

FREEDOM OF INFORMATION, SHARED SERVICES AND OUTSOURCING

By Ibrahim Hasan

The Freedom of Information Act 2000 came into force on 1st January 2005. It aims to promote a culture of openness in the public sector by giving access to all recorded information held by it (subject to some exemptions). The private sector may be forgiven for thinking that the Act has no impact on them. On the contrary, it applies not just to information held by public sector organisations but also to those holding information on behalf of such organisations. Those involved in providing shared and outsourced services to public authorities need to have a good understanding of the Act and when information will be disclosable or exempt. The new mantra is “Secrecy out; openness in!”

The Act applies to information recorded in any form and which is held by approximately 130,000 public authorities who are based in England, Wales and Northern Ireland. (Scotland has separate but very similar legislation.) These include government departments and their agencies, the police, Parliament, local authorities, and health organisations. Anyone can make a request and the only formality is that the request should be in writing, state the name and address of the applicant and be clear about what is sought. A request can require access to documents, answers to questions or both. Normally it has to be responded to within twenty working days, although the public authority can refuse to disclose the information by claiming one or more of twenty three exemptions under the Act.

Richard Thomas, the Information Commissioner, enforces the Act. A dissatisfied applicant can complain to him about a refusal. He has the power to force public authorities to disclose the requested information. There have been many decisions of the Commissioner which have emphasised the need for the private sector to take note of the Act and its potential to impact on the information held about them as well as information they hold.

Shared services and outsourcing companies who are in the business of processing information on behalf of public sector clients (e.g. providers of IT, market research and payroll services) will need to carefully consider the contractual basis upon which they are engaged. It may be that some information that they generate as part of the service provision may have to be disclosed by the public authority if it receives an FOI request. In a decision involving Leeds City Council (Case Ref: FS50118044 Date: 10/04/2007) the complainant requested copies of the responses given to a market research exercise undertaken by Swift Research Ltd on behalf of Leeds City Council. The Council concluded that it did not hold the requested information, as it only asked Swift to provide it with a final report and not the completed questionnaires. After examining the contractual relationship between the company and the Council, the Commissioner concluded that the questionnaire responses were held by Swift on behalf of the Council and so subject to the Act. Consequently they had to be obtained and disclosed by the Council.

In the light of the above, it will be important for those providing services to a public authority to ensure that the legal contract covers access to information generated by the company and the thorny issue of payment for such information as well as the time

involved in retrieving it. Such matters are easily overlooked as the information will be of no direct interest to the public authority until it receives an FOI request.

Shared services and outsourcing is a very competitive environment. The difference between the winner of a contract and a loser will often be a small difference in price or service delivery method. Such information will be commercially sensitive and service providers will be keen to protect it from disclosure to competitors. When a public authority receives an FOI request for such information Section 43 of the Act allows it to be withheld if disclosure would prejudice the commercial interests of any person (including the public authority holding it).

Recently a number of local authorities have received FOI requests about the nature of their shared services and outsourcing contracts. Whether such contracts relate to management of the education or housing function, or the setting up of a shared services centre jointly with other local authorities, the requests have focused on payments made to companies, performance standards, and the nature of complaints received and warnings issued by the authorities.

Not all such information will be exempt under section 43. The timing of the request is of paramount importance when considering commercial sensitivity. Recently the Information Commissioner ordered Mid Suffolk District Council (Case Ref: FS50131138 Date: 19/06/2008) to release a contract with a commercial partner, including the financial details, concerning the work to carry out repairs and maintenance at Mid Suffolk Leisure Centre. He dismissed the possibility that releasing the contract would be likely to prejudice the commercial interests of the Council or the contractor.

The Council initially provided a redacted version of the contract. It refused to disclose the financial details contained in the document. The Commissioner noted that these details were mainly the individual price quoted per task and the total price for each section of the contract. The Council provided a number of reasons including that disclosure would breach confidentiality, set a precedent and may prevent it from obtaining the best possible price for future work or projects.

The Commissioner refused to accept that disclosure would be likely to lead to any change in the tendering process or undermine the Council's ability to achieve best value for money. The contract in question dated back to 2004. He also refused to accept the Council's suggestion that disclosure would deter organisations from entering into business with public authorities on the basis that council contracts are a lucrative source of business for commercial organisations.

It is now common practice for complainants not just to request details of contracts and successful bids but unsuccessful ones too. In a Commissioner decision involving the Department for Transport (DfT) (Ref: FS50141374 Date: 28/07/2008) the complainant requested the Net Present Value ("NPV") figures offered by the unsuccessful bidders for the South Western rail franchise. The DfT confirmed that it held this information, but refused to disclose it, relying on the exemption under section 43(2); that disclosure would harm the commercial interests of the bidders as well as the DfT itself.

The Commissioner was not persuaded by this argument. He believed that the bidding process for a rail franchise, and the process of awarding the franchise to a particular bidder, is a complex one with many variables, including the needs and priorities of the bidding companies at the time the bids are made. He did not believe that conclusions could be drawn solely from the NPVs alone. He was also not persuaded that the withheld information would allow competitors of the bidders to take a more informed view of their future bidding behaviour nor that the disclosure of the withheld information will be likely to lead to more conservative bids in future rail franchise competitions and thus harm the DfT.

This decision proves that it is not enough to show that information is commercial in nature to claim the section 43 exemption. There must be a significant prejudice to one or more of the parties' commercial interests and a clear causal link between disclosure of the information and the prejudicial effect. Whilst the information Commissioner as well as the Code of Practice under the Act, emphasises the importance of consulting the owner of the information, not all public authorities do this. Again it is important when bidding for public sector contracts for companies to state what information is confidential and why. A clause in the contract should insist on consultation before the public authority discloses any information pursuant to an FOI request.

Finally the Act can be used by private sector companies for their benefit. There is no requirement for the applicant to be an individual. Companies can therefore obtain valuable information from public authorities, which could benefit their business. For example a company, which is in the business of recycling waste, may wish to know to whom the local authority's recyclable waste currently goes. This will allow it to know who its competitors are and what it can do to win future work.

The Freedom of Information Act 2000 has led to a big increase in requests for information about public authority procurement and contracts. Lawyers and procurement professionals need to keep abreast of the decisions of the Information Commissioner in this area. They will have a big impact on companies in the shared services and outsourcing sector.

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