
**Freedom of Information and
Procurement: A practical guide
for public authorities**

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Preface

This is a Constitution Unit practical guide. It is written as a general introduction to the large and complex subject of dealing with Freedom of Information requests in the field of procurement. It is designed for a wide range of people across many public authorities who will have responsibilities relating to questions about the potential release of information about procurement. This includes procurement professionals and others with responsibilities relating to FoI who need an overall understanding of the main issues. It will be useful both for those who need a good overall understanding of the subject, and for those who will use it as an introduction to more detailed study. It can also be used as an aid in the training and awareness programmes of authorities.

Both the Information Commissioner's Office and the Department for Constitutional Affairs are developing a range of official advice about how to implement, operate and interpret the Freedom of Information Act. We understand that the Office of Government Commerce will also publish detailed advice relating to procurement. The Constitution Unit guide is intended to be compatible with and complementary to this official advice, while being more succinct and focusing upon what we believe to be the key questions authorities will have to answer in the context of procurement.

We welcome feedback about how this guide can best be improved and made more useful. We will update it from time to time taking into account the feedback received as well as the development of official advice and case law.

1. Context

Requests for information relating to contracts placed by public authorities are likely to be made in high volume and be amongst the most contentious requests made under the FoI Act¹. Reasons for this include:

- the large monetary values involved
- the direct financial interests of large numbers of suppliers and potential suppliers in information which will enable them better to compete and secure profitable business
- the growing range of services provided to public authorities and directly to the public under long term contracts placed with the private sector, about which there is increasing demand for information from the media, NGOs and members of the public

Some limited information about contracts is currently made available under the EU Procurement Regulations, and other information is provided very variably by different public authorities in the context of the Code of Practice on Access to Government Information². A great deal more information is provided in the reports by the National Audit Office to Parliament about specific contracts which have been subject to investigation.

The Environmental Information Regulations 1992 (EIRs), as amended in 1998, have also been used by applicants to request information relating to procurement. The High Court has decided that the content of a concession agreement relating to the construction of a motorway was environmental information.³

The Government, in setting up the Office of Government Commerce, has recognised the vital role which professional procurement and project management can play in delivering high quality services which are optimal value for money. Information about contracts and their performance is recognised as a key ingredient in enabling authorities to learn lessons and improve the quality of contracting and of delivery of services.

¹ In FoI regimes overseas, requests for commercial information, usually about contracts, are typically the highest volumes after requests for personal information. See Freedom of Information and Business, The Constitution Unit, June 1999. Also, World Bank Development Outreach, R Macdonell, March 2003 quoted USA, 1,959,959 requests in 2001 of which 550,000 were from business: Canada 21,625 requests in 2001 of which 9,237 were from business.

² Code of Practice on Access to Government Information 1994, revised 1997. Applies mainly to central government (bodies subject to the jurisdiction of the Parliamentary Commissioner for Administration (Ombudsman))

³ Case No: CO/4553/98. R v Secretary of State for the Environment, Transport and the Regions and Midland Expressway Ltd. Ex Parte Alliance against the Birmingham Northern Relief Road and others

2. What types of information about contracts are typically held and likely to be subject to requests?

Information which relates to contracts and is held by public authorities can be divided into four groups:

1) Pre-contractual process:

- contextual information about the authority, its business, objectives and plans
- general procurement guidelines, information about opportunities and how to qualify to bid in future
- pre-qualification questionnaire
- project initiation documents including strategic outline business case

2) The contractual process—pre-award of contract

- final business case
- qualification information for potential bidders
- invitation to Tender (ITT)—with criteria for award
- details of qualified bidders
- plans and advice on exit strategy for current supplier
- bids submitted
- information about capabilities of bidders, evaluations of bids, including best and final offers (BAFOs), invitations to negotiate (ITN), negotiating briefs and recommendations

3) Post contract—immediate

- the contract:
 - full contract
 - summary of key features
- information about why the successful bidder was selected
- information about other bids and bidders

4) Post contract—longer term

- implementation plan
- information about performance:
 - performance reviews
 - performance deductions
- information about contract amendments with supporting papers

3. Transparency—trends, benefits and prejudice

1) Trends

The international trend is towards greater transparency in the awarding of government contracts. This is evident from the inclusion in the EU Procurement Regulations of requirements relating to debriefing, the publication of contract award notices and the preparation of detailed reports by contracting authorities. Other international organisations such as the OECD, the WTO and the World Bank are also developing policies and guidelines on transparency in government procurement.

2) Effects of transparency

The effects of transparency in relation to government contracts can be considered from three main perspectives:

- that of public authorities with which such contracts are concluded
- that of businesses
- that of the public at large

3) Benefits of transparency

Benefits for public authorities

- previously unsuccessful tenderers and new entrants present themselves as higher quality bidders based upon more detailed information about previous contracts which have been awarded and the reasons for the awards.
- public authorities therefore receive higher quality bids which they are better able to assess and which address their needs more fully⁴
- it is easier to learn from other authorities about the performance and reputation of suppliers

Benefits for businesses

- gaining knowledge about their competitors that will allow them to make better-judged bids in future
- being able to see more clearly that the awarding of the contract is conducted fairly and in a non-discriminatory fashion.
- finding out more about the real needs of potential customers
- as a result making fewer, better quality bids and winning a higher proportion of them

Benefits for the public at large

- more visible accountability including easier monitoring of the operation of long term public contracts during their lifetime
- lessons from unsuccessful projects learned and seen to have been learned
- protection against inefficiency and corruption within contracting authorities

⁴ Here, and with some of the other points, the argument is based upon business profitability and economics. The costs of bidding for public contracts are usually very high. When a bid fails, the money spent bidding is lost and there is also the opportunity cost since the same money could have been spent to better effect elsewhere. Companies therefore have an important interest in achieving a high ratio of successful to unsuccessful bids, and aim to achieve this by gathering relevant information to qualify their chances of success, and only bidding when these are judged to be above a threshold percentage—say 30–50%.

4) Prejudice arising from wrongful release

It is recognised widely that certain information, released at the wrong time, can cause serious harm to the procurement process, private sector companies and to the public interest. Examples include information about:

- a bid, before the contract has been awarded
- the financial stability of a bidder
- a trade secret

Prejudice to public authorities

- potential contractors could be deterred from competing for contracts, thus reducing the level of competition.

Prejudice to businesses

- damage to competitiveness, reputation and in very serious cases, even survival

Prejudice to the public at large

- damage to an important part of the private sector with negative effects upon employment and the financing of public services
- negative effects in terms of value for money that could arise from the withdrawal of potential contractors.

While the harm that could be caused by wrongful release might be substantial, this is widely understood by public authorities subject to FoI legislation. The overseas evidence is that this happens very rarely, and then usually by mistake.

4. Legal framework relating to transparency and procurement

1) Introduction

The legal framework which will apply from 1 January 2005 has the following four main elements:

- The FoI Act
- EU Procurement Directives. These are expected to be revised before January 2005
- Environmental Information Regulations (EIRs). Revised regulations are expected to be brought into force in January 2005
- Audit regulations

The focus of this guide is the effect of the FoI Act upon procurement. The effect of the other elements is summarised and more detailed guidance about each of these is available from the sources which are listed in Annex B

2) The FoI Act—key aspects relating to procurement

The FoI Act

This will replace the current Code of Practice on Access to Government Information 1994, revised in 1997. The main features of the FoI Act as they apply to contracts are:

- the Act applies to information about all public contracts held by a very wide range of public authorities
- it applies to information which is held by another person on behalf of the authority
- there is no requirement to have a particular status, such as a losing tenderer, to make a request and be given information
- it is retrospective in that it applies to all information which is 'held' at the time a request is received

There are a number of exemptions under which information which has been requested need not be released. Some of these are subject to the public interest test defined in section 2 of the Act. A number of the exemptions could apply in the context of procurement. Two which will most commonly need to be considered are section 41, "Information provided in confidence", and section 43, "Commercial interests". Other exemptions might also apply, for example, section 24, "National Security", section 27, "International relations" and section 42, "Legal privilege".

Information provided in confidence (s. 41)

This exemption applies if releasing the information would amount to an actionable breach of confidence at the time a request is made. This exemption is not subject to the public interest test in s. 2, but it is generally accepted that the action for breach of confidence incorporates a public interest defence. The operation of the exemption requires consideration of the applicability of the three requirements of the action for breach of confidence which are; that the information must have the necessary quality of confidence about it; that it must have been imparted in circumstances imposing a duty of confidence; and that there must be unauthorised use of the information to the detriment of the party communicating it.

Commercial interests (s. 43)

This exemption is made up of two parts, each of which constitutes a separate ground for refusing access to information. The first protects against disclosure of trade secrets by stating simply that information is exempt if it constitutes a trade secret. The second part of the exemption applies where disclosure “would, or would be likely to prejudice the commercial interests of any person”. This exemption is subject to an overriding public interest test (in s. 2) which provides that it will not apply where in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test (s. 2)

Section 2 of the FoI Act provides that the right of access does not apply where in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. While the s. 2 public interest override does not apply to all of the exemptions, it is available in the case of s. 43 (commercial interests). The operation of the public interest override requires a balancing of the public interest factors favouring disclosure against those that favour withholding of the information. Where these interests are evenly balanced, the requested information must be disclosed. Public authorities are obliged when withholding information under exemptions to which the public interest override applies, to state the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Access Code issued under s. 45 of the Act provides that consultation with affected third parties should take place where the views of the third party may assist the authority to determine where the public interest lies under section 2 of the Act.

FoI Act Code of Practice issued under s. 45 (Access Code)⁵

The Act specifies that the Secretary of State shall issue a code of practice which it ‘would be desirable’ for public authorities to follow in connection with their obligations under the Act. This is referred to as the Access Code. While it is written as guidance on good practice rather than specific legal obligations, it has considerable practical force for public authorities. It is one of the duties of the Information Commissioner to promote the observance of the code. He may issue a ‘practice recommendation’ to an authority specifying the steps to be taken to promote conformity with the Code. It also has some legal force in that it gives rise to a ‘legitimate expectation’ that public authorities will comply unless for good reason.

In the context of procurement the most relevant aspects include provisions which cover:

- advice about the acceptance of contractual terms which purport to restrict the disclosure of information held by the authority
- acceptance of confidentiality provisions should be for good reasons capable of being justified to the Commissioner

Enforcement

A disappointed applicant, having followed the internal appeals process of the authority, can appeal to the Commissioner at no cost. The Commissioner can review whether the Act has been applied properly in refusing access and if he decides that an exemption has not been properly applied or the public interest not weighed appropriately, can require release of the information. The applicant and the public authority can appeal beyond the Commissioner to the Information Tribunal, but third parties have no right of appeal either to the Commissioner or the Tribunal. This is very different from the position with the EU Procurement Regulations, where a disappointed applicant can only go to the High Court to enforce access rights.

⁵ Lord Chancellor’s Code of Practice...issued under section 45 of the Act, Nov. 2002. See sections VIII and IX.

3) Related legislation

EU Procurement regulations

The public procurement Directives relating to works, supplies and services and implemented in the UK by various regulations apply to contracts of certain types and above published value thresholds. They require that information that falls into the following categories be made available:

- basic information to be published in contract award notices (e.g. name of winning tender and a description of the subject of the contract)
- debriefing information to be made available to unsuccessful tenderers on request (e.g. reasons for rejection and characteristics and relative advantages of the winning tender)

FoI will provide for much wider disclosure of information beyond these categories. The procurement Directives provide for certain discretions not to disclose information (notably in relation to contract award notices and debriefing when disclosure would prejudice legitimate commercial interests). The practical effect will be that such discretion will need to be exercised subject to FoI. In the case of any claimed prejudice to commercial interests this would require consideration of the public interest test. It will also be significant that seeking redress under FoI will be much simpler than under the procurement Directives and will be at no cost to the applicant. This is likely to encourage interested parties to more readily contest decisions not to disclose requested information.

The UK Regulations implementing the Directives provide for compliance by contracting authorities with a contractor's reasonable confidentiality requirements. The proposed new consolidated public sector procurement Directive to be adopted shortly has a tighter confidentiality provision. It will prohibit the disclosure by contracting authorities of information which has been designated as confidential by contractors. But the provision is stated to apply in accordance with national law so non-disclosure will still need to be brought within the confidentiality exemption in FoI.

Environmental Information Regulations (EIRs)

The current EIRs are shortly to be revised with the revised regulations expected to be in force in January 2005.⁶ The effect is likely to make it more difficult to refuse a request for information which is judged to fall within the revised definitions of environmental information. All exemptions in the revised EIRs are subject to the public interest test. Currently the EIRs are enforced through the High Court, but from January 2005 they will be enforced by the Information Commissioner in the same way as the FoI Act.

Audit Regulations

The National Audit Office now has statutory powers to access directly the documents of a contractor or sub-contractor, which relate to "a contractual obligation to supply goods or services to a body the accounts of which are examined by the Comptroller and Auditor General..."⁷

⁶ The revised regulations are to implement the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (The Aarhus Convention), and EU Directive 2003/4/EC of 28th January 2003.

⁷ Statutory Instrument 2003 No. 1325, May 2003, The Government Resources and Accounts Act 2000

5. Guidance and check lists

This guidance comprises a table which outlines normal good practice and the following four areas where more detailed guidance may be helpful. These are:

- publication of information
- advice to suppliers
- records management
- possible nomination of suppliers under s. 5

1) Table: guidance on disclosure in normal circumstances

This table relates to the types of information relevant to procurement which is shown in section 2, and outlines normal good practice in relation to disclosure. In specific cases there may be good reasons why this should not be followed. There can be no sensible or legally correct guidance which applies to all situations. This can be used as a check list to examine whether reasons for non-disclosure are adequate in any particular situation.

Guidance on disclosure in normal circumstances

Pre contractual process	
Contextual information about the authority, its business, objectives and plans	Normally discloseable and ideally published in FoI Act Publication Scheme
General procurement guidelines, information about opportunities and how to qualify to bid in future	Normally discloseable and ideally published in FoI Act Publication Scheme
Pre qualification questionnaire	Normally discloseable
Project initiation documents, including strategic outline business case	Summary version discloseable, but precise details of budget and business case may be withheld until after award to avoid prejudice to competition
The contractual process—pre award of contract	
Final business case	Normally withheld until after award to avoid prejudice to competition
Qualification information for potential bidders	Normally discloseable, but, where justified, could be restricted to qualified bidders
Invitation to tender (ITT)—with criteria for award	Normally discloseable, but, where justified, could be restricted to qualified bidders
Details of qualified bidders	Normally discloseable in summary form
Plans and advice on exit strategy for current supplier	Normally withheld until release would no longer prejudice transfer to new supplier
Bids submitted	Normally withheld
Information about capabilities of bidders, evaluations of bids, including best and final offers (BAFOs), invitations to negotiate (ITN), negotiating briefs and recommendations	Normally withheld until after award and then possibly subject to summary and redaction, so as to avoid breach of confidence and/or prejudice. However consideration of the public interest will require justification for decision
Post contract—immediate	
The contract:	
Full	Could be released, possibly with some parts redacted for a defined period
Summary of key features	Should normally be released or published

Information about why the successful bidder was selected	Normally discloseable in full
Information about other bids and bidders	Sufficient should be disclosed to demonstrate validity of selection, but details of bids of losing bidders not usually discloseable
Post contract—longer term	
Implementation plan	Normally discloseable, except for elements which may be withheld for a short period
Information about performance:	
Performance reviews	Normally discloseable, after agreement on accuracy of content
Performance deductions	Normally discloseable
Contract amendments with supporting papers	Normally discloseable, as for contracts

2) Publication of information—relevant to procurement

There are a number of benefits which arise if an authority publishes information which is relevant to its procurement activities in its FoI Act publication scheme. These include:

- it is easier for suppliers to do business with the authority. This reduces their costs and encourages new suppliers, including SMEs, to enter the market
- authorities save the time and cost spent handling individual requests⁸
- authorities can decide what information to publish as part of a systematic management process, as compared to responding to individual requests to tight timescales

In order to achieve these benefits, the following aspects should be addressed:

- what information is published currently? Information which is relevant to procurement covers a wide range. The broad categories are set out in section 2.
- Is it easy for stakeholders in general and potential suppliers in particular to access and understand this information?
- Has this been tested?
- Is there a systematic process to understand what information stakeholders need and want?
- Is there a plan, which is reviewed on a regular basis, to publish more of this information

3) Advice to suppliers

It is important for suppliers and potential suppliers to understand how the FoI Act will affect them. Many, smaller companies in particular, may not be aware of the implications for them. They will benefit from being able to find out more easily information about opportunities and the performance of other players. The main area of risk for them would arise when information about them which they may have expected to remain confidential (in line with previous custom and practice) is made available. The following areas should be addressed:

- have they been made aware that all the information they have provided, are currently providing and will provide is subject to the FoI Act?
- is there a process for them to use to make the authority aware of information they believe should be protected? This should include clear specification of the precise information and the reasons why it should be protected and for how long, which relate to the FoI Act. It should also be made clear that the public authority cannot guarantee that the information will not be disclosed under the FoI Act.

⁸ Canada: study on the operation of the Access to Information Act, reported that by 1998/9 the average cost of handling an individual request had come down to 38 hours.

- do they understand the significance of markings on documents such as 'confidential' or 'commercial in confidence'? Such markings do not necessarily mean that the document in question will be exempt from disclosure.
- are arrangements in place to enable consultation about possible release in accordance with the provisions of the s. 45 code, to take place promptly, so that the timescales defined in the Act are met?
- do suppliers understand the type of response they will need to make when they are consulted? Essentially to agree to release, or give reasons within the terms of the Act which convince the authority that an exemption should properly be applied.
- when they wish a duty of confidence to apply to defined information or wish to propose a confidentiality agreement, do they understand the case they need to make to the authority in line with the s. 45 code?
- have they been informed of and are they prepared to meet the possible requirements of the National Audit Office, and advise their sub-contractors accordingly.

Where the contract envisages that a supplier will hold information 'on behalf of' the authority, the supplier needs to be aware of the implications for him, since the authority will need to ensure that such information is collected, held and can be accessed to similar standards to those the authority is required to meet.

Much of this information can be published for all suppliers to read in the publication scheme of the authority.

With many suppliers, in particular those most accustomed to working in an FoI environment, authorities will find that the concerns will be more about awareness of the standards in advance, and that they will be applied consistently and predictably to all players, as compared to concerns about openness.

4) Records management

Good records management provides the foundation for cost-effective implementation of the Act. Authorities should ask themselves:

- has the s. 46 code of practice on records management been implemented, so that they know what information they hold, where it is and can access it readily?
- have the information requirements relating to excellence and good practice in procurement and project management from OGC been implemented?⁹

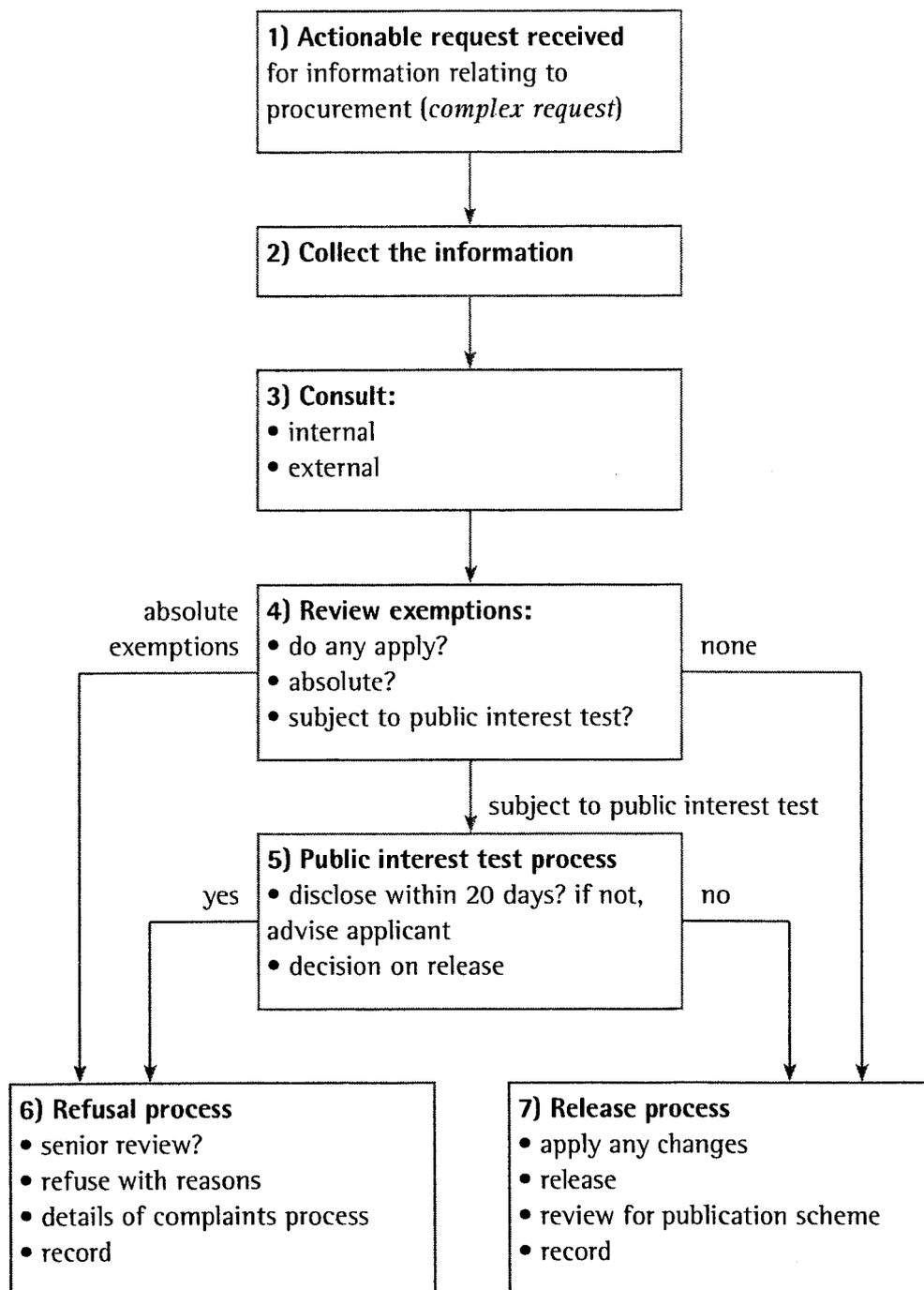
5) Possible nominations of suppliers for designation as public authorities under section 5

We suggest that a judgement about whether the authority wishes to propose designation under s. 5 (1) (b) for its chosen contractor to the Secretary of State be made early in the procurement process. If so:

- it would be good practice to advise potential contractors early so that such a contingency can be built into their plans.
- the authority will need to review its own information requirements in such an event, so that it can still satisfy the requirements of accountability and transparency in carrying out its functions.

⁹ See, for example, COE minimum data requirements matrix in the Successful Delivery Toolkit, and the information requirements for Gateway Reviews. <http://www.ogc.gov.uk/sdtoolkit/>

6) Handling individual requests—procurement specific elements



Introduction

The processes described here relate to a request for procurement information. This is defined as either directly about one or more specific procurement activities or where the expertise of procurement professionals is needed.

It is assumed that preliminary matters relating to the receipt and initial handling of the request have been handled in accordance with the overall guidance and processes.

Procurement professionals could either be handling the request or advising an FoI resource or group.

1) Actionable request for information relating to procurement received

This means it has already been decided that:

- there is no claim that the request is vexatious
- there is no intention to refuse on the grounds that cost of compliance would exceed the appropriate limit
- the request is clearly understood
- the information is held
- it falls to be handled under the FoI Act rather than the DP Act or the EIRs
- it is a complex request in the sense that exemptions need to be considered

2) Collect the information

The information should be collected from wherever it is held within the organisation. In some cases this will involve copying documents, but increasingly it will involve simply accessing information held in electronic form.

3) Consult

Where consultation is required this needs to be handled to short and planned timescales. This can be of two types:

- internal, where the procurement professionals, staff and managers who best understand the issues are consulted. The purpose is to understand whether one or more of the exemptions might apply, and the nature of any likely 'prejudice'
- external, where third party suppliers of information, or people and organisations who might be affected by release of the information, are asked whether they believe they would or would be likely to be prejudiced by release in any way, and if so, for what reasons, the chances that the prejudice might occur, the seriousness of the prejudice and the timescale during which the risk will apply.

In both cases, where they explain that prejudice might be suffered, it is important to establish to which specific parts of the information this applies, so that removal (redaction) of just that part of the information can be considered.

It is important to establish whether an explicit or implicit duty of confidence applies to any of the information. If so, the third party to whom such a duty is owed should be asked if they will agree to release.

4) Review exemptions

A systematic consideration of the exemptions which might apply should be undertaken. If a number of exemptions apply, there may be no need to consider them all in detail but care should be taken to consider the main ones. In the past the Ombudsman has criticised organisations that come forward with new exemptions after he has ruled that the one presented does not apply. It would be prudent to expect the Information Commissioner to take a similar view.

If it is clear that one of the absolute exemptions applies, after consideration of whether redaction would enable some of the information to be released the request should be passed to the refuse process.

If the exemption to be considered is subject to the public interest test (PI test) then the request moves to the PI test process. If no exemptions apply then the request is passed to the release process.

5) Public interest test process

The first matter to address is the timescale required to complete this process. If more than the 20 days in total from receipt of the request is needed and if the appropriate notice has not been given to the applicant, such a notice should be sent now.

For more detail on this process see guidance on the public interest test. Once it has been completed and any appropriate redaction applied, the request should be passed to the release process 10) or the refuse process 9).

6) Refusal process

Authorities may wish to adopt a policy to define which type of requests can be refused at what level in the organisation. This could be combined with a policy to review all refusals of a certain type at senior level to ensure consistency and that they have the support of senior management.

Refusal should be communicated formally to the applicant, together with details of their rights to complain. The statement of refusal should include reasons and be handled in conformance with Access Code (s. 45).

Detailed records of the refusal and reasons should be maintained and reported, also in conformance with this code

7) Release process

Any estimated fees should be collected unless this happened previously. Normally an authority will expect to collect any significant fees before engaging in the task of collection and retrieval of the information. This would be in a previous process.

Information released should be recorded and considered for addition to the publication scheme. This can comprise both publishing the request and information supplied in full or summary form and consideration of whether to include information of this type in the scheme in future.

Annex A. Disclosure of contract information under FoI legislation overseas and under the Code of Practice on Access to Government Information.

Here are some examples of the application of FoI law to requests for contract related information in other jurisdictions operating under FoI legislation and under the Code of Practice on Access to Government Information. The examples are offered by way of illustration and do not purport to predict the manner in which the UK FoI Act will be interpreted. It is worth noting in this context that the relevant exemption provisions of the overseas legislation are similar *but not identical* to those in the UK FoI Act. Neither are the relevant exemption provisions of the Code of Practice on Access to Government Information identical to those in the FoI Act. The decisions are also based on particular fact situations which arose in each of the cases.

This annex addresses:

1. The application of the confidentiality and commercial interests exemptions to contract information
2. The operation of the public interest test in the context of requests for access to contract related information

I. Application of the Confidentiality and Commercial Interests Exemptions to Contract Information

1. Successful tenderers

a. Total tender prices of successful tenderers

The confidentiality exemption was found to be inapplicable once the contract had been awarded:

Re Henry Ford & Son Ltd and Office of Public Works Information Commissioner, unreported, Decision No.9849, March 31, 1999 (Ireland)

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland).

While the commercially sensitive exemption was applicable, the information was held to be subject to disclosure in the public interest:

Re Henry Ford & Son Ltd and Office of Public Works Information Commissioner, unreported, Decision No.9849, March 31, 1999 (Ireland)

Re X and Leitrim County Council Information Commissioner, unreported, Decision No.99557, November 29, 2001 (Ireland).

In applying the Code of Practice on Access to Government Information, the Ombudsman has taken the view that:

- it should be normal practice for departments and agencies to disclose the price that they have paid to contractors for providing a service and in such circumstances, Exemption 13 (third part commercial confidences) was inapplicable: Case A/28/02.
- the prices at which 27 British Rail businesses were sold to buyers in the private sector could not be withheld under Exemption 13: Case A.5/96

b. Tender submissions of successful tenderers

The approach generally taken has been to exempt certain elements of successful tender submissions while disclosing others.

Neither the commercially sensitive nor the confidentiality exemptions were found to be applicable to the following categories of information which were therefore disclosed:

- marketing and promotional information:
Re Mark Henry and Office of Public Works Information Commissioner, unreported, Decision No.98188, June 25, 2001(Ireland)
Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)
- information available on a tenderer's website or in other publications:
Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

The following categories of information were found to be covered by the commercially sensitive information exemption:

- client information
- details of fee structures (including details about what the fees did or did not include)
- terms of payment.

The fee structure was released on public interest grounds but the remainder of this information was withheld:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

More commercially sensitive elements of successful tenders may become subject to disclosure with the passage of time:

Re Company X and Department of Communications Marine and Natural Resources Information Commissioner, unreported, Decision No.030182, July 23, 2003 (Ireland)

2. Unsuccessful tenderers

a. Total tender prices of unsuccessful tenderers

Both the commercially sensitive and confidentiality exemptions were found to be applicable and disclosure was not in the public interest The information was withheld:

Re Mark Henry and Office of Public Works Information Commissioner, unreported, Decision No.98188, June 25, 2001(Ireland)

b. Names of unsuccessful tenderers

Neither the commercially sensitive nor the confidentiality exemptions were applicable and so the information was disclosed:

Re Mark Henry and Office of Public Works Information Commissioner, unreported, Decision No.98188, June 25, 2001 (Ireland)

c. Names of unsuccessful tenderers along with their respective tender prices

The commercially sensitive exemption was applicable and disclosure was not in the public interest. The information was therefore withheld:

Re X and Leitrim County Information Commissioner, unreported, Decision No.99557, November 29, 2001 (Ireland)

d. Tender submissions of unsuccessful tenderers

The commercially sensitive exemption was applicable and disclosure was not in the public interest so the information was withheld:

Re Mark Henry and Office of Public Works Information Commissioner, unreported, Decision No.98188, June 25, 2001 (Ireland)

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

Maddock, Lonie and Chisholm and Department of State Services [1995] WAICmr 15 (June 2, 1995) (Western Australia)

3. Records of the evaluation process

The commercially sensitive exemption was applicable and disclosure was not in the public interest in the case of the evaluation scores of unsuccessful tenderers. Disclosure of evaluation details of successful tenderers was found to be in the public interest:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

Re Wanless Wastecorp Pty and Caboolture Shire Council Queensland Information Commissioner, unreported, Decision No.03/2003, June 30, 2003 (Queensland)

Re Sideris and City of Joondalup [2001] WAICmr 37 (October 10, 2001) (Western Australia)

4. Contract documents

Once the contract was awarded, the successful tender information lost confidentiality with respect to the fee rates and other details necessary to understand the nature of the services contracted for:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

The commercially sensitive exemption was not applicable to the total prices or the timetable for payment or the fees payable in the event of termination prior to completion of the project but it did apply to details of the fee structures, including details about what the fees did or did not include, and the terms of payment but disclosure of this information was in the public interest. Thus all of these categories of information were subject to disclosure:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

The public interest favours disclosure of performance indicators in the contract eventually concluded with the successful tenderer:

Re Wanless Wastecorp Pty and Caboolture Shire Council Queensland Information Commissioner, unreported, Decision No.03/2003, June 30, 2003 (Queensland)

II. Operation of the public interest test in the context of requests for access to contract related information

1. Total tender price

In a case where the total tender price of a successful tenderer was exempt on grounds of commercial sensitivity, the Irish Commissioner nonetheless held that disclosure of this information would be in the public interest. While the Commissioner acknowledged that there is legitimate public interest in persons being able to conduct commercial transactions with public bodies without fear of suffering commercially as a result, he emphasised the public interest in disclosure of commercially sensitive information, saying that there is a public interest in ensuring the maximum openness in relation to the use of public funds. Such openness, the Commissioner said "is a significant aid to ensuring effective oversight of public expenditure, to ensuring the public obtains value for money, to preventing fraud and corruption and to preventing the waste or misuse of public funds":

Re Henry Ford & Son Ltd and Office of Public Works Information Commissioner, unreported, Decision No.9849, March 31, 1999 (Ireland)

2. Tender submissions of successful tenderers

Disclosure of detailed information about a successful tenderer's business, understanding of, and approach to, a particular project, and approach to tendering in general, contained in a successful tender document was found not to be in the public interest. Such information, it was held, should not be disclosed in the public interest unless it was necessary to explain the nature of the goods or services paid for by the public body. On the other hand, details of the fee structure contained in a successful tender submission should be disclosed in the public interest on the grounds that, on balance, the public would be better served by the release of the fee structure in light of the significant need for openness and accountability in relation to the contract:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

The age of a requested tender submission has been taken into account in determining where the public interest lay. In a case where a tender was 5 years old, it was held that any harm arising from release of the tender would be minimal given the passage of time and that it was outweighed by the strong public interest in openness and accountability in relation to the subject matter of the tender namely the controversial floatation of the national telephone service provider:

Re Company X and Department of Communications Marine and Natural Resources Information Commissioner, unreported, Decision No.030182, July 23, 2003 (Ireland)

3. Total prices and tender submissions of unsuccessful tenders

A distinction has been drawn in applying the public interest override as between successful and unsuccessful tenderers. The basis of the distinction is that while any harm or detriment which might result from disclosure of information about a successful tender would be outweighed by the benefits of being awarded the contract, this is not true with respect to an unsuccessful tender. In the case of unsuccessful tenderers, given that the requested information does not relate to the expenditure of public money (since the tender was ultimately unsuccessful) the public interest has been held to favour protecting that information from disclosure:

Re Mark Henry and Office of Public Works Information Commissioner, unreported, Decision No.98188, June 25, 2001 (Ireland)

4. Names of unsuccessful tenderers with respective tender prices

Release of the identities of unsuccessful tenderers associated with their tender prices has been found not to enhance the public interest in the openness and accountability of government to an extent sufficient to overcome the countervailing public interest in the protection of commercially sensitive information:

Re X and Leitrim County Council Information Commissioner, unreported, Decision No.99557, November 29, 2001 (Ireland)

5. Records of the Evaluation process

Again a distinction has been drawn here between successful and unsuccessful tenderers. While disclosure of the documents generated in evaluating the successful tender submission has been found to be in the public interest in terms of furthering accountability of the Council's decision to award the contract to that tenderer, the disclosure of evaluation documents which related to the unsuccessful tenderers was not be in the public interest:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

Re Wanless Wastecorp Pty and Caboolture Shire Council Queensland Information Commissioner, unreported, Decision No.03/2003, June 30, 2003 (Queensland)

The Ombudsman in applying Exemption 13 of the Code of Practice on Access to Government Information found that the public interest in disclosing data used in the evaluation known as the public sector comparator for a contract between London transport and an international consortium was outweighed by the potential harm that could be caused to the company's present and future competitive position: Case A.2/01

6. Contract documents

Disclosure of details of details of the fee structures, including details about what the fees did or did not include was found, on balance, to be in the public interest in light of the significant need for openness and accountability in relation to the contract:

Re McKeever Rowan and Department of Finance Information Commissioner, unreported, Decision No.99183, January 21, 2003 (Ireland)

Disclosure of performance indicators in a contract has been found to attract a sufficiently strong public interest consideration favouring disclosure:

Re Wanless Wastecorp Pty and Caboolture Shire Council Queensland Information Commissioner, unreported, Decision No.03/2003, June 30, 2003 (Queensland)



Annex B. Sources of further information

Freedom of Information Act 2000 (HMSO. ISBN 0 10 543600 3)

<http://www.legislation.hmso.gov.uk/acts/acts2000/20000036.htm>

Department for Constitutional Affairs

<http://www.foi.gov.uk>

Office of Government Commerce

<http://www.ogc.gov.uk>

The Information Commissioner

<http://www.informationcommissioner.gov.uk/>

Defra

<http://www.defra.gov.uk/environment/pubaccess/index.htm>

National Archives

<http://www.nationalarchives.gov.uk/footer/freedom.htm>

The Audit Commission

<http://www.audit-commission.gov.uk/>

The Constitution Unit

<http://www.ucl.ac.uk/constitution-unit/foidp/index.htm>

Campaign for Freedom of Information

<http://www.cfoi.org.uk/>

Websites with details of policies which apply in practice in USA and Canada

1) US Dept of Justice, Office of Information and Privacy

Treatment of unit prices under exemption 4

<http://www.usdoj.gov/oip/Folapost/2002foiapost13.htm>

FoIA Exemption 4 is the business information exemption. There is a current (since 1998) Federal Acquisition Regulation (FAR) which requires disclosure of unit prices unless this information is otherwise exempt. FoIA

Post outlines the impact of two related court decisions which qualify the general assumption that they should always be released.

2) NASA USA e-FoIA reading rooms.

These exist in all of the NASA centres. They all provide contract details, including scanned copies of the documents. This is an example from the Johnson Space Center.

<http://www.jsc.nasa.gov/news/contracts/index.html>

3) Contracts Canada

Summary details of contracts placed by Public Works & Government Services Canada (PWGSC)

<http://csi.contractscanada.gc.ca/csi/prod/en/applctrl.cfm?cmd=start&language=en>

A high proportion of government contracts in Canada are placed by PWGSC. It is possible to search for details of specific contracts or browse through the contracts placed by a department.