

Freedom of Information and Commercial Information:

The Story So Far

By Ibrahim Hasan

The Freedom of Information Act 2000 (FOI) is starting to have a big impact on public sector procurement. Many of the complaints made to the Information Commissioner's Office (ICO) are about public authorities refusing to give access to information about contracts and commercially sensitive information.

It is important to bear in mind that the FOI right of access applies to information which is held by a public authority. It does not necessarily have to be owned by it. Therefore a lot of information about contractors, bidders (including their bids), performance standards, penalties imposed, timescales etc. will be disclosable. However a number of exemptions may be worth considering before deciding to disclose such information.

Certain information supplied by bidders as part of a tender may be of a personal nature (e.g. bidders' employees' CVs) and so exempt under Section 40 of the Act (personal information). This may also cover information about the public authority's own staff. However the distinction has to be drawn between professional personal information and private personal information. In the recent decision involving Calderdale Council (24th November 2005), ICO ruled that the names of officers who had been on a recruitment trip to Australia should be disclosed to the applicant. Although it the information was personal, it was felt that it was fair and lawful to disclose it considering the nature of the officers' role, the amount of public money spent and the responsibility given to them to carry out the task.

Section 43 of the Act allows information to be withheld where it constitutes a trade secret or where disclosure is likely to prejudice the commercial interests of any person (including the public authority itself). It is important to note that section 43 is a qualified exemption. Therefore the public interest in disclosure has to be considered. The public have a right to know how their money is being spent. Timing is also an important factor to be considered when deciding whether to release information.

In the ICO decision involving the National Maritime Museum (20th June 2005), the complainant requested documents and correspondence relating to payments made to an artist for his exhibition. The museum argued disclosure would prejudice their own and the artist's commercial interests. It explained that it was involved in active negotiations with the next proposed artist in the same exhibition series at the time the FOI request was made. ICO ruled that the public interest in protecting the museum's bargaining position during active and contemporaneous negotiations for a project of a similar nature overrides, for the time being, the public interest in releasing the financial details of the negotiations which immediately preceded those active negotiations.

In a decision involving the Post Office (30th November 2005), the complainant made a request for information about the standard of customer service at a branch in Clapham. The Post Office refused the request partly because some of the information was exempt under section 43. ICO decided that the exemption had been correctly applied. This is because the information included public relations and marketing strategies which could be copied and used by the Post Office's commercial rivals in their own businesses. The public interest rests in preserving a level playing field for the commercial activities the Post Office is engaged in.

There is an exemption under section 42 of the Act which covers information for which a claim for legal professional privilege could be maintained. Lawyers have always considered this to be an absolute concept. However section 42 is a qualified exemption. The public interest in favour of disclosure may override the need to maintain privilege.

A number of ICO decisions involving Thanet District Council concern requests for legal advice (30th November 2005). The complainant requested a copy of the legal advice to the Council on the legal implications of night flights from Kent International Airport .The Council refused access to the document citing section 42 (legal professional privilege). The Commissioner determined that the document was privileged and that the public interest in maintaining the exemption and therefore protecting the principle of legal professional privilege outweighed the public interest in disclosure.

In each case the Commissioner acknowledged the strong public interest in enabling transparency of decisions and knowing that the public authorities act within the law. However this did not outweigh the need to maintain privilege to allow officers to obtain and receive full and frank legal advice without having to worry about the consequences of its disclosure. Similar reasoning was applied in the Calderdale Council decision (see above) where a copy of the legal advice was requested relating to the procurement process. In this case, the Commissioner also highlighted the role of the monitoring officer as an effective check to ensure legality of local authority actions.

The Freedom of Information Act 2000 has led to a big increase in requests for information about public authority procurement and contracts. The new public sector mantra is “Secrecy out; openness in!”

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