



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.

Case Studies

The Scottish Information Commissioner in Action

The Scottish FOI Commissioner has received the first appeal under the Code of Practice on Access to Scottish Executive Information, the commitment to openness which has covered the Executive and a limited number of other public bodies since 1999.

The Commissioner took over responsibility for the Code from the Scottish Public Services Ombudsman in October 2003, and will continue to investigate complaints under the code until the FOI(S)A comes into force.

The first appeal was received on 29 March 2004, and the parties concerned asked the Commissioner to work with them to effect a settlement.

The Scottish Information Commissioner was on 20 May 2004 informed by the Justice Minister that the contract between the Scottish Prison Service and Reliance Secure Task Management Ltd had been published on the Scottish Prison Service website under the terms of the Code of Practice on Access to Scottish Executive Information.

The Scottish Prison Service added that this was also consistent with the principles of freedom of information.

The Scottish Prison Service indicated on its website that: *"The contract has been published with the exclusion of items deemed to be commercially or operationally sensitive."*

The Code of Practice contains a number of exemptions which allow bodies to withhold certain types of sensitive information.

Consistent with the Code, and the provisions of the Freedom of Information (Scotland) Act 2002 which will apply to such information from 1 January 2005, the Scottish Information Commissioner would normally expect that where information has been withheld the specific reasons for doing so in terms of the exemptions applied to each exclusion would be stated.

The Commissioner is therefore discussing with the Scottish Prison Service approaches to applying the terms of the Code of Practice and the principles of freedom of information.

Following the news of the first appeal received under the Executive's Code of Practice, it seems that a second may soon follow, as a result of the ongoing debate concerning the contract between the Scottish Prison Service and Reliance Secure Task Management Ltd.

Nicola Sturgeon MSP has lodged an appeal with the Justice Department, requesting that it reviews its decision to withhold the excluded information. She has indicated that following this review, if she is dissatisfied with the material published, she will request that the Commissioner conduct a full investigation under the Code of Practice.

Canada – Examples of Recent FOI Action

The following examples from Canada of information requested under their FOI scheme, which is far more mature than ours, provides an insight into the likely requests that will be received by public authorities in the UK with regards to public procurement.

Citizenship and Immigration Canada Date received: 02-04-2002

Request for a) copies of any contracts the organization has entered into with [] for the collection or delivery of domestic or international mail; b) pricing information, including quotations or rate sheets, for the performance of those services by []; c) copies of any invoices from [] relating to those services and the amount paid by the organization to []; d) information relating to the volume of mail dealt with under the agreements between the organization and [] for those services, such as the estimate of mail volume in a request for proposals or call for tenders.

Correctional Service of Canada Date received: 05-04-2004

Procurement: 1. All contracts, past and present, governing provision of inmate purchasing and hobbycraft procurement between FMI and Home Hardware. 2. All transactions conducted under said contracts. 3. All invoices from originating suppliers and shippers or couriers, not including supplier names, addresses or contacts.

Department of Foreign Affairs and International Trade Date received: 16-03-2004

The contract signed by DFAIT with Knightsbridge (and/or sister company, Müllenhoff & partner GmbH). For the period January 1, 2001 to March 8, 2004, copies of the following documents: i) The full contract between DFAIT and Knightsbridge. ii) The total cost of the contract between DFAIT and Knightsbridge and the date the contract was paid. iii) Performance reports by DFAIT in regards to the Knightsbridge contract, including those focused on the cost effectiveness of this project. iv) DFAIT follow-up reports outlining the success or failure of the Knightsbridge contract, details from the evaluation process to determine whether the services promised in the contract were sufficiently fulfilled in order to authorize payment(s).

Fisheries and Oceans Canada Date received: 02-04-2004

a) Copies of any contracts Fisheries and Oceans Canada has entered into with Spring or Spring Canada for the collection or delivery of domestic or international mail; (b) Pricing information, including quotations or rate sheets, for the performance of those services by Spring or Spring Canada; (c) Copies of any invoices from Spring or Spring Canada relating to those services and the amount paid by Fisheries and Oceans Canada to Spring or Spring Services; (d) Information relating to the volume of mail dealt with under the agreements between Fisheries and Oceans Canada and Spring or Spring Canada for those services, such as the estimate of mail volume in a request for proposals or call for tenders.

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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