



Information Commissioner's Office  
Promoting public access to official information  
and protecting your personal information

## Freedom of Information Act Awareness Guidance No. 5 - Annexe

### Public Sector Contracts

Many of the tendering processes undertaken and contracts entered into by public authorities have been traditionally done so on the basis that most, if not all, the information concerning commercial relationships would remain confidential. Often contracts would include confidentiality clauses with the intention of prohibiting the disclosure of such information. There is concern amongst both public authorities and the private sector regarding the validity of such clauses in existing contracts as well as how information can be protected in the future.

The Freedom of Information Act (FOIA) recognises that there are valid reasons for withholding some information in response to a request. The Act lays out 23 situations in which information is considered exempt. **A public authority cannot contract out of its responsibilities under the Act and unless information is covered by an exemption it must be released if requested.**

Any of the 23 exemptions could apply to information concerning the relationship between a public authority and a contractor. Section 40 (personal information) may apply to details of a company's personnel provided in support of a tender. Section 44, statutory prohibition, will apply to information provided by contractors in some circumstances, particularly where covered by the Public Contracts Regulations 2006. The two most relevant exemptions are likely to be section 41, information which has been provided in confidence, and section 43 where the release of information is likely to prejudice someone's commercial interests.

Only information that is in fact confidential in nature, or which could prejudice a commercial interest if released, can be withheld under these provisions. It is important that contractors and public authorities understand what information may be available and how accessibility may change over time.

The Commissioner has published some awareness guidance which explains the concepts of information provided in confidence and commercial information:

- Information Provided in Confidence
- Awareness Guidance No 5 – Commercial Interests

There are a number of points worth noting when applying these exemptions. The commercial interest exemption is subject to a public interest test. That is, public authorities can only withhold commercially sensitive information where the public interest in maintaining the exemption outweighs the public interest in disclosing information. Public authorities should be aware that changing circumstances could strengthen or weaken the public interest arguments in favour of disclosure.

The law of confidence is a common law concept which has been developed by the courts as individual cases are brought before them. This case law will continue to evolve and is likely to be applied by the courts in order to determine what is 'confidential information' under the Act. For example, one of the criteria to be met under section 41 (information provided in confidence) is that the information must have been obtained from another person. The Information Tribunal has confirmed that information contained in a contract between a public authority and a third party represents the conclusion of negotiations between the two parties, and as such is jointly created rather than being obtained by the public authority from the contractor. It is therefore not confidential information. Nevertheless, depending on the circumstances of the case, there can be elements of a contract or agreement, for example technical information set out in a schedule as well as records of pre-contractual negotiations, which the public authority has obtained from the third party and so may qualify as confidential information.<sup>1</sup>

The confidential information exemption is not subject to a public interest test under the Act, but under the existing law of confidence it has always been possible to argue, in particular circumstances, that it is in the public interest to make the disclosure. In deciding whether to make a disclosure under the Act, a public authority may look to such case law for guidance. For example, the Information Tribunal has stated, in the context of commercial contractual confidentiality, that there is no requirement for an exceptional case to be made in order for the duty of confidence to be overridden on public interest grounds. In other words, there has to be a straightforward balancing of the competing public interest arguments. Unlike the public interest test for the qualified exemptions, where the balance favours the disclosure of information, the burden of proof is reversed in that the information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the confidence.<sup>2 3</sup>

Finally, it should also be remembered that the nature of information will change over time. For example, if information that was once considered confidential subsequently becomes public knowledge it will lose its quality of confidence. Similarly, information that was commercially sensitive during the tendering process may no longer be sensitive once contracts have been signed.

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<sup>1</sup> Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

<sup>2</sup> *ibid*

<sup>3</sup> S v Information Commissioner & The General Register Office (EA/2006/0030; 9 May 2007)

The Commissioner recognises that public authorities may face some difficult decisions when considering the public interest in disclosing information which it believes would, or would be likely to, prejudice a third party's commercial interest. When weighing up the public interest it might be appropriate for the public authority to take account of the possible consequences of a third party successfully taking legal action against it following the disclosure of the information. Public authorities should seek their own legal advice in these situations.

It is important that contractors have an understanding that requests may be made for information and that where a request is received, information will be disclosed unless it is covered by an exemption. How a public authority raises awareness of its responsibilities is for the public authority itself to determine. This advice merely outlines some of the considerations a public authority may wish to take account of when deciding which approach to take.

#### **a) New Contracts**

At the start of a procurement exercise there will be a number of opportunities for public authorities to inform contractors about the public right of access to information. It will have the option of raising awareness of FOIA and the Environmental Information Regulations in its tendering documentation or at some later stage in the negotiations. Alternatively, some public authorities refer to their responsibilities under the Act in the actual contract, although this will not assist in its dealings with unsuccessful tenderers.

One approach would be to identify clearly what information held in connection with the tendering process, contained in the contract, or about the subsequent performance of a contract is commercially sensitive and over what period that information is likely to remain sensitive. Once identified the information could be listed in a schedule or appendix to the contract. This would have the advantage of providing the contractor with a degree of certainty as to what information is likely to be withheld in response to a request (subject to the public interest test). It would also assist the public authority in determining whether an exemption applies within the 20 day time limit allowed.

However, a public authority may decide that it is not practical to identify all of the information which may be commercially sensitive at the outset of a business relationship. Similarly, where it seems unlikely that the contract would be the subject of a Freedom of Information request, the public authority may decide that the work involved in trying to identify all such information is not justified.

In these circumstances a public authority may wish to provide a more general assurance to the contractor that commercially sensitive information will be protected (subject to the public interest test). However, such an assurance will only be meaningful if both the public authority and contractor share a proper

understanding of how the commercial interest exemption in FOIA operates and what information it covers.

The disadvantage of this second approach is that the public authority will have more work to do in identifying the commercially sensitive information if it did receive a request. It may, therefore, be sensible to establish a consultation procedure so that if a request was received the contractor could provide advice as to what information would prejudice its commercial interests were it to be released and how that damage would be caused. As highlighted in the main body of this guidance, a public authority cannot simply speculate that there will be prejudice to the commercial interests of the contractor. A public authority needs to be able to demonstrate that it is articulating or reflecting the concerns of the contractor in this respect.

In short, the Commissioner recognises that, while a public authority cannot contract out of its FOIA obligations, there is a place for confidentiality clauses where they serve to identify information that may be exempt. That is not to say that the information referred to in such a clause would automatically attract an exemption. The information would still have to be reviewed in light of all the circumstances existing at the time a request was received in order to decide whether or not it could be withheld. The clause would at least help to help identify occasions when the contractor should be consulted.

However, a confidentiality clause which provides a false sense of security that information can be withheld when it is in fact not covered by an exemption in the Act, will only damage relationships if a public authority decides to release information at a later date.

Even if a clause is included to prevent the disclosure of information, the disclosure would not lead to an actionable breach of confidence if the information was not in fact confidential. If the information was not confidential it would have to be released under the Act (subject to the application of the other exemptions) even though there may be fears that an action for breach of contract could be brought.

Public authorities will, therefore, need to be very careful when negotiating such clauses. By agreeing to wide definitions of what constitutes 'confidential information' or 'information which may prejudice commercial interests', the public authority may unwittingly place itself in a future dilemma when faced with a request for information covered by such a clause: to breach its statutory obligation or to ignore a contractual clause.

## **b) Existing Contracts**

As FOIA came into force on 1<sup>st</sup> January 2005, contracts entered into since then by public authorities should have taken into account its provisions. Enquiries may be received about contracts that were entered into and even completed prior to

the 1<sup>st</sup> January 2005. There will be amongst these, and possibly other, contracts some that have included very broad confidentiality clauses. As a result the contractor may still expect all information relating to the contract and its commercial relationship with the public authority to remain confidential, even where such information would not be exempt under the Act. Such expectations need revising in light of the Act.

How this is achieved is an organisational matter for the public authority to decide and may depend, in part, on the number of contracts involved and their value. It may not be practical to revisit every past or existing contract. However a public authority may consider it wise to review high value contracts or other contracts that are likely to attract requests, for example those implementing or relating to controversial policies. When reviewing such contracts public authorities should aim to advise contractors as to the circumstances in which information may be released under FOIA or EIR and to establish consultation procedures.

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

### **Further advice**

If you need any more information about this or any other aspect of Freedom of Information please contact us:

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