

Lovells

The **Constitution** Unit



SCHOOL of  
PUBLIC POLICY

A guide for business  
to the planned UK  
Freedom of  
Information Act



# Executive summary

## WHAT IS THE FREEDOM OF INFORMATION ACT (FOIA)?

The UK Freedom of Information Bill was introduced into the House of Commons in November 1999. It will give citizens access to information held by public authorities, enabling them to participate 'in the discussion of policy issues, and so improve the quality of government decision making', and holding 'government and other bodies to account'<sup>1</sup>.

The Bill will apply to public authorities in England, Wales and Northern Ireland. It will not apply to the Scottish Parliament, the Scottish Administration or Scottish public authorities.

On first reading the Bill appears to give effective protection to confidential business information, while promising the release of more government information. The common law duty of confidence will be unchanged and the test for the exemption of commercial information seems an easy one to meet.

However, when looked at more closely there are some real areas of concern for business:

- The Bill is retrospective. It will apply to information which is 'held' by a public authority at the time a request is received.
- A public authority will have discretion to release commercial information which is properly exempt within the terms of the FOIA, in the light of its own judgment of all the circumstances and the balance of the public interest.
- A company will have no enforceable right to advance notice when a public authority plans to release information which the company has claimed to be confidential. The provision for advance notice will be in a code of practice.

- A requester who is refused company information which is claimed to be confidential will have an appeal process to the Information Commissioner, the Tribunal and to the High Court. A company which disagrees with a decision to release its information has no appeal process. Its only recourse is to the High Court to obtain injunctive relief.

## WHEN WILL IT BECOME LAW?

The Bill is expected to complete its passage through Parliament during the current session and become law in mid 2000.

Implementation of the main provisions of the FOIA may be delayed for up to five years. It is, however, expected that it will be implemented in phases with central government in an early phase, probably in 2001.

## WHY IS IT IMPORTANT FOR BUSINESS?

The Bill will create new risks and provide new opportunities for business.

The risks are that confidential information may become more easily available to competitors, customers, suppliers and interest groups. In addition to the risks inherent in the features of the Bill outlined above, the context in which it is being introduced and the practicalities of implementation add to these risks.

The opportunities include finding out more about the market both within and outside government, about government policies and about other players in the market.

<sup>1</sup> House of Commons Select Committee on Public Administration, Fifth Special Report, October 1999, page iv.

# Why will the new law be important for business?

*The sections of the Bill most relevant to business are sections 39 (information provided in confidence) and 41 (commercial interests).*

Section 39 retains the common law duty of confidence, essentially unchanged. The protection given to *commercial interests* in section 41 is broadly similar to that offered by the current Code of Practice on Access to Government Information<sup>2</sup>. In both cases, however, a decision on whether the exemption applies is subject to a ruling by the Information Commissioner.

There are also other important changes and the introduction of the FOIA may be expected to have a far greater impact than the Code of Practice for a number of reasons:

- A statutory provision is expected to affect the behaviour of public authorities to a far greater extent than a little used, non-statutory code.
- Many more public authorities are included in the FOIA.
- The Act will be retrospective. It applies to information that is 'held' by a public authority at the time a request is received.
- The Information Commissioner will have a central role in promoting the observance of the FOIA, and dissemination of information about its operation to the public.
- There are provisions for discretionary release of information which is otherwise exempt.

- Third parties have no enforceable right to notice before their information is released. This will be in a code of practice.
- There is an easy, low cost appeal process for a requester who is denied information requested. There is no appeal process when a company disagrees with a decision to release its information. A company would need to engage in legal process, such as an injunction at common law to prevent a breach of its confidential information.
- There is a requirement for publication schemes to be implemented by public authorities.

All these factors taken together, mean that companies should plan on the basis that a great deal more commercial and commercially useful information will be made available. This will:

- Introduce new risks that confidential information may become more easily available to competitors, customers, suppliers and interest groups.
- Provide new opportunities for a company to acquire useful information held by public authorities.

<sup>2</sup> Code of Practice on Access to Government Information, Second Edition (1997).

## NEW RISKS

In the UK public sector there has been a long tradition of treating all information provided by companies as confidential. This was an easy policy to operate with little risk of mistakes or misjudgments. Companies could freely provide the information which was required with little formal process or concern that their information might be revealed.

While this traditional blanket confidentiality has in fact been eroded over the last few years, for example with EU-initiated regulations and the UK Code of Practice, this has not yet gone very far and it has not attracted much attention outside some specific high profile areas.

The FOIA marks a very important change. The change is from a position where, as a broad generalisation, most commercial information was protected, typically with extensive use of 'commercial in confidence' labels. With the FOIA, information will be protected only if companies give convincing reasons why its release 'would or would be likely to prejudice' commercial interests. However, even when a claim on these grounds is accepted, the public authority has discretion to release information in the light of its own judgment of all the circumstances and of the balance of public interest.

Decisions about what qualifies as confidential and what is releasable will be taken by many officials in many different authorities. Inconsistency is to be expected and possibly some mistakes.

While most comment upon the draft Bill has assumed that discretion will normally be used to avoid releasing confidential information, a company cannot work on this assumption. A new Minister or an event may cause a change in the way discretion is exercised. For example, even before we have a FOIA, the Department of the Environment Transport and the Regions, in 1998, changed its previous policy and announced that in future its contracts would, 'as far as possible be publicly available documents'<sup>3</sup>. Similarly the Ministry of Agriculture, Fisheries and Food introduced a change of policy to publish by name the hygiene assessment system scores for slaughterhouses in the UK<sup>4</sup>.

A company is faced with an increasing level of openness and with a degree of unpredictability, in a context where serious harm could be caused by a change of policy, an inconsistent judgment or a simple mistake.

## NEW OPPORTUNITIES

Public authorities hold a very wide range and quantity of information. This includes information about the market, the current regulatory, licensing and planning consent regimes and the way in which they are likely to develop; information supplied by individual companies; and public authorities' own needs for products and services.

Some of this may be of real value to a company which knows what is available and how to acquire it. Currently there is limited information about what is available. The publication schemes to be introduced by public authorities under the FOIA are intended to include a guide to the publications of the authority. There are also other initiatives within government, for example the creation of an Information Asset Register, which are intended to make it easy for people to find the information they need. The FOIA will create both a legal framework and a climate within which much more information is made available to the public, and which should become easier to find.

Some examples of current use by business of publicly available information include:

- a) use of the public registers of the Environment Agency to analyse the terms of licences for noxious discharges granted to competitors, to support claims that the conditions being demanded are unfairly restrictive;
- b) use of information from the Health and Safety Executive regarding the enforcement profiles of companies, to help the assessment of their qualities as potential suppliers and as candidates for acquisition; and
- c) use of information from the Environment Agency and the Health and Safety Executive to produce 'ethical' profiles of companies to be provided to fund managers who apply specific ethical criteria to their investments.

3 DETR Press Notice 619, July 1998, DETR Contracts to go Public - Hayman

4 See MAFF, Meat Hygiene Assessment Reports, ISSN 1369-9903, monthly with supplement, Hygiene Assessment System (HAS) Scores

# What actions should business take now to protect its information?

*There is good reason to give serious consideration to this question now. Our survey showed that there is a marked difference in the level of awareness of the issue between US and UK companies. This is understandable given that the US has had a FOIA regime since 1966 and the UK has yet to introduce one.*

We would not suggest that the comparison with the US is a very close one, where the US FOIA represents a high degree of openness in a litigious culture. The proposed FOIA is more protective of commercial information. It would, however, be prudent to have the lessons from the US experience clearly in mind when considering how to protect information most effectively. In a global market, information available in one country may be used for competitive advantage elsewhere.

The logical framework for the steps which need to be taken to protect confidential information is based on answers to the following questions:

- Who in the company provides what information to which public authorities?
- Is it clearly recognised which parts of this information are confidential, and why and for how long?
- Is confidentiality claimed effectively when or before the information is submitted?
- Has the system been tested to give assurance that the company's information is being treated appropriately by the public authority, and does the public authority have up to date details of who to contact if requests are made for access to it?

In the context of a large company with many different interfaces to public authorities these questions are much easier to ask than to answer. Different departments in a large company may provide information to public authorities for a very wide range of purposes. Examples include: export licences; grant applications; applications for regulatory approval; licences and consents; regular reports required by regulators; contract bids; contracts; performance reviews; planning applications; tax returns and negotiated dispensations.

Our survey showed that in high profile areas closely related to core business functions, companies typically managed information very tightly, sometimes with formal board approval before submissions. However, we found no example within UK companies of management processes and rules relating to submission of information to public authorities across the whole range. By comparison most companies have strict rules about who may talk to the press. We found examples of managers who had submitted quite detailed information about company processes to support applications for consent licences under the Environment Regulations, without any internal process to decide if confidentiality should be claimed.

We suggest that in many cases the current processes for identifying confidential information, and claiming confidentiality in an effective and sustained way are not adequate. It is, however, important that the management processes which are put in place are economic and commensurate with the risks. The practical action programme we propose comprises:

### 1. REVIEW MANAGEMENT OF INFORMATION PROVIDED TO PUBLIC AUTHORITIES

This is to establish and record who gives what information to which public authority and on what basis. For many companies this will be a significant task. However, this is the essential foundation for the effective management of this information.

This review may well identify information which is being provided without sufficient reason or to an unnecessary level of detail.

### 2. ANALYSE THE INFORMATION PROVIDED IN TERMS OF CONFIDENTIALITY AND RISK

It is easy for most companies to identify information which is always confidential, for example, product designs and development plans, market strategy, internal costs and new product launches. However, at particular times other information may become very sensitive. Examples could be planning permissions and consents for a new plant to introduce a new process, and a particular grant application.

A possible way to classify information given to different public authorities is:

- High risk, always to be subject to tight formal process.
- Low risk, but could become high risk on occasion: to be subject to a lighter process which could be upgraded easily.
- Low risk, with little chance that this would change: to be subject to the lightest process.

### 3. DESIGN SUITABLE PROCESSES FOR MANAGEMENT OF PROVISION OF INFORMATION

These will vary to be consistent with other management processes within the company. The essential features will be to establish:

- Who is authorised to approve submission of confidential information and the degree to which this is devolved to departments or centralised?
- Who is responsible for ensuring it is properly marked and submitted and accepted by the public authority?
- Who is responsible for managing any negotiation with the public authority about the classification either at the time of submission or in response to a request to release it?
- Who is responsible for tracking the handling of the information by the authority and when necessary, alerting senior management and the legal department to the need for action?

### 4. ESTABLISH POLICIES AND PROCESSES FOR CLAIMING CONFIDENTIALITY AND FOR ENSURING THESE CLAIMS ARE EFFECTIVE

Again, these will build on existing company processes. Key aspects to consider include:

- Guidelines for claims of confidentiality and trade secrets.

It is important to end the common practice of claiming 'commercial in confidence' over large quantities of material where most of it is not objectively confidential since it is already in the public domain, for example, in brochures. The effect of such a broad claim can be to increase the risks of mistaken release of genuinely confidential material.

Under the FOIA, for claims for exemption from disclosure to succeed, specific reasons should be given which address the terms of the exemption.

We suggest that a claim can be more strongly made and effectively defended if it includes a date at which the claim will either lapse or be subject to review. Most commercially sensitive information is sensitive only for limited periods of time.

- Guidelines for when a specific non-disclosure or confidentiality agreement should be requested, and the process to be followed if it is refused by the public authority.

We expect this option to be widely considered by business as a response to the FOIA. However it would be prudent to expect public authority guidelines to require good reasons to accept such agreements.

- The process to be followed when a request for the company's confidential information is made:

*Consultation:* the proposed code of practice will encourage public authorities to consult third parties whose interests are likely to be affected. It is important to ensure that the public authority holding information has up to date details of the person who should be contacted. It is likely that the public authority would only be required to make reasonable efforts to contact the company before deciding to release the information: this will not be an enforceable requirement.

*Early involvement of legal advice:* according to the risks involved, there may be a need quickly to commence legal proceedings to protect the information. This may be against the public authority which proposes to release information, or in support of the authority in resisting a request for information.

- Other possibilities: in the case of particularly sensitive information, companies in the US have adopted a variety of practices to ensure that their confidential information is in fact kept confidential. These have included:

*Checking the authority's processes:* it became common practice in the US to employ an agent to ask anonymously for the company's information to check how effectively it is protected, and as soon as it becomes apparent

that it is not, or information was obtained that it is likely to be released, to seek an injunction preventing release. This has become known as 'reverse FOI'.

*Avoiding physical hand over of information:* inviting the public authority to view the information on the premises of the company. In this way the information is never 'held' by the public authority.

*Challenging the statutory basis upon which the authority demands the information.*

*Making information available at the very latest date.*

*Ensuring that the minimum, or at least carefully considered, detail is provided.* While the contents of many submissions are prescribed by regulation or have a statutory base, additional information is often provided voluntarily to supplement this.

*Taking care in the segregation of confidential and non-confidential material in submissions.* For example including very clear marking and different paper, to reduce the likelihood of mistakes by the public authority

*Submitting documents in two versions, one that is disclosable and the other confidential.* In the US, the Food and Drug Administration encouraged manufacturers to file summary documents for public release, while the more detailed confidential information is withheld.

*Ensuring that the authority properly records a claim of confidentiality.*

*Requesting return of documents after the authority has used them for its purpose.*

# What actions should be taken by business to obtain information from public authorities?

*This may be considered a less urgent matter, since it is some time before the FOIA will be fully implemented. However we suggest it would be useful to give consideration to the matter now, since a great deal of information is available already, the range and scope of it is growing fast, and public authorities are being encouraged by government to act to release even more in advance of the FOIA.*

The steps we suggest include:

## 1. REVIEW THE INFORMATION WHICH IS HELD BY PUBLIC AUTHORITIES WHICH COULD BE VALUABLE TO THE COMPANY.

The areas to consider most closely will vary according to the nature and priorities of the company.

Information which could be of value includes:

- Information about the background and context of particular regulatory regimes. The legal director of a large multinational company told us that he had used the FOIA in Australia to obtain information which he needed in relation to a particular regulation that would not otherwise have been available. Information may also be found to help judge likely trends in regulation, eg. government surveys and studies.
- Information about the background and likely development of planning rules and policies, also including relevant surveys and studies.
- Information about the application of regulatory, licensing and consent regimes to competitors which may provide arguments for modifications to the rules being imposed upon the company. A UK company used public access to environment registers of licences for noxious discharges for this purpose.

- Information relating to public contracts, for example, likely future requirements, performance of existing suppliers, prices charged by existing suppliers. This could include information about how a department previously analysed the issues; the alternative solutions which were considered, and more information about current operating costs and performance. This may assist a company either to make bids which are more likely to succeed or not to waste resources bidding when the chances of success are low.

## 2. DECIDE ON WHICH AREAS TO FOCUS.

For many companies there will be specific areas where it will be worthwhile exerting effort to obtain particular information from a public authority. This could be in relation to a particular regulatory situation, a new business venture, or a growing competitive threat from new entrants with new technologies.

In this context the company may consider whether high priority information could be obtained outside the UK, for example, in the US. Specialist FOIA agencies in the US have told us of non-US companies using their services to find out more about the performance of their US competitors.

# Conclusion

*We do not wish to raise unnecessary concern about the proposed FOIA. However it does and is explicitly intended to bring about a change of culture towards much greater openness.*

There is a large discretionary element in the Bill which may be used to operate either a restricted policy or a much greater level of openness. A department or public authority which currently operates a very restrictive policy and gives assurance to companies that their information will be very strongly protected will be able quickly to change its policy under a new Minister.

We suggest that the giving of information to authorities should be managed as a key company process and as tightly as information given to the press.

Our surveys showed that US companies which manage information effectively do succeed in maintaining confidentiality. They will be able to apply this experience to the UK, and this may be a source of competitive advantage.

We should not let all the attention be given to the risks. There are real opportunities for companies to gain valuable information, including about other players in the market.

We suggest that the availability of commercial information and the management of information provided to public authorities, must be put on the agenda for action.

# Appendix A

## PUBLIC AUTHORITIES WHICH WILL BE SUBJECT TO THE ACT

### 1. Bodies listed in Schedule 1 to the Act

These include:

1. Government departments.
2. The House of Commons.
3. The House of Lords.
4. The Northern Ireland Assembly.
5. The National Assembly for Wales.
6. An Assembly subsidiary as defined by section 99(4) of the Government of Wales Act 1998.
7. The armed forces of the Crown, except:
  - (a) the special forces; and
  - (b) any unit or part of a unit which is for the time being required by the Secretary of State to assist the Government Communications Headquarters in the exercise of its functions.
8. Local authorities.
9. The National Health Service.
10. Maintained schools and other educational authorities.
11. Police.
12. Other public bodies and offices, as identified in Schedule 1 to the FOIA.

### 2. Bodies designated by order of the Secretary of State

Section 4 gives power to the Secretary of State to make an Order designating as a public authority any person who appears to exercise functions of a public nature or is providing under contract a service whose provision is a function of a public authority.

This potentially would allow many contractors to be brought within the provisions of the Bill. Before making such an Order, however, the Secretary of State 'shall consult every person to whom the Order relates'. This requirement may be onerous and we do not expect the provision to be used widely. In any case such an Order would have to specify the services to which it would apply.

### 3. Publicly owned companies

The Bill defines publicly owned companies primarily as companies which are wholly owned by the Crown or by public authorities listed in Schedule 1 to the Act.

# Appendix B

## TYPES OF INFORMATION WHICH COULD BE MADE PUBLICLY AVAILABLE

### 1. Information provided to local government authorities in the context of a contract to provide goods/services.

Public disclosure of this information may depend upon:

- the terms of the invitation to tender and the contract
- whether a non-disclosure/confidentiality agreement has been signed (noting that public authorities may be unwilling to agree to such an agreement)
- whether the supplier wishes to claim that the information is confidential or a trade secret.

Many local government contracts have been available for some time under both the Local Government (Access to Information) Act 1985, and the audit regulations. We would expect the FOIA to be interpreted to allow contract details generally to be placed in the public domain.

A recent ruling by the Information Commissioner in Ireland, under the Irish FOIA, was to the effect that while contract price information could be considered commercially confidential, it was in the public interest that it be released.

In the UK, the Department of Environment, Transport and the Regions has recently announced a change of policy to the effect that it will normally make its contracts public.

A company with concerns in this area should consider identifying which parts of a bid, contract and associated material are confidential, and making specific claims for these with reasons which reflect the terms of the FOIA.

### 2. A contract to supply goods or services to a public body.

See answer to "1", above

### 3. A contract to purchase goods or services from a public body.

A purchaser could seek to procure a confidentiality agreement with the public authority that would allow it to make a claim that the information should be exempt from disclosure.

If this is not possible, a purchaser may, nonetheless, be able to claim that the circumstances give rise to a duty of confidence and that, on this basis, the information should be exempt from disclosure. The reasons given would need to be sufficiently convincing to outweigh any public interest which might be argued for disclosure.

A public authority may also have an interest in non-disclosure, at least for a short period, for example, while other similar sales take place. In 1996, for example, the Ombudsman advised on the disclosure of information regarding the sale of a number of businesses by British Rail. He held that, while the public interest required the details of proceeds from the sale of assets formerly in public ownership to be made public, where there could be harm to subsequent sales, some delay was appropriate.

**4. Information provided to a regulatory authority in response to an enquiry.**

If the information is provided under the terms of a statute which contains provisions relating to confidentiality, the statutory provisions will prevail. (The FOIA provides that information will be exempt if its disclosure is prohibited by or under an enactment. The FOIA provision which gives an overriding discretion to disclose will not then apply.)

If the information is provided in other circumstances, then the provisions of the FOIA will apply. Again, it may be possible to claim that commercial interests or confidentiality should prevent disclosure.

**5. Tax dispensations agreed with Inland Revenue.**

A company which is the subject of a dispensation could object to disclosure on the grounds that this 'would or would be likely to' prejudice its interests and that there would be no valid public interest which would outweigh this. It could also base its objection on the grounds that the information is confidential: the Taxpayer's Charter states that the Inland Revenue will keep private affairs strictly confidential.

It should be noted that FOIA's have been used in European countries and in the US to obtain disclosures of "anonymised" taxation rulings.

**6. A proposed agreement notified to the Office of Fair Trading.**

If notified under the Fair Trading Act, the agreement would prima facie be exempt from disclosure.

**7. Environmental reporting to the Environment Agency.**

The provisions of the Environmental Information (Amendment) Regulations 1998, which implement an EU directive, govern environmental reporting. In effect there is a separate regime arising from Community obligations with respect to environment information.

Much reporting is already available in public registers operated by the Environment Agency.

Commercial confidentiality can be claimed effectively under the Regulations.

We note that the FOIA makes provision for regulations to implement the information provisions of the United Nations' Economic Commission for Europe Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (sometimes called the Aarhus Convention).

The UK government signed the Aarhus Convention in June 1998. The Secretary of State will make regulations to implement the Aarhus Convention, which will replace current regulations.

The regulations will extend the existing definition of environmental information to include, for example, economic analyses, the state of human health and safety and cultural sites. They will also strengthen provisions governing release of commercial information relating to, for example, emissions, by removing current exemptions. They will also take precedence over the FOIA.

**8. An application for a discharge permit.**

See answer to "7" above.

Much of this information is already available on public registers. We understand from the Environment Agency that very few claims of confidentiality are made but that these are generally accepted if credible reasons are provided.

**9. Health and safety reporting to the Health and Safety Executive.**

The FOIA provides that information may not be disclosed following a freedom of information request if its disclosure is prohibited by another Act.

There is a complex mix of UK and EU-initiated regulations which cover health and safety reporting. Companies may be required to provide information to the Health and Safety Executive or local authorities under the UK health and safety laws. The Health and Safety at Work etc Act 1974 provides that, subject to restrictions (including anonymous disclosures), the information may not be disclosed without the consent of the company.

EU-initiated health and safety regulations have on occasion required greater openness than the UK Act would permit. An example is the Contained Use of Genetically Modified Organisms Regulations 1992, which requires the maintenance of public registers of consents and enforcement actions.

EU-initiated regulations are likely to be the main vehicle for greater openness in this field.

#### 10. An application for IP rights.

Applications for patents, registered designs and trade marks are governed by Patents Acts 1949 and 1977, the Restrictive Trade Practices Act 1976, the Registered Designs Act 1949, the Trade Marks Act 1994 (and EC Council Directive) and certain provisions of the EU Treaties. These provide for searches of the various Registers and the publication of applications. The FOIA may be used in conjunction with existing legislation.

It is possible to search for an application for a trade mark shortly after the application has been made. Information about a patent is not publicly available until the patent has been granted, usually around 18 months after the initial application. Similarly, a search for a registered design can be made only when the design has been registered.

#### 11. An application for a licence to provide financial services.

This will be governed by new Financial Services and Markets Bill, due to become law in 2000. It is proposed that approval of applications will take up to 6 months. There is no indication that the provisions of the FOIA will not apply to information obtained by the Financial Services Authority during this process.

#### 12. An application for grant funding.

The exemptions referred to in the answer to "1" above will apply. Of particular importance will be the terms upon which applications for grants are invited.

#### 13. Information currently disclosed to and kept confidential by regulators.

If there are specific statutory provisions prohibiting disclosure, these will apply. If not, the terms of the FOIA will.

Statutory provisions vary in the strength of protection that they offer. Section 22 of the Environmental Protection Act 1990, for example, provides that information which is commercially confidential will not be included in a public register, but that it is for the Environment Agency to determine what is and what is not commercially confidential. Section 59 of the Coal Industry Act 1994, on the other hand, provides that the Coal Authority will establish such arrangements as it considers best calculated to secure that information, which is in the Authority's possession in consequence of the carrying out of its functions and which relates to the affairs of a particular business, is not disclosed without the consent of the business.

#### 14. Information provided to the industry ombudsman.

See the answer to "13" above.

#### 15. Statistics on house price inflation, neighbourhood crime etc.

This type of volume information is likely to be provided (or sold) by public authorities to third parties who will add value and resell it.

In some cases, public authorities may refuse to disclose information on the basis that it would prejudice law enforcement or national economic interests.

# Appendix C

## RELEVANT PROVISIONS OF THE BILL

### 1. The Act will apply retrospectively (Section 1)

Section 1 (1) (a) refers to information which a public authority 'holds' and Section 1 (6) specifically states that the relevant information is that which the public authority holds at the time the request is made. This means that information which a business is providing to a public authority now may be made available to a requester under the FOIA when it is implemented.

While implementation of the main provisions of the FOIA may be delayed by up to 5 years from the date when the Bill is passed (Section 85 (3)), it is expected that it will be implemented in phases with central government in an early phase, probably in 2001.

### 2. The Act may be applied directly to contractors with public authorities (Section 4)

Under Section 4 (1) (b), a company which is providing a service to a public authority under contract may be designated a 'public authority' for the purposes of the FOIA. For this to occur, the Secretary of State would first have to make an order after consulting the contractor (Section 4 (3)).

### 3. Publication Schemes (Section 17)

Every public authority will have a duty to adopt and maintain a publication scheme which has been approved by the Commissioner, and to publish information in accordance with the scheme.

Business has an interest both to ensure that its confidential information is not published in this way, and to be able to acquire information which will be helpful to its business plans.

The section specifies that the scheme must have regard to the 'public interest' in, for example, the publication of reasons for decisions made by the public authority. This may be of value to a company in seeking to understand the background and context of regulatory provisions and decisions.

### 4. Information provided in confidence (Section 39)

This section has the effect of retaining, without modification, the common law position on the duty of confidence. The exemption from publication will apply where disclosure of the information would 'constitute a breach of confidence actionable by that other person'.

Some questions have been raised as to what exactly the word 'actionable' means, since the fact that an action can be commenced does not necessarily mean that it is likely to succeed. We suggest that it would be prudent for companies to plan on the basis that 'actionable' implies a good chance of success.

This exemption may be most likely to apply to information given voluntarily by a company to a public authority. Information provided under statute or to receive a benefit or permission is likely in the future to be acquired on specific terms which would make this exemption difficult to claim.

A key quality of this exemption is that, if it is accepted, then discretionary disclosure under section 13 (see below) cannot apply.

### 5. Commercial interests (Section 41)

Section 41 defines this exemption to include 'trade secrets' and information the disclosure of which '... would, or would be likely to, prejudice the commercial interests of any person ...'.

### 'Trade secrets'

While there is no statutory definition of a 'trade secret', there have been judicial interpretations of the term in (*Faccenda Chicken Ltd. v Fowler*, [1987] 1 Ch 117; *Lansing Linde Ltd. v Kerr*, [1991] 1 WLR 251). The Guidance on Interpretation of the current Code of Practice draws on the Trade Secret Protection Act of Ontario 1986, which states that:

"Trade secrets include information (including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism) which:

- (i) is or may be used in a trade or business
- (ii) is not generally known in that trade or business
- (iii) has economic value from not being generally known
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its "secrecy".

### 'Prejudice to commercial interests'

Discussion has focused on the apparent weakness of the 'would, or would be likely to prejudice' test. This test has been the subject of detailed discussion and questioning by a Parliamentary Select Committee. The Home Office's view is that this is a 'probability' test. Lord Woolf, in his evidence, explained that 'likely to' can mean possibility or probability.

It would be prudent for companies to plan on the basis that the test should be argued on the 'probability' basis.

If this exemption is accepted, then the public authority will still be required to consider discretionary disclosure under section 13 (see below).

### 6. Other exemptions (Sections 21, 22, 24, 25, 26, 27, 28, 29, 33,38, 42)

There may be circumstances when an exemption from disclosure may be claimed under exemptions which are primarily intended for other purposes.

Examples include:

- Disclosure would be likely to prejudice relations between Westminster and devolved authorities.
- The information relates to bodies dealing with security matters, where exemption is necessary to safeguard national security, or disclosure would prejudice defence, the economy, international relations, law enforcement or health and safety.
- The information is held for the purpose of certain investigations and/or proceedings as to improper or illegal conduct, fitness or competence.
- The information relates to the formulation or development of government policy and ministerial communications.
- The information is personal data (disclosure of which is covered by the Data Protection Act 1998).
- Disclosure is not allowed by EU obligations.

### 7. Discretionary disclosures (Section 13)

Section 13 provides a discretion to disclose information in some circumstances where the information has been properly decided to be exempt. This provision applies to the exemption defined in section 41, but not to the exemption defined in section 39.

In deciding whether to make discretionary disclosure of information, the public authority must have regard to all the circumstances of the case and whether the public interest in disclosure outweighs the public interest in maintaining the exemption.

If a company finds itself facing problems in this area, legal advice will be essential.

### 8. Notice (Section 44)

When a public authority is considering whether to release information which a company has claimed to be confidential, the Bill does not give the company any right to advance notice. Provisions about consultation are to be in a code of practice (see below).

#### 9. Code of Practice (Section 44)

The Secretary of State will issue a code of practice providing guidance to public authorities which it would be 'desirable' for them to follow in connection with the discharge of their functions under the FOIA. This code will be very important for business. It must include guidance relating to:

- (a) The provision of advice by public authorities to information requesters. (Note: there is no obligation for the provision of advice to information submitters).
- (b) The transfer of requests by one public authority to another, which may hold the information.
- (c) Consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information. (Note: this is a very important provision for business and its terms should be examined closely when the Code is published).
- (d) The inclusion in contracts entered into by public authorities of terms relating to the disclosure of information. (Note: different government departments currently adopt different policies with regard to disclosure of contract and price information. The Department of the Environment, Transport and the Regions announced a new policy of contractual openness in July 1998. A detailed notice explaining how requests for non-disclosure can be made is included in its instructions to tenderers.)
- (e) The provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information. (Note: we believe that the intention of this provision is to address complaints from requesters rather than complaints from information providers relating to the protection of their information. The wording would, however, allow the broader interpretation.)

We also note that the code may make different provision for different public authorities.

#### 10. The Information Commissioner (Section 16)

The existing Data Protection Commissioner will become the Information Commissioner and have responsibilities under the FOIA (see below).

#### 11. The Tribunal (Section 16)

The existing Data Protection Tribunal will become the Information Tribunal and be given a role under the FOIA (see below).

#### 12. Enforcement and appeals (Sections 50 - 60)

Third parties who provide information to public authorities have no direct role or rights in the enforcement and appeal processes. Therefore, a business which disagrees with a decision to release its information will have no right of appeal to the Commissioner or Tribunal. Its only recourse will be to legal proceedings.

Section 50 defines the rights of a dissatisfied information requester who can apply to the Commissioner for a decision. It specifies that the requester must first have exhausted any complaints procedure which is provided by the public authority in accordance with the code of practice.

If the Commissioner decides that the authority has failed to comply with the FOIA, she can issue a 'decision notice' recommending compliance. The complainant or the public authority may appeal to the Tribunal against the notice, and appeals from the Tribunal on points of law will also be allowed.

#### 13. Extent of the Act (sections 79 and 86)

The Act will apply to public authorities in England, Wales and Northern Ireland. It will not apply to the Scottish Parliament, the Scottish Administration or Scottish public authorities.

# Appendix D

## EVIDENCE FROM OTHER COUNTRIES ABOUT THE IMPACT OF FOIAS UPON BUSINESS

The FOIA is part of a growing trend towards greater openness by public authorities in Western economies.

This is clearly seen in the number of countries which have adopted or updated freedom of information and access to official information laws in recent years. They include Sweden, Finland, Denmark, France, the Netherlands, US, Canada, Australia and New Zealand. Within the EU, the European Commission has implemented a code of conduct for access to Commission information. It has also adopted a proposed Regulation on a public access to the documents of the European Parliament, Council and Commission. The Environment, Health and Safety, and Procurement Regulations introduced across the EU, require higher levels of openness than was previously available. In the UK, in 1994, a Code of Practice on Access to Government Information was introduced.

The experience of business in Australia, Canada and the US seems most relevant, with the most detailed information being available about the US experience. There is some evidence from within the EU, where several countries have had access to information laws for some time, but the evidence is very mixed and more limited.

### The US

The US introduced a FOIA in 1966. Business soon became very concerned about its effects, in particular the apparent risks that sensitive information would be disclosed. There were some high profile mistakes, eg. the release of details of the Monsanto herbicide "Roundup". There was also release of misinformation, including an

untrue report that the design of the space shuttle nose cone had been given to the Japanese.

The lack of a provision in the 1966 Act for business to be consulted before release of its information was recognised as a serious problem. This led to the creation of what became known as 'reverse FOI' law suits. The matter was settled in 1987 by an executive order which required government departments to give notice to submitters before disclosing their information.

The release of the unit prices of government contracts was also an area of controversy. This was settled in 1998 with an update of the Federal Acquisition Regulations which required the items, quantities and any stated prices of each award to be released, with no prior notice necessary.

From the legal perspective, most focus has been upon the issue of the protection of sensitive information. However, the other side of the story in the US has been the growth of specialist FOIA law firms, consultancy firms and marketing companies, which have developed businesses to acquire and sell government information.

US business today has no serious concerns about the US FOIA. Departments adhere closely to established procedures, and increasing amounts of information are published on the Internet. There is also a clear body of case-law. US businesses know how to protect sensitive information and they understand the value of searching for information which will assist their business.

The overall view of informed commentators in the US is that the FOIA's effect has been at worst neutral and probably positive.

## Australia and Canada

Australia and Canada introduced FOIAs in 1982. They had both looked at the early experience of the US and wanted to avoid problems which they had seen. In particular, they both included provisions for companies to be consulted before their information was released.

There was some initial business concern, but the policy framework within which the FOIAs were implemented was protective of commercial information. There was little business use in Australia and initially in Canada. In both countries, the view was that businesses already had better access to the government information than the FOIAs would provide.

In Canada there has recently been a growth in business use of the Canadian FOIA. In 1994, 43% of all requests came from business, mainly relating to licensing procedures, trade marks, and government contracts. Canadian government contract details are increasingly being published on the Internet.

## EU

There is a contrast in the EU between the attitudes towards freedom of information of the Nordic countries and most other countries where traditions of state secrecy have been strongly established.

In Sweden, where access to information laws date from 1766, the government normally makes available details of public contracts and these are routinely requested and used by business.

In the Netherlands and Germany the governments apply the levels of openness required by EU procurement regulations. An analysis of award notices published in the Official Journal of the EC in 1998 showed that the UK provided information on value for 33% of the awards which were published, while the EU average was 60%.

# Appendix E

## THE POSITION IN THE UK BEFORE THE NEW LAW

After a long history of blanket confidentiality being applied to information about companies held by government, there have recently been a number of changes towards greater openness. This has happened, however, in a patchy and not always predictable way.

Currently, information held by public authorities is made available under a framework of regulations and policy, some of which are initiated by the EU and some by the UK government.

The FOIA is one of several initiatives relating to government information. Other initiatives include the UK White Paper on *Modernising Government*, the EU Green Paper on *Public Sector Information in the Information Society*, the UK White Paper on *The Future Management of Crown Copyright*, and the Treasury Paper *Selling Services into Wider Markets*.

All of these initiatives seek to promote the better use of government information to:

- improve the quality of government;
- make it easier for citizens and business to relate to government;
- generate growth and employment from the value added resale of public information; and
- generate more revenue for government from the exploitation of its information assets.

### EU-initiated regulations

EU regulations cover, for example, information on public procurement, the environment and health and safety matters.

EU procurement directives are implemented into UK law by Treasury Regulations. In addition to specifying a framework for public procurement, they require the publication of information about public contracts, including the price. They also require the public authority to tell losing tenderers the characteristics and relative advantages of the selected tender and the successful tenderer's name. These regulations are often not fully implemented in practice.

### EU Environmental and Health and Safety Directives and Regulations

The Regulations seek to protect all information to which any commercial or industrial confidentiality attaches. The Environment Agency earns revenue from the sale of environmental information. For example, information regarding environmental issues within defined distances of proposed property developments. Enforcement notices are made available under the Regulations and 54 registers of environmental information are published.

The Health and Safety Executive receives requests for information each year from business interests. Requests tend to come from law firms, legal departments and purchasing departments and relate to the assessment of potential suppliers, the gathering of information about competitors and potential acquisition candidates.

### Code of Practice on Access to Government Information

The Code of Practice was first introduced in 1994 and revised in 1997. It encourages departments to make available a wide range of information subject to a number of exemptions.

At first, the Code was interpreted and applied in a restricted manner. There have recently been moves towards greater openness in some departments.

A good example is the press notice issued by the Department of the Environment, Transport and the Regions in July 1998, which announced that in future all Departmental contracts would, as far as possible, be made publicly available. We are not aware of any problems or complaints about this change.

We also understand that the Health and Safety Executive now provides more extensive information as a result of the Code of Practice. In the area of enforcement, for example, the HSE now provides a summary of the incident.

The Code of Practice has, in effect, provided a framework within which a relatively open or restrictive regime can be operated according to the policy preferred by a department. This has led to significantly greater openness in some areas and far less change in others.

The Code of Practice and EU Directives have broken down the previous blanket confidentiality applied to information about companies, but without replacing it with a predictable and generally applied policy on openness.

# Appendix F

## SURVEY AND ANALYSIS OF BUSINESS VIEWS

### Scope of the survey and analysis

The analysis in this Guide is based upon a recent survey whose purpose was to establish the business views on issues and needs arising out of the proposed FOIA.

The Constitution Unit carried out some of this research. More recent research was carried out jointly by Lovells and The Constitution Unit.

The companies that contributed included a mix of large and multi-national companies with head offices in the US, UK, Europe, and Japan. The business sectors included oil, chemicals, pharmaceuticals, financial services, information technology, telecommunications, construction, manufacturing and consumer goods.

We are most grateful to all those who gave us their time.

### Overall conclusions

There was considerable diversity in views and attitudes towards the FOIA. It was, however, possible to draw out some overall concerns and issues. These can be summarised under the following five headings:

#### Predictability and consistency

The most commonly expressed view was that the FOIA would introduce a new area of uncertainty into business' relations with government. This was sometimes expressed as a need for the Bill to be further amended to make it easier for business to make successful claims for confidentiality.

Several companies made comparisons with the US. They felt that they knew where they stood in relation to the US FOIA: the case law was well established and, with the guidance of experienced counsel, they knew how to protect confidential information effectively.

#### Fair and effective processes

There were strong views that the processes by which the FOIA was applied should be demonstrably fair and transparent. It was important for business to know that when confidential information was submitted to a public authority, it would be protected effectively. One interviewee summed this up as 'the need to know the rules of the game in advance and to play on a level playing field'.

There were particular concerns about three aspects of the Bill:

- The absence of a legal right for third parties to be given notice before their information was revealed;
- The absence of an appeal process for persons whose information was to be disclosed, although one would be available to information requesters; and
- Provisions allowing public authorities to use discretion to release otherwise exempt information and the resulting substantial uncertainty that this introduced.

#### Impact upon regulation and sector specific legislation

Companies that were subject to heavy regulation raised concerns about the possible impact of the FOIA on the operation of this regulation. Several companies indicated that their regulators' procedures were obscure and that the interaction of

the FOIA with existing regulation could give rise to the release of sensitive information.

Other companies expressed hopes that the FOIA could be used to help to ensure more transparent and soundly based regulation.

### **Internal company processes**

We asked about companies' internal processes to ensure that confidential information is protected.

Companies subject to sector-specific regulation tended to have robust processes relating to the provision of formal information required by their regulator. These included, for example, board review.

Where formal submissions were supported by working level contacts, however, these procedures often broke down. Several companies expressed concerns that regulators' file notes could be released under the FOIA and would not necessarily accurately reflect the exchange.

Our survey suggested that outside highly regulated areas, US companies had stronger internal processes to manage information provided to public authorities. These included, for example, formal reviews by line management, approval by corporate affairs departments and staff training and discipline regarding confidentiality.

Several large UK companies recognised that they could become vulnerable under the new regime and that they would need to put in place more effective processes.

### **New opportunities to obtain useful information**

Obtaining information was not a high priority among the people whom we interviewed.

They did, however, express some interest in obtaining information on the background and context of new regulations.