

Outsourcing and freedom of information - guidance document

Freedom of Information Act

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how to deal with some of the key FOIA issues to do with outsourcing, in particular determining whether information is held, providing information proactively, adopting a 'transparency by design' approach and applying exemptions.
5. The ICO has produced a separate document discussing how transparency could be further promoted in outsourcing: [Transparency in outsourcing: a roadmap](#).

Overview

Deciding whether information is held

In dealing with FOIA requests about outsourcing, a key issue is deciding what information is held by the public authority.

Information is held by a public authority if it holds it to any extent for its own purposes. Information is also held by a public authority, in terms of FOIA, if the contractor or another party holds it on behalf of the authority. There should be an objective basis for deciding what information is held on behalf of the authority. The contract is the main source to use to decide this. However, it is necessary to take account of all the circumstances of the case.

Transparency by design

We recommend that public authorities adopt a transparency by design approach to outsourcing. This means they should:

- Make arrangements to publish as much information as possible, including the contract and regular performance information, in open formats with a licence permitting re-use.

- When drawing up the contract, think about any types of information that the contractor will hold on their behalf eg information that a public authority would reasonably need to see to monitor performance. Describe this in an annex to the contract. This is itself potentially in scope of a FOIA request.
- Set out in the contract the responsibilities of both parties when dealing with FOIA requests. Look at standard contract terms (eg the Model Services Contract) for guidance.
- Identify any potentially sensitive information and what FOIA exemptions may need to be considered in the event of a request. Record this in a working agreement with the contractor.
- If necessary, carry out a transparency impact assessment to help with these steps. Involve other stakeholders as appropriate.

Exemptions

FOIA exemptions are available to protect legitimate interests. They allow for a balance to be struck between avoiding prejudice to those interests and the public interest in transparency about outsourcing.

The exemptions most likely to be relevant to outsourcing are:

- Section 43 – trade secrets and commercial interests,
- Section 41 – information provided in confidence, and
- Section 40 – personal information

Publicly owned companies and joint working

In some cases, services may be outsourced to companies set up by public authorities. These are subject to FOIA in their own right if they meet the definition of a publicly owned company. In other cases they may still hold information on behalf of public authorities.

Deciding whether information is held

6. FOIA provides a general right of access to information held by public authorities. Conversely, this means that if the information is not held by a public authority, there is no right to obtain it in response to a request. This point is particularly relevant in the context of outsourcing. Requests in connection with outsourcing can be complex because they may relate not only to information that the public authority physically holds because it has produced it, but also to information that a contractor has provided to the authority, and to information that is physically held by the contractor. Therefore, a key question is, what information is held by the public authority in terms of FOIA?
7. Section 3(2) of FOIA explains what is meant by 'held' as follows:

3. (2) For the purposes of this Act, information is held by a public authority if—

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.

8. This sets out a two part definition. Information is held by the public authority, and therefore within scope of a FOIA request, if the authority holds it (but not if it holds it only on behalf of another person), or if another person holds it on behalf of the authority.
9. Both parts of this definition can be relevant to outsourcing requests. We shall look briefly at the first of these, and then in more detail at the second, which is often more problematic.

Information held by a public authority

10. Information that a public authority has produced itself relating to its outsourcing is held by that authority for the purposes of FOIA. In the context of outsourcing, a public authority is also likely to hold information that it has received from third parties, for example tenders submitted by companies bidding for a contract. It may therefore be necessary to consider whether it

holds this information “otherwise than on behalf another person”.

11. The Upper Tribunal considered this part of the definition in the case of the *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection*¹ (“BUAV”). This was not a request about outsourcing information, but it does give a binding judgment on the interpretation of section 3(2)(a).
12. They accepted the First-tier Tribunal’s earlier finding that “hold is an ordinary English word” and “is not used in some technical sense in the Act”, but at the same time it “is not a purely physical concept and has to be understood with the purpose of the Act in mind”. This means that information may be present on an authority’s premises (or even on its IT network) but not held by the authority in terms of FOIA. To be considered as held, there has to be “an appropriate connection between the information and the authority”². However, if the public authority holds the information “to any extent” for its own purposes, then it holds the information in FOIA terms.
13. The information would only be outside the scope of FOIA if the public authority held it solely on behalf of another and not in any way for its own purposes³. In a hypothetical case, it is conceivable that a public authority might provide secure storage for some business records belonging to a contractor that are unrelated to any outsourced work the contractor is doing for that authority. In that case the authority physically holds the information, but it does not hold it to any extent for its own purposes and there is no appropriate connection between the information and the authority.
14. However, any information that a public authority has received from a contractor or other external party in connection with the outsourcing of its services is held by that authority in FOIA terms, because it holds the information to some extent for its own purposes. The information is therefore potentially in scope of a FOIA request. This would include, for example, the tenders submitted by both successful and unsuccessful bidders.

¹ *University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection*, [2011] UKUT 185 (AAC), 11 May 2011. (“BUAV”)

² The First-tier Tribunal’s comments are quoted at paragraph 23 of BUAV.

³ BUAV at paragraph 21

15. This does not mean that all such information must inevitably be released. Tenders may contain commercially sensitive information, for instance. Faced with a request for this information, the public authority must consider whether it may legitimately be withheld under one of the FOIA exemptions. Of course, issues such as whether disclosing the information would damage commercial interests or breach a duty of confidence are about whether the information that is held by the authority should be released, rather than about whether the authority holds it in the first place. These decisions can therefore be approached as they would be in response to any other FOI request.

Information held in terms of the Environmental Information Regulations

16. The EIR uses a slightly different definition of what information is 'held', namely whether the information "is in the authority's possession and has been produced or received by the authority". However, we do not consider there is any significant difference between the two on this point. This is because information cannot be said to be in the authority's possession if the authority does not hold it to any extent for its own purposes. This is explained further in our guidance document on 'Information held by a public authority for the purposes of the EIR'⁴.

Information held on behalf of a public authority

17. The definition in section 3(2) of FOIA of information "held by a public authority" includes information "held by another person on behalf of an authority". Therefore, information that a contractor holds on behalf of a public authority is also in scope of a FOIA request, even if the authority never physically holds it in its own hard copy or electronic files. A contractor will inevitably generate a large amount of information in the course of running an outsourced service. Some of this will be presented to the authority at some stage, usually as part of reporting against key performance indicators (KPIs). Behind these KPI reports there is likely to be other information that is not necessarily presented to the authority. If the authority

⁴ Information Commissioner. Information held by a public authority for the purposes of the EIR. ICO, February 2013. https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf Accessed 16 March 2015

receives a FOIA request that relates to that information, the question it has to decide is, how much of this does the contractor hold purely for their own purposes, and how much of it do they hold on behalf of the authority?

18. It's important to establish an objective reason for deciding whether certain information is held by a contractor on behalf of a public authority. The primary source that we would consider is the contract between the authority and the contractor. As this defines the relationship between, and the responsibilities of, the two parties, it provides an objective, evidence-based approach to resolving the issue. We recommend that public authorities should refer to the contract if they need to resolve an issue as to what information is held on their behalf. While it is unlikely that the contract will define explicitly what is held on behalf of the authority, it may indicate, for example:
 - what information the contractor is required to provide to the authority for reporting and monitoring purposes,
 - what information the authority has the right to see, and whether there are any conditions on that access, or
 - what happens to information that is in the contractor's possession at the termination of the contract eg whether it remains with the contractor or reverts to the authority.
19. Clauses containing indications such as these can be of help in establishing what is held on behalf of the public authority. The following examples show how they have been used by the Commissioner and the Information Rights Tribunal to decide held/ not held cases.

Examples from case work

20. The first case shows how a close reading of the contract terms shed light on the relationship between the public authority and its contractors, which helped the Commissioner to establish that they did hold information on behalf of the authority.

Example

Decision notice FS50483519⁵ concerned a request to Ofsted for training material used to train 'additional inspectors'. As well as employing their own inspectors, Ofsted contracts with a number of companies called Inspection Service Providers (ISPs) who carry out inspections on behalf of Ofsted. The ISPs employ additional inspectors to do this.

Ofsted said that they hold the ISPs responsible for the quality of the inspections, but the training materials themselves are created and delivered by the ISPs and therefore Ofsted does not hold them.

The Commissioner looked closely at the contract between Ofsted and the ISPs and considered three issues: the actual services provided; the extent to which the information in question held by the ISPs is held for the sole purpose of delivering those services; and whether Ofsted has a right of access to that information.

He concluded:

(i) The closer the outsourced service is to the public authority's core functions, the more likely it is that information about that service is held on behalf of the authority. In this case, inspections are a core function of Ofsted.

(ii) Training was a requirement of the contract. It required the ISPs to have additional inspectors who are properly trained and equipped with specific skills to do their job. The ISPs were required to provide this training, and also to participate, with Ofsted, in developing it.

(iii) The contract required the ISPs to maintain records of all their activities to do with the performance of the contract, and Ofsted had the right to access that information. Although a public authority's right of access to material held by a third party does not necessarily mean that the information is held on behalf of the authority, it is a relevant factor to consider.

The Commissioner therefore concluded that the ISPs did hold the training materials on behalf of Ofsted.

⁵ Information Commissioner. Decision notice FS50483519 ICO, 8 January 2014 https://ico.org.uk/media/action-weve-taken/decision-notices/2014/938012/fs_50483519.pdf Accessed 16 March 2015

21. When looking at a contract to establish whether information is held on behalf of the authority, it is necessary to establish the scope of any clauses dealing with access to information. They may give the authority access to certain specified information, or give the authority a more general right to access information in order to monitor the contractor's performance. In a case involving a 'general' right of access we would consider whether the information requested is information that the authority would need to see in order to monitor performance. For example, in the Ofsted case above, the contract required the ISPs to provide training, and Ofsted would therefore need a general right to access information about training in order to monitor the contractor's performance.
22. By contrast, in the following case the Commissioner found that the training and qualifications of staff seconded to a contractor was not information held on behalf of the public authority.

Example

Decision notice FS50463474⁶ concerned a request to Avon and Somerset Constabulary (ASC) for information about qualifications held by staff seconded by the Constabulary to a contractor, Southwest One (SW1). These seconded staff are employees of ASC but are under the direction and control of SW1.

The Commissioner examined relevant parts of the contract between ASC and SW1. He found that the training and certification of staff was carried out by SW1 for their purposes in delivering the contract. However, there was no evidence of any contractual or other obligation on SW1 to provide information to ASC to allow it to verify the qualifications obtained by staff. Furthermore, although the contract required SW1 to provide certain information to ASC to enable it to meet its FOIA obligations, this did not include the information requested in this case.

The Commissioner concluded that SW1 did not hold this information on behalf of ASC.

⁶ Information Commissioner. Decision notice FS50463474 ICO, 12 March 2013. https://ico.org.uk/media/action-weve-taken/decision-notices/2013/817616/fs_50463474.pdf Accessed 16 March 2015

23. The next case shows that information may be held on behalf of the public authority, even if it is not referred to specifically in the contract.

Example

A request was made to Southwark Council for the attendance register from the Seven Islands Leisure Centre, recording schools' attendance at swimming lessons. The council contracted out the management of its leisure centres to Fusion Lifestyle. The contract required Fusion to report on the usage of the pool. Although the contract did not specify that a register had to be kept, Fusion managers did use the register to compile the performance figures which were reported to the council.

In his original decision notice (FS50428799⁷), the Commissioner had found that the information was not held.

However, the First-tier Tribunal⁸ found that:

"... the requested information is specifically used by Fusion to satisfy provisions of the contract and therefore we consider it to be held for the Council's purposes and so held under FOIA" (paragraph 29(i))

They said that the Council could have asked to see the registers for auditing purposes, to verify that the figures reported by Fusion were accurate. Furthermore, they expected that Fusion would retain the registers for some time as evidence to back up its reported figures and in case of any dispute, and it appeared that they did in fact retain them.

In the light of the evidence given to the Tribunal, we accept the Tribunal's reasoning on this point.

24. The following case concerned a public authority's right, under the contract, to see information held by a contractor. The public authority handled the request under FOIA, but the

⁷ Information Commissioner. Decision notice FS50428799. ICO, 21 May 2012. https://ico.org.uk/media/action-weve-taken/decision-notices/2012/729024/fs_50428799.pdf Accessed 16 March 2015

⁸ Willem Visser v the Information Commissioner and London Borough of Southwark Council EA/2012/0125, 11 January 2013. <http://www.informationtribunal.gov.uk/DBFiles/Decision/i928/20130111%20Decision%20EA20120125.pdf> Accessed 22 August 2014

Commissioner and the First-tier Tribunal both found that the request should have been considered under the EIR. The relevant provision in the EIR regarding information held on behalf of a public authority is regulation 3(2)(b), which has the same wording as section 3(2)(b) of FOIA.

Example

The First-tier Tribunal case of *Conscape Ltd v the Information Commissioner and the Department for Regional Development (Northern Ireland)*⁹ (DRD) concerned a request for the names of subcontractors engaged by the principal contractor for environmental maintenance work. The DRD said that the information was not held and the Commissioner accepted this in his decision notice.

The Tribunal found that under the terms of the contract the contractor was required to seek the public authority's approval of the subcontractors. The DRD said that an approval process should have taken place but had not happened in this case. The Tribunal found that it did not matter whether the authority had actually obtained the information. The fact that they could have obtained it under the terms of the contract meant that the contractor held it on behalf of the authority.

25. By contrast, in the following case there was no evidence in the contract that the information requested was held on behalf of the public authority:

Example

Decision notice FS50478617¹⁰ concerned a request to London Borough of Barnet Council for a technical construction file (TCF) for bus lane cameras.

Bus lane enforcement is part of local authorities' civil parking enforcement powers. The CCTV systems used for it have to be

⁹ *Conscape Ltd v the Information Commissioner and the Department for Regional Development (Northern Ireland)* EA/2011/0246 12 June 2012
<http://www.informationtribunal.gov.uk/DBFiles/Decision/i928/20130111%20Decision%20EA20120125.pdf> Accessed 22 August 2014

¹⁰ Information Commissioner. Decision notice FS50478617. ICO, 3 June 2013.
https://ico.org.uk/media/action-weve-taken/decision-notices/2013/874130/fs_50478617.pdf Accessed 16 March 2015

certified by the Vehicle Certification Agency and the application for certification has to include the TCF. In this case the manufacturer of the system, Zenco Systems Ltd, made the application for certification and a contractor, Civica, operated the bus lane cameras on behalf of the council.

The contract between the council and Civica obliged the contractor to provide certain documentation to the council, but did not include the TCF. There was no reason for the council to hold the TCF itself, and no provision for it to be made available to the council under the contract.

While the authority has to use a certified CCTV system, and certification requires a TCF, that did not mean that the council necessarily held or had access to the TCF.

The Commissioner found that the council did not hold the TCF.

26. The contract is an important reference source in establishing what information is held on behalf of a public authority, but it is necessary to look at it in context, and take account of all the facts of the case. The contract may not necessarily provide a definitive answer. If there is no provision in the contract that would indicate what information is held on behalf of the authority, but, as a matter of custom and practice, the authority does access some information physically held by the contractor, or could access it in certain circumstances (eg if there is a problem with the delivery of the contract) then there may be a case for saying that the information in question is held on behalf of the authority.

Subcontractors

27. In many cases the main contractor will contract out some work to a subcontractor, and there may be levels of subcontracting below that. Information held by a subcontractor is not necessarily out of scope of FOIA, or the EIR. Both FOIA and EIR simply refer to information held by "another person" on behalf of the authority, and that person could be a subcontractor. In assessing whether information held by a subcontractor is held on behalf of a public authority, we recommend the evidence-based approach described above, taking account of any relevant contract terms and the facts of the case.
28. In the following case the Commissioner found that information held by a subcontractor was not held on behalf of the public

authority. This was not because the company concerned was a subcontractor but because, on the facts of the case, there was no objective basis for concluding that the information was held on behalf of the authority.

Example

Decision notice FER0484371¹¹ concerned a request to the Olympic Delivery Authority for information about the reinstatement of Leyton Marsh following its use as a basketball training venue during the London Olympics, and specifically the procurement, preparation and installation of turf and seed. The request was handled under the EIR.

The work was carried out by a company called STRI who were subcontracted by Nussli, who were the main contractors to the ODA. The information was held by STRI.

The Commissioner found that, although the information held by STRI related to the work they were doing ultimately on behalf of the ODA, this did not necessarily mean that they held that information on behalf of the ODA, in terms of the EIR. STRI did not have a direct contractual relationship with the ODA. The ODA's contract was with Nussli, and there was no clause in it that gave the ODI direct access to, or any control over, the information held by any subcontractor.

Records management

29. There is a further reason why it is important to identify from the outset what information is held on behalf of the public authority. The records management Code of Practice, issued under section 46 of FOIA, provides guidance to public authorities on good practice in relation to the keeping, management and destruction of records. It has a section on 'Records created in the course of collaborative working or through out-sourcing'. This includes the following:

"Some of an authority's records may be held on its behalf by

¹¹ Information Commissioner. Decision notice FER0484371 ICO, 16 October 2013 https://ico.org.uk/media/action-weve-taken/decision-notices/2013/906162/fer_0484371.pdf Accessed 16 March 2015.

another body, for example a body carrying out work for the authority under contract. The authority on whose behalf the records are held is responsible for ensuring that the provisions of the Code are applied to those records¹².

30. The public authority therefore needs to know what information is being held on its behalf by contractors, so that it can ensure that the appropriate records management standards and procedures are being applied to it. Information held by a contractor on behalf of a public authority is within the authority's responsibility for records management purposes as well as for FOIA.

Transparency by design

31. We recommend that, as a matter of good practice, public authorities should adopt a 'transparency by design' approach when they are drawing up an outsourcing contract. This will help to address the specific issue we have identified as to what information is held, but it goes beyond that and seeks to promote transparency and accountability in outsourcing and reduce uncertainty as to what information is available. Transparency by design encompasses a number of elements of good practice:

- making information available proactively,
- agreeing what information is held, in terms of FOIA,
- setting out responsibilities in handling FOIA requests, and
- considering in advance what information may be exempt from disclosure.

We discuss each of these elements below.

32. We also consider that for a major project, there may be scope for using a form of 'transparency impact assessment' at the outset. By this we mean considering in a formal way all the types of information that will be generated as a result of the contract, identifying information that is likely to be requested

¹² Lord Chancellor's code of practice on the management of records issued under section 346 of the Freedom of Information Act 2000. Ministry of Justice, 2009. Page 20 <https://ico.org.uk/media/for-organisations/research-and-reports/1432475/foi-section-46-code-of-practice-1.pdf> Accessed 13 January 2016

and that would inform public debate, and the effect of disclosing this on the interests of the contractor and the public authority. This could also involve consultation with interest groups and other stakeholders, in order to understand the types of information that would be useful to them. A transparency impact assessment of this type should typically help address the elements bulleted above.

Making information available proactively

33. Transparency by design starts with transparency by default. In other words, a commitment to making as much information as possible available to the public proactively. Public authorities need to identify key information about the contract that can be made publicly available and plan how to do this and in what formats. This should include not only the contract itself but also information about the supplier's performance against KPIs. Depending on the service area, there may be some information that is not published (such as trade secrets of the supplier), but the default position should be that contracts and performance information are routinely available to the public. The types of information that are to be published routinely can be listed in an annex to the contract. A transparency impact assessment would help to identify what should be made available proactively.
34. FOIA encourages proactive publication of information. As more outsourcing information is routinely published, it should also be listed in the authority's FOIA publication scheme. The ICO's Model Publication Scheme¹³, which public authorities are required to adopt, is a list of broad classes of information and we have published definition documents¹⁴ for each public authority sector explaining what information we expect to be available under each class. Under "What we spend and how we spend it", this includes details of contracts put out to tender and of contracts awarded. The threshold value of the invitations to tender and contracts varies according to the sector.
35. A further aspect of transparency by design which should be considered is the format of the information which the

¹³ Information Commissioner's Office. Model publication scheme. ICO, September 2013 <https://ico.org.uk/media/for-organisations/documents/1153/model-publication-scheme.pdf> Accessed 9 July 2014

¹⁴ Definition documents. ICO web page http://ico.org.uk/for_organisations/freedom_of_information/definition_documents Accessed 9 July 2014

contractor will produce and provide to the authority under the contract. The Open Data Institute has published a guide on *How to embed open data into the procurement of public services*¹⁵. This looks at the main types of data that may be produced as part of delivering a public service and provides guidance to public authorities on how to embed open data principles at the procurement stage and in drawing up contracts. This includes information which is intended to be published proactively, including performance data. Using open data formats for this improves the usability of the data and assists transparency, since the data can be analysed and re-used more easily.

Agreeing what is held

36. We have seen that one of the most problematic issues in relation to outsourcing is deciding whether information is held in FOIA terms. We think it would be good practice for the contract to define, in broad terms, what information regarding the outsourced service is considered to be held on behalf of the public authority. This is not about drawing up an exhaustive list of documents or datasets. It may be possible to list some specific items but the aim should be to identify the types of information that are held on behalf of the authority. This could include information that the authority has a right to see in order to monitor the contractor's performance in delivering the service, information that the authority provides to the contractor (eg content for training materials), and information that passes to the authority on the termination of the contract (eg system manuals and documentation). If it is necessary and proportionate, a transparency impact assessment could also inform these decisions. In any case, addressing these issues at the outset should save time in the long run, remove ambiguities and promote consistency.
37. This is not simply a job for the FOI officer, since procurement staff will also need to be involved and will need to understand the significance of information being held for FOI purposes. Furthermore, it should not be a unilateral exercise; dialogue between the authority and the contractor is essential. It is important for public authorities and contractors to reach a broad agreement on the types of information that could be requested under FOIA. We think that bringing some clarity to

¹⁵ Open Data Institute. How to embed open data into the procurement of public services. ODI, 2014. <http://training.theodi.org/Procurement/Guide/> Accessed 17 December 2014

this area will assist not only authorities and requesters, but also contractors, since it will indicate the types of information that they are likely to have to make available to the authority in the event of a request.

38. We have noted that information is not necessarily out of scope if it is held by subcontractors. It would therefore be helpful for the contract to refer to any information which it is envisaged would be held by subcontractors on behalf of the authority, and include a provision for the contractor to obtain this from subcontractors as required.
39. Public authorities cannot contract out of their FOIA responsibilities. We have said that we regard the contract as a prime source in establishing what information is held, but that does not mean that what is held can be circumscribed so narrowly in the contract as to exclude information that should reasonably be in scope. In the case of a complaint about information being withheld from a request, the Commissioner will make his own decision as to what is held (with that decision appealable to the Information Rights Tribunal). Our suggestion of including in the contract details of what is in scope is intended to assist the process of dealing with FOIA requests, rather than being definitive.

Setting out responsibilities in handling FOIA requests

40. Outsourcing contracts commonly include clauses setting out the procedures to be followed when a FOIA request is received. They typically include the following elements:
 - The contractor recognises that the public authority is subject to FOIA.
 - The contractor undertakes to transfer any FOIA request it receives to the authority.
 - The authority will decide at its own discretion what information will be disclosed or withheld in response to the FOIA request.
 - The authority will consult with the contractor and take its views into account, but is not bound by them.
 - The contractor will assist the authority in answering the request and provide all the information that the authority

reasonably needs.

- Information may be designated as potentially exempt, but on the understanding that this is indicative and does not guarantee it will not be released.
41. There is an example of standard FOIA clauses in clause 22 of the Model Services Contract¹⁶. This has been produced by the Crown Commercial Service and the Government Legal Service, for use by government departments and public authorities for service contracts with a value of over £10 million.
 42. Standard clauses such as these are helpful in setting out the procedures to be followed and the responsibilities of both parties and they are part of 'designing in' transparency. They also reflect important principles of FOIA, in particular the fact that the public authority is responsible for deciding what information is released in response to a FOIA request and what is withheld. They also encourage the public authority to engage in a dialogue with the contractor before making this decision.

Considering exemptions

43. Once information has been identified as being held on behalf of the public authority, then if the authority receives a request, it has to decide whether any FOIA exemptions apply to that information, and carry out the public interest test if necessary.
44. There is a movement towards greater transparency in outsourcing, and this guidance supports that direction of travel, but at the same time it must be recognised that there are situations in which some information that is in scope of FOIA (because it is held) can legitimately be withheld from disclosure in response to a request. The FOIA exemptions are available to protect legitimate interests. They allow for a balance to be struck between protecting, for example, legitimate commercial interests, confidential information and personal data on the one hand and the public interest in transparency in relation to outsourcing on the other. Detailed guidance on each exemption is available from the guidance index¹⁷ on our website. We also

¹⁶ Crown Commercial Service. Model services contract. Cabinet Office, 2014
<https://www.gov.uk/government/publications/model-services-contract> Accessed 14 January 2015.

¹⁷ Guidance index. ICO website <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/> Accessed 16 March 2015

set out the main elements of the most commonly used ones in the section on [Exemptions](#) below.

45. Another useful source of guidance is the set of working assumptions on procurement published by the Ministry of Justice¹⁸. This provides recommendations as to the types of information that should be released or withheld (with reference to relevant exemptions) at each stage of the procurement process, from the start of planning for procurement up to contract delivery and completion. It gives a stage by stage listing and a set of worked examples.
46. We recommend that, once the information held has been agreed, public authorities should engage with contractors at an early stage in the life of the contract to identify potentially sensitive areas and hence the types of information that may be subject to exemptions. This work can produce a detailed list of information, so may be better suited to a working agreement or protocol, rather than necessarily setting it down in contract terms.
47. This could also involve reviewing previous FOIA requests received in order to identify the types of information that are particularly sensitive. In the case of a major project, if the public authority is carrying out a transparency impact assessment, this can help to show what information is likely to be requested, how disclosure would affect the interests of the contractor, the public authority and other parties and how to assess the balance of public interest. This would help the public authority to make a balanced assessment of whether FOIA exemptions may be relevant.
48. It is however important to recognise that each FOIA request should be considered in the circumstances of the case, and the sensitivity of information can change over time, depending, for example, on what stage has been reached in the life cycle of the contract.

Exemptions

49. If a public authority receives a request for the information which it holds, or which is held on its behalf, it should consider

¹⁸ Ministry of Justice. Procurement. MoJ website, February 2014. <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/working-assumptions/foi-assumptions-procurement> Accessed 22 August 2014

whether any FOIA exemptions apply to it. Contrary to some popular belief, there is no exemption for “commercially confidential” information in general. Information is not exempt from disclosure simply because it is labelled “commercially confidential”. However, there are some specific exemptions that may be particularly relevant in an outsourcing context. These commonly arise in complaints to the Information Commissioner. Other exemptions may of course be engaged, depending on the facts of the case. Detailed guidance on each exemption is available from the guidance index¹⁹ on our website.

Trade secrets and commercial interests

50. Under section 43 of FOIA, information may be exempt from disclosure if it constitutes a trade secret (section 43(1)), or alternatively if disclosure would, or would be likely to, prejudice the commercial interests of any person (section 43(2)).
51. The term “trade secret” is not defined in FOIA, but our guidance on this exemption²⁰ suggests how to approach this. If the information constitutes a trade secret, then the exemption is engaged, whether or not disclosure would cause harm.
52. The second part of the exemption (prejudice to commercial interests) is more commonly used in cases involving outsourcing information. The commercial interests in question may be those of the contractor or the public authority or any other party. Even if information is held by a contractor on behalf of the authority, disclosing it to the world under FOIA may still prejudice the contractor’s commercial interests. If there is a real likelihood of prejudice to any commercial interests, then the exemption is engaged.
53. If the public authority is considering this exemption, it is important that it has some evidence to support the claim that disclosure would prejudice commercial interests. If the public authority seeks to argue that there would be prejudice to the contractor’s (or a subcontractor’s) commercial interests, they need to have some evidence that this genuinely reflects the

¹⁹ Guidance index. ICO website. <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/>

Accessed 16 March 2015

²⁰ Information Commissioner’s Office. Commercial interests (section 43) ICO, 2017. <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

Accessed 16 August 2017

concerns of that party. If there is no such evidence then the Commissioner is unlikely to accept that the exemption is engaged. This suggests that the public authority will need to have some dialogue with the contractor. This is in line with the Code of Practice made under section 45 of FOIA, which says that in some cases it will be necessary to consult with third parties, and in others it is good practice to do so, if disclosure is likely to affect their interests²¹. The model contract clauses we have discussed in the section on [Setting out responsibilities in handling FOIA requests](#) also provide for this dialogue. While the public authority has to take account of the views of the contractor, or other parties, it is not bound by them. It must reach its own decision on whether to withhold information under an exemption.

54. If the information is exempt under either part of section 43 (ie it is a trade secret, or its disclosure would or would be likely to prejudice commercial interests), then the public authority must still carry out the public interest test. The information may only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. As we have seen, there is a general public interest in transparency about outsourcing, and there may be a more specific public interest in particular cases.
55. Further advice on these points is available in our guidance documents on commercial interests.²²

Duty of confidence

56. The exemption in section 41 for information provided in confidence may be relevant in the context of outsourcing. Information is exempt from disclosure if the public authority obtained it from another person and disclosing it would be an actionable breach of confidence (a phrase explained below). Information must have the necessary 'quality of confidence', ie it is not trivial and not generally available, and must have been obtained in circumstances that implied an obligation of

²¹ Secretary of State for Constitutional Affairs. Code of practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000. Department for Constitutional Affairs, 2004. Part IV <http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice> Accessed 7 August 2014

²² Information Commissioner's Office. Freedom of Information Act awareness guidance no. 5 Commercial interests. ICO, 2008. <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf> Accessed 16 August 2017

confidence. The disclosure must also be unauthorised, ie without the consent of the person that provided the information.

57. Section 41 is an absolute exemption. If it is engaged, the information is exempt from disclosure and there is no further public interest test. However, it is important to understand what is meant by an 'actionable breach'. It means that, if the person who provided the information took the public authority to court for breach of confidence, it is more likely than not that they would be successful. They would not succeed in that court action if the authority had a public interest defence – in other words, if the authority could show that it was in the public interest to disclose the information.
58. This means that a public authority would have to consider the public interest arguments for disclosure, in order to assess whether disclosing information would be an actionable breach of a duty of confidence, and thus engage the exemption.
59. In this context, the information must be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. This is different to the public interest test for qualified exemptions, in which information must be disclosed unless the public interest in maintaining the exemption exceeds that in disclosure.
60. The issue of whether information has been obtained from another person is relevant to outsourcing contracts. The clauses in a contract that have been agreed between a public authority and a contractor would not normally fall under this exemption, because the information in them has been produced jointly, rather than provided to the public authority. However, an outsourcing contract may include other information, for example annexes containing technical details of business processes or systems, which has been provided by the contractor rather than jointly produced. Such information may potentially be exempt, if disclosing it would be an actionable breach of a duty of confidence.
61. Some information related to outsourcing may be subject to a duty of confidence. The section 45 Code of Practice discusses confidentiality obligations in Part V²³. It notes that there will be

²³ Secretary of State for Constitutional Affairs. Code of practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000. Department for Constitutional Affairs, 2004. Part V

circumstances in which confidentiality between a public authority and a contractor is appropriate and must be maintained in the public interest. However, it says that both parties must be aware of the public authority's obligations under FOIA and "the limits placed by the Act on the enforceability of such contract clauses". This implies that they have to understand how section 41 works, as outlined above.

62. The Code of Practice also recommends that information subject to a duty of confidentiality, and the reasons for it, should be identified in the contract. The contract should also indicate when the public authority should consult with the contractor about releasing information. This is reflected in the clauses discussed above in the section on [Setting out responsibilities in handling FOIA requests](#).
63. The duty of confidence is a complex area, and there is a further discussion of it in our guidance document on information provided in confidence²⁴.

Public Contracts Regulations

64. Public authorities and contractors should also be aware of the effect of the new Public Contracts Regulations²⁵ (the PCR) on the disclosure of outsourcing information. The PCR deal with the tendering, advertising and awarding of public sector contracts which are above certain threshold values²⁶. There is a prohibition in paragraph (1) of regulation 21 of the PCR on disclosing information that has been forwarded to the public authority by a contractor (referred to in the PCR as an "economic operator"), if the contractor has designated it as confidential. However regulation 21 also says:

<http://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/code-of-practice> Accessed 7 August 2014

²⁴ Information Commissioner's Office. Information provided in confidence. ICO, 2015. <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf> Accessed 24 July 2015.

²⁵ The public contracts regulations 2015 SI 2015 no.102, February 2015. http://www.legislation.gov.uk/ukxi/2015/102/pdfs/ukxi_20150102_en.pdf Accessed 4 March 2015

²⁶ The threshold values are in Article 4 of the Public Contracts Directive: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC OJ No L 94, 28.3.2014, p65 <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1425491207415&uri=CELEX:32014L0024> Accessed 5 March 2015

21 ...

(2) Paragraph (1) is without prejudice to—

...

(b) the Freedom of Information Act 2000;

(c) any other requirement, or permission, for the disclosure of information that is applicable under the law of England and Wales or, as the case may be, Northern Ireland.

65. The provision that the prohibition is without prejudice to FOIA (or other disclosure requirements or permissions) means that if information that the contractor has designated as confidential is requested under FOIA, the PCR themselves do not act as a statutory bar that would prevent disclosure under section 44 of FOIA. This appears to be a move towards greater transparency, since it is a change from the previous version of the Public Contracts Regulations from 2006²⁷. The previous version did not contain an equivalent reference to FOIA, and so they did provide a statutory bar. Although the statutory bar has been removed, the information may still be withheld under other FOIA exemptions discussed in this section, if they are engaged.

Personal data

66. Outsourcing information requested under FOIA may include personal data. For example, tender documents may include biographies of key employees of the contractor and there may be requests for information about the performance of the contractor's employees or their training, qualifications or remuneration. In the public sector there is an expectation that certain information about employees will generally be publicly available, such as the salaries of the most senior employees. This has come about not only as a result of FOIA requests but also as a result of government policy on transparency and open data. The same expectation does not necessarily extend to the private sector. Nevertheless, if the information in question is held by or on behalf of a public authority, then it is in scope of a FOIA request.

²⁷ The public contracts regulations 2006 SI 2006 no.5, January 2006
http://www.legislation.gov.uk/ukxi/2006/5/pdfs/ukxi_20060005_en.pdf Accessed 19 August 2014

67. The question then is whether it has to be released in response to that request. If the information constitutes personal data, as defined by the Data Protection Act, then under section 40 of FOIA it is exempt from disclosure if to disclose it would breach the data protection principles. This does not mean that all personal data is automatically exempt from disclosure. Deciding whether disclosure would breach data protection principles involves considering a number of factors, in particular the effects of disclosure on the individual concerned, their reasonable expectations as to what could be disclosed, and the legitimate public interests in disclosure. Our guidance on section 40 gives a detailed explanation of how to carry out this assessment²⁸.
68. We recommend that public authorities should engage with contractors at an early stage to identify the types of information that may be subject to exemptions. However, it is important to recognise that each FOIA request should be considered in the circumstances of the case, and the sensitivity of information can change over time, depending, for example, on the life cycle of the contract.

Publicly owned companies and joint working

69. Outsourcing, in the sense of the delivery of services on behalf of a public authority, is not restricted to situations where a public authority contracts with an existing private sector company. Increasingly, there are cases where services are delivered by joint working or partnership arrangements between public authorities. In some cases public authorities may set up a company or other form of organisation to deliver the service on their behalf.
70. A company that has been set up by one or more public authorities is subject to FOIA in its own right (ie it is itself a FOIA public authority), if it meets the definition of a “publicly-owned company” in section 6 of FOIA. A publicly-owned company is one that is wholly owned by the Crown (ie by one or more government departments) or by the “wider public

²⁸ Information Commissioner’s Office. Personal information. ICO, August 2013 <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf> and: Information Commissioner’s Office. Requests for personal data about public authority employees. ICO, May 2013. https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf Accessed 16 March 2015

sector” or by both. The “wider public sector” means one or more public authorities. So, for example, if a local authority or a group of local authorities sets up a company to deliver a service, and they are the only shareholders in that company, then the company is a FOIA public authority in its own right. However, if there is a shareholder that is not a public authority, for example a private investment fund, then the company is not a FOIA public authority.

71. If a company that has been set up by a public authority to deliver a service does not meet the definition of a “publicly owned company” in section 6, it may nevertheless be holding information on behalf of the public authority. It is therefore in the same position, in FOIA terms, as a private contractor, and the considerations discussed above, in the section on [Information held on behalf of a public authority](#), will apply.
72. Alternatively, there may be situations where a public authority physically holds information about this type of external company, as a result of its involvement with that company. For example the authority may be funding it or have a representative on its board and, as a result, hold associated documents such as emails on its systems. The issue in such a case, following the approach confirmed by the Upper Tribunal in *BUAV*²⁹, is whether the authority holds that information to any extent for its own purposes. Where an authority has this degree of involvement it is likely that information it holds is held by the authority for its own purposes.
73. In some cases public authorities may co-operate in a joint working arrangement which may have its own name and branding but which is not a “legal person” ie it is not a body that has its own legal rights and duties. In that case, a FOIA request to that body is in effect a request to all the parties involved. In practice, one of the public authorities involved may take the lead in handling the FOIA request, but it is necessary to establish what relevant information is held by all of the parties.

²⁹ University of Newcastle upon Tyne v the Information Commissioner and the British Union for the Abolition of Vivisection, [2011] UKUT 185 (AAC), 11 May 2011. (“BUAV”)

More information

74. [Our guidance pages](#) provide further information on the public interest test, other FOIA exemptions, and EIR exceptions.
75. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.
76. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
77. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at www.ico.org.uk.