, dentists, opticians and pharmacists; schools, colleges and universities, the police, the armed forces, quangos, regulators and advisory bodies. Courts and tribunals are not covered by FOIA, neither are the security and intelligence services. UK public authorities which operate in Scotland are covered by the UK Act rather than the Scottish legislation.

FOIA lists out a number of organisations which it specifically designates as public authorities for the purposes of FOIA. Those relevant to the construction industry and the higher education sector include:-

- the Building Regulations Advisory Committee,
- the Commission for Architecture and the Built Environment,
- the Construction Industry Training Board,
- the Council for Science and Technology,
- the Economic and Social Research Council,
- the Environment Agency,
- the Health and Safety Commission and Health and Safety Executive,
- the Higher Education Funding Councils for England and Wales and
- the Medical Research Council.

The Lord Chancellor has been given the power to designate other bodies as public authorities if they carry out public functions, which power could, for example, conceivably be used to designate trade associations as public authorities where they are operating schemes for qualifying firms for technical competence under self certification schemes. This power could also be used to designate private firms as public authorities where they are involved in PFI contracts, especially where they are running schools or prisons.

In essence, FOIA gives people a general right of access to information held by or on behalf of public authorities.

#### **What information is covered by FOIA?**

FOIA applies to any recorded information held by or on behalf of a public authority. This includes:

- Paper records
- E-mail
- Information stored on computer
- Audio or video cassettes
- Microfiches
- Maps
- Photographs
- Handwritten notes,

or any other form of recorded information.

The language used in communications should therefore now reflect the possibility of future disclosure. E-mails forming part of the public record should be properly managed.

Unrecorded information which is known to officials but not recorded is not covered.

The age of the information is irrelevant. The new rights of access apply to information recorded at any time, including information obtained before FOIA came into force.

There is nothing to stop the use of information obtained under FOIA in litigation. Requests are therefore likely to be made to support potential claims, as a form of "pre-action disclosure".

Anyone who destroys a record after the public authority has been asked for it, in order to prevent its disclosure, will be committing a criminal offence. However, it is not an offence to destroy records which have not yet been requested.

## **What is the justification for making such information available?**

FOIA is intended to promote a culture of openness and accountability amongst public sector bodies, and therefore to facilitate better public understanding of how public authorities carry out their duties, why they make the decisions that they do, and how (and why) they spend public money.

The justifications put forward for freedom of information legislation are on the whole twofold, based both on principle and on pragmatism.

The principled justification is that government exists to serve those who elect it and who fund it by their taxes, and that where a government holds information then it does so on the public's behalf. Such information should therefore not be kept secret without good reason. This justification applies to the relationship between government and commercial organisations just as much as it does to the relationship between government and private individuals: government activity ultimately depends on the wealth created by commercial undertakings.

The pragmatic justification is that it is assumed that a more open style of government will lead to better informed public debate, and hence a better quality of decision making.

The concept of freedom of information actually evolved in China more than 1200 years ago, during the Tang Dynasty. One of the early Chinese emperors, who ruled from 627 to 649, established an "Imperial Censorate", which not only recorded official government information but was also expected to scrutinise the government and its officials, criticise them where necessary and generally to expose mis-governance, bureaucratic inefficiencies and corruption.

Sweden was the first country to enact freedom of information legislation, in 1766. Two centuries later, the United States followed and many other countries now have mature FOIA regimes, including Australia, Canada and New Zealand.

### **The overseas experience**

In *Australia*, the overwhelming majority of applications has been to see personal files. As a means of opening up access to other information, the Australian FOIA 1982 is thought to have been less successful. Successive governments have been criticised for their excessive use of ministerial certificates, which ensure that documents are regarded as exempt from disclosure, and for using delaying tactics to thwart access.

In *Canada*, which also passed its legislation in 1982, whilst access by citizens to their personal files has been the most common use of the Act, business use has also been very significant, particularly by commercial rivals using the legislation as a means of securing competitive advantage over one another.

The legislation in *New Zealand* has come to be regarded as a critical element in the reform of central government.

In the *United States*, FOIA 1966 is judged to have delivered significant benefits, notably a reduction in unnecessary secrecy, greater openness, improved scrutiny and record keeping. The U.S. FOIA has however been widely criticised for the cost of its administration, the amount of litigation which it generates and because it has been used in ways which Congress never intended: 50 - 60% of requests are from commercial bodies seeking information on their business competitors. The total costs associated with the U.S. FOIA and associated legislation are estimated at \$100 million per annum; litigation makes up a substantial part of this total, partly because lawyers acting for commercial clients have long been significant users of it and partly because Government and Congress have declined to use an Ombudsman system to adjudicate between the users and the courts.

A number of different European countries have adopted freedom of information legislation but the overall picture is confused by the number of different approaches that have been taken, reflecting the diversity of legal and administrative systems within Europe.

For example, the Swedish system lists in detail the types of document that are exempt from disclosure, keeping discretion as to whether or not to release documents to a minimum, whereas in France the law on access to administrative documents, and its seven exemptions, has been criticised for being far too vague.

The UK experience is unique: no other country has introduced a statutory freedom of information regime on to a system already working to a formalised non-statutory openness regime through a Code of Practice, which has hitherto been the case in the UK.

### **The right of access under FOIA**

FOIA is summarised as:-

*"An Act to make provision for the disclosure of information held by public authorities or by persons providing services for them; and for connected purposes."*

Section 1 provides as follows:-

*"(1) Any person making a request for information to a public authority is entitled:*

*(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) If that is the case, to have that information communicated to him ..."*

Note that FOIA refers to "information" not "documents". Information requested will be extracted from any relevant document(s), but the whole document(s) will not necessarily be supplied.

It is important to note that FOIA applies not only to information held by a public authority but also to information held on behalf of a public body. A private contractor holding information on behalf of a public authority could be the direct recipient of a request for information or could be contacted by the public authority on whose behalf it holds the information in order to respond to a request. However, the obligation to respond to requests under FOIA is upon the public authority only, and private contractors should therefore not respond to requests, but should forward any requests received directly to the public authority as soon as possible. The private contractor's obligations in assisting with responding to requests for information held by them on behalf of the public authority will be determined by the contract under which the information is held. This should also determine who will bear the costs of collating information in response to a request.

Under Section 19, all public authorities are required to produce, maintain and disclose information in accordance with a publication scheme. This scheme will set out the classes of information which the public authority will publish, and how they will do it. All schemes must be approved by the Information Commissioner.

A publication scheme is thus not just a list of documents which the public authority already publishes. Rather than specifying individual documents, it will describe "classes" or "kinds" of information, such as minutes, reports, etc. It may also prescribe a charge for providing the information.

A request for information under FOIA must be in writing, stating the name and address of the applicant and describing the information requested. It can be made by e-mail.

Upon receipt of a request, a public authority may give the applicant a written notice stating that a fee will be charged for complying with their request; where a fee notice has been given, then the public authority is not obliged to provide the information unless the

fee is paid within 3 months from the date on which the fee notice was given to the applicant.

### Cost

Under Section 12, a public authority does not have to “comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit”; “the appropriate limit” means “such amount as may be prescribed, and different amounts may be prescribed in relation to different cases”.

Fees for disclosure where the cost of compliance exceeds “the appropriate limit” may be determined by the public authority in accordance with Regulations made by the Secretary of State.

A public authority’s publication scheme should give details of whether, and how much, the public authority will charge for providing the information requested.

If information is requested which is not contained within the publication scheme, the public authority may charge a fee as laid down in the Regulations, which currently provide that requests which will cost less than £450 to answer (£600 for requests to Central Government) will be free of charge, although public authorities may charge for the cost of photocopying and postage, etc. If the request will cost more than this to answer, the public authority can refuse to answer the request, or charge up to and including the full cost of answering.

The above cost limits are based on an hourly time charge of £25.

### Vexatious/repeat requests

Under Section 14, a public authority does not have to comply with a request for information “if the request is vexatious”; where it has previously complied with a request for information made by any person, then “it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request”.

Subject to the above, the public authority must comply with a request for information promptly, and, under Section 10, in any event not later than the twentieth working day following the date of receipt of the request.

The public authority's reply should confirm or deny whether or not they hold the information, and either provide the information requested or explain why it has not been provided, quoting an exemption under FOIA. If the request is refused, the reply must identify which exemption is being applied and give the applicant details of how to apply for an internal review of the public authority's decision. If after an internal review the public authority still refuses the applicant's request for information, the applicant can ask the Information Commissioner to review that decision. He can issue a "decision notice", which will give instructions to the public authority on the steps, including the release of the information, that need to be taken.

Parties may appeal against this notice to the Information Tribunal. If the decision notice is ignored, the Information Commissioner can issue an enforcement notice, which will give deadlines for the necessary action(s) to be taken. Ultimately, the Information Commissioner can ask the High Court to declare the public authority in contempt of court if it persists in non-compliance with his notices.

## Exemptions

Section 2 sets out the circumstances under which a public authority may refuse a request. In broad terms, these are as follows:-

- Absolute exemptions. These are cases where the right to know is wholly dis-applied. In some cases there is no legal right of access at all, for instance information supplied by or relating to bodies dealing with security matters. In other cases, for instance information available to the applicant by other means, or personal information relating to the applicant, it may be possible to obtain the information by alternative means although not through FOIA.
- Qualified exemptions. These are cases where a public authority, having identified a possible exemption, must consider whether there is a greater public interest in confirming or denying the existence of the information requested and providing the information to the applicant or in maintaining the exemption.

There are 23 categories of "exempt information" in FOIA, including:-

- Information accessible to the applicant by other means
- Information intended for future publication
- Information supplied by, or relating to, bodies dealing with security matters

- Information relating to national security, defence, international relations, relations within the United Kingdom
- Information the disclosure of which would, or would be likely to, prejudice the economic interests of the UK or the financial interests of any administration in the UK
- Information the disclosure of which would, or would be likely to, prejudice law enforcement
- Information relating to the formulation of government policy
- Information the disclosure of which would, or would be likely to, prejudice the effective conduct of public affairs
- Information the disclosure of which would, or would be likely to, endanger the health and safety of any individual
- Information relating to personal data
- Information provided in confidence
- Information which constitutes a trade secret
- Information the disclosure of which would prejudice the commercial interests of any person.

A public authority cannot contract out of its responsibilities under FOIA and unless information is covered by an exemption it must therefore be released if requested.

Some of the exemptions in FOIA are class exemptions and some “prejudice based”.

Class exemptions are designed to give protection to all information falling within a particular category; prejudice-based exemptions only come into force if a particular disclosure would prejudice the purpose of the exemption. Both class and prejudice-based exemptions are subject to the public interest test unless the Act states that they are absolute exemptions.

#### **What is the “public interest”?**

The term “public interest” is not defined in the Act but in effect, something “in the public interest” is, perhaps rather obviously, explained by the Information Commissioner in his Awareness Guidance as:

*“simply something which serves the interests of the public. When applying the test, the public authority is simply deciding whether in any particular case it serves the interests of the public better to withhold or to disclose information ...*



*The courts have often distinguished between things which are in the public interest and things which merely interest the public ...*

*It is also important to bear in mind that the competing interests to be considered are the public interest favouring disclosure against the public (rather than private) interest favouring the withholding of information. There will often be a private interest in withholding information which would reveal incompetence on the part of or corruption within the public authority or which would simply cause embarrassment to the authority. However, the public interest will favour accountability and good administration and it is this interest that must be weighed against the public interest in not disclosing the information.*

*It may sometimes be argued that information is too complicated for the applicant to understand or that disclosure might misinform the public because it is incomplete... Neither of these are [sic] good grounds for refusal of a request. If an authority fears that information disclosed may be misleading, the solution is to give some explanation or to put the information into a proper context rather than to withhold it."*

In the Introduction to the Freedom of Information Act 2000, the Information Commissioner listed a number of public interest factors which would encourage the disclosure of information, including:-

- *Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.*
- *Promoting accountability and transparency in the spending of public money. The public interest is likely to be served, for instance in the context of private sector delivery of public services, if the disclosure of information ensures greater competition and better value for money that is public. Disclosure of information as to gifts and expenses may also assure the public of the personal probity of elected leaders and officials.*
- *Allowing individuals and companies to understand decisions made by public authorities.*

The important point to grasp is that the public interest does not have a fixed meaning and that FOIA is designed to shift the balance in favour of greater openness.

Although any of the 23 exemptions could apply to information concerning the relationship between a public authority and a member of its construction project team, the most relevant exemptions are likely to be: information which has been provided in confidence, information the disclosure of which is likely to prejudice someone's commercial interests or prejudice the effective conduct of public affairs, and health and safety.

The Information Commissioner has published a series of Awareness Guidances which explain some of the exemptions, including the concepts of information provided "in confidence" and "commercial information".

Further useful guidance on all the exemptions is provided by the Office of Government Commerce (OGC), together with some draft confidentiality and FOIA provisions for inclusion, where appropriate, into contract documentation; further guidance is provided by the Information Commissioner and by the Department of Constitutional Affairs (DCA) who have also published Codes of Practice under Sections 45 and 46 of FOIA, the former dealing in detail with "desirable practice" on the discharging of a public authority's functions under Part I FOIA, and the latter with records keeping, management and destruction.

### **Section 36: Prejudice to effective conduct of public affairs**

Section 36 provides that:-

- " 1. *This section applies to*
  - a. *Information which is held by a government department..., and*
  - b. *Information which is held by any other public authority.*
2. *Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...*
  - b. *Would, or would be likely to, inhibit*
    - i. *the free and frank provision of advice, or*
    - ii. *the free and frank exchange of views for the purposes of deliberation, or*
  - c. *Would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

3. *The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with Section 1(1)(a) would, or would be likely to, have any of the effects mentioned in sub-section (2).*
4. *In relation to statistical information, sub-sections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person."*

"Qualified person" is defined in sub-section (5).

Section 36 is designed to protect the delivery of effective central government and enable ministers and officials to discuss policy options and delivery freely and frankly but also applies to all other public authorities covered by FOIA; it works by reference to the effects of disclosure of the information and is qualified by the public interest test.

The exemption will only apply if the reasonable opinion of a qualified person (as defined) is that certain forms of adverse effect would, or would be likely to, follow from a disclosure, by inhibiting

- The free and frank provision of advice, or
- The free and frank exchange of views for the purposes of deliberation.

The "provision of advice" may be internal within the public authority, or external, with the public authority either receiving advice from outside or itself providing advice to third parties.

The "exchange of views" is limited only by being "for the purposes of deliberation"; this will include processes of decision making, opinion forming or evaluation of the competing arguments or considerations which may influence the public authority's course of action but will exclude casual or trivial exchanges. The information must reveal the "thinking process" or reflection that has gone into a decision.

As pointed out by the DCA in their Guidance, the term "inhibit" is not found elsewhere in the FOIA exemptions; *"it suggests a suppressive effect - communications would be less likely to be made, or would be made in a more reticent or circumscribed fashion, or would be less inclusive"*. The Information Commissioner's view is that in the context of Section 36 *"it means to restrain, decrease or suppress the freedom with which opinions or options are expressed."*

The DCA Guidance goes on to say that public authorities:

*"will need to consider, in respect of each request for information, what effect disclosure would have on the provision of advice or the exchange of views. For example:-*

- *Would it make it more likely that the person or any other offering advice will be unwilling to do so in future?*
- *Would it inhibit that person or any other from offering unwelcome advice?*
- *Would it make it more likely that the person being advised will not ask for advice in future?*
- *Would it have a similar inhibiting effect on other people in future?*
- *Would it make it more likely that advice will be given that is materially different because of the possibility of disclosure?*
- *Will it make people less likely to engage in discussion (oral or written) as part of the deliberative process?*
- *Would it distort or restrain discussion?*
- *Would it result in pressure being brought to bear on officials to provide particular advice?*

*Information the disclosure of which might have a potentially inhibiting effect may be contained in formal minutes and submissions or recorded in the minutes of a meeting. Likewise the records of meetings will contain the exchange of views that took place in reaching a decision. The provision of advice and the exchange of views protected by this exemption is not limited to government ministers but includes advice and discussion which takes place at official level and within public authorities outside central government departments. The information sought does not need to be the full record of advice or an exchange of views to be capable of having an inhibiting effect; it may merely refer to it indirectly or affect it some other way. For example to disclose a reference to the fact that a confidential meeting has taken place or confidential advice has been given could in some circumstances itself have an inhibiting effect. The information need not even refer to the provision of advice or an exchange of views. It is the effect of disclosure which triggers the application of the exemption. The public interest test will then need to be considered."*

The residual exemption, namely prejudice to the effective conduct of public affairs, is so broadly expressed that a clear explanation will have to be given in any case in which this provision is relied upon, and particularly where it is the only exemption relied upon, as to how the conduct of public affairs would be prejudiced by disclosure.

The exemption under Section 36 is not an absolute exemption; it can only be used when the prejudice or harm set out in sub-section (2) can be demonstrated. The exemption is also subject to the public interest test. That means that even where prejudice can be demonstrated, it is still necessary to consider whether the public interest in withholding the information outweighs the public interest in disclosing it.

Considerations which may weigh in favour of withholding information include:-

- Premature disclosure of preliminary thinking may end up closing off better options due to adverse public reaction;
- The decision making process may not be properly recorded, in order to avoid creating information which is disclosable, and
- Appropriate expert advice may not be sought because of the reluctance of those who might supply it to engage in a debate where their contribution might be disclosable.

Under Section 36, information which is exempt information by virtue of Section 36 ceases to be exempt when it becomes a historical record, that is 30 years after it, or the most recent paper on the file in which it is contained, was created.

### **Section 38: Health and Safety**

Section 38 provides that:-

- " 1. *Information is exempt information if its disclosure under this Act would, or would be likely to*
  - *endanger the physical or mental health of any individual, or*
  - *endanger the safety of any individual.*
2. *The duty to confirm or deny does not arise if, or to the extent that, compliance with Section 1(1)(a) would, or would be likely to, have either of the effects mentioned in sub-section (1)."*

The DCA Guidance interprets some of the above terms as follows:-

- “ 1.1 Likely to endanger: In this context can be interpreted as meaning “likely to put someone’s health or safety at risk, or at greater risk”. It connotes risk of harm rather than harm itself; “likely to” suggests a result which could reasonably be expected, but which does not have to be specifically foreseeable.*
- 1.2 Physical or mental health: May and should be given a natural, general meaning to include bodily or psychological integrity and well being... They may include such matters as physical or mental impairment, injury, illness or disease (including the recurrence, aggravation, acceleration, exacerbation, or deterioration of any pre-existing impairment, injury, illness or disease). Mental health in particular may in an appropriate case include emotional and psychological well being, and should not necessarily be artificially limited to mental consequences identifiable by some particular medical or psychiatric pathology, nor to what is often called shock or trauma.*
- 1.3 Safety: Should again be given its ordinary meaning to include protection from harm. The OED defines safety as “...the state of being protected from or guarded against any hurt or injury; freedom from danger...”. As in the present context the term concerns the safety of individuals a broad approach is again likely to be right.*
- 1.4 Any individual: The exemption refers to the physical or mental health, and to the safety, “of an individual”. That person may be identified, or readily identifiable. But equally, he or she may be unidentified. He or she may be a member of a group or class of persons, any of whom or all of whom are likely to have their health or safety endangered by the disclosure. Or he or she may be a member of the public, where the danger is to the health or safety of the public at large”.*

Section 38 is not an absolute exemption, and in order to decide whether information should be disclosed or withheld, the public authority will therefore first need to assess the likelihood of disclosure endangering the health or safety of an individual and consequently weigh the competing public interest in disclosing or withholding the information in all the circumstances of the case.

As the DCA Guidance points out, *"it is important to bear in mind that information about health and safety is not the same as information which endangers health and safety. For example, the Health and Safety Executive is responsible for ensuring that risks to people from work activities are properly controlled and works with others to improve health and safety in the changing economy for the benefit of society as a whole. Not all information relating to health and safety will be information whose disclosure would endanger health and safety. It is also important to bear in mind that very much information relating to health and safety is likely to be environmental information and therefore exempt under Section 39..."*. [See below]

The DCA Guidance gives examples of disclosures *"with an evident potential for the kind of endangerment to which this exemption applies"*, including:-

- *Those which would allow individuals, groups or firms to be identified or located and consequently targeted and attacked for their beliefs or practices, including work in controversial scientific areas"*

Where a particularly vulnerable person is likely to be affected by disclosure, that may need to be taken into account.

Given that it is never in the public interest, of itself, to endanger the health and safety of any individual, this will in itself need to be taken into account. The DCA Guidance lists the following matters to be considered:-

- *The size of the risk involved, the likelihood of the outcome in question, and the extent to which steps might be taken to reduce or manage that risk.*
- *The nature and seriousness of the resulting outcome, were that risk to come about.*
- *The possibility that disclosure would help to protect the health and safety of other individuals.*
- *The possibility that the anticipated danger could be prevented or managed by other, reasonable, precautions."*

A public authority could potentially face a claim for damages if it discloses information in circumstances which could foreseeably injure someone. That makes it particularly important to consider any disclosure with this sort of potential with particular care. It will be crucial that the reasons for and processes of coming to that decision are very carefully

documented. It will also be necessary, where possible, to give the individual(s) likely to be affected an opportunity to make representations before the decision is taken.

### Section 39: Environmental information

Section 39 provides that:-

- " 1. *Information is exempt information if the public authority holding it*
  - a. *is obliged by regulations under section 74 to make the information available to the public in accordance with the regulations, or*
  - b. *would be so obliged but for any exemption contained in the regulations.*
2. *The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of sub-section 1."*

The effect of this section is to ensure that requests for "environmental information" within the meaning of the Environmental Information Regulations 2004 (EIRs) are dealt with under the separate access regime set out in those Regulations.

Regulation 2 provides that "environmental information" means "*any information in written, visual, aural, electronic or any other material form on:-*

- *The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites ... and the interaction among these elements,*
- *Factors such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment ...*
- *Measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements..."*

This definition is interpreted very broadly. The regulations apply to any information "held by or on behalf of" a body whether or not it was obtained as a result of that body's



environmental responsibilities. Information held by others on behalf of a public authority would include information held by consultants, private companies or in archives. There is no geographical restriction on this definition; the information may relate to anywhere in the world.

The same public interest test is applied by both FOIA and the EIRs.

In summary:

- If the information is environmental, the request must be processed under the EIRs,
- If the information may be sensitive, consider whether exemptions under the EIRs may apply,
- If a relevant exemption applies, then the public interest test is applied.

#### Section 40: Personal information

Section 40 of FOIA provides that:-

- " 1. Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
- 2. Any information to which a request for information relates is also exempt information if*
  - (a) it constitutes personal data which do not fall within sub-section (1), and*
  - (b) either the first or the second condition below is satisfied."*

The first condition is where the information falls within one of five categories of "data" as defined by the Data Protection Act 1998 and disclosure would contravene any of the 8 data protection principles or the right by the Act to prevent processing likely to cause damage or distress; the second condition is that the information is exempt under the DPA. The most relevant of the 8 data protection principles requires that personal data be "processed fairly and lawfully"; the DPA sets out to promote informational privacy.

The provisions of Section 40 govern the way in which decisions about the disclosure of personal information need to be approached; they have their origins in the following policy propositions, namely:-

- If an applicant has a right of access to information by virtue of the DPA, that is, he is asking for his own personal data, then the request should be considered and dealt with under DPA rules and not under FOIA rules;
- If someone could not get access to his own personal data under the DPA, no-one else should be able to get access to it under FOIA;
- In other cases, if the general DPA rules about handling personal data would prevent disclosure, an applicant would not be able to have access to it;
- But otherwise, personal information is accessible under FOIA.

Structurally speaking, the starting place is that the rights of access created by Section 1 FOIA do apply to the personal information of individuals, but:-

- Where provision is already made for that information to be accessible under the DPA, the DPA rules will apply, and
- Where provision is made for that information to be non-disclosable under the DPA, Section 40 removes any right of access under FOIA.

Section 40 therefore limits application of FOIA rights of access to personal information by reference to provisions of the DPA.

Within the procurement context, the most likely reason for a disclosure of commercial information relating to identifiable individuals to be unlawful would be if it were held in confidence. T.U.P.E. information is perhaps the most obvious example where a duty of confidence is likely to exist. Personal information held in these circumstances should not generally be disclosed. It might be possible to release summary information, e.g. numbers of staff affected, etc, from which individuals cannot be readily identified.

The Information Commissioner's Awareness Guidance has suggested a few questions to consider, such as:-

- *Would the disclosure cause unnecessary distress or damage to the individual (possibly an employee of a company targeted by special interest groups);*
- *Would disclosure be a surprise to the individual;*

- *Has disclosure been specifically refused by the individual?*

The OGC Guidance notes "*that disclosure of information that names an individual may expose that individual to attention, and ... such attention may be considered outside the expectations or responsibilities of that individual. For example, junior grade staff are not generally expected to cope with a high level of scrutiny and exposing them to that scrutiny could be unfair and potentially stressful to the individual. Although this aspect may not be strictly within the scope of exemption s40, it should nonetheless be a consideration when considering the public interest in disclosure*".

#### **Section 41: Information provided in confidence**

Section 41 of FOIA provides that:-

- "(1) Information is exempt information if*
- (a) it was obtained by the public authority from any other person (including another public authority), and*
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*
- (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial ... would ... constitute an actionable breach of confidence."*

There are thus two components to this exemption:-

1. The information must have been obtained by the public authority from "any other person"; a "person" may be an individual, a company, a local authority or any other legal entity.

The exemption does not cover information which the public authority has generated itself, although this may be covered by another exemption, under Section 43, where disclosure of the information may prejudice the commercial interests of the public authority: see below.

2. Disclosure of the information would give rise to an actionable breach of confidence, in other words, if the public authority disclosed the information, the provider or a third party could take the public authority to court.

A duty of confidence arises when one person (the "confidant") is provided with information by another (the "confider") in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected, for example, a person whose details were included in the information confided, may have the right to take action through the courts.

The law of confidence is a common law concept, which means that, rather than an Act of Parliament setting out what is confidential, what is not and what are the penalties for a breach of confidence, the law in this area has been developed by the courts.

For the purposes of FOIA, the key issue is likely to be the disclosure rather than the use of information. The Information Commissioner in his Awareness Guidance says that "*it is likely to be necessary to think first about the circumstances under which the information was provided to the authority and second about the nature of that information*".

As for the circumstances under which information is provided, there are essentially two cases:-

1. When the confider provides information to the authority, explicit conditions are attached to its subsequent use or disclosure. This may take the form of a contractual term, or may be stated, for example, in a letter.
2. Conditions are not explicitly stated, but are obvious or implied from the circumstances.

Information which is protected from disclosure by an obligation of confidence must have the necessary "quality of confidence". There are two key elements to this:-

1. The information need not be highly sensitive, nor can it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This is undermined if it is argued that even trivial matters are covered.
2. The information must not be readily available by other means.

The duty of confidence is not absolute. The courts have recognised three broad circumstances under which confidential information may be disclosed, as follows:-

1. Disclosure with consent
2. Disclosure required by law, and

3. Disclosure where there is an overriding public interest.

The courts have generally taken the view that the grounds for breaching confidentiality must be strong.

Public authorities relying upon the exemption must be satisfied that any breach of confidence would be actionable, meaning that an aggrieved party would have the right to take the public authority to court as the result of the disclosure. There are two considerations:-

1. The public authority must be satisfied that the information in question is in fact confidential.
2. The aggrieved party must have the legal standing to take action.

The courts have recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence.

Whether or not a public authority holds information subject to a duty of confidence will therefore depend largely on the circumstances in which it was obtained and whether the public authority expressly agreed to keep it confidential. The Lord Chancellor's Code of Practice, issued under Section 45 FOIA, limits the circumstances in which a public authority should agree to hold information in confidence.

If the exemption under Section 41 is incorrectly applied, and information is wrongly disclosed, a public authority may in some circumstances be exposed to an action for damages for breach of confidence. If the information is wrongly withheld, however, a public authority may face sanctions under the Act.

To be subject to the duty of confidence, the information must be information which is worthy of protection, in other words someone must have an interest in the information being kept confidential. As the Code of Practice and Guidances take pains to emphasise, even if a commercial contract states that everything in the contract is "confidential", any information which would generally be regarded as trivial will nonetheless fail the test and not be regarded as confidential.

For information to be "confidential", it must also be "inaccessible", in the sense of not being in the public domain or a matter of public knowledge. Whether the information is in the public domain is a question of degree; it will depend on the circumstances and the extent of public knowledge at the time when disclosure is requested.

As stated above, the courts will recognise that a person holds information subject to a duty of confidence in two types of situations:-

- (a) Where that person expressly agrees or undertakes to keep information confidential: there is an express duty of confidence, and
- (b) Where the nature of the information or the circumstances in which the information is obtained imply that the person should keep the information confidential: there is an implied duty of confidence.

Where a public authority expressly agrees to keep information confidential, a duty of confidence is likely to arise, provided that the information has the necessary quality of confidence. For example, where a public authority signs a contract which contains a confidentiality clause, or agrees in correspondence that, if information is provided, it will be kept confidential, subject, as stated above, to that information having the "necessary quality of confidence".

Public authorities must consider the application of this exemption not only when disclosure of confidential information is requested, but also when potentially confidential information is obtained. If information does not need to be kept confidential, but the public authority expressly agrees to keep it confidential when it is obtained, this may result in the information being exempt from FOIA, but the public authority should give careful consideration to the Lord Chancellor's Code of Practice, which sets out the following circumstances in which a public authority should accept information in confidence:-

- " 1. Public authorities 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 the public authority's functions, and it would not otherwise be provided;*
- 2. Public authorities should not agree to hold information received from third parties "in confidence" if it is not confidential in nature, and*
- 3. Acceptance of any confidentiality provisions must be capable of justification to the Information Commissioner."*

This Code has considerable force; it is one of the duties of the Information Commissioner to promote its observance and there is a high expectation that public authorities will adhere to it. A court will be likely to take its provisions into account when determining whether or not a public authority has complied with FOIA.

When considering whether to agree to hold information subject to a duty of confidentiality, the following factors, set out in the DCA Guidance, may be relevant:-

- " 1. The nature of the interest which is to be protected and whether it is necessary to hold the information in confidence in order to protect that interest;*
- 2. Whether it is possible to agree to a limited duty of confidentiality, for example by clearly stating the only circumstances in which a public authority would disclose information;*
- 3. Whether the information will only be provided on the condition that it is kept confidential and, if so, how important the information is in relation to the functions of that public authority, and*
- 4. The nature of the person from whom the information is obtained and whether or not that person is also a public authority to whom FOIA and the Code of Practice apply."*

If it is necessary and justifiable for a public authority to agree to keep the information confidential, that public authority should take practical steps to respect the confidential nature of the information. Ensuring that the circulation of confidential information is controlled, and that the confidential status of that information is regularly reviewed, will assist when responding to requests for disclosure under FOIA. See further at pages 26 and 27 below.

As far as an implied duty of confidence is concerned, this may still arise even though a public authority has no pre-existing relationship with the person to whom the duty is owed, or has not actually agreed to keep the information confidential.

Some information which is obtained by a public authority will be manifestly confidential; by its very nature, it will be clear both that substantial harm could be caused by its disclosure and that the public authority should not disclose it to members of the public. Whether the nature of the information concerned means that it is held subject to a duty of confidence is a question of degree and will, to a certain extent, depend on the circumstances at the time that disclosure is requested.

Factors which may be relevant in ascertaining whether information is held subject to an implied duty of confidence could include the following:-

1. Whether there is a long standing, consistent and well known practice on the part of the public authority of protecting similar information against disclosure, and the supplier of the information could reasonably have expected this to continue.
2. Whether the information is provided gratuitously or for consideration - in the latter case, it is, according to the DCA, less likely that an obligation of confidence would arise.

#### Existing ("legacy") contracts

A public authority may of course have previously entered into contracts which included very broad confidentiality clauses as a result of which the contractor or consultant may expect all information relating to the contract and its commercial relationship with the public authority to remain confidential, even where such information would not be exempt under FOIA.

The Information Commissioner suggests that:

*"a public authority may consider it wise to review high value contracts or other contracts that are likely to attract requests, for example those implementing or relating to controversial policies. Where reviewing such contracts public authorities should aim to advise contractors as to the circumstances in which information may be released under FOIA and to establish consultation procedures.*

*By satisfying itself that the release of information will not prejudice the commercial interests of any party, or provide a basis for an actionable breach of confidence and by being open with contractors about its duties under the Act, a public authority can reduce the risk of a significant claim for breach of contract as a result of any disclosure under the Act."*

#### The public interest test

Although Section 41 itself provides an absolute exemption, the public interest test is still relevant as, when considering the application of Section 41, a public authority must consider whether the public interest in disclosure of the confidential information concerned means that it would not constitute an actionable breach of confidence to disclose that information to the public. When conducting this balancing exercise, the public authority should apply the following principles:-

1. Where a duty of confidence exists, there is a general public interest in favour of keeping that confidence;



2. There is no general public interest in the disclosure of confidential information in breach of a confidence. If the public interest in keeping the confidence is to be outweighed, it will be necessary to identify a specific interest in favour of disclosure;
3. There is a public interest in ensuring public scrutiny of the activities of public authorities. If disclosure would enhance such scrutiny, then this will be a factor in the balancing exercise. However, where the interests of a private person (whether an individual or an organisation) are protected by a duty of confidence, the general interest in public scrutiny of information held by a public authority is unlikely in itself to override the public interest in keeping the confidence;
4. The fact that FOIA would require disclosure were it not for Section 41 is irrelevant;
5. When considering the balance of interests, public authorities must have regard to the interests of the person to whom the duty of confidence is owed; the public authority's own interests in non-disclosure are not relevant to the application of this exemption, and
6. No regard may be had to the identity of the person who is requesting the information, nor to the purpose to which they will put the information. A request for information from a journalist or pressure group must, for example, be treated in the same way as a request from a person who is conducting historical research.

If a court would conclude that the public interest in disclosure to the public outweighed the public interest in keeping the confidence, then the information will not be exempt under Section 41 and therefore, unless any other exemption applies, the information must be disclosed.

As stated above, when considering the public interest balancing test, no regard may be had to the motive for the request, nor to the effect which disclosure to that particular person making the request would have. Regard must be had, however, to the effect which disclosure to the public would have. Examples of cases where there may be a public interest in the disclosure of confidential information include:-

1. Information revealing misconduct/mismanagement of public funds;
2. Information which shows that a particular contract is bad value for money, and

3. Where a substantial length of time has passed since the information was obtained and the harm which would have been caused by disclosure at the time the information was obtained has depleted.

Examples of cases where the public interest is unlikely to favour the disclosure of confidential information include:-

1. Where disclosure would engender some risk to public or personal safety;
2. Where disclosure would be damaging to effective public administration;
3. Where there are contractual obligations in favour of maintaining confidence;
4. Where the duty of confidentiality arises out of a professional relationship, and
5. Where disclosure would affect the continued supply of important information.

There is an important distinction to be drawn between a duty of confidence owed by a public authority to a private person and a duty owed by one public authority to another. There is no general public interest in keeping confidential the information which relates to the activities of public bodies.

#### **The duty to confirm or deny**

By Section 41(2), the obligation to confirm or deny that the requested information is held does not arise if such a confirmation or denial would in itself represent an actionable breach of confidence. When ascertaining whether confirmation or denial would constitute an actionable breach of confidence, the same considerations will apply as to the disclosure of the information itself:-

- (a) Is the fact that the public authority does or does not hold the information itself information which is held subject to a duty of confidence?

and

- (b) Would confirmation or denial constitute an actionable breach of that duty of confidence?

#### **Consultation of third parties**

The Lord Chancellor's Code of Practice deals with consultation of third parties in relation to FOIA requests and provides:-

1. Where a disclosure cannot be made without the consent of a third party, for example if disclosure of the information would be a breach of confidence to which Section 41 would apply, then the public authority should consult that third party with a view to seeking their consent to the disclosure unless such a consultation is not practicable, for example because the costs of consulting them would be disproportionate;
2. If a public authority considers that consultation would be disproportionate, it should consider what is the most reasonable course of action for it to take in light of the requirements of FOIA and the individual circumstances of the request.

### **Duration of the exemption**

The Section 41 exemption does not cease to apply after a specified period, but the passage of time may however mean that the information is no longer sufficiently sensitive to be considered “confidential” or that the public interest in keeping the confidence has been substantially weakened. If a public authority receives a request for information which, although it was confidential when it was obtained, was obtained a long time ago, the public authority should consider carefully whether the disclosure of that information would still constitute an actionable breach of confidence under Section 41.

### **How to use this exemption**

In all cases where a decision is taken to withhold information, it is extremely important for the public authority to ensure that there are clear reasons for the refusal to disclose, which will stand up to scrutiny not just by the Information Commissioner but, if necessary, the courts. It is essential that the reasons for the decision are properly recorded and that there is an audit trail to demonstrate how the decision was reached. In particular, this must show why the public interest in favour of keeping the confidence was not outweighed by any countervailing public interest in disclosure.

If a public authority considers that there is a strong public interest in a particular applicant knowing information which is actually exempt under Section 41, and it would be both possible and in the public interest to disclose the information to that person, or if the information could be disclosed subject to an undertaking of confidentiality by the applicant without breaching the duty of confidence, the public authority may still be able to disclose the information even though the request has been refused under FOIA. The circumstances in which this is possible will be very limited and will depend heavily on the identity of the applicant, a knowledge of the purposes to which the applicant intends to put the

information and the ability of the authority to disclose the information subject to conditions of confidence without breaching the duty of confidence.

### Inter-relation with other exemptions

When considering whether a request for information should be refused on the basis of Section 41, a public authority should also consider whether the information may be protected from disclosure by virtue of another exemption, for example:-

Section 40: If confidential information is personal information, the personal information exemption may apply, and

Section 43: Where information is confidential because it is commercially sensitive, in which case the commercial interest exemption should be considered.

### Handling confidential information: practical guidance

The guidance proposed by the DCA is as follows:-

*" 1. Public authorities should take the following practical steps to respect the confidential nature of the information:-*

*.1 When receiving the confidential information, public authorities should state explicitly that such information will be held on an understanding of confidence, subject to the requirements of FOIA and other legal requirements;*

*.2 Once the information has been supplied, steps should be taken to ensure that the physical handling of the information respects its confidential nature through, for example:-*

*.1 restricting circulation to those who need to see the information,*

*.2 indicating clearly on the file cover the confidential nature of the content,*

*.3 ensuring that hard copies are physically secure in locked cabinets or drawers, and*

*.4 ensuring that electronically held records are adequately protected.*

- .3 *Consider whether and at what intervals it will be necessary to review the confidentiality of the information to ensure that only information whose disclosure would still be exempt by virtue of Section 41 is protectively marked: the need to keep information confidential is likely to decrease over time;*
2. *Adherence to these standards will help the management of confidential information and assist with responding to future FOIA requests."*

The Lord Chancellor's Code of Practice suggests as follows:-

- " 31 *Public authorities should bear clearly in mind their obligations under FOIA when preparing to enter into contracts which may contain terms relating to the disclosure of information by them.*
- 32 *When entering into contracts with non-public authority contractors, public authorities may be asked to accept confidentiality clauses, for example to the effect that information relating to the terms of the contract, its value and performance will not be disclosed. Public authorities should carefully consider the compatibility of such terms with their obligations under the Act. It is important that both the public authority and the contractor are aware of the limits placed by the Act on the enforceability of such confidentiality clauses.*
- 33 *The Act does, however, recognise that there will be circumstances and respects in which the preservation of confidentiality between public authority and contractor is appropriate, and must be maintained, in the public interest.*
- 34 *Where there is good reason, as recognised by the terms of the exemption provisions of the Act, to include non-disclosure provisions in a contract, public authorities should consider the desirability where possible of making express provision in the contract identifying the information which should not be disclosed and the reasons for confidentiality. Consideration may also be given to including provision in contracts as to when consultation with third parties will be necessary or appropriate before the information is disclosed."*

One further practical point to consider is whether there is a way of providing information so that it is not "held" by the public authority. For example, information may be made

available on password-protected websites in a form which does not allow printing or downloading.

### Section 43: Trade secrets and commercial interests

Section 43 states as follows:-

- "(1) Information is exempt information if it constitutes a trade secret.*
- (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*
- (3) The duty to confirm or deny does not arise if, or to the extent that, compliance with Section (1)(a) would, or would be likely to prejudice the interests mentioned in sub-section (2)."*

FOIA does not define a "trade secret", nor is there any precise definition in English law. However, the essence of a trade secret is generally regarded as comprising the following:-

1. It must be information used in a trade or business. Information may be commercially sensitive without being the sort of secret which gives a company a "competitive edge" over its rivals which would constitute a "trade secret". The Information Commissioner gives an example of a public authority holding information about the state of repair of a manufacturer's equipment. While information about the design of the equipment may constitute a trade secret, information about its state of repair would not (even though it may be commercially sensitive) since it is not information which is used to help generate profits.
2. It is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. In considering cases involving former employees, the courts have often found that the question of whether or not the employee knew that disputed information was a trade secret was important.
3. The owner must limit the dissemination of the information or, at least, not encourage or permit widespread publication of it. It may be a statutory requirement for the information to be published in some form, e.g. at the Land Registry, Companies House, etc and the information may therefore already be common knowledge in the business community. If the information is known beyond a narrow circle, then it is unlikely to constitute a trade secret.

Trade secrets are normally associated with matters such as secret processes of manufacture, special formulae, etc, in other words the idea of something commercially valuable in its own right which is private to the owner. How easy would it be for competitors to discover or reproduce the information for themselves? The Information Commissioner says that *"generally, the less skill, effort or innovation that was required to generate the information in the first place, the less likely the information is to constitute a trade secret. By the same token, the easier it would be for a competitor to recreate or discover that information through his own efforts, the less likely it is to be a trade secret"*.

Information relating to a company's solvency, its ability to carry on business and its relationship with its holding company, although commercially sensitive, does not constitute a trade secret.

The Irish Information Commissioner has held that the price of a bid could constitute a trade secret up until the time the bid was accepted [Decision No. 9849, 31 March 1999].

FOIA applies equally to a public authority's own trade secrets as well as those of, for example, a contractor or consultant with whom it is doing business.

A "commercial interest" is regarded as relating to an activity in the way of a business, trade or profession; as in the case of trade secrets, FOIA applies equally to the commercial interests of a public authority as well as those of external organisations.

When it comes to considering a public authority's own commercial interests, a range of circumstances may be applicable, for example the authority's position in the marketplace, both as a purchaser and as a supplier. The prejudice to the commercial interests of a public authority must however be contrasted with prejudice to other interests, such as the public authority's political or other interests which are not protected by this exemption.

There is a distinction between commercial interests and financial interests, which the DCA Guidance describes as follows:-

*"A commercial interest relates to a person's ability successfully to participate in a commercial activity, whereas ...*

*A financial interest concerns the financial position of an individual or organisation.*

*Although the commercial and financial interests of a commercial entity may be extremely closely related - if it has a weak financial position, that will almost*

*certainly affect its ability to engage in commercial activity - that is not necessarily so in the case of a public authority."*

Section 43(2) is a prejudice-based exemption, with the test being whether or not the commercial interests concerned would, or would be likely to, be prejudiced by disclosure.

Section 43(3) provides an exemption from the duty to confirm or deny whether or not the public authority holds information which could prejudice commercial interests, where acknowledging this could in itself be prejudicial.

This section is subject to the public interest test set out in Section 2 of the Act. It does not apply beyond 30 years, the point at which information becomes a "historical record".

### **Types of information which may affect commercial interests**

In his Awareness Guidance number 5, the Information Commissioner gives an indicative list of some of the reasons why a public authority may possess commercial information, including:-

- *Procurement - public authorities are major purchasers of goods and services and will hold a wide range of information relating to the procurement process. This could be future procurement plans, information provided during a tendering process, including information contained in unsuccessful bids right through to the details of the contract with the successful company. There may also be details of how a contractor has performed under a contract.*
- *Regulation - public authorities may be supplied with information in order to perform their regulatory functions.*
- *Public authority's own commercial activities - some public authorities, for instance publicly owned companies, are permitted to engage in commercial activities. Any information held in relation to these will potentially fall within the scope of the exemption.*
- *Policy development - During the formulation or evaluation of policy a public authority may seek information of a commercial nature. For example in developing a policy aimed at promoting a particular industry a public authority may solicit information from companies in that sector.*



- *Private Finance Initiative/Public Private Partnerships - the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature in public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.*

*In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's commercial interests, i.e. it is necessary to apply the test of prejudice. It will then be necessary to apply the public interest test."*

**When could releasing information cause prejudice to commercial interests?**

The DCA Guidance states as follows:-

*"In order to decide whether or not disclosure could prejudice commercial interests, it is necessary to identify:-*

- *The interests themselves and how disclosure might prejudice them, and*
- *Whose interests they are.*

*A [public authority's] or other body's commercial interests might, for example, be prejudiced where disclosure would be likely to:-*

- *Damage its business reputation or the confidence that customers, suppliers or investors may have in it;*
- *Have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance; or*
- *Weaken its position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors."*

The Information Commissioner's check-list is as follows:-

- Does the information relate to, or could it impact on, a commercial activity?
- Is that commercial activity conducted in a competitive environment?

- Would there be damage to reputation or business confidence?
- Whose commercial interests are affected?
- Is the information commercially sensitive?
- What is the likelihood of the prejudice being caused?

The DCA gives the following guidance:-

*“It is important to note, however, that a simple assertion by an individual or public body that there would be prejudice to his or its interest is not sufficient. The assertion must be supported by reasoned argument, and where practicable by empirical evidence. In particular it is not sufficient for a body simply to mark a document “commercial in confidence” for the information in it to be exempt. But it is also important, in this and other contexts, to be alert to the differences between using this exemption to protect the interests of a third party and using it to defend a public authority’s own interests. These differences are considered in further detail below.*

*Commercial sensitivity will often decay over time - in some cases quite quickly. The question to be considered is whether the prejudice applies at the time the request is received. For example release of information about a new product prior to public release could be damaging, but after release might not be.*

*Examples of information the disclosure of which may have a particular potential to damage commercial interests include:-*

- *strategic business plans, including for example plans to enter, develop or withdraw from a product or geographical market sector;*
- *information relating to the preparation of a competitive bid;*
- *information about the financial and business viability of a company;*

*In situations where a third party has provided information, for example voluntarily, where the third party concerned is bidding for a contract, an important element of considering whether the disclosure of information would be likely to prejudice the commercial interest of a third party will be the terms on which the information was obtained by the public authority in the first place.*

*Although the third party's expectations of commercial confidence cannot determine the question of prejudice, they will often provide important evidence as to the third party's perspective as to the likely effect of disclosure. Establishing that perspective at the outset of the transaction and, where appropriate, consultation at the time of disclosure are likely to be important steps in considering whether there is an empirical case for reliance on Section 43. It must be stressed that the prejudice to third party interests has to be assessed objectively and by the [public authority] but the third party's perspective must be taken into account in that process ...*

*A disclosure may come within the terms of Section 43(2) by virtue of the likelihood of prejudice to the commercial interests of both the [public] authority and a third party, where the relationship between them is itself in the commercial interests of one or both parties, and where disclosure could damage that relationship and hence those interests.*

*This is again most likely to be the case where commercially sensitive information has been supplied to the [public] authority by the third party... although that will not always or necessarily be the case.*

*In this context, there is likely to be considerable overlap with the applicability of Section 41. Where information has been supplied by a third party in circumstances giving rise to a legal duty of confidence, and disclosure would breach that duty, there is a clear potential for the application of Section 41. Where Section 41 applies, then it should always be considered before Section 43. It is an absolute exemption, and failure to withhold information where it applies has a potential to expose an authority to legal action.*

- *The connection between prejudice to the relationship and prejudice to one or other party's (or both parties) commercial interests must be real and demonstrable;*
- *A third party's objection to a specific disclosure is one, but only one, aspect of the overall relationship between the authority and the third party and;*
- *Where the relationship is expressed in contractual terms, the fact that a disclosure would amount to a breach of contract may be a relevant consideration on the question of commercial prejudice, but cannot be considered separately from the commercial interests in the contract terms themselves. [Public authorities] are strongly advised not to accept*

*confidentiality clauses in procurement contracts that conflict with their obligations under the Act. Under the terms of FOIA the decision as to whether to withhold or disclose the information is ultimately a matter for the public body, regardless of whether the information was originally supplied by a third party and the fact that a disclosure would be in breach of contract cannot be determinative of the legal obligations under the Act.*

*The public interest balance has to take into account not only the nature and extent of the prejudice to the relationship but the context and quality of the relationship itself. The public interest in promoting that relationship needs to be considered in its own right.*

*All [public authorities] have commercial interests as purchasers (for example of real estate, IT, office supplies, catering and cleaning services, etc).*

*Some cases require special consideration:*

- *Procurement - The position of public authorities in the procurement role is one in which they are likely to have strong and specific commercial interests. It is also one in which the commercial interests of third parties are likely to have to be considered...*
- *Public authorities' commercial interests in the disclosure of publication of information - FOIA obligations on public authorities to give or disclose information on request apply to information that is subject to copyright ... but the commercial effects of disclosure on the copyright holder - including cases where copyright is held by the public authority itself - may nevertheless be considered in relation to the exemption under Section 43. But it is not part of the function of Section 43 to justify non-disclosure of information by authorities within the terms of the Act merely because they could make more money doing so by other means. ...*

*Section 43 may protect the commercial interests of either a third party or the authority itself. At a very general level, there is a public interest in protecting the commercial interests of both the private sector (which plays an important role in the general health of the economy) and the public sector (whose commercially-related functions need in any event to be exercised in the wider context of the public interest).*

Generally speaking there is a public interest in the disclosure of commercial information in order to ensure:-

- *That there is transparency in the accountability of public funds;*
- *That public money is being used effectively, and that [public authorities] are getting value for money when purchasing goods and services;*
- *That [public authorities'] commercial activities, including the procurement process, are conducted in an open and honest way; and*

Factors that might weigh in favour of the public interest in withholding information in this area include:-

- *Where disclosure would make it less likely that companies or individuals would provide the [public authority] with commercially sensitive information in the future and consequently undermine the ability of the [public authority] to fulfil its role;*
- *Where disclosure would be likely to prejudice the commercial interests of the [public authority] by affecting adversely its bargaining position during contractual negotiations which would result in the less effective use of public money;*
- *Where disclosure would, as a consequence, make it more difficult for individuals to be able to conduct commercial transactions or have other dealings with public [authorities] which are not a typical commercial transaction - for example where an organisation obtained a grant or financial assistance from a public authority - without fear of suffering commercially as a result. It would not, for example, be in the public interest to disclose information about a particular commercial body if that information was not common knowledge and would be likely to be used by competitors in a particular market to gain a competitive advantage."*

#### Procurement-related information

Procurement-related information is likely to be the subject of a significant number of FOIA requests. A substantial amount of procurement-related information is likely to be commercially sensitive at some stage. The terms on which it was supplied will have a bearing on the assessment of whether or not the information should be disclosed.

Although there will generally speaking be a public interest in the disclosure of commercial information generated in relation to procurement, there will also be examples where the application of Section 43 should be considered, including:-

- Information relating to general/preliminary procurement activities, which the DCA guidance suggests would include "*market sounding information, information relating to programme, project and procurement strategies, and contextual information about the [public] authority, its business objectives and plans*".
- Information relating to supplier selection, such as "*qualification information for potential bidders, information about requirements including specifications, details of the qualification process, and details of qualified bidders*";
- Information relating to contract negotiation and award, for example "*bids, papers about capabilities of bidders, evaluations of bids, negotiating briefs and recommendations, the contract, information about successful bid and bidder, and information about other bids and bidders*", and
- Information relating to contract performance and post-contract activities, for example "*information about implementation, information about performance, information about contract amendments with supporting papers, and information which may be provided and reviewed by third parties (e.g. consultants/auditors)*".

It is important also to remember that the requirements of the public procurement regime need to be taken into account in relation to the possible disclosure of commercial information; the EU Directives and Regulations recognise that the interest of suppliers in sensitive information supplied by them in procurement must be respected and that both the interests of suppliers and the public interest may combine to mean that certain information relating to a contract award is withheld from publication.

The likelihood of relying successfully on this exemption to resist disclosure appears to be greater for unsuccessful bidders. The Irish and Western Australian Information Commissioners have both upheld the reliance on this exemption in the context of product and tender information supplied by unsuccessful bidders: *Re Mark Henry and Office of Public Works*, Information Commissioner Decision No. 98188, 25 June 2001, and *Re Maddock, Lonie & Chisholm and Department of State Services* [1995] WAICmr 15 (2 June 1995).

In the Australian case of *Re Byrne and Swan Hill Rural City Council* [2000] VCAT 666 (31 March 2000), in which the requested information was disclosed despite its commercial sensitivity, two important benefits of allowing access to the information were recognised: there was public interest in knowing what the public body “was promised by way of operational performance” in order to enable the public to monitor whether the contractor was meeting performance standards and “the wider public and certainly the ... rate payers [had] an interest in informing themselves as to the fitness of the operator of one of their public facilities”. The ruling in this case serves to demonstrate that a successful tenderer will be more vulnerable than an unsuccessful tenderer when it comes to the public interest test.

### **Conclusion**

Whilst the true extent of freedom of information under FOIA has yet to be seen, it is clear that public procurement information will in many cases be subject to a presumption of disclosure. It is important for public authorities and private contractors/consultants to be aware of the legislative requirements and their potential implications.

**April 2005**

**Victoria Russell**

**Fenwick Elliott LLP**

## Sources of information

Freedom of Information Act 2000 -

[www.uk-legislation.hmso.gov.uk/acts/acts2000](http://www.uk-legislation.hmso.gov.uk/acts/acts2000)

Lord Chancellor's Codes of Practice under Sections 45 and 46 FOIA -

[www.foi.gov.uk](http://www.foi.gov.uk)

Department of Constitutional Affairs' General Guidance on Exemptions -

[www.foi.gov.uk](http://www.foi.gov.uk)

Information Commissioner's Office Awareness Guidance Series -

[www.informationcommissioner.gov.uk](http://www.informationcommissioner.gov.uk)

Office of Government Commerce Policy and Guidance on Civil Procurement -

[www.ogc.gov.uk](http://www.ogc.gov.uk)

Office of Government Commerce Model Contract Terms and Conditions -

[www.ogc.gov.uk](http://www.ogc.gov.uk)



## APPENDIX A

### Section 41/Section 43 Exemption Check-list

1. Review significant existing contracts for confidentiality clauses and ensure that the relevant suppliers understand the impact of FOIA on supplier information.
2. Include FOIA provisions in all new invitations to tender, asking tenderers to identify commercially sensitive information and the period of that sensitivity.
3. On receipt of requests relating to tender information identified as sensitive, consult the relevant company, using the guidance provided by the DCA, the Information Commissioner and the OGC, as to what might legitimately be considered sensitive.
4. Include similar FOIA provisions in new contracts, again asking suppliers to identify commercially sensitive information and sensitivity periods.
5. Use the DCA, Information Commissioner and OGC Guidance to help judge whether that information is truly sensitive and include discussions on this point within general contract negotiations.
6. On receipt of requests under FOIA, do the following:-
  - .1 If the request relates to procurement information identified as commercially sensitive, and within the sensitivity period, consult the relevant tenderer/supplier. The tenderer/supplier should be consulted if there is any doubt about the information's sensitivity, regardless of the declared period.
  - .2 If the relevant tenderer/supplier has not been asked to identify sensitive information, use the guidance to ascertain whether the information is likely to be sensitive and consult with the tenderer/supplier as necessary.
  - .3 Consider whether there are any internal commercial sensitivity issues.
  - .4 If an exemption under Section 43 is likely, consider the public interest test.
  - .5 Consider whether any other exemptions may apply.
  - .6 Make a decision on how to respond to the request.

If the public authority decides to disclose the information, and supplier/tenderer information is involved, inform the supplier/tenderer of that decision prior to release where possible.

**NB:** The above check-list is based on guidance given by the OGC, who use the terms “commercially sensitive” and “sensitive” to mean information that could prejudice, i.e. be detrimental to, the information provider or the public authority, with the detriment being to their financial or commercial position.

## APPENDIX B

Office of Government Commerce FOI (Civil Procurement) Policy and Guidance - Version 1.1

Paragraph 5.4: Working Assumptions (page 24 of 41)

Annex A - Information Disclosure Policy (pages 31 to 35 of 41)

Annex B - Worked Examples (pages 36 to 41 of 41)