GUIDELINES ON THE RELEASE OF COMMERCIAL INFORMATION & THE FREEDOM OF INFORMATION LAW

INTRODUCTION

1. The Freedom of Information Unit has created this Guidance Document on the Freedom of Information Law and Commercial Information to assist Information Managers in making decisions on requests for information of a commercial value or records which if released could cause prejudice to the commercial interests of a company or public authority. The FOI law requires applications for records to be considered on a case by case basis. The guidance provided will not always apply to the request received by each public authority but is intended to provide some guidelines on handling requests for specific categories of information. In no way is this guidance a substitute for individual decision making and there is no intention to provide legal advice.

2. Public authorities hold a vast number of records which contain information concerning not just the affairs of the authorities themselves, but also individuals, companies and other organizations (collectively 'third parties') who have dealt with the authority. In many cases, third parties will have supplied information to public authorities without any idea that such information might one day have to be disclosed to anyone expressing an interest in it.

3. In addition to information concerning contracts between public authorities and businesses, public authorities may also hold official documents which contain information about businesses as a result of licence or permit applications. Much of this type of information will not have been created by your public authority; rather it will have been sent to you in support of an application for a benefit, approval, etc. or as part of a submission to influence policy. Such records might include details of a company's, sole trader's or professional's:

· financial affairs
· output, profit margin, etc...
· pricing structure
· product details, design or constituent elements
· manufacturing techniques
· expansion plans, marketing strategy
· customer information

These types of information may be found in files or records relating to:

· licence applications
· grant applications, evaluations, etc...
· tender documents
· applications relating product approval
· export/import of goods
· trade statistics
· submissions to the department from business interests on policy matters
· negotiations with business or commercial interests

The Freedom of information Law is retrospective and applies to documents coming into existence both before and after the enactment of the legislation.

4. Any regulatory function the authority may carry out will give rise to a number of official documents which may have to be disclosed. Where public authorities conduct regular reviews of the performance of those with whom they do business the disclosure of this information could likewise assist those who hope to do business with the authority in the future, yet potentially harm the interests of the present contractors. Obtaining disclosure of the reasons why bids or tenders were unsuccessful could be of particular interest to business

5. It has been estimated that between 50 and 60 per cent of all requests for information made under the Freedom of Information legislation in the US are made by commercial organizations seeking information about their competitors.[1]

6. Given the potential for both harm and benefit to the business community if disclosure is made under Freedom of Information Law, the Law does contain some safeguards intended to balance the competing interests of the business community, whose information might be disclosed, and the interests of the public (which will include competitors) in maintaining governmental accountability, transparency and public participation in national decision making (the objects of the Law).

7. The Freedom of Information law provides a right of access to 'records, which means '*information held in any form''*, and held by a public authority in connection with its functions as a public authority. Every person has a right to obtain access to a record other than an exempt record.

8. There will be no need for a person applying to see or have a copy of an official record under the Freedom of information Law to state why the record is sought. The motive for the application is immaterial. There is nothing to prevent businesses using the Law to obtain information about their competitors.

9. Unless an exemption applies, every person has a *right of access* to records. Subject to the physical state of the official document in question and other practical considerations the person applying for access may choose whether to inspect the document or have a copy of it.

10. The right of access appears at s 6 of the Law. There is no right of access if an exemption applies. There are two types of exemption

[1] ME Tankersley "How the Electronic Freedom of Information Act Amendments of 1996 update public access for the information age" (1998) 50 Admin Law Review 421 - 458

(1) an absolute exemption, where the public interest in obtaining the information, however great, is irrelevant and there is no right of access; and

(2) a qualified exemption which requires the decision maker to balance the interests protected by the exemption against the public interest in disclosure being made.

The exemptions most likely to protect third party commercial interests are to be found at Section 17 (which applies if disclosure would be an actionable breach of confidence) and section 21 (which exempts trade secrets, information of commercial value which would be destroyed or diminished if the information were disclosed or where the commercial interests of any person or organization, including the authority, would be prejudiced by disclosure).

11. **Public authorities cannot contract out of their obligation to disclose records**. The fact that an authority has agreed with a business to treat certain information as confidential is not sufficient to guarantee that it will not have to be disclosed under the Law. However, if a public authority has undertaken, expressly or by implication, to treat information as confidential it will be liable for damages if the undertaking is breached when the authority is obliged to make disclosure under the Law. It is vital that no express or implied undertakings are given to keep information confidential. Great care should be taken before disclosing information under the Law which might have been given in confidence. In the case of doubt, legal advice should be sought.

12. Before turning to the exemptions most likely to apply to commercial interests, the following points of good practice should be noted

(1) Authorities should accept information in confidence *only* when they have no other means of obtaining the information;

(2) Confidential material provided by or concerning third parties should be clearly marked as such, subject to the Law;

(3) The physical handling of the information should respect its confidential nature. For example, circulation might be restricted, it could be kept in a separate file and clearly marked as confidential;

(4) When information which might be commercially sensitive is obtained by a public authority, the person providing the information should be asked whether the information is considered commercially sensitive and, if it is, the reason why it is so regarded. If possible, a brief note of the reasons why the material is regarded as confidential could prove very helpful when it comes to handling FOI requests relating to it. The information manager responsible for the decision as to whether or not to disclose will need to know why material is confidential so that he or she can weigh up the reasons for the material being confidential, (and the potential harm if material is disclosed) against the public interest in disclosure. When asking whether the information is commercially sensitive, care should be taken not to be thought to be giving an assurance that the information will not be disclosed. Ultimately it is a matter for the Information Commissioner and the Courts to decide whether information should be disclosed in answer to a request under the law; neither the authority in question nor the third party will have a right of veto. This should be made clear.

(5) Consideration should be given to devising a system which would allow the public authority to alert any third party whose information has been requested under FOI request;

(6) As a matter of practice, when sensitive information is received it would be prudent to ask the party providing the information who should be contacted in the event that a request for the information is made under the FOI Law.

(7) Since the passing of time can render what was once confidential, no longer confidential a regular review should take place to ensure that all information thought to be confidential continues to deserve this designation.

THE EXEMPTIONS

Actionable Breach of Confidence– Section 17

13. Section 17 of the Law exempts from disclosure 'official records'[2] where disclosure would constitute an actionable breach of confidence. In the Law this exemption appears to be an absolute exemption, i.e. there does not appear to be a need to consider the public interest in disclosure. However, since it is a defence to a claim for breach of confidence to show that the public interest favoured disclosure this is not, in fact, an absolute exemption. The public interest in obtaining access to an official record can override a duty to maintain confidentiality.

14. Whether or not disclosure would constitute an 'actionable breach of confidence' requires an assessment of whether the common law would consider disclosure to be a breach of confidence. The classic test is as follows

(1) Does the information have the necessary quality of confidence about it?
(2) Was the information imparted in circumstances importing an obligation of confidence?
(3) Would disclosure be to the detriment of the party seeking to restrain disclosure?

If these points are satisfied, the final question is

(4) Would a public interest defence be available if an action for breach of confidence were brought?

[2] This could be taken to be narrower than 'record', though it is doubtful that that is the intention.

15. In what has become the leading case on breach of confidence, Megarry J, in Coco v Clark [1969] RPC 41, said this:

> *"it seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this would suffice to impose upon him the equitable obligation of confidence. In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture…I would regard the recipient as carrying a heavy burden if he seems to repel a contention that he was bound by an obligation of confidence".*

16. The fact that information provided to or obtained by a public authority was confidential or commercially sensitive when it was obtained, does not mean that this will always be so. The age of the information will have a bearing on whether or not it is confidential.

17. Information may have the necessary quality of confidence about it because the information was provided on the express condition that it was to be treated in confidence, but this is not essential. A duty of confidence can arise expressly, as a result of an agreement to keep information confidential, but it can also arise by implication. Businesses dealing with local authorities will often expect details of their sensitive negotiations and contracts to be kept confidential, even though this may not be expressly stated. Information given to the authority in such circumstances is likely to have a sufficient quality of confidence about it to satisfy points (1) and (2) set out at paragraph 12 above.

18. If a third party to whom a duty of confidence is owed agrees that the confidential information may be disclosed, no actionable breach of confidence claim could succeed. Though there is no statutory duty to consult third parties, there can be no doubt that it makes good sense to do so and that consultation with parties whose

sensitive information has been sought should be regarded as a matter of good practice. If the third party consents to the release of the information, however sensitive the material the "actionable breach of confidence" exemption would not apply.

19. A breach of confidence claim will not be actionable if the public interest favours disclosure. There is no *absolute* duty of confidence. On occasions there may be a duty to the public to disclosure information in breach of a private obligation to maintain confidentiality. There will be no actionable breach of confidence if the public interest in disclosure outweighs the public interest in keeping the information confidential. Classic examples of the public interest favouring disclosure include

    - the detection or prevention of wrongdoing;
    - the prevention of a miscarriage of duty;
    - the maintenance of public safety.

    In England the courts have also allowed disclosure which would otherwise have been in breach of confidence in order to show whether a particular contract was poor value for money (London Regional Transport v The Mayor of London [2001] EWC Civ 1491).

20. In deciding whether a public interest defence would be available, the guiding principle should be to preserve legitimate commercial confidentiality while enabling the general public to be informed of matters which are of considerable public interest. The more hotly contested, or keenly watched, the public debate the more likely that the equitable duty of confidence will be overridden by the public interest. It is not sufficient, however, that a matter should be *of* interest to the public. It must be *in* the public interest for the duty of confidentiality to be overridden, which suggests a benefit to the public in making disclosure beyond the mere satisfaction of curiosity. The presumption is in favour of respecting the confidence; all things being equal, do

not disclose. This is in contrast to the public interest test which is applied in the case of qualified exemptions. Under the Law, all things being equal, disclose.

21. It is important to bear in mind that it may possible to redact a document to take out some of the more sensitive information while allowing the document to retain its meaning. It will not be permissible to withhold the whole of a document where, in fact, disclosure of only part is objectionable. In the London Regional Transport case referred to above, redactions to the document in question was key to the Court being satisfied that there the document should be disclosed.

Commercial Interests – Section 21

22. Section 21which exempts a record from disclosure

(1) if disclosure would reveal **trade secrets;** or

(2) if disclosure would reveal any other **information of a commercial value,** which value would be, or could reasonably be expected to be, **destroyed or diminished if the information were disclosed**

(3) if it contains information concerning **the commercial interests** of any person or organization (including a public authority) and the disclosure of the information **would prejudice those interests**

None of the above is an absolute exemption, however. If the exemption is engaged, disclosure should be made if the public interest favours disclosure. Where there appears to be an equal balance in favour of disclosure or non disclosure then the doubt is to be resolved in favour of disclosure (s 7).

Trade Secrets – 21 (1) (a) (i)

23. There is no precise legal definition of the expression 'trade secret'. Common law has tended to keep this category within narrow bounds, requiring that the information

must be used in a trade or business, must be treated with a sufficiently high degree of confidentiality within the business to amount to a trade secret and disclosure must be liable to cause real or significant harm to the owner of the secret.[3] For a matter to be a trade secret, the owner of the material in question would be expected to have taken reasonable steps to safeguard the information and prevent it becoming known, save as is necessary for the trade or business in question. Examples of trade secrets are details of manufacturing processes, chemical formulae or designs. The fact that information is confidential (information relating to prices or sales figures, for example) is not sufficient to make it a trade secret.

Information of commercial value which would be destroyed or diminished if disclosed (s 21(1) (a) (ii))

24. Information of commercial value which could be destroyed or diminished if disclosed is exempt from disclosure unless the public interest test favours disclosure. This category of exemption is wider than trade secrets. It could include detailed plans or drawings which the owner sells in the course of its business and which would lose their commercial value if sold to the public for no more than the cost of a photocopy. If the information is publicly available or known (other than under the Law) then it is most unlikely that its commercial value would be reduced or diminished by disclosing it. It may that the information is valuable because it can be sold, but this is not necessary. It is sufficient that its value would be destroyed or diminished by being made public. As a record ages, it is likely to lose its commercial value. This exemption is subject to the public interest test discussed below.

Information which, if disclosed, would prejudice the commercial interests of any person or organization (including the public authority)

25. This is likely to be the widest category of exemption in connection with the disclosure of commercially sensitive information. There is no definition in the Law of 'commercial interests'. In the UK the Department of Constitutional affairs has

[3] Faccenda Chicken Ltd v Fowler [1987] 1 Ch 117, Lansing Linde Ltd v Kerr [1991] 1 WLR 251

produced guidance as to the type of information which might harm commercial interests and the following are mentioned[4]:

- Research and plans relating to a potential new product
- Product manufacturing cost information
- Product sales forecast information
- Strategic business plans, including plans to enter develop or withdrawn from a particular product or market
- Marketing plans to promote a new or existing product
- Information relating to the preparation of a competitive bid
- Information about the financial and business viability of a company
- Information provided to a public authority in respect of an application for a licence or as a requirement of a licence or under a regulatory regime.

26. 'Prejudice' is not defined, but would need to be more than a small or trifling negative effect and require a real negative impact. The types of instance where commercial interests might be prejudiced are many. For example, authorities may take the view that disclosure of the full details of a recently awarded contract after tender could harm their interests by, for example, weakening their bargaining power with future contractors and assisting others to know where to pitch future offers. However, since this is a qualified exemption it is subject to the public interest test.

The Public Interest Test

27. The public interest test for the release of information is included in the FOI Regulations. The categories of public interest are not closed and will vary depending on the circumstances of each individual case. Below are some of the factors which may be considered in determining where the public interest lies: The authority should consider whether the release of the information sought may, or may tend to:

[4] http://www.dca.gov.uk/foi/guidance/exguide/sec43/chap03.htm

- promote greater public understanding of the processes of, or decisions of public authorities;
- provide reasons for decisions taken by government;
- promote the accountability of and within government;
- promote accountability for public expenditure or the more effective use of public funds;
- facilitate public participation in decision making by the government;
- improve the quality of services provided by government and the responsiveness of government to the needs of the public or of any section of the public;
- deter or reveal wrongdoing or maladministration;
- reveal information relating to the health and safety of the public or the quality or the environment or heritage sites or measures to protect any of those matters; or
- reveal untrue, incomplete or misleading information or acts of a public authority.
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Factors favouring withholding records in the Public Interest

- That the person or company concerned not be unduly impeded in the effective pursuit of its business.

- There is a public interest in an agency being able to make informed decisions in the course of carrying out its functions and in being able to maintain the confidentiality of their deliberative process in some circumstances, particularly where those deliberative processes relate to ongoing negotiations.

The fact that the release of a record might embarrass the public authority is *not* a relevant factor.

28. Once an information manager has decided that a qualified exemption applies, he or she must consider the factors for and against disclosure. The adverse consequences of releasing the document must be considered and set against the object of the Law and the various public interest factors set out above. Where for and against disclosure are thought to be equally balanced, disclosure should be made.

Consultation with Third Parties

29. There is **no statutory duty to consult or inform** third parties before disclosing a record which concerns them. The FOI Regulations protect third party interests where disclosure of personal information is concerned, but the regulations will *not* provide a mechanism to safeguard commercial, as opposed to personal interests. The Law makes no provision for an authority, or the Information Commissioner, to consult third parties or to advise third parties of decisions to disclose or refuse to disclose information which may concern a third party or its interests. The only remedies available to businesses in these circumstances will be a challenge to the authority's decision making by way of judicial review, or a common law action for breach of confidence (if that is applicable) seeking an injunction to restrain the threatened breach or damages.

30. It is difficult to see how an authority could be fully informed as to the adverse impact of disclosing material which might affect third party interests unless the third party has an opportunity to explain what the impact would be. Consultation is likely to be **essential** if an authority is to be fully informed when it decides whether an exemption will apply to a document.

31. A third party has no right of veto when it comes to the disclosure of its commercially sensitive information. However, if a third party indicates that it would be a breach of confidence for information to be disclosed and that it does not consent, the authority could well find itself liable for damages if the confidence is breached. Since damages will often be difficult to quantify, it is likely that a third party owed a duty of confidence would be able to obtain an injunction to prevent disclosure,

provided he has had the opportunity to seek one before disclosure is made. Once confidential or sensitive data the information is released the third party has no remedy other than a damages claim against the authority. If notice of the *intention* to disclose the record containing such material is given to a third party, the third party would at least have the opportunity to seek an injunction from the Grand Court to prevent disclosure, reducing the likelihood of a damages claim against the authority if there are good grounds of objection and saving the third party from the difficult task of trying to assess what damage will have been caused by any wrongful disclosure.

ADVICE TO THIRD PARTIES

32. Public authorities will hold a great deal of information supplied by persons or bodies long before the implementation of the Law, yet this information will fall within the provisions of the Law. Going forward, it will be a matter of good practice to advise all who deal with public authorities that the authorities are subject to the Law so that they are aware that the authorities may have disclosure obligations in relation to the information supplied.

Informing persons of the possibility of disclosure:

33. Public authorities can reduce the work involved in consulting with third parties on FOI requests by alerting persons in advance to the existence of FOI and the possibility of release of the information. The following practical steps should be considered by public bodies:

· **inform companies submitting tenders** for government contracts that, if successful, access may be given under FOI to particular aspects of their tender

· **when seeking information from business** or commercial concerns, ask the company to inform you, at the time of submitting the information, which parts of it may be disclosed and which parts they regard as being commercially sensitive and why..

The following standard statement is suggested for inclusion in:

· tender documents
· invitations for submissions
· standard forms requiring information to be supplied

> *"The public authority undertakes to use its best endeavours to hold confidential, any information provided by you in this (tender / form / submission, etc.). subject to the department's obligations under law, including the Freedom of Information Law which came into force on [include date]. Should you wish that any of the information supplied by you in this tender / form / submission should not be disclosed because of its sensitivity, you should, when providing the information, identify the same and specify the reasons for its sensitivity. The public authority will consult with you about this sensitive information before making a decision on any Freedom of Information request received".*

You might also be specific that if no information is identified as sensitive, with supporting reasons, then it is likely to be released in response to an FOI request .

FOI Implementation Planning Committee
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