


# Freedom of Information Act 2000

A detailed photograph of an owl with large orange eyes and prominent ear tufts, perched on a green, needle-covered branch. The background is a soft-focus green forest.

Many Governments around the world share a common goal and that is to try and reverse the working premise that everything is secret unless otherwise stated, to a position where everything is public unless it falls into specified excepted cases.



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## Introduction

Many Governments around the world share a common goal and that is to try and reverse the working premise that everything is secret unless otherwise stated, to a position where everything is public unless it falls into specified excepted cases.<sup>1</sup>

Global initiatives take many forms however, where the sharing of information has been concerned, many governments have chosen to use legislation to extend the right of access to information. For example; Uganda have introduced the Access to Information Act, which came into force April 2005. India approved in June 2005 the Right of Information Act. Switzerland has adopted a Federal Law on the Principle of Administrative Transparency. These are just small examples however, the fact that most countries have adopted the legislative framework, which emphasises the importance, that organisations need to operate in a responsible and transparent manner.

The UK Government adopted the Freedom Of Information Act (FOIA) in 2000 but it came into force after a staged implementation on the 1<sup>st</sup> January 2005 introducing ‘*the right to know*’ The FOIA is designed to promote transparency and accountability in the public sector and to revolutionise the conduct and behaviour of public sector organisations.

Private sector organisations also need to beware, as they too may be subject to ‘*the right to know*’ under the FOIA, especially if they provide services to public sector organisations. Details of tenders, unsuccessful bids, and contracts, including performance issues and pricing may all fall within the ambit of the FOIA and will be disclosable unless one of the exemptions apply.

## The Business Impact

Although the scope of the FOIA is potentially very broad in application it applies to “all” “information” held by “public authorities”. Furthermore it is retrospective in effect. It applies to existing information as well as to information created after 1<sup>st</sup> January 2005. It is important to clarify the types of information, the holding of information and what constitutes under the eyes of the FOIA a public authority.

**Information** - means information recorded in any form, from paper files to electronic documents and emails, and even telephone messages.

**Holding information** – information is considered to be “held” by a public authority if the authority either holds the information itself, or if the information is held on its behalf by another person, e.g. private sector, government, contractor or supplier.

**Public Authorities** – includes central and local government, the NHS, schools and the police. Critically private sector organisations may, by order of the Secretary of State, also fall within the definition of public authorities if they are deemed to be performing either public functions or the functions of a public authority under contract.<sup>2</sup>

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<sup>1</sup> Lord Chancellor’s first Annual Report on the implementation of the Freedom of Information Act 2000; November 2001

<sup>2</sup> Source: Shaw Pittman LLP, briefing note titled Access all Areas, [www.shawpittman.com](http://www.shawpittman.com)

In addition, from 1<sup>st</sup> January 2005, any person may ask a public authority whether it holds specific information. The public authority must inform the applicant whether or not it holds that information and provide the requested information within 20 working days unless the public authority decides that one of the exemptions apply. Significantly, there is no limit as to the purposes for which information may be requested under the FOIA, for example, there is no blanket prohibition on requests by government contractors that might result in disclosure of their competitors' pricing and other confidential information.

## FOIA & Purchasing & Supply Management (P&SM)

According to the Treasury approximately £125 Billion per year is classed as public procurement.<sup>3</sup> There is a multitude of activities that fall under this heading, from a local authority outsourcing its back office function, to an NHS trust commissioning contracts for hospital meals, to a university buying energy. It is this level of spending that the UK government seeks to make more transparent.

Under current EU public procurement rules all procurement undertaken in the public sector has to be totally transparent and non-discriminatory, with records of tenders and decisions being retained and made readily available on request. Similarly, under the FOIA there will be the right to go to any given company or organisation and request information on tenders; the company must respond within 20 working days. Among the further implications of the FOIA are recording practice at meetings, corporate etiquette, company policy re retention of documents, and general policies and procedures.

P&SM in most cases protects the commercial interests of the public authority when purchasing goods, works and services. It is important that P&SM professionals consider why a public authority possesses commercial information and have a good understanding of the types of information that can affect the commercial interests of a public authority:

- **Procurement** – public authorities are major purchasers of goods and services and will hold a wide range of information relating to the procurement process. This could be future procurement plans, information provided during a tendering process, including information contained in unsuccessful bids right through to the details of how a contractor has performed under the contract.
- **Regulation** – public authorities may be supplied with information in order to perform their regulatory functions e.g. the issuing of licences. Alternatively they may obtain commercial information whilst investigating potential breaches of regulations that they are responsible for.
- **Public authorities own commercial activities** – some public authorities, for instance publicly owned companies, are permitted to engage in commercial activities. Any information held in relation to these will potentially fall within the scope of the exemption.
- **Policy development** – during the formulation or evaluation of policy a public authority may seek information of a commercial nature. For example in developing a policy aimed at promoting a particular industry a public authority may solicit information from companies in that sector.
- **Policy implementation** – e.g. policy of encouraging economic sustainable development via award grants, public authority will hold information in relation to the assessment of the business proposals when awarding those grants.

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<sup>3</sup> Green Futures November/December 2005 article titled 'Hey Big Spender'

- **Private Finance Initiatives/Public Private Partnerships** – the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related the particular project in which a private partner is involved and more generally to the private partner's business.

It is important to note that the above discussion points only refers to how a public authority, in the exercise of its functions, may come to hold information relating to business. It does not imply that such information would be exempt. In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's commercial interests.

Public authorities cannot contract out their duty to disclose information under the FOIA and particular attention must be paid to the confidentiality and disclosure provisions within contracts, both historically and going forwards. Section 45 of the Lord Chancellor's Code of Practice sets out the standards that public authorities are expected to meet to comply with their obligations under Part 1 of the FOIA. The Code gives guidance on the FOIA in context of contractual relationships and states that public authorities should:

- Not include terms in their contracts which purport to restrict the disclosure of information held by the authority relating to the contract beyond the restrictions permitted by the FOIA;
- Reject confidentiality clauses which attempt to make the terms of the contract, its value and performance exempt from disclosure;
- Not agree to hold information 'in confidence' where that information is not, in fact confidential in nature; and
- Be able to justify to the Information Commissioner any confidentiality provisions agreed.

The Code affects P&SM activities in both public authorities and private sector organisations in a number of ways:

- Public authorities will need to review provisions relating to confidentiality and disclosure in existing contracts and may seek to re-negotiate with their private sector counterparts so as to bring such provisions into compliance with the FOIA. ***(It is important to note that where this is not possible, public authorities may be at risk of breaching contractual restrictions through unauthorised disclosure)***
- Attention will need to be paid to confidentiality and disclosure provisions in new contracts to ensure that they comply with the Code of Practice
- Private sector service providers may themselves be considered to be "public authorities" and, if this is the case, will need to conduct their affairs in accordance with the Code of Practice.
- Public authorities will need to consider as to what information they are prepared to accept on a "confidential basis".
- Private sector organisations will also need to consider how much commercially sensitive information is disclosed to public sector customers.
- Contracts should identify categories of information that may be subject to disclosure under the FOIA
- Private sector organisations should seek to negotiate rights in relation to the FOIA disclosure process; eg., the right to be consulted or to take part in any decision



making process to determine the applicability of the exemptions, and the right to consent prior to the release of information relating to that organisation.

**It is important to note that the use of any protective markings such as confidential, trade secret may be useful to indicate intent but will not be conclusive without analysis of the underlying information.**

## The Exemptions

If at any time the P&SM professional receives a FOIA request it is important that they ensure it is put through the relevant authority within the public authority. The reason for this is that public authorities in receipt of a FOIA request must consider a total of 23 exemptions to the 'right to know.'

In certain cases, a public authority can not only refuse to disclose the information, but can also refuse to disclose whether or not it even holds the information. Of these 23 exemptions, 6 are absolute and 17 are qualified exemptions. Qualified exemptions are subject to the *Public Interest Test* prescribed by the FOIA. Under this test, information can only be withheld where the public interest in doing so outweighs that in disclosing it.

P&SM professional with colleagues will need to conduct a balancing exercise<sup>4</sup> before deciding upon whether or not to disclose the information, which is the subject of request. As a result, 'confidential information' may be disclosed, even where that information is subject to contractual obligations of confidence.

## The Confidential Information Exemption

Information is exempt from disclosure under S41 if (a) it was obtained from another person, and (b) disclosure would give rise to an actionable breach of confidence. A duty of confidence that arises at common law because the information is inherently confidential in nature should not be confused with a duty not to disclose information that is deemed to be confidential by virtue of a contract. A contract may protect a much broader scope of information than that which is, in fact, inherently confidential in nature.

## Exemption for Trade Secrets and prejudice to Commercial Interests

In the FOIA Awareness Guidance No5, the Information Commissioner has stated that, where information constitutes a trade secret, for example, the names of customers, the goods they buy and pricing structures if these are not generally known and are the source of 'competitive edge', the public authority does not need to consider the harm its disclosure may cause. The very fact that the information is a trade secret is sufficient to withhold the information (subject to satisfying the public interest test), but the public authority must still inform the applicant whether or not it holds the information.

A private sector organisation doing business with a public authority, therefore, should (as a matter of good practice) clearly identify any information provided to government, e.g. as part of a tendering exercise, which may cause a loss of its competitive edge (although this is merely an indicator and the final decision will rest with the public authority).

## Commercially Sensitive Information

A significant amount of information provided during the course of a commercial relationship is likely to be commercially sensitive, yet it will not amount to a trade secret. However, the S43 exemption will allow the public authority to refuse to supply such information where its disclosure would damage the entity's commercial interest – *the Prejudice Test (see below)*. In contrast to the position taken with regard to trade secrets, the public authority may, subject to the public interest test, refuse to confirm or deny whether it holds the requested information if this would prejudice commercial interests.

The Information Commissioner considers that commercial interests relate to a person's ability to participate successfully in a commercial activity, eg. procurement plans, information provided during tendering processes (including unsuccessful bids), details of the contract and the supplier's performance, and information surrounding PFI/PPP relationships. Such information may not be exempt but will be the subject to the prejudice test and the public interest test.

### The Prejudice Test

- Does the information relate to, or could it impact on a commercial activity?
- Is that commercial activity conducted in a competitive environment?
- Would disclosure cause damage to reputation or business confidence
- Whose commercial interests are affected?
- Is the information commercially sensitive?
- What is the likelihood of prejudice being caused?

As relationships with suppliers change over time, what is confidential or commercially sensitive at the outset of the relationship may not remain so, eg. a government contract has been awarded. Therefore, a public authority cannot rely on an earlier assessment to refuse to disclose information at a later date.

### Hints & Tips

Ten top tips from the Information Commissioners Office (ICO) to aid compliance with the Freedom of Information Act.

- **Be positive.** Greater transparency is overall beneficial for the running of our society
- **Be active.** Use Publication Schemes pro-actively. Pro-active publication saves time, effort, resources and money
- **Anticipate Requests.** Don't wait to be asked
- **Why not?** The FOIA presumes disclosure. Public authorities should meet people's requests unless there is a good reason within the FOIA not to. Organisations do not have to withhold information if an exemption applies.
- **Get talking.** A dialogue between the requester and the public authority can help you resolve requests more quickly
- **Don't fear precedent.** All decisions should be made on their own merits and on a case-by-case basis at the time of the request.
- **Give clear reasons.** If you are turning down a request, write a clear Refusal Notice. Properly drafted and fully explained refusals can help avoid reviews and complaints.
- **Give more if it helps.** Supply additional information where it is useful, such as an explanation of the data you are supplying
- **Help yourself.** Look at the ICO's guidance on [www.ico.gov.uk](http://www.ico.gov.uk) for more information on freedom of information, as well as information on data protection.<sup>4</sup>

### Practical guidance

(a) Requests made after a bidder has been selected and during delivery of the contract

#### *Disclose*

- Names of unsuccessful bidders on an FOIA request
- Range of tender prices offered unless there were only two unsuccessful bidders
- Assessment criteria for the bids
- Identity of bidder
- Contract price
- High level price breakdown and information about the contract and its management.

#### *Withhold*

- Risk assessments and risk logs
- Supplier's approach to work
- Financial models

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<sup>4</sup> [www.ico.gov.uk](http://www.ico.gov.uk)



- CVs
- Reference site information
- Supplier costing mechanisms
- Sums recovered under incentive clauses.

(b) The guidance also looks at procurement information requested after requests for tender have been issued but before selection of the preferred bidder and offers similar guidance in relation to what might be withheld which is financial plans including budgets and cost estimates, management information about value and benefits and information received from tenderers in response to bid invitation and prior to selection of preferred bidder (which can be withheld).

(c) It examines procurement information requested prior to issue of bid invitations and suggests withholding business case and procurement programme/project briefs and plans, financial plans, requirements documentation, procurement risk information.

(d) Finally the guidance examines requests for procurement information or for commercial market information made after a contract has been delivered or made outside the procurement process and indicates it may be appropriate to withhold specific information on particular companies derived from different procurements and lessons learned from a specific procurement. However information derived from different procurements which assesses the performance of different sectors of suppliers such as information about the performance of the consultancy sector should be released, according to the guidance.

The guidance summarised above is produced by the Ministry of Justice (previously Department for Constitutional Affairs) and other guidance issued by them including the guidance above is at <http://www.foi.gov.uk/practitioner/handlingrequests.htm>. The Awareness Guidance under the FOIA is on the web site of the Information Commissioner - [www.ico.gov.uk](http://www.ico.gov.uk).

### Summary

This paper has demonstrated that the FOIA will have a dramatic impact on the conduct of public sector procurement. Public bodies and private sector organisations doing business with the public sector will need to take into account the disclosure obligations under the FOIA and focus on the scope and categories of information that should genuinely be non-disclosable.

### Further Reading

Guide to the Freedom of Information Act 2000, Author Richard Thomas, Publisher Blackstone  
Freedom of Information, A practical guide to implementing the Act, Kelvin Smith, Publisher Facet

Freedom of Information Act Procedural Guidance from the Information Commissioner  
[www.informationcommissioner.org.uk](http://www.informationcommissioner.org.uk)

### Useful Websites

[www.informationcommissioner.org.uk](http://www.informationcommissioner.org.uk)

[www.cfoia.org.uk](http://www.cfoia.org.uk)

[www.ogc.gov.uk](http://www.ogc.gov.uk)

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