



Information Commissioner's Office  
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## 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 before the advent of Freedom of Information were done so on the basis that most, if not all, the information concerning commercial relationships would remain 'confidential'. Often contracts would include confidentiality clauses which purport to prohibit the disclosure of such information. There is clearly 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 (the "Act") 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 attempt to 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 some one'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:

- [Awareness Guidance No 2 – 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.

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 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.

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.

The Commissioner recognises that public authorities may face some difficult decisions when considering the public interest in disclosing information which it believes could 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 new responsibilities will be for the public authority itself to determine. This paper 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 Freedom of Information. It will have the option of raising awareness of the Act in its tendering documentation or even at some later stage in the negotiations. Alternatively, we are aware that some public authorities refer to their new responsibilities under the Act in the actual contract.

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 the Freedom of Information Act operates.

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.

In short, the Commissioner recognises, while a public authority cannot contract out of its FOIA obligations, that 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 help identify occasions when it would be helpful to consult the contractor.

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 commercial relationships if a public authority decides to release information at a later date.

Even if a clause attempts 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 this may result in an action for breach of contract.

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 breach a contract.

## **b) Existing Contracts**

A public authority may have already entered into contracts that include very broad confidentiality clauses. As a result the contractor may expect all information relating to the contract and its commercial relationship with the public authority to remain confidential even where such information would not be exempt under 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 Freedom of Information 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 significant claim for breach of contract as a result of any disclosure under the Act.