

Public Contract Regulations

Freedom of Information Act Environmental Information Regulations

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities. The Environmental Information Regulations 2004 (EIR) give rights of public access to environmental information held by public authorities.
2. An overview of the main provisions of FOIA and the EIR can be found in [The Guide to Freedom of Information](#) and [The Guide to the Environmental Information Regulations](#).
3. This is part of a series of guidance, which goes into more detail than the Guides, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains the impact that the statutory prohibition created by regulation 43 of the Public Contract Regulations 2006 (PCR) has on the disclosure of information under FOIA and the EIR.

Overview

- The Public Contract Regulations 2006 set out the procedures that must be followed when certain public sector contracts are offered for tender.
- Information forwarded to a public authority by a contractor during a procurement exercise will be protected by the statutory prohibition on disclosure established by regulation 43, but only if it is reasonably designated as confidential.
 - Information will only be reasonably designated as confidential if it is confidential under a common law duty of confidence.
 - Confidentiality will not last indefinitely.
- Information that has been mutually agreed as part of a contract is not protected by regulation 43 since it has not been forwarded by the contractor.
- Information protected by regulation 43 will be exempt from freedom of information requests under section 44 FOIA – statutory prohibitions.
- Information that is protected by regulation 43 will also be

exempt from requests under section 41 FOIA – information obtained in confidence.

- Information that is protected by regulation 43 will also be exempt under section 43 FOIA – prejudice to commercial interests.
 - However, section 43 FOIA is wider than regulation 43 as it can protect mutually agreed information and the public authority’s own information.
- The confidentiality of commercial information about the environment can be protected by regulation 12(5)(e) of the EIR so long as that confidentiality is provided by law. Regulation 43 PCR can provide that confidentiality.

The Public Contract Regulations 2006

5. The PCR implement EU Directive 2004/18/EC aims to promote a single European market and increase competition for public sector procurement. The PCR set out procedures that must be followed when awarding public sector contracts for the delivery of capital projects or for the provision of goods and services. This includes the requirement that contracts are advertised in the Official Journal of the European Union, which provides contractors throughout Europe with an equal opportunity to tender. The PCR only apply to contracts over particular values. Details of these thresholds can be found on the website of the Official Journal of the European Community at www.ojec.com/Thresholds.aspx .
6. During the procurement process a contractor will often disclose commercially sensitive information to the body offering the contract. Regulation 43 PCR creates a statutory prohibition, preventing the disclosure of confidential information provided in this way.
7. Regulation 43 PCR states that:

43 – (1) Subject to the provisions of these Regulations, a contracting authority shall not disclose information forwarded to it by an economic operator which the economic operator has reasonably designated as confidential.

(2) In this regulation, confidential information includes technical or trade secrets and confidential aspects of tenders.

8. An economic operator is a contractor, a supplier or a provider of services. A contracting authority is the public sector body offering the contract. Many of the organisations that are public authorities for the purposes of FOIA are also contracting authorities for the purposes of the PCR.
9. This guidance will not only look at how regulation 43 engages section 44 FOIA – statutory prohibitions, but also its relevance to section 41 FOIA – information provided in confidence, and section 43 FOIA – commercial prejudice. It will also look at the exception in the EIR provided by regulation 12(5)(e) EIR – the confidentiality of commercial and industrial information.

How regulation 43 PCR engages section 44 FOIA

10. Section 44 of FOIA provides that information is exempt if its disclosure is prohibited by or under any enactment. This would include the prohibition created by regulation 43 of the PCR. Therefore if the information is protected by regulation 43 PCR, it will also be exempt from freedom of information requests under section 44 FOIA. More information on section 44 FOIA can be found in our guidance [Prohibitions on disclosure](#).
11. For regulation 43 to apply two conditions have to be satisfied. Firstly the information must have been forwarded to the contracting authority. Secondly its designation as confidential information has to be reasonable.

Forwarded to the contracting authority

12. Regulation 43 PCR only applies to information that the contractor or “economic operator” has forwarded to the contracting authority. So, although it can cover information submitted in the economic operator’s initial tender it will not cover information in a contract that has been negotiated and mutually agreed between the two parties.

Example:

In [Department of Health v Information Commissioner](#)

[\(EA/2008/0018 18 November 2008\)](#) the Information Tribunal considered a request for the contract to create an electronic recruitment service for the National Health Service (NHS). The contract was awarded in 2003 when the Public Service Contracts Regulations 1993 were in force. These contained a similar statutory prohibition to that in the PCR. The 1993 regulations referred to information “provided” by a contractor rather than information that had been “forwarded”, but there was no material difference in how the statutory prohibition operated.

The Information Tribunal found, at paragraph 41, that the contract records the terms upon which both parties agreed; it is “mutual information”. Since it is not provided by the economic operator, the statutory prohibition provided by regulation 43 PCR did not apply to the contract.

13. In the above case, the entire contract was found to be information that had been mutually agreed. This will not always be the case. It is quite possible that as well containing each party’s obligations, a contract will contain technical details, even trade secrets, which the economic operator has forwarded to the contracting authority. Such information could be protected by regulation 43 PCR.

Reasonably designated

14. The statutory prohibition applies to information that the economic operator has designated as confidential. The economic operator has to take the initiative and identify the information they wish to remain confidential. However, this does not mean they are free to designate any information they choose as confidential. The designation must be reasonable.
15. Assistance in interpreting the term “reasonably designated” is provided by Article 6 of EU Directive 2004/18/EC; the Directive on which the PCR is based. Article 6 states that:

“... in accordance with the **national law** to which the contracting authority is subject, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential;” (Emphasis added)

16. The reference to “national law” means that only information that is confidential under English law can be protected by regulation 43 PCR. This means that the contracting authority must owe the economic operator a duty of confidence under either common law or, the terms of a contract.

Common law duty of confidence

17. To establish that a contracting authority owes the economic operator a common law duty of confidence it will be necessary to show that:
- the information was imparted in circumstances giving rise to an expectation of confidence;
 - the information has the necessary quality of confidence ie it is not available by other means, nor is it trivial;
 - an unauthorised disclosure of that information would be detrimental to the confider, ie the economic operator; and
 - there is no overriding public interest defence against the breach of confidence.
18. When information is provided as part of a procurement process it is likely that there will be an expectation that sensitive information will be treated as being confidential. Therefore it will usually be easy to satisfy the test established by the first bullet point. The real tests will be provided by the remaining three bullets.
19. The third bullet concerns detriment. It states that a disclosure of information must be detrimental to the confider. The Commissioner recognises that detriment is not a necessary ingredient of confidence in all cases. However, he considers that in the case of commercial information, detriment is an essential element. That said, it is never possible to say with certainty what impact a disclosure in the future would have. Therefore the Commissioner considers that if a public authority can show that disclosing the information would, or would be likely to be detrimental, then it should be regarded as being confidential, subject to the tests set out in the other bullets above also being satisfied.
20. The fourth bullet point concerns the public interest defence to a breach of confidence. As explained in more detail in [The duty of confidence and the public interest](#), the public interest defence to a breach of confidence assumes that a duty of confidence

should be maintained unless there is a greater public interest in disclosure. This reverses the public interest test in section 2 FOIA, where it is assumed information will be disclosed unless there is a greater public interest in maintaining an exemption. More information on [The public interest test](#) is available.

21. The common law duty of confidence is discussed in more detail in [Information provided in confidence](#).

Contractual obligations of confidence

22. It is not uncommon for commercial contracts to contain confidentiality clauses which oblige the parties to keep the terms of that contract private. Some require the parties to keep the entire contract confidential. However, it is unlikely that all elements of a contract will have the necessary quality of confidence or would be detrimental if disclosed.
23. Therefore, despite the protection that a confidentiality clause may claim to afford information, only information which is truly confidential will be deemed reasonably designated as such for the purpose of regulation 43 PCR. Public authorities are advised not to agree to blanket confidentiality clauses.

The passage of time

24. Confidentiality can change with time. Information that was once secret may become public knowledge. Alternatively, information that is still secret may no longer be commercially sensitive, for example what was once cutting edge technology may become obsolete. Clearly it would not be reasonable for an economic operator to designate information as confidential forever.
25. Therefore, the Commissioner will look at whether the information is still confidential at the time of the request when determining if it is protected by regulation 43 PCR. Where some time has elapsed between the information being designated confidential and the request, public authorities should contact the economic provider to determine whether the information remains confidential.

The impact of FOIA on what it is reasonable to designate as confidential

26. The very existence of FOIA has had an impact on what it is now reasonable to accept as confidential.

Example

Returning to [Department of Health v Information Commissioner \(EA/2008/0018 18 November 2008\)](#), the contract contained a confidentiality clause identifying the entire contract as confidential. Although the Information Tribunal found that regulation 43 PCR did not apply on the basis that the information had not been provided by the contractor, it also commented on the blanket confidentiality clause. The Information Tribunal noted that the contract had been awarded three years after FOIA was enacted. In light of this, the Tribunal commented that it was not reasonable to expect the entire contract to remain confidential (see paragraph 47).

The Commissioner's approach to investigating whether regulation 43 PCR applies

27. The PCR apply to certain procurement exercises, and regulation 43 only protects information supplied by an economic operator. The onus will be on the public authority to first satisfy the Commissioner that the information relates to a relevant procurement exercise. The public authority will need to confirm that:

- it is a contracting authority as defined by regulation 3 PCR;
- the contractor is an economic operator as defined by regulation 4 PCR;
- the contract is one that falls within the PCR by virtue of regulation 5 PCR;
- the contract meets the financial thresholds established in regulation 8 PCR; and
- none of the general exclusions set out in regulation 6 PCR apply.

28. The Commissioner will then consider whether regulation 43 applies, ie whether the information was forwarded by the economic operator, and that it was reasonably designated as confidential. If all the conditions relating to both the procurement exercise and regulation 43 PCR are met, the

statutory prohibition will apply and therefore section 44 FOIA will be engaged.

Section 44 and the public interest

29. Section 44 FOIA is an absolute exemption; there is no need to consider the public interest test. However, the application of regulation 43 PCR depends on the information being confidential and the law of confidentiality has an inbuilt public interest test. This means that where regulation 43 PCR, and therefore, section 44 FOIA apply, the public interest in disclosing the information will already have been considered.

Interaction between regulation 43 and section 41 FOIA – information provided in confidence

30. Section 41 FOIA provides that information obtained by a public authority from a third party is exempt if its disclosure would constitute an actionable breach of confidence. Firstly, its application depends on the information being obtained from another party and secondly it being confidential under common law.
31. These requirements are very similar to the ones that have to be met in order for regulation 43 PCR to apply. Therefore where information is protected by regulation 43 PCR it will also be exempt under section 41 FOIA.
32. However, not all commercial information exempt under section 41 FOIA can be protected by regulation 43 PCR. For example, the procurement exercise may not be governed by the PCR or the confider may not be an economic operator.
33. The application of section 41 FOIA is discussed in more detail in [Information provided in confidence](#) and [The duty of confidence and the public interest](#).

Interaction between regulation 43 and section 43 FOIA – commercial interests

34. Section 43 FOIA provides that information is exempt if it is a trade secret or if its disclosure would or would be likely to prejudice someone's commercial interests.

35. For regulation 43 PCR to apply the information has to be confidential. Commercial information will only be considered confidential if its disclosure is likely to have a detrimental impact on the interests of the confider. It follows that the disclosure of information protected by regulation 43 PCR would, or would be likely to prejudice the commercial interests of the economic operator. Therefore, when regulation 43 PCR applies, there will also be grounds for withholding the information under section 43 FOIA.
36. Section 43 FOIA is subject to the public interest test as set out in section 2 FOIA. This test differs from the public interest test built into the duty of confidence. Under section 2 the default position is that information will be disclosed unless the public interest in maintaining the exemption is greater than the public interest in disclosure. This means that the public interest test applied to section 43 FOIA is more likely to favour disclosing information than the public interest test in maintaining confidences used when applying regulation 43 PCR.
37. However, section 43 FOIA is capable of protecting a wider range of information than regulation 43 PCR. The statutory prohibition created by regulation 43 only protects information forwarded by the economic operator. Whereas section 43 can apply to information that has been jointly agreed between the two parties and information that would, or would be likely to prejudice the commercial interest of the contracting authority. Therefore, section 43 FOIA may be able to protect more of the information in a contract than regulation 43 PCR.

Dealing with requests for non-environmental information

38. The Commissioner encourages public authorities to be as open and transparent as possible. However, he recognises the need to protect some information.
39. Where information about a procurement exercise is requested, some of it may have been designated as confidential under regulation 43 PCR. If regulation 43 does apply the information will be exempt from disclosure under the absolute exemption provided by section 44 – prohibitions on disclosure. Public authorities may therefore wish to consider the use of this exemption first. However, for regulation 43 to apply the information must be truly confidential, which in turn means its disclosure would also satisfy the tests set out in sections 41

and 43 of FOIA, information provided in confidence and prejudice to commercial interest, respectively.

40. The advantage of applying section 44 first is that, being absolute, it is not subject to the public interest. That said, determining whether the information is covered by the regulation 43 does involve consideration of the public interest defence when assessing whether the information is truly confidential.
41. Information that was not forwarded by an economic provider and properly designated as confidential will not be protected by regulation 43. Therefore regulation 43 will not be capable of protecting all information captured by a request about a procurement exercise. Public authorities should consider the application of section 41, where a duty of confidence is owed to someone other than an economic provider, and section 43 to the residual information if it believes it to be sensitive.

EIR regulation 12(5)(e) – confidentiality of commercial or industrial information

42. Regulation 5(6) EIR disapplies any statutory prohibitions on disclosure of environmental information. This means that even if regulation 43 PCR has been correctly applied there will be no automatic engagement of an EIR exception in the same way as section 44 would be automatically engaged under FOIA.
43. However, regulation 43 PCR **is** relevant to the application of regulation 12(5)(e) EIR. Detailed guidance on regulation 12(5)(e) is available in [Confidentiality of commercial or industrial information \(regulation 12\(5\)\(e\)\)](#). In broad terms, it provides that commercially confidential information is exempt from disclosure. The exception can be broken down into a four stage test:
 - the information is commercial or industrial in nature;
 - the information is protected by confidentiality provided by law;
 - the confidentiality is protecting a legitimate economic interest; and
 - the confidentiality would be adversely affected by disclosure.

44. Regulation 43 PCR is relevant to the second stage in this test. Confidentiality will be provided by law if the information is protected by the common law of confidence, a contractual obligation of confidence, or a statutory prohibition. So when the statutory prohibition created by regulation 43 PCR has been properly applied the information will be protected by confidentiality provided by law.
45. Regulation 12(5)(e) of the EIR is broader than regulation 43 PCR and can protect not only information forwarded to the public authority by the economic operator but also mutually agreed information and information created by the public authority itself. Therefore, as with section 43 of FOIA, it is capable of protecting more elements of the tendering process than regulation 43 PCR.
46. All the exceptions in the EIR, including regulation 12(5)(e), are subject to the public interest test.
47. In accordance with regulation 12(9) EIR the exception is not available for information on emissions.

Other considerations

48. As well the guidance identified above, you might also want to consider the following;
 - [Section 41 – Information provided in confidence relating to contracts](#)
 - [Section 43 – Commercial interests](#)
49. Additional guidance is available on our guidance pages if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

More information

50. 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.

51. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.
52. If you need any more information about this or any other aspect of freedom of information, please contact us: see our website www.ico.gov.uk.