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Freedom of Information Act 2000

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Introduction

What 'information' will now be 'free'? The Freedom of Information Act 2000 ("FOIA") came into force in the UK on 1 January 2005. The legislation gives citizens the right to know information held by any governmental or public body, whose decisions are now ostensibly visible and transparent. If an individual requests access to information on a particular matter, public authorities must grant access to it within 20 days, provided that it is not covered by an exemption under the FOIA.

Most politically sensitive information will probably come within one of the 23 exemptions to the disclosure requirement. The most significant exemptions to disclosure include any information relating to the development of government policy, any information that needs to be kept secret for national security purposes and any information relating to security matters (such as any information held by GCHQ and the Security Services). It is notable, however, that the present government was unable to find any exemption that would spare the blushes of the previous government over the United Kingdom's departure from the Exchange Rate Mechanism in 1991. If the current Conservative opposition forms a government in future, it may want to return the favour.

Who will be affected?

There are over 100,000 public bodies in the UK which fall within the FOIA's definition of "public authority", including government bodies, the Central Office of Information, various museums and libraries, the BBC, the Greater London Authority, PFI entities and many more. Any company which supplies services to a public authority (or tenders to provide services) could see its own commercially sensitive information relating to the public authority being disclosed to anybody who requests access to it under the FOIA. This information could include prices and payment terms, details of services supplied, future marketing campaigns, agency staff, financial information and other sensitive information. Experience from other countries with similar freedom of information systems suggests that the biggest use of the FOIA is likely to be in relation to the private sector supplying services to the public sector. In Ireland, Australia, New Zealand and Canada, the right to request information has been used predominantly by businesses as a tool for competitor analysis. We already know of examples in this country of public authorities receiving information requests from competitors and journalists using the FOIA to fish for access to copies of rival agencies' tender documents, contracts and even invoices.

How will the FOIA apply to confidential information from the private sector?

Before the advent of the FOIA, most suppliers to government bodies entered into contracts on the basis that most information about the commercial relationship would be confidential. However, the public's "right to know" now extends to all information held by a public authority, unless it falls under one of the exemptions to disclosure.

There are two most relevant exemptions cover information which:

- is provided in confidence, where disclosure of the information would put the public authority at risk of an action in breach of confidence being brought against it; or
- is a trade secret, or is likely to prejudice the commercial interests of any person, company, public authority or other organisation if it is released.

Neither exemption is anywhere near as wide or comforting as it might appear. Merely marking information as "Private & Confidential" or "Secret" will not necessarily be enough to make the information fall within one of the exemptions. Qualification for an exemption will be judged at the time the request is made. Information that was once provided in confidence might no longer qualify as a trade secret under the FOIA by the time that the disclosure request is received. In that case, the public authority would be required to disclose the relevant information. For example, pricing proposals in a tender document could be a trade secret under the FOIA at the time of the tender and therefore exempt from disclosure. But after the tender is awarded, pricing proposals may no longer be a trade secret, so the public authority would be required to disclose them, if requested.

The second exemption listed above is also subject to an important qualification. Even if the information falls under the exemption, the public authority must disclose the information if it is in the public interest to do so. There is a bias in favour of disclosure being in the public interest. If the request relates to a contract for the outsourcing of public services, or relates to an issue of national importance, there will be an even stronger presumption in favour of disclosure.

How can suppliers protect sensitive information from disclosure?

How can suppliers avoid their sensitive information finding its way to a competitor, or into a tabloid? Crucially, it is impossible for public authorities to contract out of the FOIA. General "boilerplate" confidential obligations in contracts, which historically have rarely been negotiated, cannot exempt a public authority from the requirement to disclose information under the FOIA, even if it means that the public authority is in breach of contract by doing so.

There is also no requirement in the FOIA for public authorities to consult suppliers about requests for information prior to disclosure, and the FOIA does not give suppliers the ability to prevent disclosure of information which they believe should not be disclosed. However, as a matter of good practice, the Department of Constitutional Affairs ("DCA") advises public authorities to check with any third party that may have sent or supplied the information requested or have a close and direct interest in it. This would include contracts, tendering documents and other commercial information. The DCA also notes that even where such information is not exempt, the public authority should think about informing third parties or obtaining their views on the release of the information.

The overriding principle, however, is that any views expressed by suppliers or other third parties concerning the release of information are not binding on public authorities. The statutory duty to provide access to information binds the public authority, not the third party. The DCA notes that the only real exemption to this is when the third party considers that the release of the information would be an actionable breach of confidence. In such cases, public authorities are advised to take legal advice. Ultimately, however, the public authority must take the final view as to whether information should be released and a refusal by a third party to consent to the release of information is not binding. The onus will then be on the third party to bring an action for breach of confidence. Suppliers will therefore have limited options when faced with the prospect of information about their businesses being disclosed to the public.

Possible options will include liaising with the public authority to persuade it not to disclose the information; applying for an injunction preventing disclosure; or suing for damages for breach of contract/confidence (assuming the contract in question imposed confidential obligations on the relevant public authority).

The Office of Government Commerce ("OGC") has issued model contract clauses dealing with the FOIA in procurement contracts, together with guidance notes, but these are heavily weighted in favour of the public authority, and suppliers will probably wish to consider amending these clauses in their contracts with public authorities. In particular, we recommend that marketing services agencies supplying government departments consider the following actions:

- The agency should examine the types of information which might be exempt from the duty to disclose under the FOIA now, before a request for information is received by the public authority, as timing will be tight because of the requirement to disclose within 20 days. This should be done in conjunction with the public authority's FOI officer to ascertain their policies for managing their records and dealing with FOI requests.
- The agency should agree a list or schedule with the public authority which sets out the commercial information held about it that is potentially disclosable under the FOIA and confidential information which is potentially exempt.
- If information held in one document is exempt in part but disclosable in part, the agency should consider reformatting the document so that all exempt information is held in one separate document. There should also be a clause in the body of the contract that expressly deals with this distinction between the two categories of information by reference to the FOIA. This will facilitate the identification and management of such information, reduce the possibility of accidental disclosure, simplify the release of other disclosable information and allow disputes to be resolved more quickly and within the time scale for dealing with requests.
- The agency could agree with the public authority in their contract that the public authority must consult with the agency, or at the very least notify them, before a disclosure is made about any of their commercial information under the FOIA. This clause is not covered under the OGC model clauses.

The agency should try to negotiate the inclusion of a clause in the contract specifying that the supplier will receive its costs in dealing with any requests for information under the FOIA. This is also not covered under the OGC model clauses. Requests are likely to take significant time and resources to progress. Agencies might even wish to go one step further and ask for fees covering the time they spend dealing with any requests for information under the FOIA.

With all the headaches created for a marketing services supplier by the potential receipt of an information request by its public authority client, it is easy to forget that the FOIA presents opportunities too. As well as considering how to defend their position, agencies should also consider how to go on the offensive, and use the new law as a positive opportunity to gain valuable information about a range of issues, especially the reasoning behind unsuccessful pitches and tenders to public authorities.

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